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Contents

Federal Register

Vol. 89, No. 7

Wednesday, January 10, 2024

Separate Parts In This Issue

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

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CFR PARTS AFFECTED IN THIS ISSUE

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

Rules and Regulations

Federal Register
Vol. 89, No. 7
Wednesday, January 10, 2024

OFFICE OF GOVERNMENT ETHICS

5 CFR Parts 2634 and 2636

RIN 3209–AA69

2024 Civil Monetary Penalties Inflation Adjustments for Ethics in Government Act Violations

AGENCY: Office of Government Ethics.

ACTION: Final rule.

SUMMARY: In accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the U.S. Office of Government Ethics is issuing this final rule to make the 2024 annual adjustments to the Ethics in Government Act civil monetary penalties.

DATES: This final rule is effective January 15, 2024.

FOR FURTHER INFORMATION CONTACT: Margaret Dylus-Yukins, Assistant Counsel, General Counsel and Legal Policy Division, Office of Government Ethics, Telephone: 202–482–9300; TTY: 800–877–8339; FAX: 202–482–9237.

SUPPLEMENTARY INFORMATION:

I. Background

In November 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of Pub. L. 114–74) (the 2015 Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410). The 2015 Act required Federal agencies to make annual inflationary adjustments to the civil monetary penalties (CMPs) within their jurisdiction, to be effective no later than January 15 of each year.

The Ethics in Government Act, as amended, Chapter 131, title 5 of the United States Code, provides for five CMPs.[1] Specifically, the Ethics in Government Act provides for penalties that can be assessed by an appropriate United States district court, based upon a civil action brought by the Department of Justice, for the following five types of violations:

(1) knowing and willful failure to file, report required information on, or falsification of a public financial disclosure report, 5 U.S.C. 13106(a)(1), 5 CFR 2634.701(b);

(2) knowing and willful breach of a qualified trust by trustees and interested parties, 5 U.S.C. 13104(f)(6)(C)(i), 5 CFR 2634.702(a);

(3) negligent breach of a qualified trust by trustees and interested parties, 5 U.S.C. 13104(f)(6)(C)(ii), 5 CFR 2634.702(b);

(4) misuse of a public report, 5 U.S.C. 13107(c)(2), 5 CFR 2634.703; and

(5) violation of outside employment/activities provisions, 5 U.S.C. 13145(a), 5 CFR 2636.104(a).

In compliance with the 2015 Act and guidance issued by the Office of Management and Budget (OMB), the U.S. Office of Government Ethics (OGE) made previous inflationary adjustments to the five Ethics in Government Act CMPs, and is issuing this rulemaking to effectuate the 2024 annual inflationary adjustments to those CMPs. In accordance with the 2015 Act, these adjustments are based on the percent change between the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October preceding the date of the adjustment, and the prior year's October CPI–U. Pursuant to OMB guidance, the cost-of-living adjustment multiplier for 2024, based on the CPI–U for October 2023, not seasonally adjusted, is 1.03241. To calculate the 2024 annual adjustment, agencies must multiply the most recent penalty by the 1.03241 multiplier, and round to the nearest dollar.

Applying the formula established by the 2015 Act and OMB guidance, OGE is amending the Ethics in Government Act CMPs through this rulemaking to:

(1) Increase the three penalties reflected in 5 CFR 2634.702(a), 2634.703, and 2636.104(a)—which were previously adjusted to a maximum of $23,727—to a maximum of $24,496;

(2) Increase the penalty reflected in 5 CFR 2634.702(b)—which was previously adjusted to a maximum of $11,864—to a maximum of $12,249; and

(3) Increase the penalty reflected in 5 CFR 2634.701(b)—which was previously adjusted to a maximum of $71,316—to a maximum of $73,627.

These adjusted penalty amounts will apply to penalties for violations that occurred after November 2, 2015, and that are assessed after January 15, 2024 (the effective date of this final rule). OGE will continue to make future annual inflationary adjustments to the Ethics in Government Act CMPs in accordance with the statutory formula set forth in the 2015 Act and OMB guidance.

II. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b), as Acting Director of the Office of Government Ethics, I find that good cause exists for waiving the general notice of proposed rulemaking and public comment procedures as to these technical amendments. The notice and comment procedures are being waived because these amendments, which concern matters of agency organization, procedure and practice, are being adopted in accordance with statutorily mandated inflation adjustment procedures of the 2015 Act, which specifies that agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedure Act. It is also in the public interest that the adjusted rates for civil monetary penalties under the Ethics in Government Act become effective as soon as possible in order to maintain their deterrent effect.

Regulatory Flexibility Act

As the Acting Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this final rule would not have a significant economic impact on a substantial number of small entities because it primarily affects current Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply

[1] OGE has previously determined, after consultation with the Department of Justice, that the $200 late filing fee for public financial disclosure reports that are more than 30 days overdue (see 5 U.S.C. 13106(d) and 5 CFR 2634.704 of OGE's regulations thereunder) is not a CMP as defined under the Federal Civil Penalties Inflation Adjustment Act, as amended. Therefore, that fee is not being adjusted in this rulemaking (nor was it adjusted by OGE in previous CMP rulemakings). The late filing fee for public financial disclosure reports that are more than 30 days overdue will remain at its current amount of $200.

because this regulation does not contain information collection requirements that require approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (as adjusted for inflation) in any one year.

Executive Order 13563 and Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget has determined that rulemakings such as this implementing annual inflationary adjustments under the 2015 Act are not significant regulatory actions under Executive Order 12866.

Executive Order 12988

As Acting Director of the Office of Government Ethics, I have reviewed this rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects

5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

5 CFR Part 2636

Conflict of interests, Government employees, Penalties.

Dated: January 4, 2024.

Shelley Finlayson,

Acting Director, U.S. Office of Government Ethics.

For the reasons set forth in the preamble, the U.S. Office of Government Ethics is amending 5 CFR parts 2634 and 2636 as follows:

PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

■ 1. The authority citation for part 2634 is revised to read as follows:

Authority: 5 U.S.C. ch. 131; 26 U.S.C. 1043; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note, as amended by sec. 31001, Pub. L. 104–134, 110 Stat. 1321 and sec. 701, Pub. L. 114–74; Pub. L. 112–105, 126 Stat. 291; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

■ 2. Section 2634.701 is amended by revising paragraph (b) to read as follows:

§ 2634.701 Failure to file or falsifying reports.

* * * * *

(b) *Civil action.* The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information required by filers of public reports under subpart B of this part. The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 1 to this section, as provided by 5 U.S.C. 13106(a)(1), and as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

TABLE 1 TO § 2634.701(b)

Date of violation	Penalty
Violation occurring between Sept. 14, 2007 and Nov. 2, 2015	$50,000
Violation occurring after Nov. 2, 2015	73,627

* * * * *

■ 3. Section 2634.702 is revised to read as follows:

§ 2634.702 Breaches by trust fiduciaries and interested parties.

(a) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully violates the provisions of § 2634.408(d)(1) or (e)(1). The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 1 to this paragraph (a), as provided by section 5 U.S.C. 13104(f)(6)(C)(i) and as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

TABLE 1 TO § 2634.702(a)

Date of violation	Penalty
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	$11,000
Violation occurring after Nov. 2, 2015	24,496

(b) The Attorney General may bring a civil action in any appropriate United States district court against any individual who negligently violates the provisions of § 2634.408(d)(1) or (e)(1). The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 2 to this paragraph (b), as provided by 5 U.S.C. 13104(f)(6)(C)(ii) and as adjusted in accordance with the inflation adjustment procedures of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

TABLE 2 TO § 2634.702(b)

Date of violation	Penalty
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	$5,500
Violation occurring after Nov. 2, 2015	12,249

■ 4. Section 2634.703 is revised to read as follows:

§ 2634.703 Misuse of public reports.

(a) The Attorney General may bring a civil action against any person who obtains or uses a report filed under this part for any purpose prohibited by 5 U.S.C. 13107(c)(1), as incorporated in § 2634.603(f). The court in which the action is brought may assess against the person a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 1 to this section, as provided by 5 U.S.C. 13107(c)(2) and as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

TABLE 1 TO § 2634.703(a)

Date of violation	Penalty
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	$11,000
Violation occurring after Nov. 2, 2015	24,496

(b) This remedy shall be in addition to any other remedy available under statutory or common law.

PART 2636—LIMITATIONS ON OUTSIDE EARNED INCOME, EMPLOYMENT AND AFFILIATIONS FOR CERTAIN NONCAREER EMPLOYEES

■ 5. The authority citation for part 2636 is revised to read as follows:

Authority: 5 U.S.C. ch. 131; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note, as amended by sec. 31001, Pub. L. 104–134, 110 Stat. 1321 and sec. 701, Pub. L. 114–74; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

■ 6. Section 2636.104 is amended by revising the section heading and paragraph (a) to read as follows:

§ 2636.104 Civil, disciplinary, and other action.

(a) *Civil action.* Except when the employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103, an employee who engages in any conduct in violation of the prohibitions, limitations, and restrictions contained in this part may be subject to civil action under 5 U.S.C. 13145(a), and a civil monetary penalty of not more than the amounts set in Table 1 to this this paragraph (a), as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, or the amount of the compensation the individual received for the prohibited conduct, whichever is greater.

TABLE 1 TO § 2636.104(a)

Date of violation	Penalty
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	$11,000
Violation occurring after Nov. 2, 2015	24,496

* * * * *

[FR Doc. 2024–00271 Filed 1–9–24; 8:45 am]

BILLING CODE 6345–03–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

RIN 3133–AF58

Civil Monetary Penalty Inflation Adjustment

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulations to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction to account for inflation. This action, including the amount of the adjustments, is required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Gira Bose, Senior Staff Attorney, at 1775 Duke Street, Alexandria, VA 22314, or telephone: (703) 518–6562.

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. Statutory Requirements

Every Federal agency, including the NCUA, is required by law to adjust its maximum CMP amounts each year to account for inflation. Prior to this being an annual requirement, agencies were required to adjust their CMPs at least once every four years. The previous four-year requirement stemmed from the Debt Collection Improvement Act of 1996,[1] which amended the Federal Civil Penalties Inflation Adjustment Act of 1990.[2]

The current annual requirement stems from the Bipartisan Budget Act of 2015,[3] which contains the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 amendments).[4] This legislation provided for an initial ''catch-up'' adjustment of CMPs in 2016, followed by annual adjustments. The catch-up adjustment reset CMP maximum amounts by setting aside the inflation adjustments that agencies made in prior years and instead calculated inflation with reference to the year when each CMP was enacted or last modified by Congress. Agencies were required to publish their catch-up adjustments in an interim final rule by July 1, 2016, and make them effective by August 1, 2016.[5] The NCUA complied with these requirements in a June 2016 interim final rule, followed by a November 2016 final rule to confirm the adjustments as final.[6]

The 2015 amendments also specified how agencies must conduct annual inflation adjustments after the 2016 catch-up adjustment. Following the catch-up adjustment, agencies must make the required adjustments and publish them in the **Federal Register** by January 15 each year.[7] For 2017, the NCUA issued an interim final rule on January 6, 2017,[8] followed by a final rule issued on June 23, 2017.[9] For each of the years 2018 through 2023, the NCUA issued a final rule to satisfy the agency's annual requirements.[10] This final rule satisfies the agency's requirement for the 2024 annual adjustment.

The law provides that the adjustments shall be made notwithstanding the section of the Administrative Procedure Act (APA) that requires prior notice and public comment for agency rulemaking.[11] The 2015 amendments also specify that each CMP maximum must be increased by the percentage by which the consumer price index for urban consumers (CPI–U) [12] for October of the year immediately preceding the year the adjustment is made exceeds the CPI–U for October of the prior year.[13] Thus, for the adjustment to be made in 2024, an agency must compare the October 2022 and October 2023 CPI–U figures.

An annual adjustment under the 2015 amendments is not required if a CMP has been amended in the preceding 12 months pursuant to other authority. Specifically, the statute provides that an agency is not required to make an annual adjustment to a CMP if in the preceding 12 months it has been increased by an amount greater than the annual adjustment required by the 2015 amendments.[14] The NCUA did not make any adjustments in the preceding 12 months pursuant to other authority. Therefore, this rulemaking adjusts all of the NCUA's CMPs pursuant to the 2015 amendments.

B. Application to the 2024 Adjustments and Office of Management and Budget Guidance

This section applies the statutory requirements and the Office of Management and Budget's (OMB) guidance to the NCUA's CMPs and sets forth the Board's calculation of the 2024 adjustments.

[1] Public Law 104–134, Sec. 31001(s), 110 Stat. 1321–373 (Apr. 26, 1996). The law is codified at 28 U.S.C. 2461 note.

[2] Public Law 101–410, 104 Stat. 890 (Oct. 5, 1990), codified at 28 U.S.C. 2461 note.

[3] Public Law 114–74, 129 Stat. 584 (Nov. 2, 2015).

[4] 129 Stat. 599.

[5] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[6] 81 FR 40152 (June 21, 2016); 81 FR 78028 (Nov. 7, 2016).

[7] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[8] 82 FR 7640 (Jan. 23, 2017).

[9] 82 FR 29710 (June 30, 2017).

[10] 83 FR 2029 (Jan. 16, 2018); 84 FR 2052 (Feb. 6, 2019); 85 FR 2009 (Jan. 14, 2020); 86 FR 933 (Jan. 7, 2021); 87 FR 377 (Jan. 5, 2022); 88 FR 1323 (Jan. 10, 2023).

[11] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[12] This index is published by the Department of Labor, Bureau of Labor Statistics, and is available at its website: *https://www.bls.gov/cpi/.*

[13] Public Law 114–74, Sec. 701(b)(2)(B), 129 Stat. 584, 600 (Nov. 2, 2015).

[14] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 600 (Nov. 2, 2015).

The 2015 amendments directed OMB to issue guidance to agencies on implementing the inflation adjustments.[15] OMB is required to issue its guidance each December and, with respect to the 2024 annual adjustment, did so on December 19, 2023.[16] For 2024, Federal agencies must adjust the maximum amounts of their CMPs by the percentage by which the October 2023 CPI–U (307.671) exceeds the October 2022 CPI–U (298.012). The resulting increase can be expressed as an inflation multiplier (1.03241) to apply to each current CMP maximum amount to determine the adjusted maximum. The OMB guidance also addresses rulemaking procedures and agency reporting and oversight requirements for CMPs.[17]

The following table presents the adjustment calculations. The current maximums are found at 12 CFR 747.1001, as adjusted by the final rule that the Board approved in January 2023. This amount is multiplied by the inflation multiplier to calculate the new maximum in the far-right column. Only these adjusted maximum amounts, and not the calculations, will be codified at 12 CFR 747.1001 under this final rule. The adjusted amounts will be effective upon publication in the **Federal Register** and can be applied to violations that occurred on or after November 2, 2015, the date the 2015 amendments were enacted.[18]

On November 28, 2023, the NCUA announced the reinstatement of the program under which the agency assesses CMPs for credit unions failing to submit NCUA Form 5300 Call Reports.[19] As stated in the announcement, this program was suspended after the December 2019 cycle due to the COVID–19 pandemic. The December 2023 Call Report will be the first reporting cycle under the reinstated program and will be due by 11:59:59 p.m. Eastern time, January 30, 2024.[20]

TABLE—CALCULATION OF MAXIMUM CMP ADJUSTMENTS

Citation	Description and tier[21]	Current maximum ($)	Multiplier	Adjusted maximum ($) (current maximum X multiplier, rounded to nearest dollar)
12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report.	4,745	1.03241	4,899
12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report.	47,454	1.03241	48,992
12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard.	Lesser of 2,372,677 or 1% of total credit union (CU) assets.	1.03241	Lesser of 2,449,575 or 1% of total CU assets
12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to the National Credit Union Share Insurance Fund (NCUSIF), or inadvertent submission of false or misleading statement.	4,339	1.03241	4,480
12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement.	43,377	1.03241	44,783
12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard.	Lesser of 2,168,915 or 1% of total CU assets.	1.03241	Lesser of 2,239,210 or 1% of total CU assets
12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements.	148	1.03241	153
12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements.	345	1.03241	356
12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements.	11,864	1.03241	12,249
12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty.	59,316	1.03241	61,238
12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person).	2,372,677	1.03241	2,449,575
12 U.S.C. 1786(k)(2)(C)	Tier 3 (same) (CU)	Lesser of 2,372,677 or 1% of total CU assets.	1.03241	Lesser of 2,449,575 or 1% of total CU assets
12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions.	390,271	1.03241	402,920
15 U.S.C. 1639e(k)	Non-compliance with appraisal independence standards (first violation).	13,627	1.03241	14,069
15 U.S.C. 1639e(k)	Subsequent violations of the same	27,252	1.03241	28,135
42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements.	2,577	1.03241	2,661

[21] The table uses condensed descriptions of CMP tiers. Refer to the U.S. Code citations for complete descriptions.

[15] Public Law 114–74, Sec. 701(b)(4), 129 Stat. 584, 601 (Nov. 2, 2015).

[16] *See* OMB Memorandum M–24–07, Implementation of Penalty Inflation Adjustments for 2024, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (December 19, 2023).

[17] *Id.*

[18] Public Law 114–74, 129 Stat. 600 (Nov. 2, 2015).

[19] NCUA Reinstates Civil Money Penalties for Late Call Report Filing, November 2023. Announcement available at *https://ncua.gov/newsroom/press-release/2023/ncua-reinstates-civil-money-penalties-late-call-report-filing?utm_medium=email&utm_source=NCUAgovdelivery.*

[20] *Id.*

II. Regulatory Procedures

A. Final Rule Under the APA

In the 2015 amendments, Congress provided that agencies shall make the required inflation adjustments in 2017 and subsequent years notwithstanding 5 U.S.C. 553,[22] which generally requires agencies to follow notice-and-comment procedures in rulemaking and to make rules effective no sooner than 30 days after publication in the **Federal Register**. The 2015 amendments provide a clear exception to these requirements.[23] In addition, the Board finds that notice-and-comment procedures would be impracticable and unnecessary under the APA because of the largely ministerial and technical nature of the final rule, which affords agencies limited discretion in promulgating the rule, and the statutory deadline for making the adjustments.[24] In these circumstances, the Board finds good cause to issue a final rule without issuing a notice of proposed rulemaking or soliciting public comments. The Board also finds good cause to make the final rule effective upon publication because of the statutory deadline. Accordingly, this final rule is issued without prior notice and comment and will become effective immediately upon publication.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the APA [25] or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**.[26] Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers federally insured credit unions (FICUs) with assets less than $100 million to be small entities.[27]

As discussed previously, consistent with the APA, the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking.[28] Rules that are exempt from notice and comment procedures are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, the Board notes that this final rule will not have a significant economic impact on a substantial number of small credit unions because it affects only the maximum amounts of CMPs that may be assessed in individual cases, which are not numerous and generally do not involve assessments at the maximum level. In addition, several of the CMPs are limited to a percentage of a credit union's assets. Finally, in assessing CMPs, the Board generally must consider a party's financial resources.[29] Because this final rule will affect few, if any, small credit unions, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden.[30] For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, or credit unions but does not require any reporting or recordkeeping. Therefore, this final rule will not create new paperwork burdens or modify any existing paperwork burdens.

D. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive order. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, and federally insured credit unions, including state-chartered credit unions. However, the final rule does not create any new authority or alter the underlying statutory authorities that enable the Board to assess CMPs. Accordingly, this final rule will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The Board has determined that this final rule does not constitute a policy that has federalism implications for purposes of the Executive order.

E. Assessment of Federal Regulations and Policies on Families

The Board has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[31]

F. Congressional Review Act

For purposes of the Congressional Review Act,[32] the OMB determines whether a final rule constitutes a ''major rule.'' If the OMB deems a rule to be a ''major rule,'' the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication. As required by the Congressional Review Act, the Board submitted the final rule and other appropriate reports to the OMB which determined that this rule is not a ''major rule.'' The Board will also be submitting this rule to Congress and the Government Accountability Office for review.

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-

[22] Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

[23] *See* 5 U.S.C. 559; *Asiana Airlines* v. *Fed. Aviation Admin.,* 134 F.3d 393, 396–99 (D.C. Cir. 1998).

[24] 5 U.S.C. 553(b)(3)(B); *see Mid-Tex. Elec. Co-op., Inc.* v. *Fed. Energy Regulatory Comm'n,* 822 F.2d 1123 (D.C. Cir. 1987). For the same reasons, this final rule does not include the usual 60-day comment period under NCUA Interpretive Ruling and Policy Statement (IRPS) 87–2, as amended by IRPS 03–2 and 15–1 (Sept. 24, 2015).

[25] 5 U.S.C. 553(b).

[26] 5 U.S.C. 603, 604.

[27] NCUA IRPS 15–1.

[28] 5 U.S.C. 553(b)(3)(B).

[29] 12 U.S.C. 1786(k)(2)(G)(i).

[30] 44 U.S.C. 3507(d); 5 CFR part 1320.

[31] Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998).

[32] 5 U.S.C. 801–808.

based enterprises in domestic and export markets.[33]

For the reasons previously stated, the Board is adopting the final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest.[34]

List of Subjects in 12 CFR Part 747

Civil monetary penalties, Credit unions.

By the National Credit Union Administration Board

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons stated in the preamble, the Board amends 12 CFR part 747 as follows:

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

■ 1. The authority for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101–410; Pub. L. 104–134; Pub. L. 109–351; Pub. L. 114–74.

■ 2. Revise § 747.1001 to read as follows:

§ 747.1001 Adjustment of civil monetary penalties by the rate of inflation.

(a) The NCUA is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890, as amended (28 U.S.C. 2461 note)), to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction by the rate of inflation. The following chart displays those adjusted amounts, as calculated pursuant to the statute:

U.S. Code citation	CMP description	New maximum amount
(1) 12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report.	$4,899.
(2) 12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report.	$48,992.
(3) 12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard.	$2,449,575 or 1% of the total assets of the credit union, whichever is less.
(4) 12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to the National Credit Union Share Insurance Fund (NCUSIF), or inadvertent submission of false or misleading statement.	$4,480.
(5) 12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement.	$44,783.
(6) 12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard.	$2,239,210 or 1% of the total assets of the credit union, whichever is less.
(7) 12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	$153.
(8) 12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	$356.
(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements.	$12,249.
(10) 12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty.	$61,238.
(11) 12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person).	$2,449,575.
(12) 12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (insured credit union).	$2,449,575 or 1% of the total assets of the credit union, whichever is less.
(13) 12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions.	$402,920.
(14) 15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements.	First violation: $14,069. Subsequent violations: $28,135.
(15) 42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	$2,661.

(b) The adjusted amounts displayed in paragraph (a) of this section apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations pre-dated the increase and occurred on or after November 2, 2015.

[FR Doc. 2024–00316 Filed 1–9–24; 8:45 am]

BILLING CODE 7535–01–P

[33] 5 U.S.C. 804(2).

[34] 5 U.S.C. 808.

FARM CREDIT SYSTEM INSURANCE CORPORATION

12 CFR Part 1411

RIN 3055–AAZZ

Rules of Practice and Procedure; Adjusting Civil Money Penalties for Inflation

AGENCY: Farm Credit System Insurance Corporation.

ACTION: Final rule.

SUMMARY: This rule implements inflation adjustments to civil money penalties (CMPs) that the Farm Credit System Insurance Corporation (FCSIC) may impose under the Farm Credit Act of 1971, as amended. These adjustments are required by 2015 amendments to the Federal Civil Penalties Inflation Adjustment Act of 1990.

DATES: *Effective date:* This regulation is effective on January 10, 2024.

Applicability date: The adjusted amounts of civil money penalties in this rule are applicable to penalties assessed on or after January 15, 2024, for conduct occurring on or after November 2, 2015.

FOR FURTHER INFORMATION CONTACT: Lynn M. Powalski, General Counsel, Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102, (703) 883–4380, TTY (703) 883–4390.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act) [1] to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The Inflation Adjustment Act provides for the regular evaluation of CMPs and requires FCSIC, and every other Federal agency with authority to impose CMPs, to ensure that CMPs continue to maintain their deterrent values.[2]

FCSIC must enact regulations that annually adjust its CMPs pursuant to the inflation adjustment formula of the amended Inflation Adjustment Act and rounded using a method prescribed by the Inflation Adjustment Act. The new amounts are applicable to penalties assessed on or after January 15, 2024, for conduct occurring on or after November 2, 2015. Agencies do not have discretion in choosing whether to adjust a CMP, by how much to adjust a CMP, or the methods used to determine the adjustment.

II. CMPs Imposed Pursuant to Section 5.65 of the Farm Credit Act

First, section 5.65(c) of the Farm Credit Act, as amended (Act), provides that any insured Farm Credit System bank that willfully fails or refuses to file any certified statement or pay any required premium shall be subject to a penalty of not more than $100 for each day that such violations continue, which penalty FCSIC may recover for its use.[3] Second, section 5.65(d) of the Act provides that, except with the prior written consent of the Farm Credit Administration, it shall be unlawful for any person convicted of any criminal offense involving dishonesty or a breach of trust to serve as a director, officer, or employee of any System institution.[4] For each willful violation of section 5.65(d), the institution involved shall be subject to a penalty of not more than $100 for each day during which the violation continues, which FCSIC may recover for its use.

FCSIC's current § 1411.1 provides that FCSIC can impose a maximum penalty of $249 per day for a violation under section 5.65(c) and (d) of the Act.

III. Required Adjustments

The 2015 Act requires agencies to make annual adjustments for inflation. Annual inflation adjustments are based on the percent change between the October Consumer Price Index for all Urban Consumers (CPI–U) preceding the date of the adjustment, and the prior year's October CPI–U. Consumer Price Index (CPI–U) for the month of October 2023, not seasonally adjusted, the cost-of-living adjustment multiplier for 2024 is 1.03241.[5] Multiplying 1.03241 times the current penalty amount of $249, after rounding to the nearest dollar as required by the 2015 Act, results in a new penalty amount of $257.

IV. Notice and Comment Not Required by Administrative Procedure Act

In accordance with the 2015 Act, Federal agencies shall adjust civil monetary penalties ''notwithstanding'' section 553 of the Administrative Procedures Act. This means that public procedure generally required for agency rulemaking—notice, an opportunity for comment, and a delay in effective date—is not required for agencies to issue regulations implementing the annual adjustment.

List of Subjects in 12 CFR Part 1411

Banks, Banking, Civil money penalties, Penalties.

For the reasons stated in the preamble, part 1411 of chapter XIV, title 12 of the Code of Federal Regulations is amended as follows:

PART 1411—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 1411 continues to read as follows:

Authority: 12 U.S.C. 2277a–7(10), 2277a–14© and (d); 28 U.S.C. 2461 *note.*

■ 2. Revise § 1411.1 to read as follows:

§ 1411.1 Inflation adjustment of civil money penalties for failure to file a certified statement, pay any premium required or obtain approval before employment of persons convicted of criminal offenses.

In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, a civil money penalty imposed pursuant to section 5.65(c) or (d) of the Farm Credit Act of 1971, as amended, shall not exceed $257 per day for each day the violation continues.

Dated: January 5, 2024.

Ashley Waldron,

Secretary to the Board, Farm Credit System Insurance Corporation.

[FR Doc. 2024–00339 Filed 1–9–24; 8:45 am]

BILLING CODE 6710–01–P

FEDERAL TRADE COMMISSION

16 CFR Part 1

Adjustments to Civil Penalty Amounts

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is implementing adjustments to the civil penalty amounts within its jurisdiction to account for inflation, as required by law.

[1] Public Law 101–410, 104 Stat. 890 (Oct. 5, 1990), as amended by Public Law 104–134, title III, sec. 31001(s)(1), 110 Stat. 1321–373 (Apr. 26, 1996); Public Law 105–362, title XIII, sec. 1301(a), 112 Stat. 3293 (Nov. 10, 1998); Public Law 114–74, title VII, sec. 701(b), 129 Stat. 599 (Nov. 2, 2015), codified at 28 U.S.C. 2461 note.

[2] Under the amended Inflation Adjustment Act, a CMP is defined as any penalty, fine, or other sanction that: (1) Either is for a specific monetary amount as provided by Federal law or has a maximum amount provided for by Federal law; (2) is assessed or enforced by an agency pursuant to Federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts. All three requirements must be met for a fine to be considered a CMP.

[3] 12 U.S.C. 2277a–14(c).

[4] 12 U.S.C. 2277a–14(d).

[5] *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum No. M–24–07, *Implementation of Penalty Inflation Adjustments for 2024, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (December 19, 2023).

DATES: Effective January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Marie Choi, Attorney (202–326–3368), Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act Improvements Act (''FCPIAA'') of 2015 [1] directs agencies to adjust the civil penalty maximums under their jurisdiction for inflation every January. Accordingly, the Commission issues annual adjustments to the maximum civil penalty amounts under its jurisdiction.[2]

Commission Rule 1.98 sets forth the applicable civil penalty amounts for violations of certain laws enforced by the Commission.[3] As directed by the FCPIAA, the Commission is issuing adjustments to increase these maximum civil penalty amounts to address inflation since its prior 2023 adjustment. The following adjusted amounts will take effect on January 10, 2024:

- Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1) (premerger filing notification violations under the Hart-Scott-Rodino Improvements Act)—Increase from $50,120 to $51,744;
- Section 11(*l*) of the Clayton Act, 15 U.S.C. 21(*l*) (violations of cease and desist orders issued under Clayton Act section 11(b))—Increase from $26,628 to $27,491;
- Section 5(*l*) of the FTC Act, 15 U.S.C. 45(*l*) (unfair or deceptive acts or practices)—Increase from $50,120 to $51,744;
- Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (unfair or deceptive acts or practices)—Increase from $50,120 to $51,744;
- Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B) (unfair or deceptive acts or practices)—Increase from $50,120 to $51,744;
- Section 10 of the FTC Act, 15 U.S.C. 50 (failure to file required reports)—Increase from $659 to $680;
- Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65 (failure by associations engaged solely in export trade to file required statements)—Increase from $659 to $680;
- Section 6(b) of the Wool Products Labeling Act, 15 U.S.C. 68d(b) (failure by wool manufacturers to maintain required records)—Increase from $659 to $680;
- Section 3(e) of the Fur Products Labeling Act, 15 U.S.C. 69a(e) (failure to maintain required records regarding fur products)—Increase from $659 to $680;
- Section 8(d)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(d)(2) (failure to maintain required records regarding fur products)—Increase from $659 to $680;
- Section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a) (knowing violations of EPCA § 332, including labeling violations)—Increase from $542 to $560;
- Section 525(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a) (recycled oil labeling violations)—Increase from $26,628 to $27,491;
- Section 525(b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(b) (willful violations of recycled oil labeling requirements)—Increase from $50,120 to $51,744;
- Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2) (knowing violations of the Fair Credit Reporting Act)—Increase from $4,705 to $4,857;
- Section 1115(a) of the Medicare Prescription Drug Improvement and Modernization Act of 2003, Public Law 108–173, as amended by Public Law 115–263, 21 U.S.C. 355 note (failure to comply with filing requirements)—Increase from $17,719 to $18,293; and
- Section 814(a) of the Energy Independence and Security Act of 2007, 42 U.S.C. 17304 (violations of prohibitions on market manipulation and provision of false information to federal agencies)—Increase from $1,426,319 to $1,472,546.

Calculation of Inflation Adjustments

The FCPIAA, as amended, directs federal agencies to adjust each civil monetary penalty under their jurisdiction for inflation in January of each year pursuant to a cost-of-living adjustment.[4] The cost-of-living adjustment is based on the percent change between the U.S. Department of Labor's Consumer Price Index for all-urban consumers (''CPI–U'') for the month of October preceding the date of the adjustment, and the CPI–U for October of the prior year.[5] Based on that formula, the cost-of-living adjustment multiplier for 2024 is 1.03241. The FCPIAA also directs that these penalty level adjustments should be rounded to the nearest dollar. Agencies do not have discretion over whether to adjust a maximum civil penalty, or the method used to determine the adjustment.

The following chart illustrates the application of these adjustments to the civil monetary penalties under the Commission's jurisdiction.

CALCULATION OF ADJUSTMENTS TO MAXIMUM CIVIL MONETARY PENALTIES

Citation	Description	2023 Penalty level	Adjustment multiplier	2024 Penalty level (rounded to the nearest dollar)
16 CFR 1.98(a): 15 U.S.C. 18a(g)(1)	Premerger filing notification violations	$50,120	1.03241	$51,744
16 CFR 1.98(b): 15 U.S.C. 21(*l*)	Violations of cease and desist orders	26,628	1.03241	27,491
16 CFR 1.98(c): 15 U.S.C. 45(*l*)	Unfair or deceptive acts or practices	50,120	1.03241	51,744
16 CFR 1.98(d): 15 U.S.C. 45(m)(1)(A)	Unfair or deceptive acts or practices	50,120	1.03241	51,744
16 CFR 1.98(e): 15 U.S.C. 45(m)(1)(B)	Unfair or deceptive acts or practices	50,120	1.03241	51,744
16 CFR 1.98(f): 15 U.S.C. 50	Failure to file required reports	659	1.03241	680
16 CFR 1.98(g): 15 U.S.C. 65	Failure to file required statements	659	1.03241	680
16 CFR 1.98(h): 15 U.S.C. 68d(b)	Failure to maintain required records	659	1.03241	680
16 CFR 1.98(i): 15 U.S.C. 69a(e)	Failure to maintain required records	659	1.03241	680
16 CFR 1.98(j): 15 U.S.C. 69f(d)(2)	Failure to maintain required records	659	1.03241	680
16 CFR 1.98(k): 42 U.S.C. 6303(a)	Knowing violations	542	1.03241	560
16 CFR 1.98(*l*): 42 U.S.C. 6395(a)	Recycled oil labeling violations	26,628	1.03241	27,491
16 CFR 1.98(*l*): 42 U.S.C. 6395(b)	Willful recycled oil labeling violations	50,120	1.03241	51,744

[1] Public Law 114–74, 701, 129 Stat. 599 (2015). The Act amends the Federal Civil Penalties Inflation Adjustment Act, Public Law 101–410, 104 Stat. 890 (codified at 28 U.S.C. 2461 note).

[2] 81 FR 42476 (2016); 82 FR 8135 (2017); 83 FR 2902 (2018); 84 FR 3980 (2019), 85 FR 2014 (2020); 86 FR 2539 (2021); 87 FR 1070 (2022); 88 FR 1499 (2023).

[3] 16 CFR 1.98.

[4] 28 U.S.C. 2461 note at (4).

[5] *Id.* (3), (5)(b); Office of Management and Budget, Memorandum M–24–07, *Implementation of Penalty Inflation Adjustments for 2024* (December 19, 2023), available at: *https://www.whitehouse.gov/wp-content/uploads/2023/12/M-24-07-Implementation-of-Penalty-Inflation-Adjustments-for-2024.pdf.*

CALCULATION OF ADJUSTMENTS TO MAXIMUM CIVIL MONETARY PENALTIES—Continued

Citation	Description	2023 Penalty level	Adjustment multiplier	2024 Penalty level (rounded to the nearest dollar)
16 CFR 1.98(m): 15 U.S.C. 1681s(a)(2)	Knowing violations	4,705	1.03241	4,857
16 CFR 1.98(n): 21 U.S.C. 355 note	Non-compliance with filing requirements	17,719	1.03241	18,293
16 CFR 1.98(o): 42 U.S.C. 17304	Market manipulation or provision of false information to federal agencies.	1,426,319	1.03241	1,472,546

Effective Dates of New Penalties

These new penalty levels apply to civil penalties assessed after the effective date of the applicable adjustment, including civil penalties whose associated violation predated the effective date.[6] These adjustments do not retrospectively change previously assessed or enforced civil penalties that the FTC is actively collecting or has collected.

Procedural Requirements

The FCPIAA, as amended, directs agencies to adjust civil monetary penalties through rulemaking and to publish the required inflation adjustments in the **Federal Register**, notwithstanding section 553 of title 5 in the United States Code. Pursuant to this congressional mandate, prior public notice and comment under the APA and a delayed effective date are not required. For this reason, the requirements of the Regulatory Flexibility Act (''RFA'') also do not apply.[7] Further, this rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995 as amended. 44 U.S.C. 3501 *et seq.*

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

List of Subjects for 16 CFR Part 1

Administrative practice and procedure, Penalties, Trade practices.

Text of Amendments

For the reasons set forth in the preamble, the Federal Trade Commission amends 16 CFR part 1 as follows:

[6] 28 U.S.C. 2461 note at (6).

[7] A regulatory flexibility analysis under the RFA is required only when an agency must publish a notice of proposed rulemaking for comment. *See* 5 U.S.C. 603.

PART 1—GENERAL PROCEDURES

Subpart L—Civil Penalty Adjustments Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as Amended

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

Authority: 28 U.S.C. 2461 note.

■ 2. Revise § 1.98 to read as follows:

§ 1.98 Adjustment of civil monetary penalty amounts.

This section makes inflation adjustments in the dollar amounts of civil monetary penalties provided by law within the Commission's jurisdiction. The following maximum civil penalty amounts apply only to penalties assessed after January 10, 2024, including those penalties whose associated violation predated January 10, 2024.

(a) Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1)—$51,744;

(b) Section 11(*l*) of the Clayton Act, 15 U.S.C. 21(*l*)—$27,491;

(c) Section 5(*l*) of the FTC Act, 15 U.S.C. 45(*l*)—$51,744;

(d) Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A)—$51,744;

(e) Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)—$51,744;

(f) Section 10 of the FTC Act, 15 U.S.C. 50—$680;

(g) Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65—$680;

(h) Section 6(b) of the Wool Products Labeling Act, 15 U.SC. 68d(b)—$680;

(i) Section 3(e) of the Fur Products Labeling Act, 15 U.S.C. 69a(e)—$680;

(j) Section 8(d)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(d)(2)—$680;

(k) Section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a)—$560;

(l) Sections 525(a) and (b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a) and (b), respectively—$27,491 and $51,744, respectively;

(m) Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2)—$4,857;

(n) Section 1115(a) of the Medicare Prescription Drug Improvement and Modernization Act of 2003, Public Law 108–173, as amended by Public Law 115–263, 21 U.S.C. 355 note—$18,293;

(o) Section 814(a) of the Energy Independence and Security Act of 2007, 42 U.S.C. 17304—$1,472,546; and

(p) Civil monetary penalties authorized by reference to the Federal Trade Commission Act under any other provision of law within the jurisdiction of the Commission—refer to the amounts set forth in paragraphs (c), (d), (e) and (f) of this section, as applicable.

By direction of the Commission.

Joel Christie,

Acting Secretary.

[FR Doc. 2024–00301 Filed 1–9–24; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 12–2021; AG Order No. 5851–2024]

RIN 1105–AB66

Privacy Act Regulations

AGENCY: United States Department of Justice.

ACTION: Final rule.

SUMMARY: This rule amends the United States Department of Justice (''DOJ'' or ''Department'') Privacy Act implementation regulations, including its Privacy Act record access and amendment procedures. Additionally, this rule includes procedures regarding processing Privacy Act requests to access or amend covered records, as designated under the Judicial Redress Act of 2015, and expands protections on the Department's maintenance of Social Security account numbers, in accordance with the Social Security Number Fraud Prevention Act of 2017.

DATES: This final rule is effective February 9, 2024.

FOR FURTHER INFORMATION CONTACT: Katherine Harman-Stokes, Acting Director, U.S. Department of Justice, Office of Privacy and Civil Liberties, Two Constitution Square, 145 N Street NE, Suite 8W.300, Washington, DC

20530, telephone (202) 514–0208 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

The Department received no comments in response to the notice of proposed rulemaking for the revision of the Department of Justice Privacy Act regulations published on January 6, 2023, 88 FR 1012, and now finalizes this rule without changes.

II. Overview of the Department's Privacy Act of 1974 Implementation Regulations

The Privacy Act of 1974, as amended, 5 U.S.C. 552a (''Privacy Act''), establishes certain agency responsibilities and individual rights regarding the collection, use, maintenance, and disclosure of records about individuals. To carry out these rights, the Privacy Act requires agencies to promulgate rules that will: (1) establish procedures whereby an individual can be notified if any system of records named by the individual contains a record pertaining to that individual; (2) define reasonable times, places, and requirements for identifying an individual who requests a record or information pertaining to the individual before the agency shall make the record or information available; (3) establish procedures for the disclosure to an individual upon request of a record or information pertaining to the individual, including special procedures, if deemed necessary, for the disclosure to an individual of medical records pertaining to the individual; (4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to exercise fully the individual's rights under the Privacy Act; and (5) establish fees to be charged, if any, to any individual for making copies of records pertaining to the individual, excluding the cost of any search for and review of the record. 5 U.S.C. 552a(f).

The Department's Privacy Act regulations are promulgated at title 28, part 16, subpart D, Code of Federal Regulations. While existing procedures have largely remained the same, certain amendments are required to ensure the Department's Privacy Act regulations reflect changes in the law, as well as in the Department's practices.

III. Discussion of Changes

A. Relationship to the Freedom of Information Act

The Department continues to process all Privacy Act requests for access to records under the Freedom of Information Act (''FOIA''), 5 U.S.C. 552, following the rules contained in subpart A of part 16, thus giving requesters the benefit of both statutes. The updates to subpart D, in particular 28 CFR 16.41 through 16.45, better align the FOIA and Privacy Act request-for-access procedures. For example, updates to 28 CFR 16.42 align the consultation, referral, and coordination procedures with the FOIA procedures under 28 CFR 16.4, subject to certain deviations to comply with Privacy Act requirements. Updates to 28 CFR 16.42 through 16.43 align the re-routing of misdirected Privacy Act requests for access procedures, the procedures for determining which component is responsible for responding to a request, and the timing for those responses, with the FOIA procedures contained in 28 CFR part 16, subpart A. Finally, similar to the FOIA procedures, components are encouraged, to the extent practicable, to communicate with requesters having access to the internet using electronic means, such as by email or through a web portal.

B. Updates to the Privacy Act Request-for-Access Procedures

The changes set forth in this rule update the Department's Privacy Act request-for-access procedures to more accurately reflect existing practices. First, the rules clarify that the Department has a decentralized system for responding to Privacy Act requests for access, by informing requesters that they may make a Privacy Act request for access by writing directly to the component that maintains the record. 28 CFR 16.41(a)(1). The updates remove the requirement that a requester send or deliver requests to Department field offices, and instead requires requesters to send or deliver requests to the component's office at the address listed in appendix I to 28 CFR part 16, or in accordance with the access procedures outlined in the corresponding System of Records Notice. 28 CFR 16.41(a)(2).

Additionally, the updates remove explicit references to in-person Privacy Act requests for access because such requests have become generally impracticable for members of the public. That said, the new procedures explicitly state that a requester may request a record in a particular form or format, 28 CFR 16.41(b), and components will honor a requester's preference where the record is readily reproducible by the component in the form or format requested, 28 CFR 16.43(a). This would continue to permit a member of the public to request access to the member's records in-person when components can provide a copy of the record for in-person inspection.

C. Updates to the Privacy Act Procedures for Requests for Amendment or Correction

The rule updates the Department's procedures for requesting amendment or correction of records under the Privacy Act, in accordance with existing practices. First, the rule would explicitly set out the timing for components to respond to a Privacy Act request for amendment or correction. 28 CFR 16.46(b). In accordance with the Privacy Act, 5 U.S.C. 552a(d)(2), components responsible for responding to a Privacy Act request for amendment or correction must acknowledge, in writing, the receipt of the request no later than ten (10) working days after receipt, and must promptly grant or refuse to grant the request. 28 CFR 16.46(b)(1). The rule authorizes components to designate multiple processing tracks that distinguish between simple and more complex Privacy Act requests for amendment or correction, consistent with the Privacy Act request-for-access procedures. 28 CFR 16.46(b)(3). The rule requires components to provide additional content in the response that components must provide when refusing to grant a Privacy Act request for amendment or correction. 28 CFR 16.46(e). Finally, the rule updates the list of records not subject to amendment or correction. 28 CFR 16.46(i).

D. Privacy Act Access Appeals and Privacy Act Amendment Appeals

The rule updates the Department's Privacy Act administrative appeal procedures to align with existing practices. First, the rules clarify that a refusal to grant a Privacy Act request for access or Privacy Act request for amendment or correction is subject to an administrative appeal, and provides examples of what commonly qualifies as a refusal to grant a Privacy Act request. 28 CFR 16.45 through 16.46. The rule clarifies that the Attorney General has designated the Director of the Office of Information Policy, or the Director's designee, with the responsibility for adjudicating Privacy Act access appeals, 28 CFR 16.45(b)(1), and the DOJ Chief Privacy and Civil Liberties Officer (''CPCLO''), or the CPCLO's designee, with the responsibility for adjudicating

Privacy Act amendment appeals. 28 CFR 16.46(f)(1).

E. Safeguards and Employee Code of Conduct

The rule updates the Department's Privacy Act record safeguard requirements and employee conduct requirements to reflect updated standards of practice. First, the updates clarify that the Department's administrative, technical, and physical controls in place for its systems of records are consistent with applicable Department and government-wide laws, regulations, policies, and standards, including but not limited to those required for the security of Department information systems. 28 CFR 16.51. Second, the updates require Department employees to read, acknowledge, and agree to abide by the Department of Justice rules of behavior for accessing, collecting, using, maintaining, and protecting personally identifiable information. 28 CFR 16.54.

F. Judicial Redress Act of 2015

The Judicial Redress Act of 2015, Public Law 114–126, 130 Stat. 282 (''Judicial Redress Act''), codified at 5 U.S.C. 552a note, extends certain rights of judicial redress established under the Privacy Act to citizens of foreign countries or regional economic organizations certified as a ''covered country.'' Specifically, the Judicial Redress Act enables a ''covered person'' (*i.e.,* a natural person, other than a U.S. citizen or permanent resident alien, who is a citizen of a covered country) to bring suit and obtain specified redress in the same manner, to the same extent, and subject to the same limitations, including exemptions and exceptions, as an ''individual'' (*i.e.,* a U.S. citizen or permanent resident alien) may bring suit and obtain specified redress with respect to the improper refusal to grant access to or an amendment of a ''covered record'' (*i.e.,* a record pertaining to the covered person transferred by a public authority of, or a private entity within, a covered country to a designated Federal agency or component for purposes of preventing, investigating, detecting, or prosecuting criminal offenses) under 5 U.S.C. 552a(g)(1)(A) & (B). The updates clarify that, consistent with the processes established for individuals under the Privacy Act, a covered person must follow the Privacy Act request-for-access procedures, or the Privacy Act request-for-amendment or correction procedures, before a covered person may file suit. 28 CFR 16.40(e).

G. Social Security Number Fraud Prevention Act of 2017

The Social Security Number Fraud Prevention Act of 2017, Public Law 115–59, 131 Stat. 1152 (''SSN Fraud Prevention Act''), codified at 42 U.S.C. 405 note, requires the Department to promulgate rules that will: (1) specify the circumstances under which inclusion of a Social Security account number on a document sent by mail is necessary; (2) instruct components on the partial redaction of Social Security account numbers where feasible; and (3) require that Social Security account numbers not be visible on the outside of any package sent by mail. This proposal promulgates the above requirements.

Specifically, the updates define the term ''necessary'' to include only those circumstances in which a component would be unable to comply, in whole or in part, with a legal, regulatory, or policy requirement if prohibited from mailing the full Social Security account number. 28 CFR 16.53(b). The definition further specifies that including the full Social Security account number on a document sent by mail is not necessary if a legal, regulatory, or policy requirement could be satisfied by either partially redacting the Social Security account number or by removing the Social Security number entirely. *Id.* Components are then restricted from including the full Social Security account number on any document sent by mail unless the inclusion of the Social Security account number on the document is necessary. 28 CFR 16.53(d). Unless the Attorney General directs otherwise, the CPCLO is authorized to assist components in interpreting this paragraph. 28 CFR 16.53(d)(1).

The updates also instruct components, where feasible, to partially redact the Social Security account number on any document sent by mail by including no more than the last four digits of the Social Security account number, while prioritizing technical methods to facilitate such redactions. 28 CFR 16.53(d)(3).

H. Administrative Amendments

Finally, the rule amends 28 CFR part 16, subpart D, throughout to correct minor administrative edits or to reorganize sentences, sections, or paragraphs for readability.

IV. Regulatory Certifications

Executive Orders 12866 and 13563—Regulatory Review

This rule does not raise novel legal or policy issues, nor does it adversely affect the economy, the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof in a material way. The Department of Justice has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Information and Regulatory Affairs within the Office of Management and Budget (''OMB'') pursuant to Executive Order 12866.

Regulatory Flexibility Act

This rule relates to individuals rather than small business entities. Pursuant to the requirements of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, therefore, the rule will not have a significant economic impact on a substantial number of small entities.

Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires the Department to consider the impact of paperwork and other information collection burdens imposed on the public. The DOJ Certification of Identity Form, DOJ–361, has been assigned OMB No. 1103–0016.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not

have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This rule will have no implications for Indian Tribal governments. More specifically, it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Therefore, the consultation requirements of Executive Order 13175 do not apply.

List of Subjects in 28 CFR Part 16

Administrative practices and procedures, Courts, Freedom of information, Privacy.

Pursuant to the authority vested in me by 5 U.S.C. 552a and 42 U.S.C. 405 note, the Department of Justice amends 28 CFR part 16 as follows:

PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

■ 1. The authority citation for part 16 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717; 42 U.S.C. 405.

■ 2. Revise subpart D to read as follows:

Subpart D—Access to and Amendment of Individual Records Pursuant to the Privacy Act of 1974, and Other Privacy Protections

Sec.

§ 16.40 General provisions.

(a) *Purpose and scope.* (1) This subpart contains the rules that the Department of Justice (''DOJ'' or ''the Department'') follows when handling records maintained by the Department in a system of records, in accordance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a (''Privacy Act'' or ''PA''). This subpart describes the procedures by which individuals can be notified if a Department system of records contains records about themselves, may request access to records about themselves maintained in a Department system of records, may request amendment or correction of records about themselves maintained in a Department system of records, and may request an accounting of disclosures of records about themselves maintained in a Department system of records. This subpart also establishes other procedures on the appropriate maintenance of records by the Department and when Privacy Act exemptions may apply. This subpart should be read together with the Privacy Act, which provides additional information about records maintained in agency systems of records, including those of the Department.

(2) This subpart contains the procedures that the Department follows when handling covered records maintained by the Department in a system of records, in accordance with the Judicial Redress Act of 2015, 5 U.S.C. 552a note (''Judicial Redress Act''). This subpart should be read together with the Privacy Act and the Judicial Redress Act, which provide additional information about covered records maintained in agency systems of records, including those of the Department.

(3) This subpart contains the procedures that the Department follows when collecting, using, maintaining, or disclosing Social Security account numbers, in accordance with the Privacy Act and the Social Security Number Fraud Prevention Act of 2017, 42 U.S.C. 405 note (''Social Security Number Fraud Prevention Act''). This subpart should be read together with the Privacy Act and the Social Security Number Fraud Prevention Act, which provide additional information about agencies' maintenance of Social Security account numbers, including that of the Department.

(b) *Relationship to the Freedom of Information Act.* The Department also processes Privacy Act requests for access to records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, following the rules contained in subpart A of this part, which gives requesters the benefits of both statutes.

(c) *Definitions.* In addition to the definitions found under 5 U.S.C. 552a(a), and section (2)(h) of the Judicial Redress Act, as used in this subpart:

Component means each separate bureau, office, board, division, commission, service, or administration of the Department.

Privacy Act request for access means a request made in accordance with 5 U.S.C. 552a(d)(1), and includes requests for a Privacy Act access appeal, in accordance with this subpart.

Privacy Act request for amendment or correction means a request made in accordance with 5 U.S.C. 552a(d)(2)–(4), and includes requests for a Privacy Act amendment or correction appeal, in accordance with this subpart.

Privacy Act request for an accounting means a request made in accordance with 5 U.S.C. 552a(c)(3).

Requester means an individual who makes a Privacy Act request for access, a Privacy Act request for amendment or correction, a Privacy Act request for an accounting, or, as provided by the Judicial Redress Act, a covered person who makes either a Privacy Act request for access or a Privacy Act request for amendment or correction to covered records.

System of Records Notice means the notice(s) published by the Department in the **Federal Register** upon the establishment or modification of a system of records describing the existence and character of the system of records. A System of Records Notice (''SORN'') may be composed of a single **Federal Register** notice addressing all of the required elements that describe the current system of records, or it may be composed of multiple **Federal Register** notices that together address all of the required elements.

(d) *Authority to request records for a law enforcement purpose.* The head of a component or a United States Attorney, or either's designee, is authorized to make written requests under 5 U.S.C. 552a(b)(7), for records maintained by other agencies that are necessary to carry out an authorized law enforcement activity. The request must specify the particular portion desired

and the law enforcement activity for which the record is sought.

(e) *Judicial Redress Act application.* (1) With respect to covered records, the Judicial Redress Act authorizes a covered person to bring a civil action against the Department and obtain civil remedies, in the same manner, to the same extent, and subject to the same limitations, including exemptions and exceptions, as an individual may bring a civil action and obtain civil remedies with respect to records under 5 U.S.C. 552a(g)(1)(A), (B).

(2) To the extent consistent with the Judicial Redress Act, when making a request for access, amendment, or correction to a covered record, a covered person must follow the procedures outlined in this subpart for making a Privacy Act request for access to a covered record, or a Privacy Act request for amendment or correction of a covered record. A covered person must exhaust the administrative remedies, as outlined in this subpart, before the covered person may bring a cause of action described in paragraph (e)(1) of this section.

(f) *Providing written consent to disclose records protected under the Privacy Act.* The Department may disclose any record contained in a system of records by any means of communication to any person, or to another agency, pursuant to a written request by, or with the prior written consent of, the individual about whom the record pertains. An individual must verify the individual's identity in the same manner as required by § 16.41(d) when providing written consent to disclose a record protected under the Privacy Act and pertaining to the individual.

§ 16.41 Privacy Act requests for access to records.

(a) *General information.* (1) The Department has a decentralized system for responding to Privacy Act requests for access to records, with each component designating an office to process Privacy Act requests for access to records maintained by that component. A requester may make a Privacy Act request for access to records about the requester by writing directly to the component that maintains the records. All components have the capability to receive requests electronically either through email or a web portal. The request should be sent or delivered to the component's office at the address listed in appendix I to this part, or in accordance with the access procedures outlined in the corresponding SORN. The functions of each component are summarized in part 0 of this title and in the description of the Department and its components in the United States Government Manual, which is updated on a year-round basis and is available free of charge at *https://www.usgovernmentmanual.gov/.*

(2) If a requester cannot determine where within the Department to send the Privacy Act request for access to records, the requester may send it by mail to the FOIA/PA Mail Referral Unit, Justice Management Division, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530–0001; by email to *MRUFOIA.Requests@usdoj.gov;* or by fax to (202) 616–6695. The Mail Referral Unit will forward the request to the component(s) it believes most likely to have the requested records. For the quickest possible handling, the requester should mark both the request letter and the envelope ''Privacy Act Access Request.''

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable Department personnel to locate the applicable system of records containing them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist a component in identifying the requested records, such as the name or identifying number of each system of records in which the requester believes the records are maintained, or the date, title, name, author, recipient, case number, file designation, reference number, or subject matter of the record. The Department publishes SORNs in the **Federal Register** that describe the type and categories of records maintained in Department-wide and component-specific systems of records. Department SORNs may be found in published issues of the **Federal Register** and a list is available at *https://www.justice.gov/opcl/doj-systems-records.* Requesters may also request the record in a particular form or format.

(c) *Agreement to pay fees.* A Privacy Act request for access may specify the amount of fees that the requester is willing to pay in accordance with § 16.49. The component responsible for responding to the request shall confirm this agreement in an acknowledgement letter, in accordance with § 16.43.

(d) *Verification of identity.* (1) A requester must verify the requester's identity when making a Privacy Act request for access. The requester must state the requester's full name, current address, and date and place of birth. The requester must:

(i) Sign the request, and the signature must either be notarized or submitted by the requester under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization; or

(ii) When available, use one of the Department's approved digital services, as indicated on the Department's Privacy Act Request web page, to verify the identity of the requester through identity proofing and authentication processes.

(2) While no specific form is required, the requester may obtain forms for this purpose from the FOIA/PA Mail Referral Unit, Justice Management Division, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530–0001, or obtain the form at *https://www.justice.gov/oip/doj-reference-guide-attachment-d-copies-forms.*

(3) To help identify and locate requested records, a requester may also include, at the requester's option, any additional identifying information which may be helpful in identifying and locating the requested records. Components shall establish appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of information provided by the requester, and to protect against any anticipated threats, in accordance with § 16.51.

(e) *Verification of guardianship.* (1) The parent of a minor, or the legal guardian of an individual who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, is permitted to act on behalf of the individual. In order for a parent of a minor or the legal guardian of an individual to make a Privacy Act request for access on behalf of the individual, the parent or legal guardian must establish:

(i) The identity of the individual who is the subject of the request, by stating the name, current address, date and place of birth, and, at the parent or legal guardian's option, any additional identifying information that may be helpful in identifying and locating the requested records;

(ii) The parent or legal guardian's own identity, as required in paragraph (d) of this section;

(iii) Proof of parentage or legal guardianship, which may be proven by providing a copy of the individual's birth certificate or by providing a court order establishing legal guardianship; and

(iv) That the parent or legal guardian is acting on behalf of that individual in making the request.

(2) Components shall establish appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of information provided by the parent or

legal guardian, and to protect against any anticipated threats, in accordance with § 16.51.

§ 16.42 Responsibility for responding to Privacy Act requests for access to records.

(a) *In general.* Except as stated in paragraphs (c) through (f) of this section, the component that first receives a Privacy Act request for access is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily will include only those records it maintained as of the date the component begins its search. If any other date is used, the component shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The head of a component, or the component head's designee, is authorized to grant or deny any Privacy Act request for access to records maintained by that component.

(c) *Re-routing of misdirected requests.* When a component's FOIA/Privacy Act office determines that a request was misdirected within the Department, the receiving component's FOIA/Privacy Act office shall route the request to the FOIA/Privacy Act office of the proper component(s).

(d) *Consultations, referrals, and coordination.* When a component receives a Privacy Act request for access to a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from access under the Privacy Act. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the receiving component determines that it is not best able to process the record, then it shall follow the consultation, referral, and coordination procedures under § 16.4, subject to the requirements in this section. Components may make agreements with other components or agencies to eliminate the need for consultations or referrals for particular types of records.

(e) *Consultations, referrals, and coordination concerning law enforcement information.* When a component receives a Privacy Act request for access to a record in its possession containing information that relates to an investigation of a possible violation of law and that originated with another component or agency of the Federal Government, the receiving component shall either refer the responsibility for responding to the request regarding that information to that other component or agency or shall consult with that other component or agency.

(f) *Consultations, referrals, and coordination concerning classified information.* (1) When a component receives a Privacy Act request for access to a record containing information that has been classified or may be appropriate for classification by another component or agency under any applicable Executive order concerning the classification of records, the receiving component shall consult with or refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, or that should consider the information for classification.

(2) When a component receives a Privacy Act request for access to a record containing information that has been derivatively classified, the receiving component shall consult with or refer the responsibility for responding to that portion of the request to the component or agency that classified the underlying information.

§ 16.43 Responses to a Privacy Act requests for access to records.

(a) *In general.* Components should, to the extent practicable, communicate with requesters who have access to the internet using electronic means, such as through email or a web portal. A component shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the component in the form or format requested.

(b) *Acknowledgement of requests.* The component responsible for responding to the request must acknowledge, in writing, receipt of a Privacy Act request for access. A component shall initially respond to the requester by acknowledging the Privacy Act request for access, assigning the request an individualized tracking number, and, if applicable, confirming, in writing, the requester's agreement to pay fees in accordance with § 16.49.

(c) *Timing of responses to a Privacy Act request for access.* (1) Components ordinarily will respond to Privacy Act requests for access according to their order of receipt. The response time will commence on the date that the request is received by the proper component's office designated to receive requests, but in any event not later than ten (10) working days after the request is first received by any component's office designated by this subpart to receive requests.

(2) A component may designate multiple processing tracks that distinguish between simple and more complex Privacy Act requests for access, based on the estimated amount of work or time needed to process the request. Among the factors a component may consider are the number of pages involved in processing the request and the need for consultations or referrals. Components may advise requesters of the track into which their request falls and, when appropriate, may offer requesters an opportunity to narrow their request so that it can be placed in a different processing track.

(d) *Granting a Privacy Act request for access.* Once a component makes a determination to grant a Privacy Act request for access, in whole or in part, it shall notify the requester in writing. The component shall inform the requester in the notice of any fee charged under § 16.49 and shall disclose records to the requester promptly on payment of any applicable fee.

(e) *Adverse determination to a Privacy Act request for access.* A component that makes an adverse determination to a Privacy Act request for access, in whole or in part, shall notify the requester of the adverse determination in writing. An adverse determination to a Privacy Act request for access includes a determination by the component that: the request did not reasonably describe the record sought; the information requested is not a record subject to the Privacy Act; the requested record is not maintained in a system of records; the requested record is exempt, in whole or in part, from a Privacy Act request for access under applicable exemption(s); the requested record does not exist, cannot be located, or has been destroyed; the record is not readily reproducible in a comprehensible form; or there is a matter regarding disputed fees.

(f) *Content of adverse determination response.* An adverse determination to a Privacy Act request for access, in whole or in part, shall be signed by the head of the component, or the component head's designee, and shall include:

(1) The name and title or position of the person responsible for the adverse determination to the Privacy Act request for access;

(2) A brief statement of the reason(s) for the adverse determination to the Privacy Act request for access, including any Privacy Act exemption(s) applied by the component;

(3) An estimate of the volume of any records or information withheld, if applicable, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated or if providing an estimate

would harm an interest protected by an applicable exemption; and

(4) A statement that the adverse determination to the Privacy Act request for access may be appealed under § 16.45, and a description of the requirements set forth in § 16.45.

§ 16.44 Classified information.

In processing a Privacy Act request for access, a Privacy Act request for amendment or correction, or a Privacy Act request for accounting, in which information is classified under any applicable Executive order concerning the classification of records, to the extent the requester lacks the appropriate security clearance and fails otherwise to meet all requirements to access the classified record or information, the originating component shall review the information in the record to determine whether it should remain classified. Information determined to no longer require classification shall be de-classified and the record evaluated for an appropriate release to the requester, subject to any applicable exemptions or exceptions. On receipt of any appeal involving classified information, the official responsible for adjudicating the appeal shall take appropriate action to ensure compliance with part 17 of this title.

§ 16.45 Privacy Act access appeals.

(a) *Requirement for making a Privacy Act access appeal.* A requester may appeal an adverse determination to a Privacy Act request for access to the Office of Information Policy (''OIP''). The contact information for OIP is contained in the FOIA Reference Guide, which is available at *https://www.justice.gov/oip/04_3.html.* Appeals may also be submitted through the web portal accessible on OIP's website. Examples of an adverse determination to a Privacy Act request for access are provided in § 16.43. The requester must make the appeal in writing. To be considered timely, the requester must postmark, or in the case of electronic submissions, submit the request, within 90 calendar days after the date of the adverse determination. The appeal should indicate the assigned request number and clearly identify the component's determination that is being appealed. To facilitate handling, the requester should mark both the appeal letter and envelope, or include in the subject line of any electronic communication, ''Privacy Act Access Appeal.''

(b) *Adjudication of Privacy Act access appeals.* (1) The Director of OIP, or a designee of the Director of OIP, shall act on behalf of the Attorney General on all Privacy Act access appeals under this section, unless the Attorney General directs otherwise.

(2) Should the Attorney General exercise the right to respond to a Privacy Act request for access, the Attorney General's decision shall serve as the final action of the Department and will not be subject to a Privacy Act access appeal.

(3) A Privacy Act access appeal ordinarily will not be adjudicated if the request becomes a matter of litigation.

(c) *Responses to Privacy Act access appeals.* (1) OIP shall make its decision on an appeal in writing.

(2) A decision that upholds a component's adverse determination to the Privacy Act request for access, in whole or in part, shall include a brief statement of the reason(s) for the affirmance, including any Privacy Act exemption applied, and shall provide the requester with notification of the statutory right to file a lawsuit.

(3) A decision that reverses or modifies, in whole or in part, a component's adverse determination to the Privacy Act request for access shall include notice to the requester of the specific reversal or modification. The component(s) shall thereafter further process the request, in accordance with the appeal decision, and respond directly to the requester, as appropriate.

(d) *When a Privacy Act access appeal is required.* Before seeking review by a court of a component's refusal to grant a Privacy Act request for access, a requester generally must first submit a timely appeal in accordance with this section.

§ 16.46 Privacy Act requests for amendment or correction.

(a) *Requirements for making a Privacy Act request for amendment or correction.* Unless the record is not subject to amendment or correction, as stated in paragraph (i) of this section, individuals may make a Privacy Act request for amendment or correction of a Department record about themselves. Requesters must write directly to the Department component that maintains the record. A Privacy Act request for amendment or correction shall identify each particular record in question, state the amendment or correction that the requester would like to make, and state why the requester believes the record is not accurate, relevant, timely, or complete. Requesters may submit any documentation that would be helpful in determining the accuracy, relevance, timeliness, or completeness of the record. If the requester believes that the same record is in more than one Department system of records, the requester should address the request to each component that the requester believes maintains the record. For the quickest possible handling, requesters should mark both their request letter and envelope ''Privacy Act Amendment Request.'' Components and requesters must otherwise follow the procedures and responsibilities set forth in §§ 16.41 and 16.42.

(b) *Timing of responses to a Privacy Act request for amendment or correction.* (1) Components responsible for responding to a Privacy Act request for amendment or correction must acknowledge, in writing, receipt of the request no later than ten (10) working days after receipt.

(2) Components must promptly respond to a Privacy Act request for amendment or correction. Components ordinarily will respond to Privacy Act requests for amendment or correction according to their order of receipt. The response time will commence on the date that the request is received by the proper component's office designated to receive requests, but in any event no later than ten (10) working days after the request is first received by any component's office designated by this subpart to receive requests.

(3) A component may designate multiple processing tracks that distinguish between simple and more complex Privacy Act requests for amendment or correction, based on the estimated amount of work or time needed to process the request. Among the factors a component may consider are the number of pages involved in processing the request and the need for consultations or referrals. Components may advise requesters of the track into which their request falls and, when appropriate, may offer requesters an opportunity to narrow their request so that it can be placed in a different processing track.

(c) *Granting a Privacy Act request for amendment or correction.* If a component grants a Privacy Act request for amendment or correction, in whole or in part, it shall notify the requester in writing. The component shall describe the amendment or correction made and shall advise the requester of the requester's right to obtain a copy of the corrected or amended record, in accordance with the Privacy Act right of access procedures described in §§ 16.41 through 16.45.

(d) *Adverse determination to a Privacy Act request for amendment or correction.* A component that makes an adverse determination to a Privacy Act request for amendment or correction, in whole or in part, shall notify the requester of the determination in

writing. An adverse determination to a Privacy Act request for amendment or correction includes a decision by the component that: the information at issue is not a record as defined by the Privacy Act; the requested record is not subject to amendment or correction as stated in paragraph (i) of this section; the request does not reasonably describe the records sought or the amendment or correction to that record; the record at issue does not exist, cannot be located, has been destroyed, or otherwise cannot be amended or corrected; or the record is maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness in any determination about the individual about whom the record pertains.

(e) *Content of adverse determination response.* An adverse determination to a Privacy Act request for amendment or correction, in whole or in part, shall be signed by the head of the component, or the component head's designee, and shall include:

(1) The name and title or position of the person responsible for the adverse determination to the Privacy Act request for amendment or correction;

(2) A brief statement of the reason(s) for the adverse determination to the Privacy Act request for amendment or correction, including any Privacy Act exemption(s) applied by the component; and

(3) A statement that the adverse determination to the Privacy Act request for amendment or correction may be appealed under paragraph (f) of this section and a description of the requirements set forth in paragraph (f).

(f) *Privacy Act amendment appeals.* (1) A requester may appeal an adverse determination to a Privacy Act request for amendment or correction, in whole or in part, to the Office of Privacy and Civil Liberties (''OPCL''). The contact information for OPCL is available at *https://www.justice.gov/privacy.* The requester must make the appeal in writing. To be considered timely, the requester must postmark the appeal request, or in the case of electronic submissions, submit the appeal request, within 90 calendar days after the date of the component's refusal to grant a Privacy Act request for amendment or correction. The appeal should indicate the assigned request number and clearly identify the component's determination that is being appealed. To facilitate handling, the requester should mark both the appeal letter and envelope, or include in the subject line of the electronic transmission, ''Privacy Act Amendment Appeal.''

(2) The Chief Privacy and Civil Liberties Officer (''CPCLO''), or a designee of the CPCLO, will act on behalf of the Attorney General on all Privacy Act amendment appeals under this section, unless otherwise directed by the Attorney General.

(3) A Privacy Act amendment appeal ordinarily will not be adjudicated if the request becomes a matter of litigation.

(4) A decision on a Privacy Act amendment appeal must be made in writing. A decision that upholds a component's adverse determination to a Privacy Act request for amendment or correction, in whole or in part, shall include a brief statement of the reason(s) for the affirmance, including any Privacy Act exemption applied, whether the requester has a right to file a Statement of Disagreement, as described in paragraph (g) of this section, and the requester's statutory right to file a lawsuit. A decision that reverses or modifies a component's adverse determination to a Privacy Act request for amendment or correction, in whole or in part, shall notify the requester of the specific reversal or modification. The component shall thereafter further process the request, in accordance with the appeal decision, and respond directly to the requester, as appropriate.

(g) *Statement of Disagreement.* If a request is subject to a Privacy Act request for amendment or correction, but the component's adverse determination to a Privacy Act request for amendment or correction is upheld, in whole or in part, the requester has the right to file a Statement of Disagreement that states the requester's reason(s) for disagreeing with the Department's refusal to grant the requester's Privacy Act request for amendment or correction. Statements of Disagreement must be concise, must clearly identify each part of any record that is disputed, and should be no longer than one typed page for each fact disputed. A Statement of Disagreement must be sent to the component involved, which shall place it in the system of records in which the disputed record is maintained so that the Statement of Disagreement supplements the disputed record. The component shall mark the disputed record to indicate that a Statement of Disagreement has been filed and where in the system of records it may be found.

(h) *Notification of amendment, correction, or Statement of Disagreement.* Within thirty (30) working days of the amendment or correction of a record, the component that maintains the record shall notify all persons, organizations, or agencies to which it previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended or corrected. If an individual has filed a Statement of Disagreement, the component shall append a copy of it to the disputed record whenever the record is disclosed. The component may also append a concise statement of its reason(s) for denying the Privacy Act request for amendment or correction of the record.

(i) *Records not subject to amendment or correction.* The following records are not subject to amendment or correction:

(1) Copies of court records;

(2) Transcripts of testimony given under oath or written statements made under oath;

(3) Transcripts of grand jury proceedings, judicial proceedings, or quasi-judicial proceedings, which are the official record of those proceedings;

(4) Presentence reports, and other records pertaining directly to such reports originating with the courts;

(5) Records in a system of records that have been exempted from amendment and correction, pursuant to 5 U.S.C. 552a(j) or (k), through the applicable regulations in this subpart; and

(6) Records not maintained in a system of records.

§ 16.47 Privacy Act requests for an accounting of record disclosures.

(a) *Requirements for making a Privacy Act request for accounting of record disclosures.* Except where accountings of disclosures are not required to be kept as stated in paragraph (c) of this section, individuals may make a Privacy Act request for an accounting of record disclosures about themselves that have been made by the Department to another person, organization, or agency. This accounting contains the date, nature, and purpose of each disclosure, as well as the name and address of the person, organization, or agency to which the disclosure was made. If the requester believes that the same record is in more than one system of records, the requester should address their request to each component that the requester believes maintains the record. For the quickest possible handling, requesters should mark both their request letters and envelopes ''Privacy Act Accounting Request.'' Requests must otherwise follow the procedures in § 16.41.

(b) *Processing Privacy Act requests for an accounting of record disclosures.* Unless otherwise specified in this section, components shall process Privacy Act requests for accountings of record disclosures following the procedures in §§ 16.42 and 16.43.

(c) *Where accountings of record disclosures are not required.*

Components are not required to provide Privacy Act accountings of record disclosures to a requester in cases in which they relate to:

(1) Disclosures of information not subject to the Privacy Act;

(2) Disclosures of records not maintained in a system of records;

(3) Disclosures of records maintained in a system of records for which accountings are not required to be kept, including disclosures to those officers and employees of the Department who have a need for the record in the performance of their duties, 5 U.S.C. 552a(b)(1), or disclosures that are required under the FOIA, 5 U.S.C. 552a(b)(2);

(4) Disclosures made to law enforcement agencies for authorized law enforcement activities in response to written requests from those law enforcement agencies specifying the law enforcement activities for which the disclosures are sought; or

(5) Disclosures made from systems of records that have been exempted from the accounting of record disclosure requirements pursuant to the Privacy Act, 5 U.S.C. 552a(j) or (k), through the applicable regulations in this subpart.

(d) *Appeals.* A requester may appeal a component's refusal to grant a Privacy Act request for an accounting of record disclosures in the same manner, and under the same procedures, as a Privacy Act access appeal, as set forth in § 16.45.

§ 16.48 Preservation of records.

Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or by the National Archives and Records Administration's General Records Schedule 4.2. Records shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the Privacy Act.

§ 16.49 Fees.

Components shall charge fees for duplication of records under the Privacy Act in the same way in which they charge duplication fees for responding to FOIA requests under § 16.10. No search or review fee may be charged for any record unless the record has been exempted from access pursuant to exemptions enumerated in the Privacy Act, 5 U.S.C. 552a(j)(2) or (k)(2).

§ 16.50 Notice of compulsory legal process and emergency disclosures.

(a) *Legal process disclosures.* Components shall make reasonable efforts to provide notice to an individual whose record is disclosed under compulsory legal process, such as an order by a court of competent jurisdiction, and such process becomes a matter of public record. Notice shall be given within a reasonable time after the component's receipt of process, except that in a case in which such process is not a matter of public record, the notice shall be given within a reasonable time only after such process becomes public. Where an individual, or the individual's legal counsel, has not otherwise received notice of the disclosure in the litigation process, notice shall be mailed to the individual's last known address and shall contain a copy of such process and a description of the information disclosed. Notice shall not be required if disclosure is made from a system of records that has been exempted from the notice requirement.

(b) *Emergency disclosures.* Upon disclosing a record pertaining to an individual made under compelling circumstances affecting health or safety, the component shall notify that individual of the disclosure. This notice shall be mailed to the individual's last known address and shall state the nature of the information disclosed; the person, organization, or agency to which it was disclosed; the date of disclosure; and the compelling circumstances justifying the disclosure.

§ 16.51 Security of systems of records.

(a) Each component shall establish and maintain administrative, technical, and physical controls consistent with applicable Department and Government-wide laws, regulations, policies, and standards, to ensure the security and confidentiality of records, and to protect against reasonably anticipated threats or hazards to their security or integrity, including against any reasonably anticipated unauthorized access, use, or disclosure, which could result in substantial harm, embarrassment, inconvenience, or unfairness to individuals about whom information is maintained. The stringency of these controls shall correspond to the sensitivity of the records that the controls protect. At a minimum, each component shall maintain administrative, technical, or physical controls to ensure that:

(1) Records are protected from unauthorized access, including unauthorized public access;

(2) The physical area in which records are maintained is supervised or appropriately secured to prevent unauthorized persons from having access to them;

(3) Records are protected from damage, loss, or unauthorized alteration or destruction; and

(4) Records are not disclosed to unauthorized persons or to authorized persons for unauthorized purposes in either oral or written form.

(b) Each component shall establish procedures that restrict access to records to only those individuals within the Department who must have access to those records in order to perform their duties and that prevent inadvertent disclosure of records.

(c) The CPCLO, or a designee of the CPCLO, may impose additional administrative, technical, or physical controls to protect records in consultation with the Chief Information Officer and the Director of the Office of Records Management Policy.

§ 16.52 Contracts for the operation of record systems.

(a) Any approved contract for the operation of a system of records shall contain the standard contract terms and conditions in accordance with the Federal Acquisition Regulations in 48 CFR chapter 28 and may also contain additional privacy-related terms and conditions to ensure compliance with the requirements of the Privacy Act for that system of records. The contracting component will be responsible for ensuring that the contractor complies with these contract requirements.

(b) The CPCLO, a designee of the CPCLO, or contracting components may impose additional contract requirements to further protect records.

§ 16.53 Use and collection of Social Security account numbers.

(a) *Purpose and scope.* This section contains the rules that the Department of Justice follows in handling Social Security account numbers in accordance with section 7 of the Privacy Act, and with the Social Security Fraud Prevention Act.

(b) *Definitions.* For the purposes of this section:

Mail means any physical package sent to entities or individuals outside the Department through the United States Postal Service or any other express mail carrier; and

Necessary includes only those circumstances in which a component would be unable to comply, in whole or in part, with a legal, regulatory, or policy requirement if prohibited from mailing the full Social Security account number. Including the full Social Security account number of an individual on a document sent by mail is not ''necessary'' if a legal, regulatory, or policy requirement could be satisfied

by either partially redacting the Social Security account number in accordance with paragraph (d)(3) of this section, or entirely removing the Social Security account number.

(c) *Denial of rights, benefits, or privileges.* Components are prohibited from denying any right, benefit, or privilege provided by law to an individual because of such individual's refusal to disclose the individual's Social Security account number. This paragraph (c) shall not apply with respect to:

(1) Any disclosure that is required by Federal statute; or

(2) The disclosure of a Social Security account number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(d) *Restriction of Social Security account numbers on documents sent by mail.* (1) A component shall not include the full Social Security account number of an individual on any document sent by mail, unless the inclusion of the Social Security account number on the document is necessary. Unless the Attorney General directs otherwise, the CPCLO is authorized to assist components in implementing this paragraph (d), including determining whether inclusion of the Social Security account number on a document sent by mail is necessary.

(2) If the use of the full Social Security account number on a document sent by mail is necessary, the component sending the document shall implement appropriate administrative, technical, and physical safeguards to ensure a reasonable level of security against unauthorized access to, and use, disclosure, disruption, modification, or destruction of, the documents sent by mail.

(3) Where feasible, components should partially redact the Social Security account number on any document sent by mail by including no more than the last four digits of the Social Security account number. Components should prioritize technical methods to redact Social Security account numbers.

(4) Components are prohibited from placing a Social Security account number, whether full or partially redacted, on the outside of any mail.

(e) *Employee awareness.* Each component shall ensure that employees authorized to collect Social Security account numbers are made aware of the following:

(1) The requirements of paragraphs (c) and (d) of this section;

(2) That individuals requested to provide their Social Security account numbers must be informed of:

(i) Whether providing Social Security account numbers is mandatory or voluntary;

(ii) Any statutory or regulatory authority that authorizes the collection of Social Security account numbers; and

(iii) The uses that will be made of the Social Security account numbers; and

(3) That the Department may have other regulations or polices regulating the use, maintenance, or disclosure of Social Security account numbers by which employees must abide.

§ 16.54 Employee standards of conduct.

Each component shall inform its employees and any contractors involved in developing or maintaining a system of records of the provisions of the Privacy Act, including the Privacy Act's civil liability and criminal penalty provisions. Unless otherwise permitted by law, employees and contractors of the Department shall:

(a) Collect from individuals only the information that is relevant and necessary to discharge the responsibilities of the Department;

(b) Collect information about an individual directly from that individual whenever practicable;

(c) Inform each individual asked to supply information for a record pertaining to that individual of:

(1) The legal authority to collect the information and whether providing it is mandatory or voluntary;

(2) The principal purpose for which the Department intends to use the information;

(3) The routine uses the Department may make of the information; and

(4) The effects on the individual, if any, of not providing the information;

(d) Ensure that the component maintains no system of records without public notice and that it notifies appropriate Department officials of the existence or development of any system of records that is not the subject of a current or planned public notice;

(e) Maintain all records that are used by the Department in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual in the determination;

(f) Except as to disclosures made to an agency or made under the FOIA, make reasonable efforts, prior to disseminating any record about an individual, to ensure that the record is accurate, relevant, timely, and complete;

(g) Maintain no record describing how an individual exercises the individual's First Amendment rights, unless maintaining the record is expressly authorized by statute or by the individual about whom the record is maintained, or is pertinent to and within the scope of an authorized law enforcement activity;

(h) When required by the Privacy Act, maintain an accounting in the specified form of all disclosures of records by the Department to persons, organizations, or agencies;

(i) Maintain and use records with care to prevent the loss or the unauthorized or inadvertent disclosure of a record to anyone;

(j) Notify the appropriate Department official of any record that contains information that the Privacy Act does not permit the Department to maintain; and

(k) Read, acknowledge, and agree to abide by the Department of Justice rules of behavior for accessing, collecting, using, and maintaining Department information.

§ 16.55 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act, the Social Security Fraud Reduction Act, or the Judicial Redress Act.

■ 3. Amend appendix I to part 16 by revising the first two paragraphs to read as follows:

Appendix I to Part 16—Components of the Department of Justice

Please consult Attachment B of the Department of Justice FOIA Reference Guide for the contact information and a detailed description of the types of records maintained by each Department component. The FOIA Reference Guide is available at *https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide* or upon request to the Office of Information Policy (OIP).

The Department component offices, and any component-specific requirements, for making a FOIA or Privacy Act request are listed in this appendix. The Certification of Identity form, available at *https://www.justice.gov/oip/doj-reference-guide-attachment-d-copies-forms,* may be used by individuals who are making requests for records pertaining to themselves. For each of the six components marked with an asterisk, FOIA and Privacy Act requests for access must be sent to OIP, which handles initial requests for those six components.

* * * * *

Dated: January 2, 2024.

Merrick B. Garland,

Attorney General.

[FR Doc. 2024–00282 Filed 1–9–24; 8:45 am]

BILLING CODE 4410–PJ–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0020]

RIN 1625–AA00

Safety Zone; North Pacific Ocean, Dutch Harbor, AK

AGENCY: Coast Guard, Department of Homeland Security (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 10, 2024, through March 6, 2024. For the purposes of enforcement, actual notice will be used from January 7, 2024, until January 10, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0020 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 recently 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 recent 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 recent vessel fire and the hazardous materials onboard the vessel 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. The duration of the rule is necessary due to the challenges associated with getting materiel and personnel to the vessel given its remote location.

IV. Discussion of the Rule

This rule establishes a safety zone from January 7, 2024, through March 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.

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 60 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 part 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.T17–0020 to read as follows:

§ 165.T17–0020 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, AK.

(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 shall 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 January 7, 2024, through March 6, 2024.

Dated: January 5, 2024.

C.A. Culpepper,

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

[FR Doc. 2024–00437 Filed 1–8–24; 4:15 pm]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 36 and 42

RIN 2900–AR89

Federal Civil Penalties Inflation Adjustment Act Amendments

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations to adjust for inflation the amount of civil monetary penalties that are within VA's jurisdiction. These adjustments comply with the requirement in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, to make annual adjustments to the penalties.

DATES: This rule is effective January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Stephanie Li, Assistant Director, Regulations, Legislation, Engagement, and Training, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–8862. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act) (Pub. L. 114–74, sec. 701, 129 Stat. 584, 599–600), which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, sec. 5, 104 Stat. 890, 891–892), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The amended statute, codified in a note following 28 U.S.C. 2461, requires agencies to publish annual adjustments for inflation, based on the percentage change between the Consumer Price Index (defined in the statute as the Consumer Price Index for all-urban consumers (CPI–U) published by the Department of Labor) for the month of October preceding the date of the adjustment and the prior year's October CPI–U. 28 U.S.C. 2461 note, secs. 4(a) and (b) and 5(b)(1). This rule implements the 2024 calendar year inflation adjustment amounts.

Under 38 U.S.C. 3710(g)(4)(B), VA is authorized to levy civil monetary penalties against private lenders that originate VA–guaranteed loans if a lender falsely certifies that they have complied with certain credit information and loan processing standards, as set forth by chapter 37, title 38 U.S.C. and part 36, title 38 CFR. Under section 3710(g)(4)(B), any lender who knowingly and willfully makes such a false certification shall be liable to the United States Government for a civil penalty equal to two times the amount of the Secretary's loss on the loan involved or to another appropriate amount, not to exceed $10,000, whichever is greater. VA implemented the penalty amount in 38 CFR 36.4340(k)(1)(i) and (k)(3). On December 19, 2023, the Office of Management and Budget (OMB) issued Circular M–24–07. This circular reflects that the October 2022 CPI–U was 298.012 and the October 2023 CPI–U was 307.671, resulting in an inflation adjustment multiplier of 1.03241. Accordingly, the calendar year 2024 inflation revision imposes an adjustment from $27,018 to $27,894.

Under 31 U.S.C. 3802, VA can impose monetary penalties against any person who makes, presents, or submits a claim or written statement to VA that the person knows or has reason to know is false, fictitious, or fraudulent, or who engages in other covered conduct. The statute permits, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each claim. 31 U.S.C. 3802(a)(1) and (2). VA implemented the penalty amount in 38 CFR 42.3(a)(1)(iv) and (b)(1)(ii). As previously noted, OMB Circular M–24–07 reflects an inflation adjustment multiplier of 1.03241. Therefore, the calendar year 2024 inflation revision imposes an adjustment from $13,508 to $13,946.

Accordingly, VA is revising 38 CFR 36.4340(k)(1)(i) and (3) and 42.3(a)(1)(iv) and (b)(1)(ii) to reflect the 2024 inflationary adjustments for civil monetary penalties assessed or enforced by VA.

Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under 5 U.S.C. 553(b)(B) and (d)(3) to dispense with the opportunity for prior notice and public comment and to publish this rule with an immediate effective date. The statute requires agencies to make annual adjustments for inflation to the allowed amounts of civil monetary penalties ''notwithstanding section 553 of title 5, United States Code.'' 28 U.S.C. 2461 note, sec. 4(a) and (b). The penalty adjustments, and the methodology used to determine the adjustments, are set by the terms of the statute. VA has no discretion to make changes in those areas. Therefore, an opportunity for prior notice and public comment and a delayed effective date are unnecessary.

Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

Unfunded Mandates

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

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not satisfying the criteria under 5 U.S.C. 804(2).

List of Subjects

38 CFR Part 36

Condominiums, Housing, Individuals with disabilities, Loan programs—housing and community development, Loan programs—veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

38 CFR Part 42

Administrative practice and procedure, Claims, Fraud, Penalties.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on January 4, 2024, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR parts 36 and 42 as set forth below:

PART 36—LOAN GUARANTY

■ 1. The authority citation for part 36 continues to read as follows:

Authority: 38 U.S.C. 501 and 3720.

§ 36.4340 [Amended]

■ 2. In § 36.4340, amend paragraphs (k)(1)(i) introductory text and (k)(3) by removing ''$27,018'' and adding in its place ''$27,894''.

PART 42—STANDARDS IMPLEMENTING THE PROGRAM FRAUD CIVIL REMEDIES ACT

■ 3. The authority citation for part 42 continues to read as follows:

Authority: Pub. L. 99–509, secs. 6101–6104, 100 Stat. 1874, codified at 31 U.S.C. 3801–3812.

§ 42.3 [Amended]

■ 4. In § 42.3, amend paragraphs (a)(1)(iv) and (b)(1)(ii) by removing ''$13,508'' and adding in its place ''$13,946''.

[FR Doc. 2024–00353 Filed 1–9–24; 8:45 am]

BILLING CODE 8320–01–P

POSTAL SERVICE

39 CFR Parts 233 and 273

Inspection Service Authority; Civil Monetary Penalty Inflation Adjustment

AGENCY: Postal Service™.

ACTION: Interim final rule.

SUMMARY: This document updates postal regulations by implementing inflation adjustments to civil monetary penalties that may be imposed under consumer protection and mailability provisions enforced by the Postal Service pursuant to the Deceptive Mail Prevention and Enforcement Act and the Postal Accountability and Enhancement Act, as well as the civil monetary penalty that may be imposed by the Postal Service for false claims and statements under the Program Fraud Civil Remedies Act. These adjustments are required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This document includes the adjustments for 2024 for the statutory civil monetary penalties subject to the 2015 Act and all necessary updates authorized by the 2015 Act for regulatory civil monetary penalties.

DATES: Effective January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Louis DiRienzo, (202) 268–2705, *ljdirienzo@uspis.gov.*

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), Public Law 114–74, 129 Stat. 584, amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (1990 Act), Public Law 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. Section 3 of the 1990 Act specifically includes the Postal Service in the definition of ''agency'' subject to its provisions.

Beginning in 2017, the 2015 Act requires the Postal Service to make an annual adjustment for inflation to civil penalties that meet the definition of ''civil monetary penalty'' under the 1990 Act. The Postal Service must make the annual adjustment for inflation and publish the adjustment in the **Federal Register** by January 15 of each year. Each penalty will be adjusted as instructed by the Office of Management and Budget (OMB) based on the Consumer Price Index (CPI–U) from the most recent October. OMB has furnished detailed instructions regarding the annual adjustment for 2024 in memorandum M–24–07, *Implementation of Penalty Inflation Adjustments for 2024, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (December 19, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/12/M-24-07-Implementation-of-Penalty-Inflation-Adjustments-for-2024.pdf.* This year, OMB has advised that an adjustment multiplier of 1.03241 will be used. The new penalty amount must be rounded to the nearest dollar.

The 2015 Act allows the interim final rule and annual inflation adjustments to be published without prior public notice or opportunity for public comment.

Adjustments to Postal Service Civil Monetary Penalties

Civil monetary penalties may be assessed for postal offenses under sections 106 and 108 of the Deceptive Mail Prevention and Enforcement Act, Public Law 106–168, 113 Stat. 1811, 1814 (*see,* 39 U.S.C. 3012(a), (c)(1), (d), and 3017(g)(2), (h)(1)(A)); and section 1008 of the Postal Accountability and Enhancement Act, Public Law 109–435, 120 Stat. 3259–3261 (*see,* 39 U.S.C. 3018(c)(1)(A)). The statutory civil monetary penalties subject to the 2015 Act and the amount of each penalty after implementation of the annual adjustment for inflation are as follows:

39 U.S.C. 3012(a)—False Representations and Lottery Orders

Under 39 U.S.C. 3005(a)(1)–(3), the Postal Service may issue administrative orders prohibiting persons from using the mail to obtain money through false representations or lotteries. Persons who evade, attempt to evade, or fail to comply with an order to stop such prohibited practices may be liable to the United States for a civil penalty under 39 U.S.C. 3012(a). The regulations implemented pursuant to this section currently impose a $85,637 penalty for each mailing less than 50,000 pieces, $171,269 for each mailing of 50,000 to 100,000 pieces, and $17,128 for each additional 10,000 pieces above 100,000 not to exceed $3,425,405. The new penalties will be as follows: a $88,412 penalty for each mailing less than 50,000 pieces, $176,820 for each mailing of 50,000 to 100,000 pieces, and $17,683 for each additional 10,000 pieces above 100,000 not to exceed $3,536,422.

39 U.S.C. 3012(c)(1)—False Representation and Lottery Penalties in Lieu of or as Part of an Order

In lieu of or as part of an order issued under 39 U.S.C. 3005(a)(1)–(3), the Postal Service may assess a civil penalty. Currently, the amount of this penalty, set in the implementing regulations to 39 U.S.C. 3012(c)(1), is $42,818 for each mailing that is less than 50,000 pieces, $85,637 for each mailing of 50,000 to 100,000 pieces, and an additional $8,564 for each additional 10,000 pieces above 100,000 not to exceed $1,712,703. The new penalties will be $44,206 for each mailing that is less than 50,000 pieces, $88,412 for each mailing of 50,000 to 100,000 pieces, and an additional $8,842 for each additional 10,000 pieces above 100,000 not to exceed $1,768,212.

39 U.S.C. 3012(d)—Misleading References to the United States Government; Sweepstakes and Deceptive Mailings

Persons may be liable to the United States for a civil penalty under 39 U.S.C. 3012(d) for sending certain deceptive mail matter described in 39 U.S.C. 3001((h)–(k), including:

- Solicitations making false claims of Federal Government connection or approval;
- Certain solicitations for the purchase of a product or service that may be obtained without cost from the Federal Government;
- Solicitations containing improperly prepared ''facsimile checks''; and
- Certain solicitations for ''skill contests'' and ''sweepstakes'' sent to individuals who, in accordance with 39 U.S.C. 3017(d), have requested that such materials not be mailed to them.

Currently, under the implementing regulations, this penalty is not to exceed $17,128 for each mailing. The new penalty will be $17,683.

39 U.S.C. 3017(g)(2)—Commercial Use of Lists of Persons Electing Not To Receive Skill Contest or Sweepstakes Mailings

Under 39 U.S.C. 3017(g)(2), the Postal Service may impose a civil penalty against a person who provides information for commercial use about individuals who, in accordance with 39 U.S.C. 3017(d), have elected not to receive certain sweepstakes and contest information. Currently, this civil penalty may not exceed $3,425,405 per violation, pursuant to the implementing regulations. The new penalty may not exceed $3,536,422 per violation.

39 U.S.C. 3017(h)(1)(A)—Reckless Mailing of Skill Contest or Sweepstakes Matter

Currently, under 39 U.S.C. 3017(h)(1)(A) and its implementing regulations, any promoter who recklessly mails nonmailable skill contest or sweepstakes matter may be liable to the United States in the amount of $17,128 per violation for each mailing to an individual. The new penalty is $17,683 per violation.

39 U.S.C. 3018(c)(1)(A)—Hazardous Material

Under 39 U.S.C. 3018(c)(1)(A), the Postal Service may impose a civil penalty payable into the Treasury of the United States on a person who knowingly mails nonmailable hazardous materials or fails to follow postal laws on mailing hazardous materials. Currently, this civil penalty is at least $371, but not more than $147,675 for each violation, pursuant to the implementing regulations. The new penalty is at least $383, but not more than $152,461 for each violation.

Adjustments to Regulatory Postal Service Civil Monetary Penalties

In October 1986, Congress enacted the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812. The Program Fraud Civil Remedies Act established an administrative remedy against any person who makes, or causes to be made, a false claim or written statement to certain Federal agencies. The Act requires each covered agency to promulgate rules and regulations necessary to implement its provisions. The Postal Service's implementing regulations are found in part 273 of title 39, Code of Federal Regulations. The current penalty amount is $13,508. The new penalty amount is $13,946.

List of Subjects

39 CFR Part 233

Administrative practice and procedure, Banks, Banking, Credit, Crime, Infants and children, Law enforcement, Penalties, Privacy, Seizures and forfeitures.

39 CFR Part 273

Administrative practice and procedure, Claims, Fraud, Penalties.

For the reasons set out in the preamble, the Postal Service amends 39 CFR parts 233 and 273 as follows:

PART 233—INSPECTION SERVICE AUTHORITY

■ 1. The authority citation for part 233 continues to read as follows:

Authority: 39 U.S.C. 101, 102, 202, 204, 401, 402, 403, 404, 406, 410, 411, 1003, 3005(e)(1), 3012, 3017, 3018; 12 U.S.C. 3401–3422; 18 U.S.C. 981, 983, 1956, 1957, 2254, 3061; 21 U.S.C. 881; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–208, 110 Stat. 3009; Secs. 106 and 108, Pub. L. 106–168, 113 Stat. 1806 (39 U.S.C. 3012, 3017); Pub. L. 114–74, 129 Stat. 584.

§ 233.12 [Amended]

■ 2. In § 233.12:
■ a. In paragraph (a):
■ i. Remove ''$85,637'' and add in its place ''$88,412'';
■ ii. Remove ''$171,269'' and add in its place ''$176,820'';
■ iii. Remove ''$17,128'' and add in its place ''$17,683''; and
■ iv. remove ''$3,425,405'' and add in its place ''$3,536,422''.
■ b. In paragraph (b):
■ i. Remove ''$42,818'' and add in its place ''$44,206'';
■ ii. Remove ''$85,637'' and add in its place ''$88,412'';
■ iii. Remove ''$8,564'' and add in its place ''$8,842''; and
■ iv. Remove ''$1,712,703'' and add in its place ''$1,768,212''.
■ c. In paragraph (c)(4), remove ''$17,128'' and add in its place ''$17,683''.
■ d. In paragraph (d), remove ''$3,425,405'' and add in its place ''$3,536,422''.
■ e. In paragraph (e), remove ''$17,128'' and add in its place ''$17,683''.
■ f. In paragraph (f), remove ''$371'' and add in its place ''$383'' and remove ''$147,675'' and add in its place ''$152,461''.

PART 273—ADMINISTRATION OF PROGRAM FRAUD CIVIL REMEDIES ACT

■ 3. The authority citation for part 273 continues to read as follows:

Authority: 31 U.S.C. Chapter 38; 39 U.S.C. 401.

■ 4. In § 273.3:
■ a. In paragraph (a)(1)(iv):
■ i. Remove the second sentence.
■ ii. Remove ''$13,508'' and add in its place ''$13,946''.
■ b. Designate the undesignated paragraph following paragraph (b)(1)(ii) as paragraph (b)(1)(iii).
■ c. In paragraph (b)(1)(ii), add a sentence at the end of the paragraph.

The addition reads as follows:

§ 273.3 Liability for false claims and statements.

* * * * *

(b) * * *

(1) * * *

(ii) * * * As adjusted under Public Law 114–74, the penalty is $13,946 per claim.

* * * * *

Christopher Doyle,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2024–00313 Filed 1–9–24; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2023–0097; FRL–11564–04–R4]

Air Plan Approval; Kentucky; Revisions to Jefferson County Emissions Monitoring and Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving changes to

the Jefferson County portion of the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky, through the Energy and Environment Cabinet (Cabinet), via a letter dated June 15, 2022. The changes were submitted by the Cabinet on behalf of the Louisville Metro Air Pollution Control District (District) and amend the District's stationary source emissions monitoring and reporting requirements. EPA is approving the changes because they are consistent with the Clean Air Act (CAA or Act).

DATES: This rule is effective February 9, 2024.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2023–0097. All documents in the docket are listed on the *regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tiereny Bell, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9088. Ms. Bell can also be reached via electronic mail at *bell.tiereny@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 15, 2022,[1] the Commonwealth of Kentucky submitted changes to the Jefferson County portion of the Kentucky SIP for EPA approval.[2] [3] In this rulemaking, EPA is approving changes to Regulation 1.06, *Stationary Source Self-Monitoring, Emissions Inventory Development, and Reporting* submitted on June 15, 2022.

Through a notice of proposed rulemaking (NPRM) published on November 20, 2023 (88 FR 80680), EPA proposed to approve these changes to Regulation 1.06. Section 6, *Emissions Statements for Ozone Precursors,* of Regulation 1.06 requires that on or before April 15 of each year, all stationary sources of NO_X or VOC shall submit to the District a statement of actual emissions of those compounds. In this rulemaking, EPA is finalizing its approval of the District's June 15, 2022, request to incorporate Version 11 of Regulation 1.06 into the SIP, replacing Version 10. Version 10 of Regulation 1.06 at Section 6.2.1 states that facilities with less than 25 tons per year (tpy) of plant-wide actual VOC emissions or less than 25 tpy of plant-wide actual NO_X emissions are exempted from the emissions statement requirements in Section 6, unless emissions of the other pollutant (VOC or NO_X) are at or above 25 tpy. Version 11 revises Section 6.2.1 to instead exempt facilities with less than 25 tpy of plant-wide *potential* VOC *and* less than 25 tpy of plant-wide *potential* NO_X emissions from the Section 6 emissions statement requirement.[4] The contents of the District's submission, as well as EPA's rationale for approving changes to this regulation, are described in more detail in EPA's November 20, 2023, NPRM. Comments on the November 20, 2023, NPRM were due on or before December 20, 2023. EPA received one comment and responds to this comment in the next section of this rulemaking notice.

II. Response to Comment

EPA received one comment on the November 20, 2023, NPRM. The comment expresses both support for and concern about EPA's proposed action to approve the amendments to Jefferson County's emissions reporting requirements.

Comment: The commenter stated that changing the way emissions are reported could be ''very beneficial and more organized,'' which the commenter finds ''especially important if it would help benefit Kentucky residents.'' The commenter's ''only concern is how it would be ensured'' that the changes to the emissions reporting requirements would not ''decrease the amount of emissions reported.'' The commenter asks if there are measures put in place to keep plants accountable, noting that ''[c]limate change is a very real concern and it is important to hold the power plants that are contributing to change accountable.''

Response: CAA section 182(a)(3)(B)(i) requires States to submit to EPA a SIP revision requiring the owner or operator of each stationary source of NO_X or VOC in an ozone nonattainment area to report its NO_X and VOC emissions to the State and to certify the accuracy of these reported emissions. Section 182(a)(3)(B)(ii) allows States to waive the requirements under subsection (i) for stationary sources emitting less than 25 tpy of VOC or NO_X if the State provides an inventory of emissions from such class or category of sources.

Jefferson County is subject to the requirements of CAA section 182(a) because it is part of the Louisville, KY-IN moderate nonattainment area for the 2015 8-Hour Ozone National Ambient Air Quality Standards (NAAQS). Regulation 1.06, *Stationary Source Self-Monitoring, Emissions Inventory Development, and Reporting,* in the Jefferson County portion of the Kentucky SIP, provides the District with the authority to require emissions monitoring at stationary sources and requires certain sources to maintain emissions records and to provide annual emissions statements to the District.[5] Section 6, *Emissions Statements for Ozone Precursors,* requires that on or before April 15 of each year, all stationary sources of NO_X or VOC shall submit to the District a statement of actual emissions of those compounds.

[1] On June 15, 2022, Kentucky provided multiple SIP revisions that are not addressed in this rulemaking. One of the June 15, 2022, submittals contains changes to District Regulation 2.04, *Construction or Modification of Major Sources in or Impacting upon Non-Attainment Areas (Emission Offset Requirements)* in the Kentucky SIP. These changes are not addressed in this notice. EPA will act on these changes in a separate rulemaking. Another June 15, 2022, SIP revision contained changes to District Regulation 2.17, *Federally Enforceable District Origin Operating Permits,* in the Kentucky SIP. EPA finalized its approval of changes to Regulation 2.17 on March 1, 2023. *See* 88 FR 12831.

[2] EPA received this submission on June 13, 2022, via a letter dated June 15, 2022. Throughout this final rule, this submission will be referred to as the June 15, 2022, submission.

[3] In 2003, the City of Louisville and Jefferson County governments merged, and the ''Jefferson County Air Pollution Control District'' was renamed the ''Louisville Metro Air Pollution Control District.'' However, to be consistent with the terminology used in the subheading in Table 2 of 40 CFR 52.920(c), throughout this notice we refer to the District regulations contained in the Jefferson County portion of the Kentucky SIP as the ''Jefferson County'' regulations.

[4] Section 6.2.1 continues to allow the District to require sources claiming the exemption to provide adequate information to verify actual emissions for the previous year.

[5] On March 9, 2022, EPA determined that Regulation 1.06 met the requirements for the 2015 ozone NAAQS for the Jefferson County Area. *See* 87 FR 13177.

As discussed above, Version 10 of Regulation 1.06 at Section 6.2.1 states that facilities with less than 25 tpy of plant-wide actual VOC emissions or less than 25 tpy of plant-wide actual NO_X emissions are exempted from the emissions statement requirements in Section 6, unless emissions of the other pollutant (VOC or NO_X) are at or above 25 tpy. In this action, EPA is approving Version 11 into the SIP which revises Section 6.2.1 to instead exempt facilities with less than 25 tpy of plant-wide *potential* VOC *and* less than 25 tpy of plant-wide *potential* NO_X emissions from the Section 6 emissions statement requirement.[6]

As noted in the NPRM, the changes do not reduce the number of facilities required to submit emissions statements. Changing the basis for the exemption from *actual* to *potential* emissions does not reduce the number of facilities that must submit emissions statements because potential emissions reflect a facility's maximum capacity to emit a pollutant under its physical and operational design.[7] Thus, the change from *actual* to *potential* emissions may make fewer facilities eligible for the exemption, thus increasing the number of facilities required to submit emissions statements. Furthermore, the changes do not affect the amount or type of information that must be included in the emissions statements.

III. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, and as discussed in Section I of this preamble, EPA is finalizing the incorporation by reference of District Regulation 1.06, *Stationary Source Self-Monitoring, Emissions Inventory Development, and Reporting,* adopted by the District on March 16, 2022 (referred to as ''Version 11'' by the District). EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[8]

IV. Final Action

EPA is approving the aforementioned changes to Regulation 1.06, *Stationary Source Self-Monitoring, Emissions Inventory Development, and Reporting,* adopted by the District on March 16, 2022, into the Jefferson County portion of the Kentucky SIP. The EPA is approving these changes because they are consistent with the CAA.

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- 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 subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a State program;
- 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.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have Tribal implications and will not impose substantial direct costs on Tribal governments or preempt Tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The District did not evaluate EJ considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States

[6] As discussed in the NPRM, section 6 continues to satisfy the emissions statement requirements in CAA section 182(a)(3)(B).

[7] *See, e.g.,* the definition of ''potential to emit'' in Regulation 1.02, Section 1.61, of the Jefferson County portion of the Kentucky SIP.

[8] 62 FR 27968 (May 22, 1997).

Court of Appeals for the appropriate circuit by March 11, 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).

List of Subjects in 40 CFR Part 52

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

Dated: December 29, 2023.

Jeaneanne Gettle,

Acting Regional Administrator, Region 4.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart S—Kentucky

■ 2. In § 52.920, in table 2 to paragraph (c), under the center heading ''Reg 1—General Provision,'' revise the entry for 1.06 to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 2 TO PARAGRAPH (c)—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY

Reg	Title/subject	EPA approval date	**Federal Register** notice	District effective date	Explanation
	Reg 1—General Provisions				
*	* * *	*	*	*	*
1.06 ...	Stationary Source Self-Monitoring, Emissions Inventory Development, and Reporting.	1/10/2024	[Insert citation of publication].	3/16/2022	Except Section 5 and any references to Section 5 in this regulation.
*	* * *	*	*	*	*

* * * * *

[FR Doc. 2024–00012 Filed 1–9–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Part 506

[Docket No. FMC–2024–0002]

RIN 3072–AC98

Inflation Adjustment of Civil Monetary Penalties

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) is publishing this final rule to adjust for inflation the civil monetary penalties assessed or enforced by the Commission, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act). The 2015 Act requires that agencies adjust and publish their new civil penalties by January 15 each year.

DATES: This rule is effective January 15, 2024.

FOR FURTHER INFORMATION CONTACT: David Eng, Secretary; Phone: (202) 523–5725; Email: *secretary@fmc.gov*.

SUPPLEMENTARY INFORMATION: This rule adjusts the civil monetary penalties assessable by the Commission in accordance with the 2015 Act, which became effective on November 2, 2015. Public Law 114–74, section 701. The 2015 Act further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), Public Law 101–410, 104 Stat. 890 (codified as amended at 28 U.S.C. 2461 note), in order to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect.

The 2015 Act requires agencies to adjust civil monetary penalties under their jurisdiction by January 15 each year, based on changes in the consumer price index (CPI–U) for the month of October in the previous calendar year. On December 19, 2023, the Office of Management and Budget published guidance stating that the CPI–U multiplier for October 2023 is 1.03241.[1] In order to complete the annual adjustment, the Commission must multiply the most recent civil penalty amounts in 46 CFR part 506 by the multiplier, 1.03241.

[1] Office of Management and Budget, M–24–07, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 1 (Dec. 19, 2023) (M–23–05).

Rulemaking Analyses and Notices

Notice and Effective Date

Adjustments under the FCPIAA, as amended by the 2015 Act, are not subject to the procedural rulemaking requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553), including the requirements for prior notice, an opportunity for comment, and a delay between the issuance of a final rule and its effective date.[2] The 2015 Act requires that the Commission adjust its civil monetary penalties no later than January 15 of each year.

Congressional Review Act

The rule is not a ''major rule'' as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The rule will not result in: (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

[2] *Id.* at 3–4. Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, section 4(b)(2), 104 Stat. 890 (codified at 28 U.S.C. 2461 note).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the APA (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis describing the impact of the rule on small entities or the head of the agency must certify that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604–605. As indicated above, this final rule is not subject to the APA's notice and comment requirements, and the Commission is not required to either conduct a regulatory flexibility analysis or certify that the final rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This final rule does not contain any collection of information, as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The public may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at *http://www.reginfo.gov/public/do/eAgendaMain.*

List of Subjects in 46 CFR Part 506

Administrative practice and procedure, Claims, Penalties.

For the reasons stated in the preamble, 46 CFR part 506 is amended as follows:

PART 506—CIVIL MONETARY PENALTY INFLATION ADJUSTMENT

■ 1. The authority citation for part 506 continues to read as follows:

Authority: 28 U.S.C. 2461.

■ 2. Amend § 506.4 by revising paragraph (d) to read as follows:

§ 506.4 Cost of living adjustments of civil monetary penalties.

* * * * *

(d) *Inflation adjustment.* Maximum civil monetary penalties within the jurisdiction of the Federal Maritime Commission are adjusted for inflation as follows:

TABLE 1 TO PARAGRAPH (d)

United States Code citation	Civil monetary penalty description	Maximum penalty as of January 15, 2023	Maximum penalty as of January 15, 2024
46 U.S.C. 42304	Adverse impact on U.S. carriers by foreign shipping practices	$2,479,282	$2,559,636
46 U.S.C. 41107(a)	Knowing and Willful violation/Shipping Act of 1984, or Commission regulation or order.	70,752	73,045
46 U.S.C. 41107(a)	Violation of Shipping Act of 1984, Commission regulation or order, not knowing and willful.	14,149	14,608
46 U.S.C. 41108(b)	Operating in foreign commerce after tariff suspension	141,506	146,092
46 U.S.C. 42104	Failure to provide required reports, etc./Merchant Marine Act of 1920.	11,162	11,524
46 U.S.C. 42106	Adverse shipping conditions/Merchant Marine Act of 1920	2,232,281	2,304,629
46 U.S.C. 42108	Operating after tariff or service contract suspension/Merchant Marine Act of 1920.	111,614	115,231
46 U.S.C. 44102, 44104	Failure to establish financial responsibility for non-performance of transportation.	28,194 941	29,108 971
46 U.S.C. 44103, 44104	Failure to establish financial responsibility for death or injury	28,194 941	29,108 971
31 U.S.C. 3802(a)(1)	Program Fraud Civil Remedies Act/making false claim	13,508	13,946
31 U.S.C. 3802(a)(2)	Program Fraud Civil Remedies Act/giving false statement	13,508	13,946

By the Commission.

David Eng,

Secretary.

[FR Doc. 2024–00354 Filed 1–9–24; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 4

[GN Docket No. 15–206; FCC 16–81, FCC 19–138; FR ID 195876]

Improving Outage Reporting for Submarine Cables and Enhanced Submarine Cable Outage Data

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective and compliance dates.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) approved the information collection associated with the Commission's *Report and Order* and subsequent *Order on Reconsideration.* This document, consistent with those documents, fulfills the Commission's commitment that it would publish a document in the **Federal Register** announcing the effective date of those rules.

DATES:

Effective date: The amendments to 47 CFR 1.767 and 4.15, published at 81 FR

52354 on August 8, 2016, are effective January 10, 2024.

Compliance date: Compliance with 47 CFR 1.767 and 4.15, published at 81 FR 52354 on August 8, 2016, began on October 28, 2021.

FOR FURTHER INFORMATION CONTACT: Scott Cinnamon, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, at (202) 418–2319, or email: *scott.cinnamon@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document announces that, on March 25, 2021, OMB approved, for a period of three years, the information collection requirements relating to mandatory submarine outage reporting rules contained in the Commission's *Order,* FCC 16–81, published at 81 FR 52354, August 8, 2016. The OMB Control Number is 3060–1283. The Commission publishes this document as an announcement of the effective date of the rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Nicole Ongele Federal Communications Commission, 45 L Street NE, Washington, DC 20554. Please include the OMB Control Number, 3060–1283, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received final OMB approval on March 25, 2021, for the information collection requirements contained in the modifications to the Commission's rules in 47 CFR parts 1 and 4. Notice of that approval was published in the **Federal Register** on April 28, 2021 (see 86 FR 22360).

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–1283.

The foregoing notification is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1283.

OMB Approval Date: March 25, 2021.

OMB Expiration Date: March 31, 2024.

Title: Improving Outage Reporting for Submarine Cables and Enhanced Submarine Outage Data.

Form Number: N/A.

Respondents: Business or other for-profit entities.

Total Number of Respondents and Responses: 74 respondents; 336 respondents.

Estimated Time per Response: 2 hours.

Frequency of Response: On-occasion reporting requirements.

Obligation to Respond: The statutory authority for this information collection is contained in in 47 U.S.C. 34 through 39, 151, 154, 155, 157, 201, 251, 254, 301, 303(b), 303(g), 303(r), 307, 309(a), 309(j), 316, 332, 403, 615a–1, 615c, 1302(a), and 1302(b); 5 U.S.C. 301, and Executive Order No. 10530.

Total Annual Burden: 2,016 hours.

Total Annual Costs: No costs.

Needs and Uses: On July 12, 2016, the Commission released the Order, FCC 16–81, published at 81 FR 52355, August 8, 2016, adopting final rules—containing information collection requirements—establishing mandatory outage reporting requirements for submarine cable licensees. The rules replaced a voluntary outage reporting system that was in place for submarine cable operators with a mandatory outage reporting requirement similar to the requirements places on other part 4 licensees identified in 47 CFR 4.3. For outages of a certain scope and duration, a submarine cable licensee must file a Notification, Interim Report, and Final Report in the manner prescribed in 47 CFR 4.15. The outage reports are submitted to the Commission through its Network Outage Reporting System (NORS). This mandatory reporting system provides the Commission greater visibility into the availability and resiliency of submarine cable systems.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–00341 Filed 1–9–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 23–126; FCC 23–112; FR ID 192684]

Low Power Protection Act

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts rules to implement the Low Power Protection Act (LPPA or Act), which was enacted on January 5, 2023. The LPPA provides certain low power television (LPTV) stations with a limited window of opportunity to apply for primary spectrum use status as Class A television stations. With limited exceptions, the rules adopted herein are consistent with the Commission's proposals in the Notice of Proposed Rulemaking (*NPRM*) in this proceeding. In this Order, we further the implementation of the LPPA by establishing the period during which eligible stations may file applications for Class A status, eligibility and interference requirements, and the process for submitting applications.

DATES: Effective February 9, 2024; except for 47 CFR 73.6030(c) and 73.6030(d) which are delayed. The Federal Communications Commission will publish a document announcing the effective dates of the delayed amendments in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Kim Matthews, Media Bureau, Policy Division, 202–418–2154, *kim.matthews@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (*Report and Order*), in MB Docket No. 23–126; FCC 23–112, adopted on December 11, 2023 and released on December 12, 2023. The full text of this document is available for download at *https://docs.fcc.gov/public/attachments/FCC-23-112A1.pdf.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Paperwork Reduction Act of 1995 Analysis

This document contains new or modified information collection requirements. The Commission, as part

of its continuing effort to reduce paperwork burdens, will invite the general public to comment on the information collection requirements contained in this *Report and Order* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002 (SBPRA), we will seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Synopsis

I. Introduction

1. In this *Report and Order,* we adopt rules to implement the Low Power Protection Act (LPPA or Act), Low Power Protection Act, Public Law 117–344, 136 Stat. 6193 (2023), which was enacted on January 5, 2023. With limited exceptions, the rules adopted herein are consistent with the Commission's proposals in the Notice of Proposed Rulemaking (*NPRM*), Implementation of the Low Power Protection Act, 88 FR 22980 (April 14, 2023), in this proceeding.

II. Background

A. Low Power Television Service

2. The Commission created the LPTV service in 1982 to bring television service, including local service, to viewers ''otherwise unserved or underserved'' by existing full power service providers. From its creation, the LPTV service has been a secondary service, meaning LPTV stations may not cause interference to, and must accept interference from, full power television stations as well as certain land mobile radio operations and other primary services.

3. Currently, there are 1,889 licensed LPTV stations. These stations operate in all states and territories, and serve both rural and urban audiences. LPTV stations were required to complete a transition from analog to digital operation in 2021, and all such stations must now operate in digital format.

B. Class A Television Stations

4. In 2000, the Commission established a Class A television service to implement the Community Broadcasters Protection Act of 1999 (CBPA). The CBPA allowed certain qualifying LPTV stations to become Class A stations, which provided those television stations primary status, and thereby a measure of interference protection from full service television stations.

5. Congress sought in the CBPA to provide certain LPTV stations a limited window of opportunity to apply for primary status. Among other matters, the CBPA set out certain certification and application procedures for LPTV licensees seeking Class A designation and prescribed the criteria for eligibility for a Class A license. Specifically, under the CBPA, an LPTV station could qualify for Class A status if, during the 90 days preceding the date of enactment of the statute, the station: (1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least 3 hours per week of programming produced within the market area served by the station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and (3) was in compliance with the Commission's requirements for LPTV stations.

6. In addition to these qualifying requirements, the CBPA gave the Commission discretion to determine that the public interest, convenience, and necessity would be served by treating a station as a qualifying LPTV station under the CBPA, or that a station should be considered to qualify for such status for other reasons determined by the Commission, even if it did not meet the qualifying requirements in the statute discussed above. In implementing the CBPA, the Commission concluded, however, that it would not accept applications under the CBPA from LPTV stations that did not meet the statutory criteria and that did not file a certification of eligibility by the statutory deadline, absent compelling circumstances.

C. Low Power Protection Act

7. Like the CBPA, the LPPA is intended ''to provide low power TV stations with a limited window of opportunity'' to apply for primary status as a Class A television licensee. The Act gives LPTV stations one year to apply for a Class A license, from the date that the Commission's rules implementing the LPPA become effective.

8. The LPPA sets forth eligibility criteria for stations seeking Class A designation that are similar to the eligibility criteria under the CBPA, as discussed above. Specifically, the LPPA provides that the Commission ''may approve'' an application submitted by an LPTV station if the station meets the following eligibility criteria:

- during the 90-day period preceding the date of enactment of the LPPA (*i.e.,* between October 7, 2022 and January 5, 2023), the station satisfied the same requirements applicable to stations that qualified for Class A status under the CBPA, ''including the requirements . . . with respect to locally produced programming;''
- the station satisfies the Class A service requirements in 47 CFR 73.6001(b)–(d) or any successor regulation;
- the station demonstrates that it will not cause any interference as described in the CBPA;
- during that same 90-day period, the station complied with the Commission's requirements for LPTV stations; and
- as of January 5, 2023, the station operated in a Designated Market Area with not more than 95,000 television households.

Finally, the LPPA requires that a station accorded Class A status must (1) be subject to the same license terms and renewal standards as a license for a full power television broadcast station (except as otherwise expressly provided in the LPPA) and (2) remain in compliance with the LPPA's eligibility criteria during the term of the station's license.

III. Discussion

9. The rules and policies we adopt herein to implement the LPPA are largely consistent with the Commission's proposals in the *NPRM,* with one exception. We adopt the proposals regarding the application period, the definition of a low power TV station and eligibility criteria, applicable interference requirements, and use of the Nielsen Local TV Station Information Report (Local TV Report) to determine the DMA where the LPTV station's transmission facilities are located for purposes of eligibility. We do not, however, adopt in full the proposal to require that all licensees that convert to Class A status pursuant to the LPPA remain in compliance with the LPPA's DMA eligibility requirement for the term of their Class A license. Instead, we conclude that LPPA Class A stations will not be required to continue to comply with the 95,000 TV household threshold if the population in the station's DMA later exceeds the threshold amount for specific reasons beyond the station's control. Finally, we adopt the *NPRM* proposals regarding the process for applying for Class A status pursuant to the LPPA, decline to amend our rules, as requested, to give LPPA Class A stations must carry rights equivalent to full service stations, and decline to adopt a requested *de minimis* exception to the LPPA's DMA eligibility requirement.

A. Application Period

10. For the reasons discussed in the *NPRM* and described below, we adopt the *NPRM's* proposals regarding the application period. In the *NPRM,* the Commission proposed to provide LPTV stations a period of one year to apply for Class A status under the LPPA. The Commission also tentatively concluded that the public interest would not be served by providing for conversion to Class A status beyond the one year period contemplated by the LPPA. The Commission proposed, however, that, similar to its approach in implementing the CPBA, if a potential applicant faces circumstances beyond its control that prevents it from filing by the application deadline, the Commission would examine those instances on a case-by-case basis to determine the potential applicant's eligibility for filing. No commenter addressed these issues.

11. The LPPA provides LPTV stations a period of one year to apply for Class A status. The LPPA also provides that the Commission may approve an application for Class A status if the application satisfies section 336(f)(2) of the Communications Act of 1934, as amended (which codifies the CBPA). This provision sets forth the eligibility criteria for stations qualifying for Class A status, and gives the Commission discretion to determine whether a station that does not satisfy such criteria should otherwise qualify. In the *Class A Order,* the Commission declined either to expand these eligibility criteria or to allow ongoing conversion to Class A status beyond the 6 month window contemplated in the CBPA. Absent comment on this issue, we find no reason to deviate from these prior determinations and the tentative conclusions in the *NPRM* that the application window will be limited to the one-year application window specified in the LPPA, but that we will examine on a case-by-case basis a potential applicant's claim that it was prevented from filing by the application deadline due to circumstances beyond its control.

B. Eligibility Requirements

1. Definition of Low Power TV Station

12. As proposed in the *NPRM,* we apply the Commission's recently updated definition of a ''low power TV station'' for purposes of determining which stations are eligible for Class A status under the LPPA. The LPPA provides that the term ''low power TV station'' has the meaning given the term ''digital low power TV station'' in § 74.701 of our rules, or any successor regulation. No commenter addressed this proposal. We will apply this recently updated definition of an LPTV station for purposes of determining which stations are eligible for Class A status under the LPPA.

13. We adopt the tentative conclusion in the *NPRM* that television translator stations are unlikely to satisfy the eligibility requirements of the LPPA. As explained in the *NPRM,* translator stations ''operate for the purpose of retransmitting the programs and signals of a television broadcast station, without significantly altering any characteristic of the original signal other than its frequency and amplitude,'' and thus, are not permitted to ''originate programming'' as defined in the rules. The sole commenter to address this issue, News-Press & Gazette Broadcasting (NPG), agrees that excluding television translator stations from eligibility under the LPPA ''is a practical approach for most translators'' but argues that ''additional flexibility is warranted'' for TV translator stations such as NPG's translator.

14. KXPI–LD, Pocatello, Idaho, retransmits the signal of full power station KIDK, (Fox), Idaho Falls, Idaho. According to NPG, ''KXPI–LD is classified in the Commission's records as a digital TV translator station, but it functions more like an originator of programming than a translator; it is a primary Fox Network affiliate providing local news, weather, and information to the Pocatello community. . . .'' NPG argues that KXPI–LD meets all of the LPPA's eligibility requirements, ''except its ministerial technical classification as a digital TV translator.'' NPG also argues that ''the FCC's 'low power TV station' definition, Rule 74.701(k), encompasses stations like KXPI–LD that retransmit the signal of a TV broadcast station, and does not require program origination.'' NPG urges that the Commission permit stations like KXPI–LD to be eligible for the Class A filing opportunity afforded by the LPPA.

15. We affirm our tentative conclusion that translator stations are unlikely to satisfy the eligibility requirements of the LPPA. NPG's argument that the Commission's definition of a low power TV station encompasses stations like KXPI–LD that retransmit the signal of a TV broadcast station, and does not require program origination, is misplaced. LPAA section 2(c)(2)(B)(i)(I) requires that, during the 90-day eligibility period, an LPTV station must broadcast an average of at least three hours per week of programming produced within the market area served by the station. As a translator station, KXPI–LD retransmits the programming feed it obtains from full-power station KIDK. NPG does not demonstrate that the KIDK programming that KXPI–LD is retransmitting was produced in KXPI–LD's own noise limited contour. Thus, NPG has failed to demonstrate how a translator station like KXPI–LD can satisfy the requirement of LPAA section 2(c)(2)(B)(i)(I) to broadcast an average of at least three hours per week of programming produced within the market area served by the translator station.

2. Eligibility Criteria

16. As noted above, the LPPA sets forth eligibility criteria for stations seeking Class A designation that are similar to the eligibility criteria under the CBPA. Specifically, the LPPA provides that the Commission ''may approve'' an application submitted by an LPTV station if the station, during the 90-day period preceding the date of enactment of the LPPA, meets the same requirements in section 336(f)(2) of the Communications Act applicable to stations that qualified for Class A status under the CBPA, ''including the requirements . . . with respect to locally produced programming.'' Thus, to qualify for Class A status, in the 90 days preceding the LPPA's January 5, 2023 effective date (between October 7, 2022 and January 5, 2023) an LPTV station must have met the following requirements: (1) the station must have broadcast a minimum of 18 hours per day; (2) the station must have broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled LPTV stations that carry common local programming produced within the market area served by such group; and (3) the station must have been in compliance with the Commission's requirements applicable to LPTV stations. In addition, from and after the date of its application for a Class A license, the station must be in compliance with the Commission's operating rules for full power television stations.

17. *Locally Produced Programming.* We will define locally produced programming for purposes of the LPPA as that ''produced within the predicted noise-limited contour (*see* § 73.619(c)) of a Class A station broadcasting the program or within the contiguous predicted noise-limited contours of any of the Class A stations in a commonly owned group.'' Block supports this proposed definition of ''locally produced programming,'' and with the exception of REC's request for clarification addressed below, no other

commenter addressed this issue. As proposed in the *NPRM,* we will apply this definition to define ''programming produced within the market area served by the station'' for purposes of determining eligibility for Class A status under section 2(c)(2)(B)(i)(I) of the LPPA.

18. We decline at this time to adopt REC's proposal that we clarify the definition of ''locally produced programming'' for purposes of the LPPA. REC advocates that the Commission (1) clarify that local programming may not be repeated within the same week to satisfy the weekly locally produced programming requirement; (2) require that local programming be aired on the same programming stream and not aggregated among multiple streams to meet the minimum requirement; (3) clarify that the local programming requirement need only be satisfied on one programming stream of simultaneous video and related audio programming; and (4) require that the programming must be simultaneous video and audio programming where the audio portion of the programming directly relates to the video portion of the programming. We note that the concerns underlying REC's proposed clarifications are equally applicable to existing Class A stations under the CBPA. Any change to the definition of ''locally produced programming'' to address such concerns should be considered with respect to all Class A stations, not just those stations that convert to Class A status pursuant to the LPPA. Because the Commission did not propose to revise the definition of locally produced programming for purposes of Class A stations generally, we find REC's proposals to be outside the scope of this proceeding. Accordingly, we decline to pursue REC's proposals at this time.

19. *Operating Requirements.* For the reasons contained in the *NPRM* and discussed below, we adopt the *NPRM's* proposals related to operating requirements. The *NPRM* tentatively concluded that all applicants seeking to convert to Class A status under the LPPA must certify that they have complied with the Commission's requirements for LPTV stations during the 90-day eligibility period. The *NPRM* also proposed that a station applying to convert to Class A status must comply, beginning on the date of its application for a Class A license and thereafter, with the same Commission Part 73 operating rules that apply to Class A stations that converted pursuant to the CBPA. This includes the requirement that existing Class A stations comply with children's programming and online public inspection file (OPIF) regulations. No commenter opposed this approach. Absent objection, we adopt these proposals. Regarding our requirement that Class A TV applicants and licensees maintain an OPIF, NPG notes that LPTV stations have no OPIF and are therefore unable to upload records to the system. The Commission will activate an OPIF for LPTV stations that apply to convert to Class A status pursuant to the LPPA and inform applicants when that station's OPIF is ready for the applicant to upload documents required to be maintained in OPIF.

20. We also require that all stations that receive a Class A license under the LPPA comply with all Class A regulations, as proposed in the *NPRM.* As discussed in the *NPRM,* the LPPA requires that LPPA Class A stations ''remain in compliance'' with the Act's eligibility criteria ''during the term of the license.'' This includes, among other things, the requirements to broadcast a minimum of 18 hours per day and to broadcast an average of at least three hours per week of locally produced programming each quarter. In addition, the station must continue to comply with the interference requirements adopted herein. Further, we adopt the tentative conclusion in the *NPRM* that there is no reason to exempt LPTV stations converting to Class A status under the LPPA from other rules applicable to LPTV stations that converted to Class A status under the CBPA, given that the service requirements in the LPPA closely track those in the CBPA and thus it makes sense for Class A rules generally to apply. No commenter addressed these issues.

21. Finally, we conclude that the requirement to comply with the Class A eligibility requirements begins when an LPTV station's Class A application is submitted. The LPPA states that the ''Commission may approve an application [for Class A status] if the low power TV station submitting the application—satisfies—paragraphs (b), (c), and (d) of 73.6001,'' which contains the requirements that Class A stations broadcast a minimum of 18 hours per day and broadcast an average of at least three hours per week of locally produced programming each quarter. This requirement is distinct from the separate statutory obligation to meet the eligibility requirements during the 90-day eligibility period of October 7, 2022 to January 5, 2023. No commenter addressed this issue. As discussed above, the LPPA requires that applicants continue to broadcast a minimum of 18 hours per day and to broadcast an average of at least three hours per week of locally produced programming each quarter after a Class A license is granted. We conclude that the language quoted above would be rendered superfluous if we did not interpret it to apply these requirements from the time the Class A application is submitted. Thus, the requirement to broadcast a minimum of 18 hours per day and broadcast an average of at least three hours per week of locally produced programming each quarter begins when a station submits an application to convert to Class A status pursuant to the LPPA and continues for the term of the Class A license.

22. *License Application and Documentation.* As proposed in the *NPRM,* we will require an applicant to certify in its application that its station meets the operating and programming requirements of the LPPA. No commenter objected to these proposals. We believe these certification requirements will assist us with the orderly processing of applications received under the LPPA, and thus we adopt the proposals. Finally, we also require that an applicant certify that it was in compliance with the Commission's requirements applicable to LPTV stations.

23. Consistent with the tentative conclusion in the *NPRM,* we require an applicant to submit, as part of its application, documents to support its certification that it meets the operating and programming requirements of the LPPA. As noted in the *NPRM,* the Commission staff may later determine that additional documentation is needed to evaluate an application and may at that time require an applicant to submit additional, specific documentation during consideration of the application. We believe this approach will ensure eligibility while preserving flexibility for applicants. We decline to permit applicants to certify that they meet operating and programming requirements without submission of supporting documentation, as Block suggests. We believe such an approach would lack the information necessary for the Commission staff to undertake a sufficient review of the application in these circumstances. NAB suggests that we require stations to provide ''a statement concerning the station's operating schedule and a list of locally produced programs'' at the application stage. We will adopt NAB's suggestion and require applicants to provide with their application a statement concerning the station's operating schedule during the 90 days preceding January 5, 2023 as well as a list of locally produced programs aired during that time period. We believe that requiring applicants to

submit this basic information in support of their certification that they meet the LPPA's eligibility criteria will assist us in processing applications. In addition, an applicant should submit whatever additional documents available to the applicant that it believes best support its certification that it meets the operating and programming requirements of the Act. For example, to support its certification that the station was on the air at least 18 hours each day during the eligibility period, a station could provide electric power bills from a third party vendor that specify the station's broadcast facility location for the designated period, and/or copies of any program guides, EAS logs, or agreements to purchase and air programming on the specified station during the times of operation in an amount sufficient to satisfy this operating requirement. If the station was silent during any portion of the eligibility period, the station must identify any silent periods and the reasons why the station was silent. To support its certification that a station aired an average of at least three hours of locally produced programming each week, the station could, for example, submit copies of any agreements to purchase and air such programming and/or identify the producer of any programming it claims is locally produced, the location where the programming was produced, and records of advertisements aired during locally produced programming showing that the programming was in fact aired.

24. Apart from a statement regarding the station's operating schedule and a list of locally produced programming aired during the 90 days preceding January 5, 2023, we decline to mandate the form of the additional documents that applicants submit to support their applications. We recognize that some applicants may not have specific types of documentation, or that a specific document may not be in a form that supports the applicant's certification. In light of that, we permit each applicant to provide with the station's application, documents that it has that best support its certification that it met the operational and programming requirements of the LPPA during the eligibility period. The Commission staff will review the documentation on a case-by-case basis and determine if it will need to request additional documentation before it can make a determination whether to grant a Class A license application.

25. *Alternative Eligibility Criteria.* As proposed in the *NPRM,* we will allow deviation from the strict statutory eligibility criteria under the LPPA only where deviations are insignificant or where there are compelling circumstances such that equity mandates a deviation. No commenter disagreed with this approach.

26. We conclude that, similar to the Commission's approach in implementing the CBPA, we will allow deviation from the strict statutory eligibility criteria in the LPPA only where such deviations are insignificant or where there are compelling circumstances such that equity mandates a deviation. We will consider any such requests on a case-by-case basis. As the Commission tentatively concluded in the *NPRM,* we believe that the LPPA provides precise and limited eligibility criteria and, except in very limited circumstances, we are not inclined to expand the specific qualifying criteria beyond that identified in the statute.

3. Interference Requirements

27. We adopt the tentative conclusions in the *NPRM* that our interference rules applicable to existing Class A stations, including requirements that were adopted subsequent to enactment of the CBPA in 1999, will apply to stations that convert to Class A status pursuant to the LPPA. This approach will ensure that LPTV stations converting to Class A status under the LPPA will not cause interference to the licensed or previously proposed facilities of digital broadcast stations, including full power, Class A, LPTV and TV translator stations.

28. NPG generally supports that the current interference rule rather than the old analog rule should be applied. However, NPG would have us provide flexibility to permit interference beyond what is permitted in our current rules. NPG states that the Commission should adopt a ''flexible approach'' granting applications that would violate the rule ''if the applicant is able to demonstrate no actual interference, acceptance by the licensee subject to such interference, or other showing that the public interest is served by the applicant obtaining Class A status.'' We are not persuaded to grant this request. First, we do not anticipate any scenarios where interference is predicted, but the applicant is able to demonstrate a lack of actual interference. The TVStudy software used to prepare and process applications already considers the elements likely to cause actual interference. Specifically, TVStudy makes full use of terrain shielding and Longley-Rice terrain propagation methods to determine whether a proposed facility is predicted to cause impermissible interference consistent with OET Bulletin No. 69, accounting for unique characteristics such as terrain. For this reason, we do not believe there would be merit in accepting other methods of determining interference. Second, the Commission's rules already allow applicants and licensees to accept interference subject to Commission approval, and the Media Bureau will continue to consider and accept interference agreements in processing Class A license applications filed pursuant to the LPPA without the need to adopt additional flexibility. Finally, we reject NPG's suggestion that waiver of television broadcast interference protection rules should be considered upon undefined public interest arguments. NPG provides no example—and we can imagine none—where we have granted an LPTV station primary status that caused interference to a licensed (or previously proposed) broadcast facility entitled to protection. Congress clearly intended the LPPA to apply to a discrete number of LPTV stations that satisfy specific eligibility requirements and protect existing stations and previously proposed facilities. We decline to adopt an exception that would contravene this careful balance.

29. *Protection of Land Mobile Stations.* The LPPA provides that the Commission may approve an application by an LPTV station if it ''demonstrates to the Commission that the Class A station for which the license is sought will not cause any interference described in section 336(f)(7) of the Communications Act of 1934. . . .'' Section 336(f)(7)(C) of the CBPA provides that the Commission may not grant a Class A license or modification of license where the Class A station will cause interference within the protected contour of land mobile stations. We adopt the proposal in the *NPRM* that Class A applications will not be grantable where the Class A station will cause interference within the protected contour of land mobile stations which have been allocated the use of TV channels 14–20 in certain urban areas of the country, as well as channel 16 in the New York City metropolitan area. We received no specific objection to this proposal. We note that in implementing the CBPA, the Commission implemented the same interference protections and procedures which are prescribed in § 74.709 of the rules, and these rules have not changed.

30. We decline to adopt as both unnecessary and outside the scope of this proceeding, the County of Los Angeles, California's request that we incorporate by reference comments in a proceeding requested by the Land

Mobile Communications Council regarding rules governing separation between land mobile stations and television stations located in the T-Band. Unless and until there is a change in the applicable rules, we will apply our existing land mobile protection requirements in considering applications to convert to Class A status pursuant to the LPPA. We note that in limiting eligibility to LPTV stations operating in a DMA or an equivalent with not more than 95,000 television households, Congress intended to convey the benefits of Class A status under the LPPA to LPTV stations operating in smaller DMAs. T-band radio systems, which are used for public safety and industrial/business land mobile communications, operate on 470–512 MHz (television channels 14 through 20) in 13 large cities, located in the largest DMAs with more than 1,000,000 television households. LPTV stations operating in larger DMAs or an equivalent television market are not eligible for Class A status under the LPPA and thus, it is unlikely that land mobile operations in the T-band will be affected by the LPPA.

4. Designated Market Area

31. The LPPA requires that an LPTV station must demonstrate that as of January 5, 2023, the station ''operates in a Designated Market Area with not more than 95,000 television households.'' The LPPA further states that DMA means ''(A) a [DMA] determined by Nielsen Media Research or any successor entity; or (B) a [DMA] under a system of dividing television broadcast station licensees into local markets using a system that the Commission determines is equivalent to the system established by Nielsen Media Research . . .'' The Commission sought comment in the *NPRM* on (1) the meaning of the word ''operates'' in the LPPA, and (2) whether to adopt the Nielsen Local TV Station Information Report (Local TV Report) for determining DMAs or an equivalent alternative local market system. We address each of these issues below.

32. ''*Operates*'' *in the DMA.* As proposed in the *NPRM,* we conclude that ''operates'' means that the LPTV station applying for Class A status under the LPPA must demonstrate that its transmission facilities, which include the structure on which its antenna is mounted, are located within the qualifying DMA. No commenters addressed this issue. We find that this requirement is consistent with Congress's intent to limit Class A status to stations located in small DMAs, as evidenced by its limiting eligibility for Class A status under the LPPA to LPTV stations operating in a DMA or an equivalent with not more than 95,000 television households. To make the necessary demonstration, we will require applicants to provide the following information as it existed on January 5, 2023, as proposed in the *NPRM:* (1) the coordinates of the station's transmission facilities (*i.e.,* the structure on which its antenna is mounted); (2) the city/town/village/or other municipality and county in which the transmission facilities are located; and (3) the qualifying DMA in which the station's transmission facilities are located.

33. *Use of Nielsen to Determine DMAs.* We also adopt the proposal in the *NPRM* to use the Nielsen Local TV Report in determining the DMA where the LPTV station's transmission facilities were located as of January 5, 2023. First, the decision is fully consistent with the LPPA which contemplates the use of Nielsen. Furthermore, as explained in the *NPRM,* use of the Nielsen Local TV Report is consistent with the Commission's Nielsen DMA Determination Update Order, which adopted Nielsen's monthly Local TV Report as the successor publication to Nielsen's Annual Station Index and Household Estimates and determined that the Local TV Report should be used to define ''local market'' as stated in other statutory provisions and rules relating to carriage, including retransmission consent, distant signals, significantly viewed, and field strength contour. When the Commission sought comment on what publication to use for DMA determinations in that proceeding, commenters unanimously supported use the Local TV Report. Thus, we note that the record in that proceeding indicated that the Local TV Report was the sole source of information regarding DMA determinations and that there was no company currently accredited to determine the local market area of broadcast television stations. In addition, some commenters in this proceeding support our decision to use the Nielsen Local TV Report for purposes of implementing the LPPA. As NAB points out, the Commission and the television industry have long relied on Nielsen DMA data to define television markets. REC notes that the Nielsen Local TV Report provides a ''cut-and-dry'' determination of a station's DMA, and that the ''debate and development of any alternative system would further delay the process.''

34. While the LPPA defines a DMA as ''a [DMA] determined by Nielsen Media Research or any successor entity,'' it also provides that a DMA may be ''a [DMA] under a system of dividing television broadcast station licensees into local markets using a system that the Commission determines is equivalent to the system established by Nielsen Media Research. . . .'' The *NPRM* sought comment on alternatives to the Nielsen Local TV Report that would be ''equivalent to the system established by Nielsen Media Research.'' For the reasons discussed below, we decline to adopt any of the alternatives proposed. The *NPRM* specifically sought comment on the LPTV Broadcasters' Association (LPTVBA) requests that the Commission use Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs) as defined by the Office of Management and Budget (OMB) using census data to implement the LPPA. Some commenters support the suggestion. Flood contends that MSA market definitions ''more accurately reflect the characteristics of the LPTV station's service area that are pertinent to determining eligibility'' under the LPPA. Flood also argues that the Nielsen DMAs are ''geographically overbroad'' and group some of the most rural areas in the U.S. with distant major cities, rendering some stations in rural areas ineligible for Class A status. Flood also notes that, under a DMA approach, similarly situated LPTV stations in immediately adjacent counties would receive inconsistent eligibility determinations, and, in some situations, stations in densely populated, larger counties would be eligible while those in adjacent, smaller, less densely populated counties would be ineligible. The Identical Commenters urge the Commission to ''create a TV market definition system that relies on . . . MSAs as the primary criteria for determining a set of geographic areas equivalent to the Nielsen DMA metric of 95,000 households or fewer.'' They also note that the Nielsen DMA system does not include LPTV stations in its assessments and that ''Nielsen's data is private and requires costly fees for access.''

35. We decline to use market classifications based on Census data, such as MSAs or RSAs, for purposes of implementing the LPPA. The LPPA specifically directs that the Commission use either Nielsen DMAs or a ''system of dividing television broadcast station licensees into local markets'' that is ''equivalent'' to the system established by Nielsen. Census classifications are not a ''system of dividing television broadcast station licensees into local markets,'' and thus cannot be considered ''equivalent'' to the system established by Nielsen. Such

classifications do not reflect television stations in the market, the reach of those local stations, the location of the populations they serve, or local viewing patterns. On the other hand, a Nielsen DMA is an ''exclusive geographic area in which the home market television stations hold a dominance of total hours viewed'' and ties specifically to television viewing markets. Thus, we conclude census-based categories are not ''equivalent'' to the system established by Nielsen. In addition, we note that classifications based on Census data are based on population and group urban areas (the population ''nucleus'') with outlying counties ''that have a high degree of integration'' with the population nucleus based on commuting trends. OMB itself warns that such classifications do not themselves adequately differentiate between urban and rural areas. Thus, these census classifications do not address the concerns raised by those commenters who argue that Nielsen DMAs are geographically overbroad. We also note that the kind of inconsistent eligibility results that some commenters argue would occur using Nielsen DMAs are inevitable with any system that divides the country into geographic markets, and are not unique to Nielsen. Furthermore, we decline Identical Commenters' invitation that the Commission fabricate a new classification system based on Census data because we find that such an exercise is unnecessary due to the availability of Nielsen data which is appropriate for this purpose. We also believe that such an exercise would significantly delay our ability to implement the LPPA. We also do not believe the failure of Nielsen to assign LPTV stations to DMAs is relevant because the eligibility requirement is that the station ''operate'' in the DMA (that is, its transmission facilities are located within the qualifying DMA), not that it be assigned to the DMA. Finally, reference to the fact that Nielsen is a private company that charges for some of its materials is not a barrier to our decision here. Nielsen has represented that it will provide to stations at no charge information about the DMA to which the station is assigned, and information about the number of TV households in each DMA is publicly available.

36. We also reject RCC's argument that our proposed adoption of an approach that limits eligibility under the LPPA to LPTV stations in DMAs with no more than 95,000 TV households is ''nonsensical.'' This commenter points out that, under this approach, only thirty-three Nielsen DMAs would qualify under the LPPA (in other words, only 33 out of 210 DMAs), amounting to only 1.6% of TV households. As a result, RCC argues that Congress could not have intended for use of Nielsen DMAs. We disagree. Congress clearly intended that eligibility under the LPPA be limited, as the Act expressly provides that eligibility is limited to DMAs with no more than 95,000 TV households. As NAB notes, elevating LPTV stations from secondary to primary Class A status comes at the cost of ''effectively block[ing] coverage and service improvements by full-service stations.'' In turn, Congress sought to allow certain LPTV stations in only smaller DMAs (not all small LPTV stations or all LPTV stations in rural areas) to elevate to primary status. We decline to read the LPPA as promoting maximum elevation of LPTV stations to primary status; rather, Congress adopted a much more balanced approach.

37. We also decline to use Comscore data as an alternative to the Nielsen Local TV Report for purposes of the LPPA, as advocated by several commenters. Like Nielsen, Comscore is a media analytics company that produces a list of television market areas and a calculation of the number of television households in each market. Because Comscore, like Nielsen, has a proprietary market system and requires payment for access, LPTVBA opposes adoption of Comscore data as an alternative local market system. REC comments that ''the debate and development of any alternate system'' to Nielsen ''would further delay the process and could defeat the purpose of limiting'' Class A conversions to rural areas, but also noted that Comscore markets ''could be'' comparable to Nielsen DMAs and should be considered. While it is possible that Comscore could qualify as a ''system of dividing television broadcast station licensees into local markets'' that is ''equivalent'' to the system established by Nielsen, we find that the record here does not establish any material benefits from use of Comscore either in addition to or in place of Nielsen for purposes of the LPPA, nor that any such benefits would outweigh the uncertainty and delay that use of Comscore would have in issuing Class A licenses. In particular, we are concerned about introducing uncertainty into the application review process, in the instance where Comscore's market classifications may differ from Nielsen. The lack of a compelling reason to select a different classification system instead of Nielsen weighs in favor of our decision to use Nielsen Local TV Report for purposes of implementing the LPPA.

38. Finally, we decline the requests of three other commenters who argue in favor of other alternatives to Nielsen DMAs. One Ministries advocates that the Commission should allow LPTV stations to demonstrate that the geographic area covered by the station is a subset of a larger DMA, such as when the station is in a hyphenated DMA, *i.e.,* Chico-Redding. One Ministries argues that Nielsen identifies Chico and Redding separately for purposes of radio markets, that LPTV stations cover roughly the same area as radio stations, and that no LPTV station in Chico-Redding covers both of those cities. The LPPA directs that the Commission define DMA using Nielsen or an ''equivalent'' system of local TV markets, and dividing Nielsen hyphenated markets into separate markets for purposes of the LPPA would not be ''equivalent'' to the system established by Nielsen. As NAB notes, more than 40 percent of Nielsen markets are hyphenated, and allowing these markets to be treated as separate markets would create a system that is dramatically different from the current Nielsen DMA market definitions. JB Media Group argues that Nielsen DMAs do not account for variables such as interference that ''can significantly impact viewership'' and urges ''an alternative approach that takes into account interference, actual households, and signal power under different weather conditions.'' We find that it would be impractical and lead to delay in implementing the LPPA for Commission staff to define markets based on factors such as weather and actual viewership, and JB Media Group does not offer an existing alternative market definition based on these factors. Finally, RCC argues that the Commission should allow all LPTV stations whose ''Section 307(b) community of license has fewer than 95,000 TV households'' to convert to Class A status. We conclude that such a system of defining local TV markets would be very different than the one required by the LPPA to be ''equivalent'' to the system established by Nielsen, which defines larger geographic regions than community of license.

5. License Standards (Ongoing Eligibility Requirements)

39. We will not require LPPA Class A stations to continue to comply with the 95,000 TV household threshold if the population in the station's DMA later exceeds the threshold amount as a result of changes beyond the station's control. In the *NPRM,* the Commission stated its

belief that the LPPA requirement that stations remain in compliance with the Act's eligibility requirements for the term of the Class A license means that stations that convert to Class A status must continue to operate in DMAs with not more than 95,000 television households in order to maintain their Class A status. The Commission noted that, under this interpretation of the Act, a station that converted to Class A status pursuant to the LPPA would no longer be eligible to retain Class A status if the population in its DMA later grows to more than 95,000 television households.

40. All of the commenters that addressed this interpretation of the Act oppose requiring LPPA Class A stations to remain in DMAs that meet the threshold population restriction, at least without some exceptions. Commenters argue that if the Commission were to require continued compliance with this restriction, licensees would lack regulatory certainty to pursue Class A status, which would undermine the economic viability of Class A stations, and thus fewer stations would likely apply. Commenters also contend that it would be unfair to mandate that a station lose rights through no fault of its own if the population rose above the 95,000 threshold, that the proposal would limit a licensee's ability to modify its facilities in the future (*e.g.,* by relocating), and that the proposal would impose different license terms for LPPA Class A stations than for existing Class A stations, which face no similar possible loss of their Class A status.

41. Commenters also argue that the Commission proposal is not required by the statute. Section 2(c)(2)(B)(iii) of the LPPA states that the Commission may approve conversion to Class A status for a station that ''as of the date of enactment of this Act, operates in a Designated Market Area with not more than 95,000 television households.'' While section 2(c)(3)(B) directs that a converted station is to remain in compliance with paragraph (2)(B)'s eligibility requirements during the term of the license, commenters argue that this language is properly interpreted to require only that a station be in compliance with the DMA requirement ''as of'' the date of enactment of the LPPA (January 5, 2023), not that it remain in compliance going forward.

42. We are persuaded by commenters who argue that a station, once it converts to Class A status pursuant to the LPPA, should not later lose eligibility and therefore be required to revert back to an LPTV station with secondary spectrum use status as a result of changes beyond the station's control. We conclude that Congress did not intend for LPPA Class A stations to subsequently lose Class A status through DMA changes that are not under the control of the station because Congress intended that the communities served by these stations should be able to rely on uninterrupted service from the stations. Accordingly, we will not require LPPA Class A stations to continue to comply with the 95,000 TV household threshold if the population in the station's DMA later exceeds the threshold amount as a result of changes beyond the station's control. We find that the reasons that a station may no longer comply with the 95,000 TV household threshold that are beyond the station's control are a change in the market size through (1) population growth, (2) a change in the boundaries of a qualifying DMA such that the population of the DMA exceeds 95,000 television households, or (3) the merger of a qualifying DMA into another DMA such that the combined DMA exceeds the threshold amount.

43. We will not, however, permit an LPPA Class A station to maintain its Class A status if the size of the market it serves increases beyond 95,000 television households due to a change within the control of the station. For instance, we will not permit an LPPA Class A station to initiate a move to a different DMA that does not meet the LPPA population threshold at the time of the move and still retain the station's Class A status. We interpret the LPPA's continuing compliance mandate to preclude changes under the station's control that would result in the station's failure to continue to comply with the Act's eligibility requirements. We disagree with those commenters who argue that the Act requires only that the station be in compliance with the DMA requirement as of January 5, 2023. This reading of section 2(c)(2)(B)(iii) of the Act is contrary to the language of section 2(c)(3)(B), which does not carve out the 95,000 TV household threshold requirement from the continuing compliance mandate. Such an interpretation would also undercut the purpose of the LPPA to strengthen protections for TV stations located in smaller DMAs, as it would allow LPPA Class A stations to move to DMAs with larger populations, depriving smaller DMAs of the service these stations provide. We also disagree with those commenters who argue that stations that convert to Class A status pursuant to the LPPA should be able to initiate later site changes that would move the station to a non-qualifying DMA. The language of the Act requires that LPPA Class A licensees remain in compliance with the LPPA's eligibility requirements for the term of their Class A license, including the requirement that they operate in a DMA with no more than 95,000 TV households. Apart from changes to a DMA that are beyond the station's control, we will require that LPPA Class A licensees remain in compliance with the 95,000 TV household threshold DMA requirement for the term of the Class A license. Stations that choose to pursue a non-compliant modification may do so, but will have to surrender their Class A status.

C. Application Process

44. As proposed in the *NPRM,* we will evaluate applications to convert to Class A status pursuant to the LPPA as a modification of the LPTV station's existing license. No commenters addressed this issue. For purposes of the LPPA, applications to convert to Class A status will be limited to the conversion of existing LPTV facilities as they exist at the time of application, without consideration of any pending modifications to those facilities or unbuilt construction permits. This approach will allow for expeditious consideration of all applications, and will eliminate delays that could arise from the possibility of mutual exclusivity between a Class A conversion application and other licensed full power or Class A facilities, were we to entertain license modifications during the application window. A licensed LPTV station holding a construction permit to modify its facilities will either need to license those permitted facilities before applying to convert to Class A status, or may apply for a new modification after the Commission has processed the applications from the window.

45. When implementing the CBPA, the Commission required stations applying for Class A status to provide local public notice of applications for Class A status ''since the nature of the underlying service is changing from secondary to primary service.'' We adopt the tentative conclusion in the *NPRM,* that for the same reason we will require an applicant seeking Class A status pursuant to the LPPA to provide local public notice of the application. No commenters addressed this issue.

46. *Application Form.* As proposed in the *NPRM,* we will require that applications for modification of an LPTV station's existing license to convert to Class A status pursuant to the LPPA be filed using FCC Form 2100, Schedule F. Such applications must be filed electronically and must include

the required filing fee. No commenters addressed these issues.

D. TV Broadcast Incentive Auction, Post-Auction Transition, and Reimbursement

47. We affirm the tentative conclusion in the *NPRM* that nothing in the LPPA or in our implementation of the Act can or will affect the Commission's work related to the Broadcast Incentive Auction. No commenters addressed this issue.

E. Digital Equity and Inclusion

48. The Commission sought comment in the *NPRM* on how its proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility. Only one commenter, REC, addressed this issue. In REC's view, the overall impact to digital equity and inclusion of the LPPA ''is slightly negative'' as some LPTV stations on channels 5 and 6 could obtain primary status, thus limiting the ability in some areas to implement full-service FM broadcasting as a part of REC's WIDE–FM proposal, which REC asserts would increase the number of radio voices. While REC notes that the language of the Act is outside the Commission's control, REC asserts that its proposals in response to the *NPRM* will help ensure that rural LPTV stations that provide a minimal level of locally originated programming will be given ''a level of expectation of longevity'' as a result of changing from secondary to primary status, which ''could help persons who live in rural or Tribal areas'' to continue to receive local TV service. In addition, REC comments that requiring LPPA Class A stations to comply with full service rules will allow the Commission to better measure diversity in broadcast ownership and, through the public file process, require stations to be more accountable to their local audiences.

49. We appreciate receiving REC's views and have considered them fully in reaching our conclusions herein regarding implementation of the LPPA. We acknowledge the importance of advancing diversity, equity, inclusion, and accessibility, and we believe that the LPPA itself, and the rules we adopt herein implementing the Act, will advance those aims.

F. Other Issues

50. *Must Carry Rights.* Two commenters, RCC and Dockins, argue that the Commission should amend its rules to give Class A stations must carry status. RCC argues that the Commission should ''clarify'' that Class A stations are incorrectly classified as ''low power stations,'' whose carriage is limited as provided in § 76.55(d) of our rules, but should instead be classified as ''local commercial television stations'' which are entitled to more expansive carriage rights as provided in § 76.555(c). Dockins asserts that ''there is no logical reason why the Commission cannot amend the rules to allow must-carry status for Class A stations'' and that the ''historic failure'' of the Commission to give Class A stations must-carry rights ''appears to be an oversight'' that should be corrected.

51. Consistent with the Commission's conclusion in the Class A MO&O with respect to LPTV stations that converted to Class A status pursuant to the CBPA, we conclude that LPPA Class A stations have the same limited must carry rights as LPTV stations, and do not have the same must carry rights as full service commercial television stations under § 76.55(c) of our rules. In the Class A MO&O, the Commission noted that both the language of the CBPA and the accompanying legislative history were silent with respect to the issue of must carry rights for Class A stations, and concluded that it is unlikely that Congress intended to grant Class A stations full must carry rights, equivalent to those of full-service stations, without addressing the issue directly. The LPPA is also silent with respect to the issue of must carry rights, and we similarly conclude therefore that Congress did not intend to confer full must carry rights on LPPA Class A stations equivalent to full-service stations, and different from the rights of CBPA Class A stations, without addressing the issue in the statute. Instead, we find that Congress intended LPPA Class A stations to have the same limited must carry rights as LPTV stations and existing Class A stations. We thus decline to revise our rules as RCC and Dockins request.

52. *De Minimis Exception to the 95,000 TV Household Requirement.* We also decline to adopt a *de minimis* exception to the LPPA's 95,000 TV household eligibility requirement, as proposed by Lockwood. Lockwood argues that the Commission should adopt an exception of up to 5 percent to the 95,000 TV household amount to ''further the underlying purpose'' of the LPPA to afford eligibility for Class A protection to LPTV stations serving smaller DMAs. Lockwood also argues that such an exception would afford flexibility in the case of fluctuations in the number of TV households in the DMA due to the methodology used to make the calculation or changes related to seasonal tourism or college/university populations. Finally, Lockwood argues that the Commission has implemented *de minimis* exceptions to other of its regulatory requirements and has discretion to do so with respect to the LPPA as the Act expressly permits the Commission to select the appropriate system for determining DMAs.

53. The language of the Act clearly requires that, to be eligible for Class A status, a station must operate in a DMA with no more than 95,000 TV households. The Act also requires that LPPA Class A licensees remain in compliance with the LPPA's eligibility requirements for the term of their Class A license. With respect to the Act's DMA limit, as discussed above we interpret this continuing compliance mandate to preclude changes under the station's control that would result in the station's failure to continue to comply with the 95,000 TV household threshold.

54. As discussed above, while the LPPA provides the Commission with additional discretion in evaluating applicants for Class A status to treat a station as qualifying for Class A status if ''the Commission determines that the public interest, convenience, and necessity would be served'' or ''for other reasons determined by the Commission,'' we are not inclined to expand the specific qualifying criteria beyond that identified in the statute. The LPPA provides precise and limited eligibility criteria and, except in very limited circumstances, we are not inclined to expand the specific qualifying criteria beyond that identified in the statute. Accordingly, we decline to adopt a blanket *de minimis* exception to the DMA eligibility requirement. As discussed above, we will allow deviation from the strict statutory eligibility criteria in the LPPA only on a case-by-case basis where such deviations are insignificant or where there are compelling circumstances such that equity mandates a deviation.

IV. Procedural Matters

55. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Act Analysis (IRFA) was incorporated into the *NPRM* released March 30, 2023. The Federal Communications Commission (Commission) sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. No comments were filed addressing the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

56. The *Report and Order* adopts rules to implement the Low Power Protection Act (LPPA or Act), which was enacted on January 5, 2023. The LPPA provides certain low power television (LPTV) stations with a ''limited window of opportunity'' to apply for primary spectrum use status as Class A television stations. The rules adopted herein reflect most of the Commission's proposals in the *NPRM* in this proceeding, with limited exceptions. We establish herein the period during which eligible stations may file applications for Class A status pursuant to the LPPA, clarify eligibility and interference requirements, and establish the process for submitting applications for Class A status pursuant to the Act. Our rules provide eligible LPTV stations with a limited opportunity to apply for primary spectrum use status as Class A television stations, consistent with Congress's directive in the LPPA.

57. We conclude that the application window will be limited to the one year application window contemplated by the Act, and that an application filed for Class A status must demonstrate that the LPTV station operated in a Designated Market Area (DMA) with not more than 95,000 television households on January 5, 2023. We also conclude that LPTV stations that convert to Class A status under the LPPA must comply with the interference protection standards set forth in section 336(f)(7) of the Communications Act of 1934, with the exception of those provisions that are now obsolete given the transition of all television stations from analog to digital operations. We apply the Commission's recently updated definition of an LPTV station for purposes of determining which stations are eligible for Class A status under the LPPA and codify in our rules the eligibility criteria set forth in the LPPA. We also implement provisions of the LPPA which provide that licenses issued to stations that convert to Class A status are subject to full power television station license terms and renewal standards, with certain exceptions. We conclude that LPPA Class A licensees are required to remain in compliance with the LPPA's eligibility requirements for the term of their Class A license, except for changes to the station's DMA that are beyond the control of the station. We conclude that we will evaluate Class A status to eligible LPTV stations as a modification of the station's existing license, and that nothing in the LPPA, or our rules implementing the Act, affects the Commission's work related to the Broadcast Incentive Auction. We address how our actions implementing the LPPA advance diversity, equity, inclusion, and accessibility and, lastly, decline to amend our rules to afford Class A stations must carry rights equivalent to full service stations and decline to adopt a de minimis exception to the LPPA's DMA eligibility requirement.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

58. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

59. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

60. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

61. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

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

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

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

64. In implementing the LPPA, the *Report and Order* adopts new or additional reporting, recordkeeping or other compliance requirements for small and other entities. For example, the LPPA requires that, to be eligible for Class A status, during the 90 days preceding the date of enactment of the LPPA an LPTV station must have broadcast a minimum of 18 hours/day and an average of at least 3 hours per week of programming produced within the ''market area'' served by the station and have been in compliance with the Commission's requirements for LPTV stations. The rules also require that small and other applicants seeking to convert to Class A status under the

LPPA certify in their application for Class A status that they have complied with these eligibility requirements during the 90 days preceding the January 5, 2023 enactment of the statute. An applicant must submit, as part of its application, a statement concerning the station's operating schedule during the 90 days preceding January 5, 2023 and a list of locally produced programs aired during that time period. The applicant may also submit other documentation to support its certification that the licensee meets the eligibility requirements for a Class A license under the Low Power Protection Act. In addition, the Commission staff may also request additional documentation if necessary during consideration of the application.

65. Beginning on the date of its application for a Class A license and thereafter, a station ''must be in compliance with the Commission's operating rules for full-power stations.'' We will apply to small and other applicants for Class A status under the LPPA, and to stations that are awarded Class A licenses under that statute, all Part 73 regulations except for those that cannot apply for technical or other reasons. For example, Class A stations must comply with the requirements for informational and educational children's programming, the political programming and political file rules, and the public inspection file rule.

66. The LPPA requires that a station that converts to Class A status pursuant to the statute continue to meet the eligibility requirements of the LPPA during the term of the station's Class A license. To be eligible under the LPPA, in addition to other eligibility requirements, section 2(c)(2)(B)(iii) of the Act requires an LPTV station must ''as of the date of enactment'' of the LPPA operate in a DMA with not more than 95,000 television households. Section 2(c)(3)(B) of the Act, however, requires that stations that convert to Class A status under the LPPA ''remain in compliance'' with paragraph (2)(B) ''during the term of the license.'' We interpret section 2(c)(3)(B) to require that stations that convert to Class A status, including small entities, remain in DMAs with not more than 95,000 television households in order to maintain their Class A status except for situations in which the population in the station's DMA later exceeds the threshold amount through (1) population growth, (2) a change in the boundaries of a qualifying DMA such that the population of the DMA exceeds 95,000 television households, or (3) the merger of a qualifying DMA into another DMA such that the combined DMA exceeds the threshold amount. LPPA Class A stations will not be permitted to initiate a move to a different DMA with more than 95,000 television households at the time of the move and still retain their Class A status. In addition, licensed Class A stations must also continue to meet the minimum operating requirements for Class A stations. Licensees unable to continue to meet the minimum operating requirements for Class A television stations, or that elect to revert to low power television status, must promptly notify the Commission, in writing, and request a change in status. The *Report and Order* also requires that stations that convert to Class A status pursuant to the LPPA comply with all rules applicable to existing Class A stations, including interference requirements.

67. The *Report and Order* requires small and other stations seeking to convert to Class A designation pursuant to the LPPA to submit an application to the Commission within one year of the effective date of the rules adopted in this proceeding. The *Report and Order* concludes that the Commission will not continue to accept applications to convert to Class A status under the LPPA beyond the one-year application period set forth in the statute. In addition, we will allow deviation from the strict statutory eligibility criteria under the LPPA only where deviations are insignificant or where there are compelling circumstances such that equity mandates a deviation. In the *NPRM,* we noted that one example of such compelling circumstances might be ''a natural disaster or interference conflict which forced the station off the air'' during the 90-day period preceding enactment of the statute.

68. We expect the actions we have taken in the *Report and Order* achieve the goals of implementing the LPPA without placing significant additional costs and burdens on small entities. At present, there is not sufficient information on the record to quantify the cost of compliance for small entities, or to determine whether it will be necessary for small entities to hire professionals to comply with the adopted rules. However, we anticipate that the compliance obligations for small stations will be outweighed by the benefits provided through the LPPA's granting of a limited opportunity for LPTV stations to apply for primary status as a Class A television licensee.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Considered

69. The RFA requires an agency to provide, ''a description of the steps the agency has taken to minimize the significant economic impact on small entities . . . including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.''

70. Through comments provided by interested parties during the rulemaking proceeding, the Commission considered various proposals from small and other entities. The adopted rules reflect the Commission's efforts to implement the LPPA by balancing the Commission's proposals in the *NPRM* with alternative proposals provided by the commenters and weighing their benefits against their potential costs to small and other entities. As discussed above, the LPPA provides a limited window of opportunity for an LPTV station to attain primary status as a Class A TV station, if the LPTV station meets the eligibility criteria set forth in the LPPA. The *Report and Order* adopts most of the Commission's proposals in the *NPRM,* with one significant exception. We do not adopt the proposal to require that all licensees that convert to Class A status pursuant to the LPPA remain in compliance with the LPPA's requirement that the station be in a DMA with no more than 95,000 TV households for the term of their Class A license. Instead, we conclude that LPPA Class A stations will not be required to continue to comply with the 95,000 TV household threshold if the population in the station's DMA later exceeds the threshold amount either through (1) population growth, (2) a change in the boundaries of a qualifying DMA such that the population of the DMA exceeds 95,000 television households, or (3) the merger of a qualifying DMA into another DMA such that the combined DMA exceeds the threshold amount. This one change to our approach in implementing the LPPA may minimize a potentially significant impact on a small entity in circumstances where the station is in a DMA that later exceeds the threshold TV household eligibility amount for reasons beyond the station's control. We also considered but did not, however, permit an LPPA Class A station to initiate a move to a DMA that does not meet the 95,000 TV household eligibility requirement and still retain its status as a Class A station.

71. Additionally, in the *Report and Order* the Commission adopted a simplified license application approach regarding the documentation stations are required to submit as part of their application for a Class A license. Rather

than mandating that an applicant provide specific additional documents to support its application, the *Report and Order* permits an applicant to provide whatever additional documentation the applicant has that best support its certification that it met the operational and programming requirements of the LPPA during the eligibility period. This flexibility minimizes the impact on small LPTV stations, some of which may have difficulty providing specific mandated documents because they do not have the necessary documents or lack the resources necessary to provide the document in a form that supports their certification. We also took the step of reducing a potential economic burden to small LPTV stations by adopting the proposal to use data from the Nielsen Local TV Station Information Report (Nielsen Local TV Report) in order to determine the DMA where the LPTV station's transmission facilities are located for purposes of eligibility. The Commission considered proposed alternatives such as using census data for Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs), or Comscore data. However, we have determined that using the Nielsen Local TV Report would be less burdensome to small and other LPTV stations based on current industry practices and because certain data, such as DMA station assignment information, can be provided to stations at no cost.

G. Report to Congress

72. The Commission will send a copy of the *Report and Order,* including this FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order,* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

73. *Final Paperwork Reduction Act Analysis.* This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002 (SBPRA), we will seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

74. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that these rules are non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of the *Report and Order* to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

V. Ordering Clauses

75. Accordingly, *it is ordered* that, pursuant to the authority found in sections 1, 2, 4(i), 4(j), 303, 307, 309, 311, and 336(f) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 303, 307, 309, 311, 336(f), and the Low Power Protection Act, Public Law 117–344, 136 Stat. 6193 (2023), this *Report and Order is adopted,* effective thirty (30) days after the date of publication in the **Federal Register**.

76. *It is further ordered* that the Commission's rules *are hereby amended* as set forth in Appendix B of the *Report and Order* and such amendments will be effective 30 days after publication in the **Federal Register**, except for 47 CFR 73.6030(c) and 73.6030(d) which contain new or modified information collection requirements that require review by OMB under the PRA. The Commission directs the Media Bureau to announce the effective date of that information collection in a document published in the **Federal Register** after the Commission receives OMB approval.

77. *It is further ordered* that, pursuant to 47 U.S.C. 155(c), the Media Bureau is granted delegated authority for the purpose of amending FCC Form 2100 as necessary to implement the licensing process adopted herein and to establish the one-year application filing window once the revised form is available for use by applicants, and for the purpose of submitting the report to Congress required pursuant to the Low Power Protection Act, Public Law 117–344, 136 Stat. 6193, Sec. 2(d) (2023).

78. *It is further ordered* that the Media Bureau is granted delegated authority for the purpose of activating an OPIF for LPTV stations that apply to convert to Class A status pursuant to the LPPA and of informing applicants when their OPIF is ready for the applicant to upload documents required to be maintained in OPIF.

79. *It is further ordered* that the Commission's Office of the Secretary *shall send* a copy of this *Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

80. *It is further ordered* that Office of the Managing Director, Performance Program Management, *shall send* a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. Amend § 73.3580 by revising paragraphs (c) introductory text and adding paragraph (c)(7) to read as follows:

§ 73.3580 Local public notice of filing of broadcast applications.

* * * * *

(c) *Applications requiring local public notice.* The following applications filed by licensees or permittees of the following types of stations must provide public notice in the manner set forth in paragraphs (c)(1) through (7) of this section:

* * * * *

(7) Applications by LPTV stations to convert to Class A status pursuant to the Low Power Protection Act. The applicant shall both broadcast on-air announcements and give online notice.

■ 3. Add § 73.6030 to read as follows:

§ 73.6030 Low Power Protection Act.

(a) *Definitions.* For purposes of the Low Power Protection Act, a low power television station's Designated Market Area (DMA) shall be defined as the DMA where its transmission facilities (*i.e.,* the structure on which its antenna is mounted) are located. DMAs are determined by Nielsen Media Research. A low power television station shall be defined in accordance with § 74.701(k).

(b) *Eligibility requirements.* In order to be eligible for Class A status under the Low Power Television Protection Act, low power television licensees must:

(1) Have been operating in a DMA with not more than 95,000 television households as of January 5, 2023;

(2) Have been broadcasting a minimum of 18 hours per day between October 7, 2022 and January 5, 2023;

(3) Have been broadcasting a minimum of at least three hours per week of locally produced programming between October 7, 2022 and January 5, 2023;

(4) Have been operating in compliance with the Commission's requirements applicable to low power television stations between October 7, 2022 and January 5, 2023;

(5) Be in compliance with the Commission's operating rules for full-power television stations from and after the date of its application for a Class A license; and

(6) Demonstrate that the Class A station for which the license is sought will not cause any interference described in 47 U.S.C. 336(f)(7).

(c) *Application requirements.* Applications for conversion to Class A status must be submitted using FCC Form 2100, Schedule F within one year beginning on the date on which the Commission issues notice that the rules implementing the Low Power Protection Act takes effect. The licensee will be required to submit, as part of its application, a statement concerning the station's operating schedule during the 90 days preceding January 5, 2023 and a list of locally produced programs aired during that time period. The applicant may also submit other documentation, or may be requested by Commission staff to submit other documentation, to support its certification that the licensee meets the eligibility requirements for a Class A license under the Low Power Protection Act.

(d) *Licensing requirements.* A Class A television broadcast license will only be issued under the Low Power Protection Act to a low power television licensee that files an application for a Class A Television license (FCC Form 2100, Schedule F), which is granted by the Commission.

(e) *Service requirements.* Stations that convert to Class A status pursuant to the Low Power Protection Act are required to meet the service requirements specified in § 73.6001(b) through (d) of this chapter for the term of their Class A license. In addition, such stations must remain in compliance with the programming and operational standards set forth in the Low Power Protection Act for the term of their Class A license. In addition, such stations must continue to operate in DMAs with not more than 95,000 television households in order to maintain their Class A status unless the population in the station's DMA later exceeds 95,000 television households through population growth, a change in the boundaries of a qualifying DMA such that the population of the DMA exceeds 95,000 television households, or the merger of a qualifying DMA into another DMA such that the combined DMA exceeds 95,000 television households. LPPA Class A stations will not be permitted to initiate a move to a different DMA with more than 95,000 television households at the time of the move and still retain their Class A status.

(f) *Other regulations.* From and after the date of applying for Class A status under the Low Power Protection Act, stations must comply with the requirements applicable to Class A stations specified in subpart J of this part (§§ 73.6000 through 73.6029) and must continue to comply with such requirements for the term of their Class A license.

[FR Doc. 2023–28619 Filed 1–9–24; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 89, No. 7
Wednesday, January 10, 2024

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2022–0790; FRL–9915–01–R3]

Air Plan Approval; District of Columbia; Removal of Stage II Gasoline Vapor Recovery Program Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submitted by the Department of Energy and Environment (DOEE) of the District of Columbia (the District). This revision removes requirements for gasoline vapor recovery systems (VRS) installed on gasoline dispensers, the purpose of which are to capture emissions from vehicle refueling operations, otherwise known as vacuum-assist Stage II vapor recovery. Specifically, this action would remove from the approved SIP prior-approved Stage II requirements applicable to new and existing gasoline dispensing facilities (GDFs). The District of Columbia SIP revision includes a demonstration that removal of Stage II requirements is consistent with the Clean Air Act (CAA) and meets all relevant EPA guidance.

DATES: Written comments must be received on or before February 9, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2022–0790 at *www.regulations.gov,* or via email to *gordon.mike@epa.gov*. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Adam Lewis, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1600 John F. Kennedy Boulevard, Philadelphia, PA 19103. The telephone number is (215) 814–2026. Mr. Adam Lewis can also be reached via electronic mail at *Lewis.Adam@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

On May 18, 2022, the DOEE submitted a revision to its SIP. That SIP submittal consisted of the District's revised Stage II vapor recovery regulations at Title 20 of the District of Columbia Municipal Regulations (DCMR) Chapter 7 Section 705 Stage II Vapor Recovery. DOEE revised its regulations so new GDFs would no longer be required to install and operate Stage II VRS. Additionally, DOEE's revisions allow existing GDFs to decommission existing vacuum-assist Stage II VRS on or after January 1, 2022. The SIP submittal includes a demonstration that removal of Stage II VRS in the District will not interfere with any requirements concerning attainment or reasonable progress of any national ambient air quality standard (NAAQS), or any other applicable requirement of the CAA.

Stage II vapor recovery is an emission control system that is installed on gasoline dispensing equipment at GDFs for the purpose of capturing fuel vapor that would otherwise be released from vehicle gas tanks into the atmosphere during vehicle refueling. Stage II VRS installed on dispensing equipment capture these refueling emissions at the dispenser and route the refueling vapors back to the GDF's underground storage tank, preventing volatile organic compounds (VOCs) in the vapors from escaping to the atmosphere. Beginning in 1998, newly manufactured gasoline-burning cars and trucks have been equipped with on-board refueling vapor recovery (ORVR) systems that utilize carbon canisters installed directly on the vehicle to capture refueling vapors in the vehicle to be later routed to the vehicle's engine for combustion during engine operation.

The 1990 CAA amendments initially required implementation of both Stage II VRS and ORVR systems. Section 182(b)(3) of the CAA required areas classified as moderate and above ozone nonattainment to implement Stage II vapor recovery programs, while CAA section 184(b)(2) required states in the Northeast Ozone Transport Region (OTR) to implement Stage II vapor recovery or comparable measures. CAA section 202(a)(6) required EPA to promulgate regulations for ORVR for light-duty cars and trucks (passenger vehicles); EPA adopted these requirements in a final action published in the **Federal Register** (April 6, 1994, 59 FR 16262), (hereafter referred to as the ORVR rule). Upon the effective date of that final rule, moderate ozone nonattainment areas were no longer subject to CAA section 182(b)(3) Stage II vapor recovery requirements. Under the ORVR rule, new passenger cars built in model year 1998 and later were required to be equipped with ORVR systems, followed by model year 2001 and later light-duty trucks. ORVR equipment has been installed on nearly all new gasoline-powered light-duty cars, light-duty trucks, and heavy-duty vehicles manufactured since 2006.[1]

[1] EPA Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation

Continued

During the phase-in of ORVR controls, Stage II vapor recovery has provided VOC emission reductions in ozone nonattainment areas and in certain areas of the OTR. Congress recognized that ORVR systems and Stage II VRS would over time become largely redundant technologies acting to capture the same pollutants; Congress therefore provided authority in the 1990 CAA amendments for EPA to allow states to remove Stage II vapor recovery programs from their SIPs upon EPA making a finding that ORVR is in ''widespread use.'' [2] EPA issued a widespread use finding in a final rule published in the **Federal Register** (May 16, 2012, 77 FR 28772), in which EPA determined that ORVR was in widespread use on a nationwide basis. EPA estimated that by the end of 2016, more than 88 percent of gasoline refueling nationwide would occur with ORVR-equipped vehicles. As noted in EPA's Stage II Removal Guidance, Stage II vapor recovery programs have become largely redundant control systems for ORVR-equipped vehicles and, as a result, Stage II VRS achieve ever-declining emissions benefits as more ORVR-equipped vehicles continue to enter the on-road motor vehicle fleet. In areas where certain types of vacuum-assist Stage II VRS are used, such as the District, the incompatibility between ORVR systems and certain configurations of Stage II vapor recovery systems results in the reduction of overall control system efficiency in capturing VOC refueling emissions, compared to what would otherwise be achieved by ORVR or Stage II VRS acting in the absence of the other. In its May 16, 2012 (77 FR 28772) widespread use rulemaking, EPA also exercised its authority under CAA section 202(a)(6) to waive certain Federal statutory requirements for Stage II VRS at GDFs, which among other things, exempted all new ozone nonattainment areas classified serious or above from the requirement to adopt Stage II vapor recovery programs. Finally, EPA's May 16, 2012 (77 FR 28772) rulemaking also noted that any state currently implementing a Stage II vapor recovery program may submit SIP revisions that would allow for the phase-out of Stage II VRS.

II. Summary of the District of Columbia's Stage II Vapor Recovery Program and SIP Revision

The District of Columbia was classified as Serious nonattainment for the 1-hour 1979 ozone NAAQS in the **Federal Register** at 56 FR 56694 (November 6, 1991), this standard has since been revoked. The District was found to be in attainment of ground-level 2008 ozone NAAQS on July 16, 2019 and subsequently found to be in Moderate nonattainment for the 2015 ozone NAAQS on November 7, 2022 (40 CFR 81.309). Because gasoline vapors contain mainly VOCs and contribute to the formation of ground-level ozone, Section 182(b)(3) of the CAA Amendments of 1990 required states with moderate and higher ozone nonattainment areas to revise their SIPs to require ''owners or operators of gasoline dispensing systems to install and operate . . . a system for gasoline vapor recovery of emissions from the fueling of motor vehicles.'' [3] As a result, in 1993 the District of Columbia adopted Stage II vapor recovery requirements at Title 20 DCMR Environment, Chapter 7 Air Quality—Volatile Organic Compounds and Hazardous Air Pollutants, Section 705 Stage II Vapor Recovery. These changes were subsequently incorporated into the District's SIP (October 27, 1999, 64 FR 57777). In October 2021, due to the widespread use of ORVR and its incompatibility with the Stage II vacuum-assist VRS in use at GDFs in the District, DOEE proposed revisions to its vapor recovery regulations. These revisions proposed to allow existing GDFs within the District the option to decommission their Stage II VRS, and for new GDFs to forgo them entirely.[4] DOEE subsequently finalized these revisions in April 2022.[5]

On May 18, 2022, DOEE submitted a SIP revision to EPA consisting of these state regulatory revisions adopted by DOEE, along with a demonstration of the emission impacts of the changes to Stage II requirements on affected areas in the District. This SIP revision includes DOEE's revised rules that allow new GDFs that commence construction on or after January 1, 2022, to do so without installing and operating a Stage II VRS and allow existing GDFs to commence the decommissioning of vacuum-assist Stage II VRS on or after January 1, 2022. DOEE's revised rules incorporate by reference requirements and procedures for decommissioning Stage II VRS based on Chapter 14 of the Petroleum Equipment Institute's ''Recommended Practices for Installation and Testing of Vapor-Recovery Systems at Vehicle-Fueling Sites,'' 2009 edition, PEI/RP300–09. The revised rules also incorporate by reference requirements and procedures for the maintenance and periodic testing of Stage II VRS for GDFs that opt to continue operating them.

The October 28, 2021, SIP revision also includes a demonstration supporting the discontinuation of the Stage II vapor recovery program in the District. This demonstration, discussed in greater detail below, shows that by 2019 the overall emissions benefits associated with the Stage II vapor recovery program, operated in conjunction with ORVR, are overwhelmed by an emissions disbenefit caused by ORVR incompatibility with the vacuum-assist type Stage II VRS equipment in use at GDFs. DOEE's analysis followed the EPA's ''Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plan and Assessing Comparable Measures'' (EPA–457/B–12–001; August 7, 2012), hereafter referred to as EPA's Stage II Removal Guidance. The DOEE analysis demonstrates that within the District the increasing prevalence of ORVR-equipped vehicles and the continued operation of the Stage II vapor recovery program results in increased VOC emissions due to the incompatibility between the vacuum-assist type Stage II VRS equipment and ORVR. The DOEE further demonstrates that allowing the decommissioning of all Stage II VRS equipment on or after January 1, 2022, will result in additional emissions decreases, especially when combined with the increasing prevalence of ORVR-equipped vehicles.

III. EPA's Evaluation of the District of Columbia's SIP Revision

EPA has reviewed the District's revised 20 DCMR 705, Stage II Vapor Recovery, and accompanying SIP narrative, and has concluded that DOEE's October 28, 2021 SIP revision is consistent with EPA's widespread use rule (77 FR 28772, May 16, 2012) and with EPA's Stage II Removal Guidance.

Plans and Assessing Comparable Measures, (August 7, 2012), hereafter referred to as EPA's Stage II Removal Guidance *www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20120807_page_stage2_removal_guidance.pdf.*

[2] See CAA Section 202(a)(6).

[3] CAA Section 182(b)(3).

[4] 68 DCR 11457, Proposed Rulemaking, Amend 20 DCMR (Environment), Ch. 7 (Air Quality—Volatile Organic Compounds and Hazardous Air Pollutants), Sec. 705 (Stage II Vapor Recovery), Removal of Stage II Vapor Recovery from Gasoline Dispensing Facilities in the District; issued October 29, 2021.

[5] 69 DCR 3128, Final Rulemaking, Amend 20 DCMR (Environment), Ch. 7 (Air Quality—Volatile Organic Compounds and Hazardous Air Pollutants), Sec. 705 (Stage II Vapor Recovery), Removal of Stage II Vapor Recovery from Gasoline Dispensing Facilities in the District; issued April 8, 2022 and effective same day.

In reviewing the proposed SIP revision, the EPA must ensure that: (1) in accordance with CAA section 110(l)'s non-interference requirement, DOEE has demonstrated that the proposed action would not interfere with attainment of the National Ambient Air Quality Standards or reasonable further progress towards attainment of any NAAQS; (2) in accordance with CAA section 184(b)(2)'s ''comparable measures'' requirement, that the proposed action would achieve comparable or greater emission reductions than the gasoline vapor recovery requirements contained in CAA section 182(b)(3); and (3) that the proposed action satisfies the anti-backsliding requirements of CAA section 193. As discussed below, the EPA finds that DOEE has demonstrated widespread use of ORVR systems throughout the motor vehicle fleet and that implementation of the rule in the proposed SIP revision would comply with CAA sections 110(l), 184(b)(2), and 193.

CAA section 110(l) specifies that the EPA cannot approve a SIP revision if it would interfere with attainment of NAAQS or reasonable further progress towards attainment, or any other applicable requirement of the CAA; this is commonly referred to as ''anti-backsliding.'' DOEE's SIP revision submittal includes a CAA section 110(l) anti-backsliding demonstration (based on equations provided in the EPA's Stage II Removal Guidance) [6] demonstrating there would be a negative increment value for the potential loss of emission reductions from removing Stage II vapor recovery systems in 2019. If the calculated increment value is zero or negative, this would indicate that removing Stage II systems would not increase refueling emissions. Thus, the SIP revision will not interfere with attainment of NAAQS, reasonable further progress towards attainment, or any other applicable requirement of the CAA.

Because the District is located in the northeast OTR, under CAA section 184(b)(2)'s ''comparable measures'' requirement, the State must show that its SIP revisions include control measures capable of achieving emission reductions comparable to those achievable through Stage II Systems under CAA section 182(b)(3). As stated in the EPA's Stage II Removal Guidance, ''the comparable measures requirement is satisfied if phasing out a Stage II control program in a particular area is estimated to have no, or a de minimis, incremental loss of area-wide emission control.'' DOEE conducted a comparable measure analysis in accordance with the EPA's Stage II Removal Guidance that shows that phasing out the Stage II program would result in zero or de minimis incremental loss of area wide emission control satisfying the comparable measures requirement of CAA section 184(b)(2).

DOEE's analysis indicates there would be a negative increment value for the potential loss of emission reductions from removing Stage II vapor recovery systems starting in 2019 at a range of at least -0.0425 and at most -0.0348. The EPA's Stage II Removal Guidance explains that a zero or negative increment value indicates that removing Stage II, ''would not increase the refueling emissions inventory because the higher efficiency from ORVR and the incompatibility emissions offset the increment due to non-ORVR vehicles being refueled at Stage II GDFs.'' [7] Thus, compliance with CAA section 184(b)(2) is demonstrated and the revision to the SIP satisfies the comparable measures requirement. EPA has reviewed the DOEE analysis and agrees with its conclusions that within the District the overall emissions benefits associated with the Stage II vapor recovery program, operated in conjunction with widespread use of ORVR, are shown to be overwhelmed by an emissions disbenefit caused by ORVR incompatibility.

IV. Proposed Action

EPA is proposing to approve the District's October 28, 2021 SIP revision for districtwide removal of Stage II vapor recovery requirements, which removes requirements for gasoline vapor recovery systems installed on gasoline dispensers, the purpose of which are to capture emissions from vehicle refueling operations, otherwise known as vacuum-assist Stage II vapor recovery. Specifically, EPA is proposing to approve Title 20 of the District of Columbia Municipal Regulations (DCMR) Chapter 7 Section 705 Stage II Vapor Recovery, and incorporate it into the District's SIP. EPA is proposing to approve this SIP revision because it meets all applicable requirements of the Clean Air Act and relevant EPA guidance and because approval of this SIP revision will not interfere with attainment or maintenance of the ozone NAAQS. EPA is soliciting public comments on the issues discussed in this action or other relevant matters. These comments will be considered before taking final action.

V. Incorporation by Reference

In this document, EPA proposes to include in a final rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the District of Columbia's revisions to 20 DCMR 705, Removal of Stage II Vapor Recovery from Gasoline Dispensing Facilities in the District; (effective date April 8, 2022), as explained in Section II of this preamble. EPA has made, and will continue to make, these materials generally 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).

VI. Statutory and Executive Order Reviews

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

[6] EPA Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures, (August 7, 2012), pages 13–14.

[7] EPA Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures, (August 7, 2012), page 13.

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 Clean Air Act;

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The DOEE did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this proposed rulemaking. Due to the nature of the proposed action being taken here, this proposed rulemaking is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

In addition, this proposed rulemaking, to remove the District's Stage II vapor recovery requirements from the SIP does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the District, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Diana Esher,

Acting Regional Administrator, Region III.

[FR Doc. 2024–00161 Filed 1–9–24; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

EPA–R01–OAR–2023–0185; FRL–11616–01–R1]

Approval and Promulgation of Air Quality Implementation Plans; Massachusetts; Regional Haze State Implementation Plan for the Second Implementation Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the Regional Haze State Implementation Plan (SIP) revision submitted by Massachusetts on July 22, 2021, as satisfying applicable requirements under the Clean Air Act (CAA) and EPA's Regional Haze Rule for the program's second implementation period. Massachusetts' SIP submission addresses the requirement that states must periodically revise their long-term strategies for making reasonable progress towards the national goal of preventing any future, and remedying any existing, anthropogenic impairment of visibility, including regional haze, in mandatory Class I Federal areas. The SIP submission also addresses other applicable requirements for the second implementation period of the regional haze program. The EPA is taking this action pursuant to sections 110 and 169A of the Clean Air Act.

DATES: Written comments must be received on or before February 9, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2023–0185 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: David Mackintosh, U.S. Environmental Protection Agency, Region 1, Air Quality Branch, 5 Post Office Square—Suite 100, (Mail code 5–MO), Boston, MA 02109–3912, at 617–918–1584, or by email at *Mackintosh.David@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What action is the EPA proposing?

On July 22, 2021, supplemented on June 15, 2022, the Massachusetts Department of Environmental Protection (MassDEP) submitted a revision to its SIP to address regional haze for the second implementation period. MassDEP made this SIP submission to satisfy the requirements of the CAA's regional haze program pursuant to CAA sections 169A and 169B and 40 CFR 51.308. The EPA is proposing to find that the Massachusetts regional haze SIP submission for the second implementation period meets the applicable statutory and regulatory requirements and thus proposes to approve Massachusetts' submission into its SIP.

II. Background and Requirements for Regional Haze Plans

A. Regional Haze Background

In the 1977 CAA Amendments, Congress created a program for protecting visibility in the nation's mandatory Class I Federal areas, which include certain national parks and wilderness areas.[1] CAA 169A. The CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.'' CAA 169A(a)(1). The CAA further directs the EPA to promulgate regulations to assure reasonable progress toward meeting this national goal. CAA 169A(a)(4). On December 2, 1980, the EPA promulgated regulations to address visibility impairment in mandatory Class I Federal areas (hereinafter referred to as ''Class I areas'') that is ''reasonably attributable'' to a single source or small group of sources. (45 FR 80084, December 2, 1980). These regulations, codified at 40 CFR 51.300 through 51.307, represented the first phase of the EPA's efforts to address visibility impairment. In 1990, Congress added section 169B to the CAA to further address visibility impairment, specifically, impairment from regional haze. CAA 169B. The EPA promulgated the Regional Haze Rule (RHR), codified at 40 CFR 51.308,[2] on July 1, 1999. (64 FR 35714, July 1, 1999). These regional haze regulations are a central component of the EPA's comprehensive visibility protection program for Class I areas.

Regional haze is visibility impairment that is produced by a multitude of anthropogenic sources and activities which are located across a broad geographic area and that emit pollutants that impair visibility. Visibility impairing pollutants include fine and coarse particulate matter (PM) (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (*e.g.,* sulfur dioxide (SO_2), nitrogen oxides (NO_X), and, in some cases, volatile organic compounds (VOC) and ammonia (NH_3)). Fine particle precursors react in the atmosphere to form fine particulate matter ($PM_{2.5}$), which impairs visibility by scattering and absorbing light. Visibility impairment reduces the perception of clarity and color, as well as visible distance.[3]

To address regional haze visibility impairment, the 1999 RHR established an iterative planning process that requires both states in which Class I areas are located and states ''the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility'' in a Class I area to periodically submit SIP revisions to address such impairment. CAA 169A(b)(2);[4] see also 40 CFR 51.308(b), (f) (establishing submission dates for iterative regional haze SIP revisions); (64 FR at 35768, July 1, 1999). Under the CAA, each SIP submission must contain ''a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal,'' CAA 169A(b)(2)(B); the initial round of SIP submissions also had to address the statutory requirement that certain older, larger sources of visibility impairing pollutants install and operate the best available retrofit technology (BART). CAA 169A(b)(2)(A); 40 CFR 51.308(d), (e). States' first regional haze SIPs were due by December 17, 2007, 40 CFR 51.308(b), with subsequent SIP submissions containing updated long-term strategies originally due July 31, 2018, and every ten years thereafter. (64 FR at 35768, July 1, 1999). The EPA established in the 1999 RHR that all states either have Class I areas within their borders or ''contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area''; therefore, all states must submit regional haze SIPs.[5] *Id.* at 35721.

Much of the focus in the first implementation period of the regional haze program, which ran from 2007 through 2018, was on satisfying states' BART obligations. First implementation period SIPs were additionally required to contain long-term strategies for making reasonable progress toward the national visibility goal, of which BART is one component. The core required elements for the first implementation period SIPs (other than BART) are laid out in 40 CFR 51.308(d). Those provisions required that states containing Class I areas establish reasonable progress goals (RPGs) that are measured in deciviews and reflect the anticipated visibility conditions at

[1] Areas statutorily designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. CAA 162(a). There are 156 mandatory Class I areas. The list of areas to which the requirements of the visibility protection program apply is in 40 CFR part 81, subpart D.

[2] In addition to the generally applicable regional haze provisions at 40 CFR 51.308, the EPA also promulgated regulations specific to addressing regional haze visibility impairment in Class I areas on the Colorado Plateau at 40 CFR 51.309. The latter regulations are applicable only for specific jurisdictions' regional haze plans submitted no later than December 17, 2007, and thus are not relevant here.

[3] There are several ways to measure the amount of visibility impairment, *i.e.,* haze. One such measurement is the deciview, which is the principal metric used by the RHR. Under many circumstances, a change in one deciview will be perceived by the human eye to be the same on both clear and hazy days. The deciview is unitless. It is proportional to the logarithm of the atmospheric extinction of light, which is the perceived dimming of light due to its being scattered and absorbed as it passes through the atmosphere. Atmospheric light extinction (b^{ext}) is a metric used to for expressing visibility and is measured in inverse megameters (Mm-1). The EPA's Guidance on Regional Haze State Implementation Plans for the Second Implementation Period (''2019 Guidance'') offers the flexibility for the use of light extinction in certain cases. Light extinction can be simpler to use in calculations than deciviews, since it is not a logarithmic function. See, *e.g.,* 2019 Guidance at 16, 19, *https://www.epa.gov/visibility/guidance-regional-haze-state-implementation-plans-second-implementation-period,* The EPA Office of Air Quality Planning and Standards, Research Triangle Park (August 20, 2019). The formula for the deciview is $10 \ln (b^{ext}/10\ Mm - 1)$. 40 CFR 51.301.

[4] The RHR expresses the statutory requirement for states to submit plans addressing out-of-state class I areas by providing that states must address visibility impairment ''in each mandatory Class I Federal area located outside the State that may be affected by emissions from within the State.'' 40 CFR 51.308(d), (f).

[5] In addition to each of the fifty states, the EPA also concluded that the Virgin Islands and District of Columbia must also submit regional haze SIPs because they either contain a Class I area or contain sources whose emissions are reasonably anticipated to contribute regional haze in a Class I area. *See* 40 CFR 51.300(b), (d)(3).

the end of the implementation period including from implementation of states' long-term strategies. The first planning period RPGs were required to provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period. In establishing the RPGs for any Class I area in a state, the state was required to consider four statutory factors: the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources. CAA 169A(g)(1); 40 CFR 51.308(d)(1).

States were also required to calculate baseline (using the five-year period of 2000–2004) and natural visibility conditions (*i.e.,* visibility conditions without anthropogenic visibility impairment) for each Class I area, and to calculate the linear rate of progress needed to attain natural visibility conditions, assuming a starting point of baseline visibility conditions in 2004 and ending with natural conditions in 2064. This linear interpolation is known as the uniform rate of progress (URP) and is used as a tracking metric to help states assess the amount of progress they are making towards the national visibility goal over time in each Class I area.[6] 40 CFR 51.308(d)(1)(i)(B), (d)(2). The 1999 RHR also provided that States' long-term strategies must include the ''enforceable emissions limitations, compliance, schedules, and other measures as necessary to achieve the reasonable progress goals.'' 40 CFR 51.308(d)(3). In establishing their long-term strategies, states are required to consult with other states that also contribute to visibility impairment in a given Class I area and include all measures necessary to obtain their shares of the emission reductions needed to meet the RPGs. 40 CFR 51.308(d)(3)(i), (ii). Section 51.308(d) also contains seven additional factors states must consider in formulating their long-term strategies, 40 CFR 51.308(d)(3)(v), as well as provisions governing monitoring and other implementation plan requirements. 40 CFR 51.308(d)(4). Finally, the 1999 RHR required states to submit periodic progress reports—SIP revisions due every five years that contain information on states' implementation of their regional haze plans and an assessment of whether anything additional is needed to make reasonable progress, see 40 CFR 51.308(g), (h)—and to consult with the Federal Land Manager(s)[7] (FLMs) responsible for each Class I area according to the requirements in CAA 169A(d) and 40 CFR 51.308(i).

On January 10, 2017, the EPA promulgated revisions to the RHR, (82 FR 3078, January 10, 2017), that apply for the second and subsequent implementation periods. The 2017 rulemaking made several changes to the requirements for regional haze SIPs to clarify States' obligations and streamline certain regional haze requirements. The revisions to the regional haze program for the second and subsequent implementation periods focused on the requirement that States' SIPs contain long-term strategies for making reasonable progress towards the national visibility goal. The reasonable progress requirements as revised in the 2017 rulemaking (referred to here as the 2017 RHR Revisions) are codified at 40 CFR 51.308(f). Among other changes, the 2017 RHR Revisions adjusted the deadline for States to submit their second implementation period SIPs from July 31, 2018, to July 31, 2021, clarified the order of analysis and the relationship between RPGs and the long-term strategy, and focused on making visibility improvements on the days with the most *anthropogenic* visibility impairment, as opposed to the days with the most visibility impairment overall. The EPA also revised requirements of the visibility protection program related to periodic progress reports and FLM consultation. The specific requirements applicable to second implementation period regional haze SIP submissions are addressed in detail below.

The EPA provided guidance to the states for their second implementation period SIP submissions in the preamble to the 2017 RHR Revisions as well as in subsequent, stand-alone guidance documents. In August 2019, the EPA issued ''Guidance on Regional Haze State Implementation Plans for the Second Implementation Period'' (''2019 Guidance'').[8] On July 8, 2021, the EPA issued a memorandum containing ''Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period'' (''2021 Clarifications Memo'').[9] Additionally, the EPA further clarified the recommended procedures for processing ambient visibility data and optionally adjusting the URP to account for international anthropogenic and prescribed fire impacts in two technical guidance documents: the December 2018 ''Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program'' (''2018 Visibility Tracking Guidance''),[10] and the June 2020 ''Recommendation for the Use of Patched and Substituted Data and Clarification of Data Completeness for Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program'' and associated Technical Addendum (''2020 Data Completeness Memo'').[11]

As previously explained in the 2021 Clarifications Memo, EPA intends the second implementation period of the regional haze program to secure meaningful reductions in visibility impairing pollutants that build on the significant progress states have achieved to date. The Agency also recognizes that analyses regarding reasonable progress

[6] EPA established the URP framework in the 1999 RHR to provide ''an equitable analytical approach'' to assessing the rate of visibility improvement at Class I areas across the country. The start point for the URP analysis is 2004 and the endpoint was calculated based on the amount of visibility improvement that was anticipated to result from implementation of existing CAA programs over the period from the mid-1990s to approximately 2005. Assuming this rate of progress would continue into the future, EPA determined that natural visibility conditions would be reached in 60 years, or 2064 (60 years from the baseline starting point of 2004). However, EPA did not establish 2064 as the year by which the national goal *must* be reached. 64 FR at 35731–32. That is, the URP and the 2064 date are not enforceable targets, but are rather tools that ''allow for analytical comparisons between the rate of progress that would be achieved by the state's chosen set of control measures and the URP.'' (82 FR 3078, 3084, January 10, 2017).

[7] The EPA's regulations define ''Federal Land Manager'' as ''the Secretary of the department with authority over the Federal Class I area (or the Secretary's designee) or, with respect to Roosevelt-Campobello International Park, the Chairman of the Roosevelt-Campobello International Park Commission.'' 40 CFR 51.301.

[8] Guidance on Regional Haze State Implementation Plans for the Second Implementation Period. *https://www.epa.gov/visibility/guidance-regional-haze-state-implementation-plans-second-implementation-period.* The EPA Office of Air Quality Planning and Standards, Research Triangle Park (August 20, 2019).

[9] Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period. *https://www.epa.gov/system/files/documents/2021-07/clarifications-regarding-regional-haze-state-implementation-plans-for-the-second-implementation-period.pdf.* The EPA Office of Air Quality Planning and Standards, Research Triangle Park (July 8, 2021).

[10] Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program. *https://www.epa.gov/visibility/technical-guidance-tracking-visibility-progress-second-implementation-period-regional.* The EPA Office of Air Quality Planning and Standards, Research Triangle Park. (December 20, 2018).

[11] Recommendation for the Use of Patched and Substituted Data and Clarification of Data Completeness for Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program. *https://www.epa.gov/visibility/memo-and-technical-addendum-ambient-data-usage-and-completeness-regional-haze-program.* The EPA Office of Air Quality Planning and Standards, Research Triangle Park (June 3, 2020).

are state-specific and that, based on states' and sources' individual circumstances, what constitutes reasonable reductions in visibility impairing pollutants will vary from state-to-state. While there exist many opportunities for states to leverage both ongoing and upcoming emission reductions under other CAA programs, the Agency expects states to undertake rigorous reasonable progress analyses that identify further opportunities to advance the national visibility goal consistent with the statutory and regulatory requirements. See generally 2021 Clarifications Memo. This is consistent with Congress's determination that a visibility protection program is needed in addition to the CAA's National Ambient Air Quality Standards and Prevention of Significant Deterioration programs, as further emission reductions may be necessary to adequately protect visibility in Class I areas throughout the country.[12]

B. Roles of Agencies in Addressing Regional Haze

Because the air pollutants and pollution affecting visibility in Class I areas can be transported over long distances, successful implementation of the regional haze program requires long-term, regional coordination among multiple jurisdictions and agencies that have responsibility for Class I areas and the emissions that impact visibility in those areas. In order to address regional haze, states need to develop strategies in coordination with one another, considering the effect of emissions from one jurisdiction on the air quality in another. Five regional planning organizations (RPOs),[13] which include representation from state and tribal governments, the EPA, and FLMs, were developed in the lead-up to the first implementation period to address regional haze. RPOs evaluate technical information to better understand how emissions from State and Tribal land impact Class I areas across the country, pursue the development of regional strategies to reduce emissions of particulate matter and other pollutants leading to regional haze, and help states meet the consultation requirements of the RHR.

The Mid-Atlantic/Northeast Visibility Union (MANE–VU), one of the five RPOs described above, is a collaborative effort of state governments, tribal governments, and various Federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility, and other air quality issues in the Mid-Atlantic and Northeast corridor of the United States. Member states and tribal governments (listed alphabetically) include Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Penobscot Indian Nation, Rhode Island, St. Regis Mohawk Tribe, and Vermont. The Federal partner members of MANE–VU are EPA, U.S. National Parks Service (NPS), U.S. Fish and Wildlife Service (FWS), and U.S. Forest Service (USFS).

III. Requirements for Regional Haze Plans for the Second Implementation Period

Under the CAA and EPA's regulations, all 50 states, the District of Columbia, and the U.S. Virgin Islands are required to submit regional haze SIPs satisfying the applicable requirements for the second implementation period of the regional haze program by July 31, 2021. Each state's SIP must contain a long-term strategy for making reasonable progress toward meeting the national goal of remedying any existing and preventing any future anthropogenic visibility impairment in Class I areas. CAA 169A(b)(2)(B). To this end, § 51.308(f) lays out the process by which states determine what constitutes their long-term strategies, with the order of the requirements in § 51.308(f)(1) through (f)(3) generally mirroring the order of the steps in the reasonable progress analysis [14] and (f)(4) through (f)(6) containing additional, related requirements. Broadly speaking, a state first must identify the Class I areas within the state and determine the Class I areas outside the state in which visibility may be affected by emissions from the state. These are the Class I areas that must be addressed in the state's long-term strategy. See 40 CFR 51.308(f), (f)(2). For each Class I area within its borders, a state must then calculate the baseline, current, and natural visibility conditions for that area, as well as the visibility improvement made to date and the URP. See 40 CFR 51.308(f)(1). Each state having a Class I area and/or emissions that may affect visibility in a Class I area must then develop a long-term strategy that includes the enforceable emission limitations, compliance schedules, and other measures that are necessary to make reasonable progress in such areas. A reasonable progress determination is based on applying the four factors in CAA section 169A(g)(1) to sources of visibility-impairing pollutants that the state has selected to assess for controls for the second implementation period. See 40 CFR 51.308(f)(2). Additionally, as further explained below, the RHR at 40 CFR 51.308(f)(2)(iv) separately provides five ''additional factors'' [15] that states must consider in developing their long-term strategies. A state evaluates potential emission reduction measures for those selected sources and determines which are necessary to make reasonable progress. Those measures are then incorporated into the state's long-term strategy. After a state has developed its long-term strategy, it then establishes RPGs for each Class I area within its borders by modeling the visibility impacts of all reasonable progress controls at the end of the second implementation period, *i.e.,* in 2028, as well as the impacts of other requirements of the CAA. The RPGs include reasonable progress controls not only for sources in the state in which the Class I area is located, but also for sources in other states that contribute to visibility impairment in that area. The RPGs are then compared to the baseline visibility conditions and the URP to ensure that progress is being made towards the statutory goal of preventing any future and remedying any existing anthropogenic visibility impairment in Class I areas. 40 CFR 51.308(f)(2)–(3).

In addition to satisfying the requirements at 40 CFR 51.308(f) related to reasonable progress, the regional haze SIP revisions for the second implementation period must address the requirements in § 51.308(g)(1) through (5) pertaining to periodic reports describing progress towards the RPGs, 40 CFR 51.308(f)(5), as well as requirements for FLM consultation that apply to all visibility protection SIPs and SIP revisions. 40 CFR 51.308(i).

A state must submit its regional haze SIP and subsequent SIP revisions to the EPA according to the requirements applicable to all SIP revisions under the CAA and EPA's regulations. See CAA

[12] See, *e.g.,* H.R. Rep No. 95–294 at 205 (''In determining how to best remedy the growing visibility problem in these areas of great scenic importance, the committee realizes that as a matter of equity, the national ambient air quality standards cannot be revised to adequately protect visibility in all areas of the country.''), (''the mandatory class I increments of [the PSD program] do not adequately protect visibility in class I areas'').

[13] RPOs are sometimes also referred to as ''multi-jurisdictional organizations,'' or MJOs. For the purposes of this notice, the terms RPO and MJO are synonymous.

[14] EPA explained in the 2017 RHR Revisions that we were adopting new regulatory language in 40 CFR 51.308(f) that, unlike the structure in 51.308(d), ''tracked the actual planning sequence.'' (82 FR 3091, January 10, 2017).

[15] The five ''additional factors'' for consideration in section 51.308(f)(2)(iv) are distinct from the four factors listed in CAA section 169A(g)(1) and 40 CFR 51.308(f)(2)(i) that states must consider and apply to sources in determining reasonable progress.

169(b)(2); CAA 110(a). Upon EPA approval, a SIP is enforceable by the Agency and the public under the CAA. If EPA finds that a state fails to make a required SIP revision, or if the EPA finds that a state's SIP is incomplete or if disapproves the SIP, the Agency must promulgate a federal implementation plan (FIP) that satisfies the applicable requirements. CAA 110(c)(1).

A. Identification of Class I Areas

The first step in developing a regional haze SIP is for a state to determine which Class I areas, in addition to those within its borders, ''may be affected'' by emissions from within the state. In the 1999 RHR, the EPA determined that all states contribute to visibility impairment in at least one Class I area, 64 FR at 35720–22, and explained that the statute and regulations lay out an ''extremely low triggering threshold'' for determining ''whether States should be required to engage in air quality planning and analysis as a prerequisite to determining the need for control of emissions from sources within their State.'' *Id.* at 35721.

A state must determine which Class I areas must be addressed by its SIP by evaluating the total emissions of visibility impairing pollutants from all sources within the state. While the RHR does not require this evaluation to be conducted in any particular manner, EPA's 2019 Guidance provides recommendations for how such an assessment might be accomplished, including by, where appropriate, using the determinations previously made for the first implementation period. 2019 Guidance at 8–9. In addition, the determination of which Class I areas may be affected by a state's emissions is subject to the requirement in 40 CFR 51.308(f)(2)(iii) to ''document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which the State is relying to determine the emission reduction measures that are necessary to make reasonable progress in each mandatory Class I Federal area it affects.''

B. Calculations of Baseline, Current, and Natural Visibility Conditions; Progress to Date; and the Uniform Rate of Progress

As part of assessing whether a SIP submission for the second implementation period is providing for reasonable progress towards the national visibility goal, the RHR contains requirements in § 51.308(f)(1) related to tracking visibility improvement over time. The requirements of this subsection apply only to states having Class I areas within their borders; the required calculations must be made for each such Class I area. EPA's 2018 Visibility Tracking Guidance [16] provides recommendations to assist states in satisfying their obligations under § 51.308(f)(1)—specifically, in developing information on baseline, current, and natural visibility conditions, and in making optional adjustments to the URP to account for the impacts of international anthropogenic emissions and prescribed fires. See 82 FR at 3103–05.

The RHR requires tracking of visibility conditions on two sets of days: the clearest and the most impaired days. Visibility conditions for both sets of days are expressed as the average deciview index for the relevant five-year period (the period representing baseline or current visibility conditions). The RHR provides that the relevant sets of days for visibility tracking purposes are the 20% clearest (the 20% of monitored days in a calendar year with the lowest values of the deciview index) and 20% most impaired days (the 20% of monitored days in a calendar year with the highest amounts of anthropogenic visibility impairment).[17] 40 CFR 51.301. A state must calculate visibility conditions for both the 20% clearest and 20% most impaired days for the baseline period of 2000–2004 and the most recent five-year period for which visibility monitoring data are available (representing current visibility conditions). 40 CFR 51.308(f)(1)(i), (iii). States must also calculate natural visibility conditions for the clearest and most impaired days,[18] by estimating the conditions that would exist on those two sets of days absent anthropogenic visibility impairment. 40 CFR 51.308(f)(1)(ii). Using all these data, states must then calculate, for each Class I area, the amount of progress made since the baseline period (2000–2004) and how much improvement is left to achieve in order to reach natural visibility conditions.

Using the data for the set of most impaired days only, states must plot a line between visibility conditions in the baseline period and natural visibility conditions for each Class I area to determine the URP—the amount of visibility improvement per year, measured in deciviews, that would need to be achieved during each implementation period in order to achieve natural visibility conditions by the end of 2064. The URP is used in later steps of the reasonable progress analysis for informational purposes and to provide a non-enforceable benchmark against which to assess a Class I area's rate of visibility improvement.[19] Additionally, in the 2017 RHR Revisions, the EPA provided states the option of proposing to adjust the endpoint of the URP to account for impacts of anthropogenic sources outside the United States and/or impacts of certain types of wildland prescribed fires. These adjustments, which must be approved by the EPA, are intended to avoid any perception that states should compensate for impacts from international anthropogenic sources and to give states the flexibility to determine that limiting the use of wildland-prescribed fire is not necessary for reasonable progress. 82 FR 3107 footnote 116.

EPA's 2018 Visibility Tracking Guidance can be used to help satisfy the 40 CFR 51.308(f)(1) requirements, including in developing information on baseline, current, and natural visibility conditions, and in making optional adjustments to the URP. In addition, the 2020 Data Completeness Memo provides recommendations on the data completeness language referenced in § 51.308(f)(1)(i) and provides updated natural conditions estimates for each Class I area.

C. Long-Term Strategy for Regional Haze

The core component of a regional haze SIP submission is a long-term strategy that addresses regional haze in each Class I area within a state's borders and each Class I area that may be affected by emissions from the state. The long-term strategy ''must include the enforceable emissions limitations, compliance schedules, and other

[16] The 2018 Visibility Tracking Guidance references and relies on parts of the 2003 Tracking Guidance: ''Guidance for Tracking Progress Under the Regional Haze Rule,'' which can be found at *https://www3.epa.gov/ttnamti1/files/ambient/visible/tracking.pdf.*

[17] This notice also refers to the 20% clearest and 20% most anthropogenically impaired days as the ''clearest'' and ''most impaired'' or ''most anthropogenically impaired'' days, respectively.

[18] The RHR at 40 CFR 51.308(f)(1)(ii) contains an error related to the requirement for calculating two sets of natural conditions values. The rule says ''most impaired days or the clearest days'' where it should say ''most impaired days and clearest days.'' This is an error that was intended to be corrected in the 2017 RHR Revisions but did not get corrected in the final rule language. This is supported by the preamble text at 82 FR 3098: ''In the final version of 40 CFR 51.308(f)(1)(ii), an occurrence of ''or'' has been corrected to ''and'' to indicate that natural visibility conditions for both the most impaired days and the clearest days must be based on available monitoring information.''

[19] Being on or below the URP is not a ''safe harbor''; *i.e.,* achieving the URP does not mean that a Class I area is making ''reasonable progress'' and does not relieve a state from using the four statutory factors to determine what level of control is needed to achieve such progress. *See, e.g.,* 82 FR at 3093.

measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv).'' 40 CFR 51.308(f)(2). The amount of progress that is ''reasonable progress'' is based on applying the four statutory factors in CAA section 169A(g)(1) in an evaluation of potential control options for sources of visibility impairing pollutants, which is referred to as a ''four-factor'' analysis. The outcome of that analysis is the emission reduction measures that a particular source or group of sources needs to implement in order to make reasonable progress towards the national visibility goal. See 40 CFR 51.308(f)(2)(i). Emission reduction measures that are necessary to make reasonable progress may be either new, additional control measures for a source, or they may be the existing emission reduction measures that a source is already implementing. See 2019 Guidance at 43; 2021 Clarifications Memo at 8–10. Such measures must be represented by ''enforceable emissions limitations, compliance schedules, and other measures'' (*i.e.,* any additional compliance tools) in a state's long-term strategy in its SIP. 40 CFR 51.308(f)(2).

Section 51.308(f)(2)(i) provides the requirements for the four-factor analysis. The first step of this analysis entails selecting the sources to be evaluated for emission reduction measures; to this end, the RHR requires states to consider ''major and minor stationary sources or groups of sources, mobile sources, and area sources'' of visibility impairing pollutants for potential four-factor control analysis. 40 CFR 51.308(f)(2)(i). A threshold question at this step is which visibility impairing pollutants will be analyzed. As EPA previously explained, consistent with the first implementation period, EPA generally expects that each state will analyze at least SO_2 and NO_X in selecting sources and determining control measures. See 2019 Guidance at 12, 2021 Clarifications Memo at 4. A state that chooses not to consider at least these two pollutants should demonstrate why such consideration would be unreasonable. 2021 Clarifications Memo at 4.

While states have the option to analyze *all* sources, the 2019 Guidance explains that ''an analysis of control measures is not required for every source in each implementation period,'' and that ''[s]electing a set of sources for analysis of control measures in each implementation period is . . . consistent with the Regional Haze Rule, which sets up an iterative planning process and anticipates that a state may not need to analyze control measures for all its sources in a given SIP revision.'' 2019 Guidance at 9. However, given that source selection is the basis of all subsequent control determinations, a reasonable source selection process ''should be designed and conducted to ensure that source selection results in a set of pollutants and sources the evaluation of which has the potential to meaningfully reduce their contributions to visibility impairment.'' 2021 Clarifications Memo at 3.

EPA explained in the 2021 Clarifications Memo that each state has an obligation to submit a long-term strategy that addresses the regional haze visibility impairment that results from emissions from within that state. Thus, source selection should focus on the in-state contribution to visibility impairment and be designed to capture a meaningful portion of the state's total contribution to visibility impairment in Class I areas. A state should not decline to select its largest in-state sources on the basis that there are even larger out-of-state contributors. 2021 Clarifications Memo at 4.[20]

Thus, while states have discretion to choose any source selection methodology that is reasonable, whatever choices they make should be reasonably explained. To this end, 40 CFR 51.308(f)(2)(i) requires that a state's SIP submission include ''a description of the criteria it used to determine which sources or groups of sources it evaluated.'' The technical basis for source selection, which may include methods for quantifying potential visibility impacts such as emissions divided by distance metrics, trajectory analyses, residence time analyses, and/or photochemical modeling, must also be appropriately documented, as required by 40 CFR 51.308(f)(2)(iii).

Once a state has selected the set of sources, the next step is to determine the emissions reduction measures for those sources that are necessary to make reasonable progress for the second implementation period.[21] This is accomplished by considering the four factors—''the costs of compliance, the time necessary for compliance, and the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements.'' CAA 169A(g)(1). The EPA has explained that the four-factor analysis is an assessment of potential emission reduction measures (*i.e.,* control options) for sources; ''use of the terms 'compliance' and 'subject to such requirements' in section 169A(g)(1) strongly indicates that Congress intended the relevant determination to be the requirements with which sources would have to comply in order to satisfy the CAA's reasonable progress mandate.'' 82 FR at 3091. Thus, for each source it has selected for four-factor analysis,[22] a state must consider a ''meaningful set'' of technically feasible control options for reducing emissions of visibility impairing pollutants. *Id.* at 3088. The 2019 Guidance provides that ''[a] state must reasonably pick and justify the measures that it will consider, recognizing that there is no statutory or regulatory requirement to consider all technically feasible measures or any particular measures. A range of technically feasible measures available to reduce emissions would be one way to justify a reasonable set.'' 2019 Guidance at 29.

EPA's 2021 Clarifications Memo provides further guidance on what constitutes a reasonable set of control options for consideration: ''A reasonable four-factor analysis will consider the full range of potentially reasonable options for reducing emissions.'' 2021 Clarifications Memo at 7. In addition to add-on controls and other retrofits (*i.e.,* new emission reduction measures for sources), EPA explained that states should generally analyze efficiency improvements for sources' existing measures as control options in their four-factor analyses, as in many cases

[20] Similarly, in responding to comments on the 2017 RHR Revisions EPA explained that ''[a] state should not fail to address its many relatively low-impact sources merely because it only has such sources and another state has even more low-impact sources and/or some high impact sources.'' Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule (81 FR 26942, May 4, 2016) at 87–88.

[21] The CAA provides that, ''[i]n determining reasonable progress there shall be taken into consideration'' the four statutory factors. CAA 169A(g)(1). However, in addition to four-factor analyses for selected sources, groups of sources, or source categories, a state may also consider additional emission reduction measures for inclusion in its long-term strategy, *e.g.,* from other newly adopted, on-the-books, or on-the-way rules and measures for sources not selected for four-factor analysis for the second planning period.

[22] ''Each source'' or ''particular source'' is used here as shorthand. While a source-specific analysis is one way of applying the four factors, neither the statute nor the RHR requires states to evaluate individual sources. Rather, states have ''the flexibility to conduct four-factor analyses for specific sources, groups of sources or even entire source categories, depending on state policy preferences and the specific circumstances of each state.'' 82 FR at 3088. However, not all approaches to grouping sources for four-factor analysis are necessarily reasonable; the reasonableness of grouping sources in any particular instance will depend on the circumstances and the manner in which grouping is conducted. If it is feasible to establish and enforce different requirements for sources or subgroups of sources, and if relevant factors can be quantified for those sources or subgroups, then states should make a separate reasonable progress determination for each source or subgroup. 2021 Clarifications Memo at 7–8.

such improvements are reasonable given that they typically involve only additional operation and maintenance costs. Additionally, the 2021 Clarifications Memo provides that states that have assumed a higher emission rate than a source has achieved or could potentially achieve using its existing measures should also consider lower emission rates as potential control options. That is, a state should consider a source's recent actual and projected emission rates to determine if it could reasonably attain lower emission rates with its existing measures. If so, the state should analyze the lower emission rate as a control option for reducing emissions. 2021 Clarifications Memo at 7. The EPA's recommendations to analyze potential efficiency improvements and achievable lower emission rates apply to both sources that have been selected for four-factor analysis and those that have forgone a four-factor analysis on the basis of existing ''effective controls.'' See 2021 Clarifications Memo at 5, 10.

After identifying a reasonable set of potential control options for the sources it has selected, a state then collects information on the four factors with regard to each option identified. The EPA has also explained that, in addition to the four statutory factors, states have flexibility under the CAA and RHR to reasonably consider visibility benefits as an additional factor alongside the four statutory factors.[23] The 2019 Guidance provides recommendations for the types of information that can be used to characterize the four factors (with or without visibility), as well as ways in which states might reasonably consider and balance that information to determine which of the potential control options is necessary to make reasonable progress. See 2019 Guidance at 30–36. The 2021 Clarifications Memo contains further guidance on how states can reasonably consider modeled visibility impacts or benefits in the context of a four-factor analysis. 2021 Clarifications Memo at 12–13, 14–15. Specifically, EPA explained that while visibility can reasonably be used when comparing and choosing between multiple reasonable control options, it should not be used to summarily reject controls that are reasonable given the four statutory factors. 2021 Clarifications Memo at 13. Ultimately, while states have discretion to reasonably weigh the factors and to determine what level of control is needed, § 51.308(f)(2)(i) provides that a state ''must include in its implementation plan a description of . . . how the four factors were taken into consideration in selecting the measure for inclusion in its long-term strategy.''

As explained above, § 51.308(f)(2)(i) requires states to determine the emission reduction measures for sources that are necessary to make reasonable progress by considering the four factors. Pursuant to § 51.308(f)(2), measures that are necessary to make reasonable progress towards the national visibility goal must be included in a state's long-term strategy and in its SIP.[24] If the outcome of a four-factor analysis is a new, additional emission reduction measure for a source, that new measure is necessary to make reasonable progress towards remedying existing anthropogenic visibility impairment and must be included in the SIP. If the outcome of a four-factor analysis is that no new measures are reasonable for a source, continued implementation of the source's existing measures is generally necessary to prevent future emission increases and thus to make reasonable progress towards the second part of the national visibility goal: preventing future anthropogenic visibility impairment. See CAA 169A(a)(1). That is, when the result of a four-factor analysis is that no new measures are necessary to make reasonable progress, the source's existing measures are generally necessary to make reasonable progress and must be included in the SIP. However, there may be circumstances in which a state can demonstrate that a source's existing measures are *not* necessary to make reasonable progress. Specifically, if a state can demonstrate that a source will continue to implement its existing measures and will not increase its emission rate, it may not be necessary to have those measures in the long-term strategy in order to prevent future emission increases and future visibility impairment. EPA's 2021 Clarifications Memo provides further explanation and guidance on how states may demonstrate that a source's existing measures are not necessary to make reasonable progress. See 2021 Clarifications Memo at 8–10. If the state can make such a demonstration, it need not include a source's existing measures in the long-term strategy or its SIP.

As with source selection, the characterization of information on each of the factors is also subject to the documentation requirement in § 51.308(f)(2)(iii). The reasonable progress analysis, including source selection, information gathering, characterization of the four statutory factors (and potentially visibility), balancing of the four factors, and selection of the emission reduction measures that represent reasonable progress, is a technically complex exercise, but also a flexible one that provides states with bounded discretion to design and implement approaches appropriate to their circumstances. Given this flexibility, § 51.308(f)(2)(iii) plays an important function in requiring a state to document the technical basis for its decision making so that the public and the EPA can comprehend and evaluate the information and analysis the state relied upon to determine what emission reduction measures must be in place to make reasonable progress. The technical documentation must include the modeling, monitoring, cost, engineering, and emissions information on which the state relied to determine the measures necessary to make reasonable progress. This documentation requirement can be met through the provision of and reliance on technical analyses developed through a regional planning process, so long as that process and its output has been approved by all state participants. In addition to the explicit regulatory requirement to document the technical basis of their reasonable progress determinations, states are also subject to the general principle that those determinations must be reasonably moored to the statute.[25] That is, a state's decisions about the emission reduction measures that are necessary to make reasonable progress must be consistent with the statutory goal of remedying existing and preventing future visibility impairment.

The four statutory factors (and potentially visibility) are used to determine what emission reduction

[23] See, *e.g.,* Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule (81 FR 26942, May 4, 2016), Docket Number EPA–HQ–OAR–2015–0531, U.S. Environmental Protection Agency at 186; 2019 Guidance at 36–37.

[24] States may choose to, but are not required to, include measures in their long-term strategies beyond just the emission reduction measures that are necessary for reasonable progress. See 2021 Clarifications Memo at 16. For example, states with smoke management programs may choose to submit their smoke management plans to EPA for inclusion in their SIPs but are not required to do so. See, *e.g.,* 82 FR at 3108–09 (requirement to consider smoke management practices and smoke management programs under 40 CFR 51.308(f)(2)(iv) does not require states to adopt such practices or programs into their SIPs, although they may elect to do so).

[25] *See Arizona ex rel. Darwin* v. *U.S. EPA,* 815 F.3d 519, 531 (9th Cir. 2016); *Nebraska* v. *U.S. EPA,* 812 F.3d 662, 668 (8th Cir. 2016); *North Dakota* v. *EPA,* 730 F.3d 750, 761 (8th Cir. 2013); *Oklahoma* v. *EPA,* 723 F.3d 1201, 1206, 1208–10 (10th Cir. 2013); *cf. also Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 485, 490 (2004); *Nat'l Parks Conservation Ass'n* v. *EPA,* 803 F.3d 151, 165 (3d Cir. 2015).

measures for selected sources must be included in a state's long-term strategy for making reasonable progress. Additionally, the RHR at 40 CFR 51.3108(f)(2)(iv) separately provides five ''additional factors'' [26] that states must consider in developing their long-term strategies: (1) Emission reductions due to ongoing air pollution control programs, including measures to address reasonably attributable visibility impairment; (2) measures to reduce the impacts of construction activities; (3) source retirement and replacement schedules; (4) basic smoke management practices for prescribed fire used for agricultural and wildland vegetation management purposes and smoke management programs; and (5) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy. The 2019 Guidance provides that a state may satisfy this requirement by considering these additional factors in the process of selecting sources for four-factor analysis, when performing that analysis, or both, and that not every one of the additional factors needs to be considered at the same stage of the process. See 2019 Guidance at 21. EPA provided further guidance on the five additional factors in the 2021 Clarifications Memo, explaining that a state should generally not reject cost-effective and otherwise reasonable controls merely because there have been emission reductions since the first planning period owing to other ongoing air pollution control programs or merely because visibility is otherwise projected to improve at Class I areas. Additionally, states generally should not rely on these additional factors to summarily assert that the state has already made sufficient progress and, therefore, no sources need to be selected or no new controls are needed regardless of the outcome of four-factor analyses. 2021 Clarifications Memo at 13.

Because the air pollution that causes regional haze crosses state boundaries, § 51.308(f)(2)(ii) requires a state to consult with other states that also have emissions that are reasonably anticipated to contribute to visibility impairment in a given Class I area. Consultation allows for each state that impacts visibility in an area to share whatever technical information, analyses, and control determinations may be necessary to develop coordinated emission management strategies. This coordination may be managed through inter- and intra-RPO consultation and the development of regional emissions strategies; additional consultations between states outside of RPO processes may also occur. If a state, pursuant to consultation, agrees that certain measures (*e.g.,* a certain emission limitation) are necessary to make reasonable progress at a Class I area, it must include those measures in its SIP. 40 CFR 51.308(f)(2)(ii)(A). Additionally, the RHR requires that states that contribute to visibility impairment at the same Class I area consider the emission reduction measures the other contributing states have identified as being necessary to make reasonable progress for their own sources. 40 CFR 51.308(f)(2)(ii)(B). If a state has been asked to consider or adopt certain emission reduction measures, but ultimately determines those measures are not necessary to make reasonable progress, that state must document in its SIP the actions taken to resolve the disagreement. 40 CFR 51.308(f)(2)(ii)(C). The EPA will consider the technical information and explanations presented by the submitting state and the state with which it disagrees when considering whether to approve the state's SIP. See *id.;* 2019 Guidance at 53. Under all circumstances, a state must document in its SIP submission all substantive consultations with other contributing states. 40 CFR 51.308(f)(2)(ii)(C).

D. Reasonable Progress Goals

Reasonable progress goals ''measure the progress that is projected to be achieved by the control measures states have determined are necessary to make reasonable progress based on a four-factor analysis.'' 82 FR at 3091. Their primary purpose is to assist the public and the EPA in assessing the reasonableness of states' long-term strategies for making reasonable progress towards the national visibility goal. See 40 CFR 51.308(f)(3)(iii)-(iv). States in which Class I areas are located must establish two RPGs, both in deciviews—one representing visibility conditions on the clearest days and one representing visibility on the most anthropogenically impaired days—for each area within their borders. 40 CFR 51.308(f)(3)(i). The two RPGs are intended to reflect the projected impacts, on the two sets of days, of the emission reduction measures the state with the Class I area, as well as all other contributing states, have included in their long-term strategies for the second implementation period.[27] The RPGs also account for the projected impacts of implementing other CAA requirements, including non-SIP based requirements. Because RPGs are the modeled result of the measures in states' long-term strategies (as well as other measures required under the CAA), they cannot be determined before states have conducted their four-factor analyses and determined the control measures that are necessary to make reasonable progress. See 2021 Clarifications Memo at 6.

For the second implementation period, the RPGs are set for 2028. Reasonable progress goals are not enforceable targets, 40 CFR 51.308(f)(3)(iii); rather, they ''provide a way for the states to check the projected outcome of the [long-term strategy] against the goals for visibility improvement.'' 2019 Guidance at 46. While states are not legally obligated to achieve the visibility conditions described in their RPGs, § 51.308(f)(3)(i) requires that ''[t]he long-term strategy and the reasonable progress goals must provide for an improvement in visibility for the most impaired days since the baseline period and ensure no degradation in visibility for the clearest days since the baseline period.'' Thus, states are required to have emission reduction measures in their long-term strategies that are projected to achieve visibility conditions on the most impaired days that are better than the baseline period and show no degradation on the clearest days compared to the clearest days from the baseline period. The baseline period for the purpose of this comparison is the baseline visibility condition—the annual average visibility condition for the period 2000–2004. See 40 CFR 51.308(f)(1)(i), 82 FR at 3097–98.

So that RPGs may also serve as a metric for assessing the amount of progress a state is making towards the national visibility goal, the RHR requires states with Class I areas to compare the 2028 RPG for the most impaired days to the corresponding point on the URP line (representing visibility conditions in 2028 if visibility

[26] The five ''additional factors'' for consideration in section 51.308(f)(2)(iv) are distinct from the four factors listed in CAA section 169A(g)(1) and 40 CFR 51.308(f)(2)(i) that states must consider and apply to sources in determining reasonable progress.

[27] RPGs are intended to reflect the projected impacts of the measures all contributing states include in their long-term strategies. However, due to the timing of analyses and of control determinations by other states, other on-going emissions changes, a particular state's RPGs may not reflect all control measures and emissions reductions that are expected to occur by the end of the implementation period. The 2019 Guidance provides recommendations for addressing the timing of RPG calculations when states are developing their long-term strategies on disparate schedules, as well as for adjusting RPGs using a post-modeling approach. 2019 Guidance at 47–48.

were to improve at a linear rate from conditions in the baseline period of 2000–2004 to natural visibility conditions in 2064). If the most impaired days RPG in 2028 is above the URP (*i.e.,* if visibility conditions are improving more slowly than the rate described by the URP), each state that contributes to visibility impairment in the Class I area must demonstrate, based on the four-factor analysis required under 40 CFR 51.308(f)(2)(i), that no additional emission reduction measures would be reasonable to include in its long-term strategy. 40 CFR 51.308(f)(3)(ii). To this end, 40 CFR 51.308(f)(3)(ii) requires that each state contributing to visibility impairment in a Class I area that is projected to improve more slowly than the URP provide ''a robust demonstration, including documenting the criteria used to determine which sources or groups [of] sources were evaluated and how the four factors required by paragraph (f)(2)(i) were taken into consideration in selecting the measures for inclusion in its long-term strategy.'' The 2019 Guidance provides suggestions about how such a ''robust demonstration'' might be conducted. See 2019 Guidance at 50–51.

The 2017 RHR, 2019 Guidance, and 2021 Clarifications Memo also explain that projecting an RPG that is on or below the URP based on only on-the-books and/or on-the-way control measures (*i.e.,* control measures already required or anticipated before the four-factor analysis is conducted) is not a ''safe harbor'' from the CAA's and RHR's requirement that all states must conduct a four-factor analysis to determine what emission reduction measures constitute reasonable progress. The URP is a planning metric used to gauge the amount of progress made thus far and the amount left before reaching natural visibility conditions. However, the URP is not based on consideration of the four statutory factors and therefore cannot answer the question of whether the amount of progress being made in any particular implementation period is ''reasonable progress.'' See 82 FR at 3093, 3099–3100; 2019 Guidance at 22; 2021 Clarifications Memo at 15–16.

E. Monitoring Strategy and Other State Implementation Plan Requirements

Section 51.308(f)(6) requires states to have certain strategies and elements in place for assessing and reporting on visibility. Individual requirements under this subsection apply either to states with Class I areas within their borders, states with no Class I areas but that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area, or both. A state with Class I areas within its borders must submit with its SIP revision a monitoring strategy for measuring, characterizing, and reporting regional haze visibility impairment that is representative of all Class I areas within the state. SIP revisions for such states must also provide for the establishment of any additional monitoring sites or equipment needed to assess visibility conditions in Class I areas, as well as reporting of all visibility monitoring data to the EPA at least annually. Compliance with the monitoring strategy requirement may be met through a state's participation in the Interagency Monitoring of Protected Visual Environments (IMPROVE) monitoring network, which is used to measure visibility impairment caused by air pollution at the 156 Class I areas covered by the visibility program. 40 CFR 51.308(f)(6), (f)(6)(i), (f)(6)(iv). The IMPROVE monitoring data is used to determine the 20% most anthropogenically impaired and 20% clearest sets of days every year at each Class I area and tracks visibility impairment over time.

All states' SIPs must provide for procedures by which monitoring data and other information are used to determine the contribution of emissions from within the state to regional haze visibility impairment in affected Class I areas. 40 CFR 51.308(f)(6)(ii), (iii). Section 51.308(f)(6)(v) further requires that all states' SIPs provide for a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area; the inventory must include emissions for the most recent year for which data are available and estimates of future projected emissions. States must also include commitments to update their inventories periodically. The inventories themselves do not need to be included as elements in the SIP and are not subject to EPA review as part of the Agency's evaluation of a SIP revision.[28] All states' SIPs must also provide for any other elements, including reporting, recordkeeping, and other measures, that are necessary for states to assess and report on visibility. 40 CFR 51.308(f)(6)(vi). Per the 2019 Guidance, a state may note in its regional haze SIP that its compliance with the Air Emissions Reporting Rule (AERR) in 40 CFR part 51 Subpart A satisfies the requirement to provide for an emissions inventory for the most recent year for which data are available. To satisfy the requirement to provide estimates of future projected emissions, a state may explain in its SIP how projected emissions were developed for use in establishing RPGs for its own and nearby Class I areas.[29]

Separate from the requirements related to monitoring for regional haze purposes under 40 CFR 51.308(f)(6), the RHR also contains a requirement at § 51.308(f)(4) related to any additional monitoring that may be needed to address visibility impairment in Class I areas from a single source or a small group of sources. This is called ''reasonably attributable visibility impairment.'' [30] Under this provision, if the EPA or the FLM of an affected Class I area has advised a state that additional monitoring is needed to assess reasonably attributable visibility impairment, the state must include in its SIP revision for the second implementation period an appropriate strategy for evaluating such impairment.

F. Requirements for Periodic Reports Describing Progress Towards the Reasonable Progress Goals

Section 51.308(f)(5) requires a state's regional haze SIP revision to address the requirements of paragraphs 40 CFR 51.308(g)(1) through (5) so that the plan revision due in 2021 will serve also as a progress report addressing the period since submission of the progress report for the first implementation period. The regional haze progress report requirement is designed to inform the public and the EPA about a state's implementation of its existing long-term strategy and whether such implementation is in fact resulting in the expected visibility improvement. See 81 FR 26942, 26950 (May 4, 2016), (82 FR at 3119, January 10, 2017). To this end, every state's SIP revision for the second implementation period is required to describe the status of implementation of all measures included in the state's long-term strategy, including BART and reasonable progress emission reduction measures from the first implementation period, and the resulting emissions reductions. 40 CFR 51.308(g)(1) and (2).

A core component of the progress report requirements is an assessment of changes in visibility conditions on the clearest and most impaired days. For second implementation period progress reports, § 51.308(g)(3) requires states

[28] See ''Step 8: Additional requirements for regional haze SIPs'' in 2019 Regional Haze Guidance at 55.

[29] *Id.*

[30] EPA's visibility protection regulations define ''reasonably attributable visibility impairment'' as ''visibility impairment that is caused by the emission of air pollutants from one, or a small number of sources.'' 40 CFR 51.301.

with Class I areas within their borders to first determine current visibility conditions for each area on the most impaired and clearest days, 40 CFR 51.308(g)(3)(i)(B), and then to calculate the difference between those current conditions and baseline (2000–2004) visibility conditions in order to assess progress made to date. See 40 CFR 51.308(g)(3)(ii)(B). States must also assess the changes in visibility impairment for the most impaired and clearest days since they submitted their first implementation period progress reports. See 40 CFR 51.308(g)(3)(iii)(B), (f)(5). Since different states submitted their first implementation period progress reports at different times, the starting point for this assessment will vary state by state.

Similarly, states must provide analyses tracking the change in emissions of pollutants contributing to visibility impairment from all sources and activities within the state over the period since they submitted their first implementation period progress reports. See 40 CFR 51.308(g)(4), (f)(5). Changes in emissions should be identified by the type of source or activity. Section 51.308(g)(5) also addresses changes in emissions since the period addressed by the previous progress report and requires states' SIP revisions to include an assessment of any significant changes in anthropogenic emissions within or outside the state. This assessment must include an explanation of whether these changes in emissions were anticipated and whether they have limited or impeded progress in reducing emissions and improving visibility relative to what the state projected based on its long-term strategy for the first implementation period.

G. Requirements for State and Federal Land Manager Coordination

Clean Air Act section 169A(d) requires that before a state holds a public hearing on a proposed regional haze SIP revision, it must consult with the appropriate FLM or FLMs; pursuant to that consultation, the state must include a summary of the FLMs' conclusions and recommendations in the notice to the public. Consistent with this statutory requirement, the RHR also requires that states ''provide the [FLM] with an opportunity for consultation, in person and at a point early enough in the State's policy analyses of its long-term strategy emission reduction obligation so that information and recommendations provided by the [FLM] can meaningfully inform the State's decisions on the long-term strategy.'' 40 CFR 51.308(i)(2). Consultation that occurs 120 days prior to any public hearing or public comment opportunity will be deemed ''early enough,'' but the RHR provides that in any event the opportunity for consultation must be provided at least 60 days before a public hearing or comment opportunity. This consultation must include the opportunity for the FLMs to discuss their assessment of visibility impairment in any Class I area and their recommendations on the development and implementation of strategies to address such impairment. 40 CFR 51.308(i)(2). In order for the EPA to evaluate whether FLM consultation meeting the requirements of the RHR has occurred, the SIP submission should include documentation of the timing and content of such consultation. The SIP revision submitted to the EPA must also describe how the state addressed any comments provided by the FLMs. 40 CFR 51.308(i)(3). Finally, a SIP revision must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas. 40 CFR 51.308(i)(4).

IV. The EPA's Evaluation of Massachusetts' Regional Haze Submission for the Second Implementation Period

A. Background on Massachusetts' First Implementation Period SIP Submission

MassDEP submitted its regional haze SIP for the first implementation period to the EPA on July 28, 2009, and supplemented it on December 9, 2010, March 2, 2011, and December 7, 2011. The EPA approved Massachusetts' first implementation period regional haze SIP submission on September 19, 2013 (78 FR 57487). EPA's approval included, but was not limited to, the portions of the plan that address the reasonable progress requirements, Massachusetts' implementation of Best Available Retrofit Technologies on eligible sources, and Massachusetts' 310 CMR 7.05 ''Fuels All Districts;'' Sulfur in Fuels rule. The requirements for regional haze SIPs for the first implementation period are contained in 40 CFR 51.308(d) and (e). 40 CFR 51.308(b). Pursuant to 40 CFR 51.308(g), Massachusetts was also responsible for submitting a five-year progress report as a SIP revision for the first implementation period, which it did on February 9, 2018. The EPA approved the progress report into the Massachusetts SIP on March 29, 2019 (84 FR 11885).

B. Massachusetts' Second Implementation Period SIP Submission and the EPA's Evaluation

In accordance with CAA sections 169A and the RHR at 40 CFR 51.308(f), on July 22, 2021,[31] Massachusetts submitted a revision to the Massachusetts SIP to address its regional haze obligations for the second implementation period, which runs through 2028. Massachusetts made a draft Regional Haze SIP submission available for public comment on April 7, 2021. Massachusetts has included the public comments and its responses to those comments in the submission.

The following sections describe Massachusetts' SIP submission, including analyses conducted by MANE–VU and Massachusetts' determinations based on those analyses, Massachusetts' assessment of progress made since the first implementation period in reducing emissions of visibility impairing pollutants, and the visibility improvement progress at nearby Class I areas. This notice also contains EPA's evaluation of Massachusetts' submission against the requirements of the CAA and RHR for the second implementation period of the regional haze program.

C. Identification of Class I Areas

Section 169A(b)(2) of the CAA requires each state in which any Class I area is located or ''the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility'' in a Class I area to have a plan for making reasonable progress toward the national visibility goal. The RHR implements this statutory requirement at 40 CFR 51.308(f), which provides that each state's plan ''must address regional haze in each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State that may be affected by emissions from within the State,'' and (f)(2), which requires each state's plan to include a long-term strategy that addresses regional haze in such Class I areas. Massachusetts has no mandatory Class I Federal area within its borders.

For the second implementation period, MANE–VU performed technical analyses [32] to help assess source and state-level contributions to visibility impairment and the need for interstate consultation. MANE–VU used the

[31] Massachusetts supplemented its SIP submission on June 15, 2022.

[32] The contribution assessment methodologies for MANE–VU Class I areas are summarized in MA RH SIP Appendix 16 of the docket. ''Selection of States for MANE–VU Regional Haze Consultation (2018),'' MANE–VU TSC. September 5, 2017.

results of these analyses to determine which states' emissions ''have a high likelihood of affecting visibility in MANE–VU's Class I areas.'' [33] Similar to metrics used in the first implementation period,[34] MANE–VU used a greater than 2 percent of sulfate plus nitrate emissions contribution criteria to determine whether emissions from individual jurisdictions within the region affected visibility in any Class I areas. The MANE–VU analyses for the second implementation period used a combination of data analysis techniques, including emissions data, distance from Class I areas, wind trajectories, and CALPUFF dispersion modeling. Although many of the analyses focused only on SO_2 emissions and resultant particulate sulfate contributions to visibility impairment, some also incorporated NO_X emissions to estimate particulate nitrate contributions.

One MANE–VU analysis used for contribution assessment was CALPUFF air dispersion modeling. The CALPUFF model was used to estimate sulfate and nitrate formation and transport in MANE–VU and nearby regions originating from large electric generating unit (EGU) point sources and other large industrial and institutional sources in the eastern and central United States. Information from an initial round of CALPUFF modeling was collated for the 444 EGUs that were determined to warrant further scrutiny based on their emissions of SO_2 and NO_X. The list of EGUs was based on an enhanced ''Q/d'' analysis [35] that considered recent SO_2 emissions in the eastern United States and an analysis that adjusted previous 2002 MANE–VU CALPUFF modeling by applying a ratio of 2011 to 2002 SO_2 emissions. This list of sources was then enhanced by including the top five SO_2 and NO_X emission sources for 2011 for each state included in the modeling domain. A total of 311 EGU stacks (as opposed to individual units) were included in the CALPUFF modeling analysis. Initial information was also collected on the 50 industrial and institutional sources that, according to 2011 Q/d analysis, contributed the most to visibility impact in each Class I area. The ultimate CALPUFF modeling run included a total of 311 EGU stacks and 82 industrial facilities. The summary report for the CALPUFF modeling included the top 10 most impacting EGUs and the top 5 most impacting industrial/institutional sources for each Class I area and compiled those results into a ranked list of the most impacting EGUs and industrial sources at MANE–VU Class I areas.[36] Overall, MANE–VU found that emission sources located close to Class I areas typically show higher visibility impacts than similarly sized facilities further away. But visibility degradation appears to be dominated by the more distant emission sources due to their larger emissions. Massachusetts had five EGUs and one industrial source that were identified in the MANE–VU CALPUFF modeling as having a magnitude of emissions located close enough to a Class I area that they could have the potential for visibility impacts.[37]

Of the six sources, four were units at Brayton Point Power Station, a coal-fired EGU facility (ORISPL 01619; MassDEP AQID 1200061). All four units at Brayton Point ceased operation in 2017 and the permits were revoked on December 6, 2017.

Canal Station (ORISPL 1599; MassDEP AQID 1200054) operates the other EGU (Unit 1) identified by the modelling, and its greatest impact was to Acadia. Unit 1 is a Babcock & Wilcox boiler that fires No. 6 fuel oil, with a permitted maximum sulfur content of 0.5 percent by weight (wt%) as the sole operational fuel, with No. 2 fuel oil as a startup/ignition fuel. Unit 1 has an approximate maximum heat input rate of 5,083 million British thermal units per hour (MMBtu/hr) and a generating capacity of approximately 560 (net) megawatts (MW). Unit 1 is equipped with low-NO_X burners, overfire air ports, flue gas recirculation (FGR), and Selective Catalytic Reduction (SCR) for the control of NO_X emissions. PM emissions are controlled by an Electrostatic Precipitator (ESP).

The emission controls installed on Unit 1 are necessary to achieve compliance with the applicable emission limits under 310 CMR 7.29 and Air Plan Approvals (*i.e.,* state air permits) issued pursuant to 310 CMR 7.02

Massachusetts concludes that visibility impairing pollutants from Canal Unit 1 are currently well controlled; however, Canal has committed to purchasing 0.3 wt% No. 6 fuel oil following the depletion of the current fuel inventory. Therefore, Massachusetts asked the owner of Canal Unit 1 to submit an application to modify its plan approval to require use of 0.3% sulfur content oil. Massachusetts approved the plan application May 26, 2022, and submitted the plan approval to EPA for approval into the SIP as a supplement to the Regional Haze SIP Revision for Massachusetts on June 15, 2022. If Canal Unit 1 should operate above 10% capacity factor in the future, existing NO_X RACT regulations (310 CMR 7.19) will further limit the NO_X emissions. From 2013 through 2022, Canal Unit one capacity had a weighted average of 2% capacity per year, with a low of 0.1% to a high of 7% capacity utilization by year and emitted an average of 42 tons of NO_X per year, ranging from a low of 2 tons to a high of 201 tons per year. Massachusetts will evaluate any changes in the operation of Canal Unit 1 in the next progress report.

The only Massachusetts industrial source deemed by MANE–VU to have the potential for significant impact on Class I areas in 2011 was Solutia, Inc., which at the time was a coal- and oil-fired chemical plant. Solutia's greatest impact was to Lye Brook, and it ranked 14th in the list of industrial/institutional sources that had potential impacts on Lye Brook, based primarily on its SO_2 emissions. MANE–VU estimated maximum extinction for Solutia at Lye Brook to be less than 1 Mm-1. As reflected in the current Title V permit for the facility (Permit Transmittal No.: X229245), Solutia has since repowered from coal/oil to natural gas and is therefore no longer a significant source of SO_2.

As explained above, the EPA concluded in the 1999 RHR that ''all [s]tates contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area,'' 64 FR at 35721, and this determination was not changed in the 2017 RHR. Critically, the statute and regulation both require that the cause-or-contribute assessment consider all emissions of visibility-impairing pollutants from a state, as opposed to emissions of a particular pollutant or emissions from a certain set of sources. Consistent with these requirements, the 2019 Guidance makes it clear that ''all types of anthropogenic sources are to be included in the determination'' of whether a state's emissions are reasonably anticipated to result in any visibility impairment. 2019 Guidance at 8.

[33] *Id.*

[34] See docket EPA–R01–OAR–2012–0025 for MANE–VU supporting materials.

[35] ''Q/d'' is emissions (Q) in tons per year, typically of one or a combination of visibility-impairing pollutants, divided by distance to a class I area (d) in kilometers. The resulting ratio is commonly used as a metric to assess a source's potential visibility impacts on a particular class I area.

[36] See appendix 8 ''2016 MANE–VU Source Contribution Modeling Report—CALPUFF Modeling of Large Electrical Generating Units and Industrial Sources.'' MANE–VU TSC. April 4, 2017.

[37] See Section 5.4, page 68, Massachusetts Regional Haze SIP Revision for 2018–2028 in the docket.

The screening analyses on which MANE–VU relied are useful for certain purposes. MANE–VU used information from its technical analysis to rank the largest contributing states to sulfate and nitrate impairment in the seven MANE–VU Class I areas and three additional, nearby Class I areas.[38] The rankings were used to determine upwind states that were deemed important to include in state-to-state consultation (based on an identified impact screening threshold). Additionally, large individual source impacts were used to target MANE–VU control analysis ''Asks'' [39] of states and sources both within and upwind of MANE–VU.[40] The EPA finds the nature of the analyses generally appropriate to support decisions on states with which to consult. However, we have cautioned that source selection methodologies that target the largest regional contributors to visibility impairment across multiple states may not be reasonable for a particular state if it results in few or no sources being selected for subsequent analysis. 2021 Clarifications Memo at 3.

With regard to the analysis and determinations regarding Massachusetts' contribution to visibility impairment at out-of-state Class I areas, the MANE–VU technical work focuses on the magnitude of visibility impacts from certain Massachusetts emissions on other nearby Class I areas. However, the analyses did not account for all emissions and all components of visibility impairment (*e.g.,* primary PM emissions, and impairment from fine PM, elemental carbon, and organic carbon). In addition, Q/d analyses with a relatively simplistic accounting for wind trajectories and CALPUFF applied to a very limited set of EGUs and major industrial sources of SO_2 and NO_X are not scientifically rigorous tools capable of evaluating contribution to visibility impairment from all emissions in a state. The EPA agrees that the contribution to visibility impairment from Massachusetts' emissions at nearby out-of-state Class I areas is smaller than that from numerous other MANE–VU states.[41] While some MANE–VU states noted that the contributions from several states outside the MANE–VU region are significantly larger than its own, we again clarify that each state is obligated under the CAA and RHR to address regional haze visibility impairment resulting from emissions from within the state, irrespective of whether another state's contribution is greater. See 2021 Clarifications Memo at 3. Additionally, we note that the 2 percent or greater sulfate-plus-nitrate threshold used to determine whether Massachusetts emissions contribute to visibility impairment at a particular Class I area may be higher than what EPA believes is an ''extremely low triggering threshold'' intended by the statute and regulations. In sum, based on the information provided, EPA generally agrees with the State's conclusions that emissions from Massachusetts contribute to visibility impairment in the Class I areas in Maine and New Brunswick and have relatively small contributions to the other nearby Class I areas. However, due to the low triggering threshold implied by the Rule and the lack of rigorous modeling analyses, we do not necessarily agree with the level of the State's 2% contribution threshold.

Regardless, Massachusetts did determine that sources and emissions within the state contribute to visibility impairment at Class I areas in Maine and New Brunswick. Furthermore, the state took part in the emission control strategy consultation process as a member of MANE–VU. As part of that process, MANE–VU developed a set of emissions reduction measures identified as being necessary to make reasonable progress in the seven MANE–VU Class I areas. This strategy consists of six Asks for states within MANE–VU and five Asks for states outside the region that were found to impact visibility at Class I areas within MANE–VU.[42] Massachusetts' submission discusses each of the Asks and explains why or why not each is applicable and how it has complied with the relevant components of the emissions control strategy the MANE–VU states laid out. Massachusetts worked with MANE–VU to determine potential reasonable measures that could be implemented by 2028, considering the cost of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts, and the remaining useful life of any potentially affected sources. As discussed in further detail below, the EPA is proposing to find that Massachusetts has submitted a regional haze plan that meets the requirements of 40 CFR 51.308(f)(2) related to the development of a long-term strategy. Thus, we propose to find that Massachusetts has nevertheless satisfied the applicable requirements for making reasonable progress towards natural visibility conditions in Class I areas that may be affected by emissions from the state.

D. Calculations of Baseline, Current, and Natural Visibility Conditions; Progress to Date; and the Uniform Rate of Progress

Section 51.308(f)(1) requires states to determine the following for ''each mandatory Class I Federal area located within the State'': baseline visibility conditions for the most impaired and clearest days, natural visibility conditions for the most impaired and clearest days, progress to date for the most impaired and clearest days, the differences between current visibility conditions and natural visibility conditions, and the URP. This section also provides the option for states to propose adjustments to the URP line for a Class I area to account for visibility impacts from anthropogenic sources outside the United States and/or the impacts from wildland prescribed fires that were conducted for certain, specified objectives. 40 CFR 51.308(f)(1)(vi)(B).

Although Massachusetts has no Class I areas, emissions from Massachusetts sources contribute to visibility impairment in MANE–VU Class I areas. MANE–VU Class I areas as well as other nearby Class I areas that MANE–VU examined, are listed below. MANE–VU used certain areas (as noted below) to represent nearby Class I areas where monitors do not exist.[43]

The MANE–VU Class I Areas are Lye Brook Wilderness Area (Vermont), Great Gulf Wilderness Area (New Hampshire) (used to represent Presidential Range—Dry River Wilderness Area), Presidential Range—Dry River Wilderness Area (New Hampshire), Acadia National Park (Maine), Moosehorn Wildlife Refuge (Maine) (used to represent Roosevelt

[38] The Class I areas analyzed were Acadia National Park in Maine, Brigantine Wilderness in New Jersey, Great Gulf Wilderness and Presidential Range—Dry River Wilderness in New Hampshire, Lye Brook Wilderness in Vermont, Moosehorn Wilderness in Maine, Roosevelt Campobello International Park in New Brunswick, Shenandoah National Park in Virginia, James River Face Wilderness in Virginia, and Dolly Sods/Otter Creek Wildernesses in West Virginia.

[39] As explained more fully in Section IV.E.a, MANE–VU refers to each of the components of its overall strategy as an ''Ask ''of its member states.

[40] The MANE–VU consultation report (Appendix 20) explains that ''[t]he objective of this technical work was to identify states and sources from which MANE–VU will pursue further analysis. This screening was intended to identify which states to invite to consultation, not a definitive list of which states are contributing.''

[41] Because MANE–VU did not include all of Massachusetts' emissions or contributions to visibility impairment in its analysis, we cannot definitively state that Massachusetts' contribution to visibility impairment is not the most significant. However, that is very likely the case.

[42] See Section 6.3 Implementing the 2017 MANE–VU Statement.

[43] See Appendix 22 ''Mid-Atlantic/Northeast U.S. Visibility Data, 2004–2019 (2nd RH SIP Metrics). MANE–VU (prepared by Maine Department of Environmental Protection). January 21, 2021 revision.''

Campobello International Park), Roosevelt Campobello International Park (New Brunswick, Canada), Brigantine Wildlife Refuge (New Jersey). Nearby Class I Areas consist of Dolly Sods Wilderness Area (West Virginia) (used to represent Otter Creek Wilderness Area), Otter Creek Wilderness Area (West Virginia), Shenandoah National Park (Virginia), and James River Face Wilderness Area (Virginia).

E. Long-Term Strategy for Regional Haze

a. Massachusetts' Response to the Six MANE–VU Asks

Each state having a Class I area within its borders or emissions that may affect visibility in a Class I area must develop a long-term strategy for making reasonable progress towards the national visibility goal. CAA § 169A(b)(2)(B). As explained in the Background section of this notice, reasonable progress is achieved when all states contributing to visibility impairment in a Class I area are implementing the measures determined—through application of the four statutory factors to sources of visibility impairing pollutants—to be necessary to make reasonable progress. 40 CFR 51.308(f)(2)(i). Each state's long-term strategy must include the enforceable emission limitations, compliance schedules, and other measures that are necessary to make reasonable progress. 40 CFR 51.308(f)(2). All new (*i.e.,* additional) measures that are the outcome of four-factor analyses are necessary to make reasonable progress and must be in the long-term strategy. If the outcome of a four-factor analysis and other measures necessary to make reasonable progress is that no new measures are reasonable for a source, that source's existing measures are necessary to make reasonable progress, unless the state can demonstrate that the source will continue to implement those measures and will not increase its emission rate. Existing measures that are necessary to make reasonable progress must also be in the long-term strategy. In developing its long-term strategies, a state must also consider the five additional factors in § 51.308(f)(2)(iv). As part of its reasonable progress determinations, the state must describe the criteria used to determine which sources or group of sources were evaluated (*i.e.,* subjected to four-factor analysis) for the second implementation period and how the four factors were taken into consideration in selecting the emission reduction measures for inclusion in the long-term strategy. 40 CFR 51.308(f)(2)(i).

The following section summarizes how Massachusetts' SIP submission addressed the requirements of § 51.308(f)(2)(i); specifically, it describes MANE–VU's development of the six Asks and how Massachusetts addressed each. Massachusetts considers the six Asks to comprise its long-term strategy for the second planning period to address regional haze visibility impairment for each mandatory Class I Federal area affected by emissions from Massachusetts. When developing the Asks with the other MANE–VU states and applying them to sources in Massachusetts, the Commonwealth considered the four statutory factors and the additional regulatory factors and identified emissions control measures necessary to make reasonable progress towards the goal of preventing of any future, and remedying any existing, anthropogenic visibility impairment in Class I areas affected by emissions from Massachusetts. The EPA's evaluation of Massachusetts' long-term strategy is contained in the following Section IV.E.b. Massachusetts' SIP submission describes how it plans to meet the long-term strategy requirements defined by the state and MANE–VU as the ''Asks.'' [44]

States may rely on technical information developed by the RPOs of which they are members to select sources for four-factor analysis and to conduct that analysis, as well as to satisfy the documentation requirements under § 51.308(f). Where an RPO has performed source selection and/or four-factor analyses (or considered the five additional factors in § 51.308(f)(2)(iv)) for its member states, those states may rely on the RPO's analyses for the purpose of satisfying the requirements of § 51.308(f)(2)(i) so long as the states have a reasonable basis to do so and all state participants in the RPO process have approved the technical analyses. 40 CFR 51.308(f)(2)(iii). States may also satisfy the requirement of § 51.308(f)(2)(ii) to engage in interstate consultation with other states that have emissions that are reasonably anticipated to contribute to visibility impairment in a given Class I area under the auspices of intra- and inter-RPO engagement.

Massachusetts is a member of the MANE–VU RPO and participated in the RPO's regional approach to developing a strategy for making reasonable progress towards the national visibility goal in the MANE–VU Class I areas. MANE–VU's strategy includes a combination of: (1) Measures for certain source sectors and groups of sectors that the RPO determined were reasonable for states to pursue, and (2) a request for member states to conduct four-factor analyses for individual sources that it identified as contributing to visibility impairment. MANE–VU refers to each of the components of its overall strategy as an Ask of its member states. On August 25, 2017, the Executive Director of MANE–VU, on behalf of the MANE–VU states and tribal nations, signed a statement that identifies six emission reduction measures that comprise the Asks for the second implementation period.[45] The Asks were ''designed to identify reasonable emission reduction strategies that must be addressed by the states and tribal nations of MANE–VU through their regional haze SIP updates.'' [46] The statement explains that ''[i]f any State cannot agree with or complete a Class I State's Asks, the State must describe the actions taken to resolve the disagreement in the Regional Haze SIP.'' [47]

MANE–VU's recommendations as to the appropriate control measures were based on technical analyses documented in the RPO's reports and included as appendices to or referenced in Massachusetts' regional haze SIP submission. One of the initial steps of MANE–VU's technical analysis was to determine which visibility-impairing pollutants should be the focus of its efforts for the second implementation period. In the first implementation period, MANE–VU determined that sulfates were the most significant visibility impairing pollutant at the region's Class I areas. To determine the impact of certain pollutants on visibility at Class I areas for the purpose of second implementation period planning, MANE–VU conducted an analysis comparing the pollutant contribution on the clearest and most impaired days in the baseline period (2000–2004) to the most recent period (2012–2016) [48] at MANE–VU and nearby Class I areas. MANE–VU found that while SO_2 emissions were decreasing and visibility was improving, sulfates still made up the most significant contribution to visibility impairment at MANE–VU and nearby Class I areas. According to the analysis, NO_X emissions have begun to play a more significant role in visibility

[44] Massachusetts Regional Haze SIP submission at 74.

[45] See appendix 15 ''MANE–VU Regional Haze Consultation Report and Consultation Documentation—Final.''

[46] *Id.*

[47] *Id.*

[48] The period of 2012–2016 was the most recent period for which data were available at the time of analysis.

impacts in recent years as SO_2 emissions have decreased. The technical analyses used by Massachusetts are included in their submission and are as follows:

- 2016 Updates to the Assessment of Reasonable Progress for Regional Haze in MANE–VU Class I Areas (MA Appendix 6);
- Impact of Wintertime SCR/SNCR Optimization on Visibility Impairing Nitrate Precursor Emissions. November 2017. (MA Appendix 17);
- High Electric Demand Days and Visibility Impairment in MANE–VU. December 2017. (MA Appendix 18);
- Benefits of Combined Heat and Power Systems for Reducing Pollutant Emissions in MANE–VU States. March 2016. (MA Appendix 7);
- 2016 MANE–VU Source Contribution Modeling Report—CALPUFF Modeling of Large Electrical Generating Units and Industrial Sources April 4, 2017 (MA Appendix 8);
- Contribution Assessment Preliminary Inventory Analysis. October 10, 2016. (MA Appendix 11);
- Four-Factor Data Collection Memo. March 2017. (MA Appendix 14);
- Status of the Top 167 Stacks from the 2008 MANE–VU Ask. July 2016. (MA Appendix 10).

To support development of the Asks, MANE–VU gathered information on each of the four statutory factors for six source sectors it determined, based on an examination of annual emission inventories, ''had emissions [of SO_2 and/or NO_X] that were reasonabl[y] anticipated to contribute to visibility degradation in MANE–VU:'' electric generating units (EGUs), industrial/commercial/institutional boilers (ICI boilers), cement kilns, heating oil, residential wood combustion, and outdoor wood combustion.[49] MANE–VU also collected data on individual sources within the EGU, ICI boiler, and cement kiln sectors.[50] Information for the six sectors included explanations of technically feasible control options for SO_2 or NO_X, illustrative cost-effectiveness estimates for a range of model units and control options, sector-wide cost considerations, potential time frames for compliance with control options, potential energy and non-air-quality environmental impacts of certain control options, and how the remaining useful lives of sources might be considered in a control analysis.[51] Source-specific data included SO_2 emissions[52] and existing controls[53] for certain existing EGUs, ICI boilers, and cement kilns. MANE–VU considered this information on the four factors as well as the analyses developed by the RPO's Technical Support Committee when it determined specific emission reduction measures that were found to be reasonable for certain sources within two of the sectors it had examined—EGUs and ICI boilers. The Asks were based on this analysis and looked to either optimize the use of existing controls, have states conduct further analysis on EGU or ICI boilers with considerable visibility impacts, implement low sulfur fuel standards, or lock-in lower emission rates.

MANE–VU Ask 1 is ''Electric Generating Units (EGUs) with a nameplate capacity larger than or equal to 25 MW with already installed NO_X and/or SO_2 controls—ensure the most effective use of control technologies on a year-round basis to consistently minimize emissions of haze precursors or obtain equivalent alternative emission reductions.'' MANE–VU observed that EGUs often only run NO_X emissions controls to comply with ozone season trading programs and consequently, NO_X sources may be uncontrolled during the winter and non-peak summer days. MANE–VU found that: (1) running existing installed controls [selective catalytic reduction (SCR) and selective non-catalytic reduction (SNCR)] is one of the most cost-effective ways to control NO_X emissions from EGUs; and (2) that running existing controls year round could substantially reduce the NO_X emissions in many of the states upwind of Class I areas in MANE–VU that lead to visibility impairment during the winter from nitrates. MANE–VU included this as an emission management strategy because large EGUs had already been identified as dominant contributors to visibility impairment and the low cost of running already installed controls made it reasonable.

Massachusetts identified 53 EGU units that meet the criteria of 25 MW or larger with installed controls.[54] Massachusetts explained that all of these units have NO_X controls and that the permits for these units set short-term NO_X emissions limits in lbs/hr or concentration, which are promulgated in MA 310 CMR 7.19 and approved into the MA SIP on October 15, 2020 (85 FR 65236). The permits also require the performance of the unit and its controls to be verified. Therefore, Massachusetts concluded that it has met this Ask-1 strategy and represented that it will continue to do so for new units that begin operation during the second planning period based on the rules now in effect.

MANE–VU Ask 2 consists of a request that states ''Emission sources modeled by MANE–VU that have the potential for 3.0 Mm-1 or greater visibility impacts at any MANE–VU Class I area, as identified by MANE–VU contribution analyses . . . perform a four-factor analysis for reasonable installation or upgrade to emission controls.''

Massachusetts explained that, after examining the visibility impact modeling results (described in Section 5 of Massachusetts' submittal), MANE–VU concluded that a 3 Mm-1 cutoff captured the group of sources contributing the largest percentage of visibility impairing pollutants to Class I areas and that the determination of reasonability for controls on each unit was left to the individual states to allow for unit-specific consideration of the four factors.

MANE–VU's analysis identified 2 units in Massachusetts with potential impacts of 3.0 Mm-1 or greater based on 2015 emissions: Brayton Point 4 and Canal Station 1. Brayton Point was a coal-fired EGU facility (ORISPL 01619; MassDEP AQID 1200061). Massachusetts notes that all units at Brayton Point ceased operation in 2017 and the permits were revoked on December 6, 2017. Canal Station (ORISPL 1599; MassDEP AQID 1200054) operates two steam electric generating units. Unit 1 is a Babcock & Wilcox boiler that fires No. 6 fuel oil, with a permitted maximum sulfur content of 0.5 percent by weight (wt%) as the sole operational fuel, with No. 2 fuel oil as a startup/ignition fuel. Unit 1 has an approximate maximum heat input rate of 5,083 million British thermal units per hour (MMBtu/hr) and a generating capacity of approximately 560 (net) megawatts (MW). Unit 1 is equipped with low-NO_X burners, overfire air ports, flue gas recirculation (FGR), and Selective Catalytic Reduction (SCR) for the control of NO_X emissions. PM emissions are controlled by an Electrostatic Precipitator (ESP). In recent years, Unit 1 has operated with a capacity factor well below 10%

The emission controls installed on Unit 1 are necessary to achieve compliance with the applicable emission limits under 310 CMR 7.29 and Air Plan Approvals issued pursuant to 310 CMR 7.02. The governing NO_X,

[49] See appendix 14 ''MANE–VU Four Factor Data Collection Memo,'' at 1, March 30, 2017.

[50] See appendix 6 ''2016 Updates to the Assessment of Reasonable Progress for Regional Haze in MANE–VU Class I Areas, Jan. 31, 2016.''

[51] *Id.*

[52] See appendix 14 ''Four Factor Data Collection Memo.''

[53] See appendix 10 ''Status of the Top 167 Stacks from the 2008 MANE–VU Ask. July 2016.''

[54] See appendix 23 ''Massachusetts Facilities Subject to Ask 1: EGUs >= 25MW with Controls.''

SO_2, and PM emission limits for Unit 1 are summarized in Table 6–1 of the MA SIP submission.

The NO_X and PM emission limits are readily met through the use of the installed emission controls. The sulfur content of No. 6 oil is limited to 0.5 wt% in accordance with 310 CMR 7.05 but the facility purchases 0.3 wt% sulfur No. 6 to meet the 6.0 lbs/MW-hr monthly, 3.0 lbs/MWhr rolling 12-month SO_2 limit applicable under 310 CMR 7.29.

Table 6–2 in the State's submittal shows Canal Unit 1's actual emissions in 2015 along with much lower emissions MANE–VU projected for 2028 and lower still for 2028 emissions under Ask 2.

Massachusetts requested and received a four-factor analysis from the owner of the facility.[55] Based on that analysis, Massachusetts concluded that visibility impairing pollutants from Canal Unit 1 are currently well controlled with low-NO_X burners, overfire air ports, flue gas recirculation (FGR), Selective Catalytic Reduction (SCR) and an Electrostatic Precipitator (ESP). In addition to these existing controls, however, Canal committed to purchase only 0.3 wt% No. 6 fuel oil, following the depletion of the current fuel inventory, which has at times contained No. 6 fuel oil with a sulfur content greater than 0.3 wt%. EPA expects that this commitment will further reduce its SO_2 emissions. As a result, Massachusetts requested and received from the owner of Canal Unit 1 an application to modify its plan approval to require use of 0.3% sulfur content oil. Massachusetts approved the application and submitted the Plan approval to EPA as a supplement to the Massachusetts Regional Haze SIP Revision in a letter dated June 15, 2022.[56] Massachusetts further notes that, if Canal Unit 1 should operate above 10% capacity factor in the future, existing SIP-approved NO_X RACT regulations (310 CMR 7.19) will further limit the NO_X emissions. Massachusetts states that it will evaluate any changes in the operation of Canal Unit 1 in future regional haze planning and reporting.

MANE–VU Ask 3 is: ''Each MANE–VU State that has not yet fully adopted an ultra-low sulfur fuel oil standard as requested by MANE–VU in 2007—pursue this standard as expeditiously as possible and before 2028, depending on supply availability, where the standards are as follows: a. distillate oil to 0.0015% sulfur by weight (15 ppm); b. #4 residual oil within a range of 0.25 to 0.5% sulfur by weight; and c. #6 residual oil within a range of 0.3 to 0.5% sulfur by weight.'' MANE–VU included the low sulfur fuel measure in the 2017 Ask because some states had not implemented it yet and the justifications for it determined in the first implementation period remained valid. As described in Section 3 of the Massachusetts SIP submittal, MassDEP met the requirements of Ask 3 during the first implementation period by generally adopting low-sulfur oil regulations in the first planning period. Massachusetts adopted 310 CMR 7.05, ''Fuels All Districts'' which was approved by EPA into the Massachusetts SIP on September 19, 2013 (78 FR 57487).

MANE–VU Ask 4 is: ''EGUs and other large point emission sources larger than 250 MMBTU per hour heat input that have switched operations to lower emitting fuels—pursue updating permits, enforceable agreements, and/or rules to lock-in lower emission rates for SO_2, NO_X and PM. The permit, enforcement agreement, and/or rule can allow for suspension of the lower emission rate during natural gas curtailment.'' Massachusetts explains that MANE–VU chose this measure because the lower cost of natural gas had made switching to natural gas reasonable for many facilities resulting in significant visibility improvements. Also, the FLMs recommended during consultation that MANE–VU secure these visibility gains.

The threshold of 250 MMBTU per hour heat input was based on prior BART analysis. Because there are no longer any large coal burning units in Massachusetts, this Ask pertains only to oil burning units. Massachusetts identified no dual/multi-fuel units larger than 250 MMBTU/hr that had made a physical change to switch to a cleaner fuel. All such dual/multi-fuel units are either continuing to burn a mix of fuels or are choosing to maintain their ability to do so in the future.

MANE–VU Ask 5 is: ''Where emission rules have not been adopted, control NO_X emissions for peaking combustion turbines that have the potential to operate on high electric demand days by: a. Striving to meet NO_X emissions standard of no greater than 25 ppm at 15% O_2 for natural gas and 42 ppm at 15% O_2 for fuel oil but at a minimum meet NO_X emissions standard of no greater than 42 ppm at 15% O_2 for natural gas and 96 ppm at 15% O_2 for fuel oil; b. Performing a four-factor analysis for reasonable installation or upgrade to emission controls; or c. Obtaining equivalent alternative emission reductions on high electric demand days.''

Massachusetts explains that ''High electric demand days are days when higher than usual electrical demands bring additional generation units online, many of which are infrequently operated and may have significantly higher emission rates than the rest of the generation fleet. Peaking combustion turbine is defined for the purposes of this 'Ask' as a turbine capable of generating 15 megawatts or more, that commenced operation prior to May 1, 2007, is used to generate electricity all or part of which is delivered to the electric power distribution grid for commercial sale and that operated less than or equal to an average of 1752 hours (or 20%) per year during 2014 to 2016; MANE–VU found a correlation between high electric demand days (HEDDs) and the 20% most impaired days at Class I areas. Because smaller turbines have the ability to respond to peak electrical demand and some of these units are not well controlled by existing rules (*i.e.,* have a higher emission rate per unit of energy), MANE–VU found that controlling these units (or providing equivalent reductions on HEDDs) was a reasonable strategy for reducing NO_X emissions on the most impaired days.''

Massachusetts identified 25 turbines rated at 15 MW or higher that were operational prior to 2007 that sold electricity to the grid and that operated less than an average of 1752 hours per year during 2014–2016. These 25 turbines are listed in Table 6–3 along with their current emission limits. On March 9, 2018, MassDEP revised 310 CMR 7.19 Reasonably Available Control Technology (RACT) for Sources of Oxides of Nitrogen (NO_X) to establish more stringent emissions limits for stationary turbines at major sources. With these revisions Massachusetts RACT now meets Ask 5 ''striving'' limits for combined cycle turbines and ''minimum'' limits for simple cycle turbines. However, the 2018 RACT rule also included an exemption for units with a capacity factor less than 10% based on the most recent 3-year average, as codified in 310 CMR 7.19(1)(d).

Almost all the turbines subject to Ask 5 fall below the 10% capacity factor because they all run very infrequently. If in the future, they exceed the 10% capacity factor limit then they will be subject to the SIP-approved RACT limits of 310 CMR 7.19 and will therefore meet Ask 5 (except for Woodland 10 and Doreen 10 which are not located at

[55] See Appendix 31, ''Four Factor Analysis Canal Unit 1, Canal Generating Station, Sandwich, MA . . .''

[56] See MassDEP letter to EPA ''Subject: Regional Haze SIP Revision for Massachusetts—supplement'' and its attachment MassDEP letter to Canal Generating LLC, Air Quality Plan Approval.

facilities that are major sources and are therefore not subject to 310 CMR 7.19). The turbines that are exempt from the 2018 RACT limits are still subject to MassDEP's 1995 RACT limits, however. Table 6–4 in MassDEP's submission compares the 1995 and 2018 RACT limits to Ask 5, showing that the 1995 RACT limits meet the Ask 5 minimum limits for combined cycle turbines, although not for simple cycle turbines. MassDEP explains that, as a result, 14 of the 25 turbines therefore meet the Ask 5 limits through either 1995 RACT limits for combined cycle turbines or through BACT permit limits. For the remaining 11 turbines that do not meet the Ask 5 limits, Massachusetts has chosen to address the Ask by demonstrating emission reductions from Brayton Point Station (Units 1, 2, and 3) and Solutia that more than offset the emissions from these 11 turbines,[57] as allowed under the Ask.

MANE–VU Ask 6 is: ''Each State should consider and report in their SIP measures or programs to: (a) decrease energy demand through the use of energy efficiency, and (b) increase the use within their state of Combined Heat and Power (CHP) and other clean Distributed Generation technologies including fuel cells, wind, and solar.''

Massachusetts has taken numerous actions to decrease energy demand through energy efficiency and has been named the most energy efficient state in the nation by the American Council for an Energy-Efficient Economy (ACEEE) for nine consecutive years. Massachusetts ranks second in electric efficiency program spending per capita (at over four times the national average). Massachusetts energy efficiency efforts will continue through the second regional haze implementation period and will achieve emissions reductions beyond those required in the MANE–VU Statement. Key features of the Massachusetts energy efficiency strategy and efforts to expand non-polluting sources of energy and include energy efficiency, clean energy, solar carve-out, Solar Massachusetts Renewable Target (SMART) Program, Clean Energy Standard (310 CMR 7.75), Regional Greenhouse Gas Initiative (RGGI), combined heat and power (CHP), clean peak energy standard (CPS), offshore wind power, and hydroelectric power. Though not part of the SIP, these programs and initiatives have already achieved substantial emissions reductions and will continue to contribute to visibility improvements in Class I areas through 2028 and beyond.

[57] *See* Massachusetts Regional Haze SIP Submission at 83–94.

b. The EPA's Evaluation of Massachusetts' Response to the Six MANE–VU Asks and Compliance with § 51.308(f)(2)(i)

The EPA is proposing to find that Massachusetts has satisfied the requirements of § 51.308(f)(2)(i) related to evaluating sources and determining the emission reduction measures that are necessary to make reasonable progress by considering the four statutory factors. We are proposing to find that Massachusetts has satisfied the four-factor analysis requirement through its analysis and actions to address MANE–VU Asks 2 and 3. We also propose to find that Massachusetts reasonably concluded that it satisfied all six Asks.

As explained above, Massachusetts relied on MANE–VU's technical analyses and framework (*i.e.,* the Asks) to select sources and form the basis of its long-term strategy. MANE–VU conducted an inventory analysis to identify the source sectors that produced the greatest amount of SO_2 and NO_X emissions in 2011; inventory data were also projected to 2018. Based on this analysis, MANE–VU identified the top-emitting sectors for each of the two pollutants, which for SO_2 include coal-fired EGUs, industrial boilers, oil-fired EGUs, and oil-fired area sources including residential, commercial, and industrial sources. Major-emitting sources of NO_X include on-road vehicles, non-road vehicles, and EGUs.[58] The RPO's documentation explains that ''[EGUs] emitting SO_2 and NO_X and industrial point sources emitting SO_2 were found to be sectors with high emissions that warranted further scrutiny. Mobile sources were not considered in this analysis because any ask concerning mobile sources would be made to EPA and not during the intra-RPO and inter-RPO consultation process among the states and tribes.'' [59] EPA proposes to find that Massachusetts reasonably evaluated the two pollutants—SO_2 and NO_X—that currently drive visibility impairment within the MANE–VU region and that it adequately explained and supported its decision to focus on these two pollutants through its reliance on the MANE–VU technical analyses cited in its submission.

Section 51.308(f)(2)(i) requires states to evaluate and determine the emission reduction measures that are necessary to make reasonable progress by applying the four statutory factors to sources in a control analysis. As explained previously, the MANE–VU Asks are a mix of measures for sectors and groups of sources identified as reasonable for states to address in their regional haze plans. Several of the Asks include analyses of emissions controls, and Massachusetts identifies numerous existing controls that are in the SIP and are included in the long-term strategy. Additionally, Ask 2 (requesting four-factor analyses be conducted) and Ask 3 (requesting adoption of low-sulfur fuel oil) specifically demonstrate Massachusetts' consideration of the statutory factors and together allow the EPA to determine that Massachusetts' SIP is sufficient to satisfy (f)(2)(i). For example, Massachusetts provided information on the four statutory factors for the identified source that continues to operate—an oil-fired EGU and included new fuel sulfur limits for that source in the SIP. See ''Four Factor Analysis Canal Unit 1, Canal Generating Station, Sandwich, MA'' in Appendix 31. While MANE–VU formulated the Asks to be ''reasonable emission reduction strategies'' to control emissions of visibility impairing pollutants,[60] EPA believes that Asks 2 and 3, in particular, engage with the requirement that states determine the emission reduction measures that are necessary to make reasonable progress through consideration of the four factors. As laid out in further detail below, the EPA is proposing to find that MANE–VU's four-factor analysis conducted to support the emission reduction measures in Ask 3 (ultra-low sulfur fuel oil Ask), in conjunction with Massachusetts' supplemental analysis and explanation of how it has complied with Ask 2 (perform four-factor analysis) satisfy the requirement of § 51.308(f)(2)(i). The emission reduction measures that are necessary to make reasonable progress must be included in the long-term strategy, *i.e.,* in Massachusetts' SIP. 40 CFR 51.308(f)(2).

Massachusetts asserted that it satisfies Ask 1 because its SIP-approved regulations applicable to EGU boilers include year-round emission limits and because it already requires that controls be run whenever technically feasible. Air Plan Approvals that MassDEP has issued for these units set short-term NO_X emissions limits in lbs/hr or

[58] See Appendix 2 ''Contributions to Regional Haze in the Northeast and Mid-Atlantic United States: Mid-Atlantic/Northeast Visibility Union (MANE–VU) Contribution Assessment. NESCAUM. August 2006.''

[59] See Appendix 22 ''Mid-Atlantic/Northeast U.S. Visibility Data, 2004–2019 (2nd RH SIP Metrics). MANE–VU (prepared by Maine Department of Environmental Protection). January 21, 2021 revision.''

[60] *Id.*

concentration. EPA thus proposes to find that Massachusetts reasonably concluded that it has satisfied Ask 1.

Ask 2 addresses the sources MANE–VU determined have the potential for larger than, or equal to, 3.0 Mm^{-1} visibility impact at any MANE–VU Class I area; the Ask requests MANE–VU states to conduct four-factor analyses for the specified sources within their borders. This Ask explicitly engages with the statutory and regulatory requirement to determine reasonable progress based on the four factors; MANE–VU considered it ''reasonable to have the greatest contributors to visibility impairment conduct a four-factor analysis that would determine whether emission control measures should be pursued and what would be reasonable for each source.'' [61]

As an initial matter, EPA does not generally agree that 3.0 Mm^{-1} visibility impact is a reasonable threshold for source selection. The RHR recognizes that, due to the nature of regional haze visibility impairment, numerous and sometimes relatively small sources may need to be selected and evaluated for control measures in order to make reasonable progress. See 2021 Clarifications Memo at 4. As explained in the 2021 Clarifications Memo, while states have discretion to choose any source selection threshold that is reasonable, ''[a] state that relies on a visibility (or proxy for visibility impact) threshold to select sources for four-factor analysis should set the threshold at a level that captures a meaningful portion of the state's total contribution to visibility impairment to Class I areas.'' 2021 Clarifications Memo at 3. In this case, the 3.0 Mm^{-1} threshold identified only two sources in Massachusetts (and only 22 across the entire MANE–VU region), indicating that it may be unreasonably high.

MANE–VU identified two units in Massachusetts with potential impacts of 3.0 Mm-1 or greater based on 2015 emissions: Brayton Point Unit 4 and Canal Station Unit 1. Brayton Point was a coal-fired EGU facility (ORISPL 01619; MassDEP AQID 1200061). All four of the coal-fired units at Brayton Point, including Unit 4, ceased operation in 2017 and the permits were revoked on December 6, 2017.[62]

Canal Station (ORISPL 1599; MassDEP AQID 1200054) operates two steam electric generating units. Unit 1 is a Babcock & Wilcox boiler that fires No. 6 fuel oil, with a permitted maximum sulfur content of 0.5 percent by weight (wt%) as the sole operational fuel, with No. 2 fuel oil as a startup/ignition fuel. Unit 1 has an approximate maximum heat input rate of 5,083 million British thermal units per hour (MMBtu/hr) and a generating capacity of approximately 560 (net) megawatts (MW). Unit 1 is equipped with low-NO_X burners, overfire air ports, flue gas recirculation (FGR), and Selective Catalytic Reduction (SCR) for the control of NO_X emissions. PM emissions are controlled by an Electrostatic Precipitator (ESP). The emission controls installed on Unit 1 are necessary to achieve compliance with the applicable emission limits under 310 CMR 7.29 and Air Plan Approvals issued pursuant to 310 CMR 7.02. The governing NO_X, SO_2, and PM emission limits for Unit 1 are summarized in Table 6–1 of the Massachusetts SIP submittal.

Pursuant to Ask 2, MassDEP requested a four-factor analysis from the owner of Canal Unit 1, which the owner submitted on September 19, 2020.[63] With respect to NO_X emissions, the analysis concludes that Canal Unit 1's existing controls (low NO_X burners, overfire air ports, FGR, and SCR) are the most stringent available and that there are no other add-on controls commercially available to reduce NO_X emissions from Canal Unit 1. The analysis explains that Canal Unit 1 has operated well below 10% capacity factor in recent years, is subject to NO_X emission limits pursuant to 310 CMR 7.29 when operating at this level and is not expected to increase its capacity factor in the future. If Canal Unit 1 did exceed 10% capacity factor, the higher number of hours would result in better performance of the SCR and, thereby, reduce NO_X emissions rates by at least 50% below the current permitted NO_X limits. Furthermore, if Canal Unit 1 exceeded 10% capacity factor, it would automatically become subject to the lower NO_X limit in MassDEP's NO_X RACT regulations (310 CMR 7.19). Infrequent operation limits the effectiveness of the existing controls, however. At its current and expected low capacity factor, meeting NO_X emission limits below the existing 310 CMR 7.29 limits would be unreasonable due to emissions that occur during startup prior to operation of the SCR. The analysis concludes that no further NO_X control measures at Canal Unit 1 are necessary to make reasonable progress.

With respect to SO_2 emissions, the four-factor analysis concludes that conversion to natural gas is not technically feasible due to supply limitations but that use of 0.3% sulfur No.6 fuel oil (rather than the 0.5% sulfur allowed under Massachusetts' low sulfur fuel regulations at 310 CMR 7.05) is technically feasible and reduces SO_2 emissions by 40% at a cost of $10,000 per ton of SO_2 reduced. While the analysis concludes that the cost of using 0.3 wt% sulfur No. 6 oil would not be considered reasonable, the owner nonetheless committed to purchasing 0.3 wt% No. 6 fuel oil following the depletion of the current fuel inventory because the MANEVU Regional Haze Consultation Report identifies sulfates from SO_2 emissions as the primary driver behind visibility impairment in the region. See June 15, 2022, MassDEP Regional Haze SIP Revision for Massachusetts Supplement.[64]

The four-factor analysis also evaluates the use of ultra-low sulfur diesel (ULSD) and retrofitting with a spray dry absorber for SO_2 control and concludes that, while technically feasible, the costs of compliance in each case (beginning at $21,000 per ton of SO_2 reduced) mean that neither measure is necessary for reasonable progress. The analysis also evaluated particulate matter emissions and concludes that they are well controlled with an electrostatic precipitator (ESP) and burning 0.3 wt% sulfur fuel. While adding a fabric filter and using ULSD is feasible, the costs are $50,000 and $170,000 per ton of SO_2 reduced, respectively and, the ESP would reduce the efficiency of the unit by 0.5% and generate 52 tons of waste per year.

Based on Canal's commitment to use 0.3% sulfur content fuel oil, MassDEP requested that the Permittee submit a permit application to require its use. Subsequently, MassDEP modified Canal's Plan Approval to provide that the sulfur content of No. 6 fuel oil purchased for Unit 1 shall not exceed 0.3% by weight. MassDEP has requested that EPA approve it into the SIP, which EPA proposes to do in today's action.

The EPA proposes to find that Massachusetts reasonably determined it has satisfied Ask 2. As explained above, we do not generally agree that a 3.0 Mm^{-1} threshold for selecting sources for four-factor analysis results in a set of sources to evaluate that will result in

[61] See Appendix 20 ''MANE–VU Regional Haze Consultation Report and Consultation Documentation—Final.''

[62] See Appendix 37, MassDEP letter from Thomas Cushing, Chief, Permit Section, Bureau of Air & Waste to Robert Vasconcelos, Director, Brayton Point Energy, LLC. December 6, 2017.

[63] See Appendix 31, ''Four Factor Analysis Canal Unit 1, Canal Generating Station, Sandwich, MA . . .''

[64] See MassDEP letter to EPA ''Subject: Regional Haze SIP Revision for Massachusetts—supplement'' and its attachment MassDEP letter to Canal Generating LLC, Air Quality Plan Approval.

potential and meaningful reduction of the state's contribution to visibility impairment. MANE–VU's threshold identified two sources, only one of which continues to operate and combust the same fuel. However, in this particular instance we propose to find that Massachusetts' additional information and explanation indicate that the state has conducted a reasonable examination of its sources, reasonably concluded that the four-factor analysis for its remaining impacting source is satisfactory, and accurately concluded the additional SO_2 controls further limiting fuel oil sulfur content are reasonable emission reductions. EPA is basing this proposed finding on the State's examination of its largest operating EGU and ICI sources, at the time of SIP submission, and on the emissions from and controls that apply to those sources, as well as on Massachusetts' existing SIP-approved NO_X and SO_2 rules that effectively control emissions from the largest contributing stationary-source sectors.

Ask 3, which addresses the sulfur content of heating oil used in MANE–VU states, is based on a four-factor analysis for the heating oil sulfur reduction regulations contained in that Ask; specifically, for the control strategy of reducing the sulfur content of distillate oil to 15 ppm. As described in Section 3 of the Massachusetts SIP submittal, MassDEP met the requirements of Ask 3 during the first implementation period by generally adopting low-sulfur oil regulations in the first planning period. Massachusetts adopted 310 CMR 7.05, ''Fuels All Districts.'' The regulation limited the Statewide sulfur content of distillate oil to 500 parts per million (ppm) from July 1, 2014, through June 30, 2018, and then to 15 ppm starting July 1, 2018. The regulation also sets the sulfur in fuel limit for No. 6 residual oil, starting July 1, 2018, at 0.5% by weight Statewide, except for the Berkshire Air Pollution Control District (APCD), which encompasses the Towns and Cities in Berkshire County, the westernmost county in the Commonwealth. The Berkshire APCD has a 1974 legislative exemption allowing sources in this district to burn up to 2.2% sulfur residual oil.[65] Therefore, the regulation does not explicitly require lower sulfur residual oil in the Berkshire APCD due to the existing law. A legislative change would be needed for MassDEP to apply the lower sulfur residual oil limits for this district. Despite the existing legislative exemption, however, MassDEP expects that the majority of residual oil burned in the Berkshire APCD will have a reduced sulfur content because the suppliers in Massachusetts and the surrounding states will need to supply lower sulfur residual oil for sale in those other APCDs and states. *See also* 77 FR 30932.

The EPA proposes to find that Massachusetts reasonably relied on MANE–VU's four-factor analysis for a low-sulfur fuel oil regulation, which engaged with each of the statutory factors and explained how the information supported a conclusion that a 15 ppm-sulfur fuel oil standard for fuel oils is reasonable. Massachusetts' SIP-approved ultra-low sulfur fuel oil rule is consistent with Ask 3's sulfur content standards for the three types of fuel oils (distillate oil, #4 residual oil, #6 residual oil). EPA therefore proposes to find that Massachusetts reasonably determined that it has satisfied Ask 3.

Massachusetts concluded that no additional updates were needed to meet Ask 4, which requests that MANE–VU states pursue updating permits, enforceable agreements, and/or rules to lock-in lower emission rates for sources larger than 250 MMBtu per hour that have switched to lower emitting fuels. As explained above, Massachusetts has asserted that there are no longer any large coal burning units in Massachusetts, meaning that this Ask pertains only to oil burning units. MA identified no dual/multi-fuel units larger than 250 MMBTU/hr that had made a physical change to switch to a cleaner fuel. All such dual/multi-fuel units are either continuing to burn a mix of fuels or are choosing to maintain their ability to do so in the future. In addition, modified units in Massachusetts are required to amend their permits through the New Source Review (NSR) process if they plan to switch back to coal or a fuel that will increase emissions. A change in fuel, unless already allowed in the permit, would be a modification.

Thus, given the permitting and regulatory requirements outlined above, including the fact that sources that have switched fuel are required to revise their permits to reflect the change, that state rules make any proposed reversion difficult by requiring permitting and other control analyses, including NSR, the EPA proposes to find that Massachusetts reasonably determined it has satisfied Ask 4.

Ask 5 addresses NO_X emissions from peaking combustion turbines that have the potential to operate on high electric demand days. Massachusetts explains that it has SIP-approved regulations to control peaking combustion turbines that have the potential to operate on high electric demand days. The Ask requests states to ''strive'' for NO_X emission standards of no greater than 25 ppm for natural gas and 42 ppm for fuel oil, or at a minimum, NO_X emissions standards of no greater than 42 ppm for natural gas and 96 ppm at for fuel oil. Massachusetts RACT requirements approved into the MA SIP on October 15, 2020 (85 FR 65236) meet Ask 5 ''striving'' limits for combined cycle turbines and ''minimum'' limits for simple cycle turbines. However, the 2018 RACT rule also included an exemption for units with a capacity factor less than 10% based on the most recent 3-year average. As shown in Table 6–3 of the Massachusetts SIP submittal, most of the turbines subject to Ask 5 fall below the 10% capacity factor because they all run very infrequently. If in the future they exceed the 10% capacity factor limit, then they will be subject to the RACT limits of 310 CMR 7.19 and will therefore meet Ask 5 (except for Woodland 10 and Doreen 10 which are not located at facilities that are major sources and are therefore not subject to 310 CMR 7.19). The turbines that are exempt from the 2018 RACT limits are still subject to MassDEP's 1995 RACT limits. For combined cycle turbines, the 1995 RACT limits meet Ask 5 minimum required limits for oil and gas, but the simple cycle limits are slightly higher at 100 ppm compared to the Ask 5 minimum of 96 ppm.

Ask 5 included an option to achieve equivalent alternative emission reductions for those combustion turbines whose limits do not match the ''minimum'' limits in the Ask. The retirement of Brayton Point 1–2–3 and repowering of Solutia Boiler 11 each provide alternative SO_2 or NO_X emission reductions, respectively, on HEDDs that are far larger than any NO_X reductions possible from the turbines that do not already meet Ask 5 (156 and 128 tons/year vs. 25 tons/year). Furthermore, the annual SO_2 emission reductions from Brayton Point 1–2–3 (785 tons/year) and Solutia Boiler 11 (847 tons/year combined SO_2 and NO_X) are each sufficiently large to offset all the annual turbine NO_X emissions (51 tons per year).

Therefore, the permanent retirement of Brayton 1–2–3 and repowering of Solutia Boiler 11 each satisfies the Ask for the remaining 11 turbines not covered by the most recent MassDEP RACT rule. Because the Solutia Boiler 11 repowering and Brayton 1–2–3 retirements offset over 100% of the emissions from the 11 turbines on HEDDs, they exceed the visibility improvement requirements of Ask 5. In

[65] Massachusetts Chapter 353 of the Acts of 1974.

addition, because MassDEP has permitted new units (*e.g.,* Footprint ½, Canal 3, and West Medway ⅘) that are much cleaner than the 11 turbines, these new units likely will displace some of the power generating capacity of the older turbines units and thereby further reduce HEDD emissions from the turbines that do not meet Ask 5.

For the majority of combustion turbines identified in the Ask, the RACT levels adopted by Massachusetts comply with the minimum requested by this Ask. For those turbines that do not meet the minimum limits, MassDEP has identified alternative emission reductions obtained through the retirement of Brayton 1–2–3 and the repowering of Solution Boiler 11 that more than make up the difference. Therefore, EPA proposes to find that Massachusetts reasonably concluded that its existing regulations comply with Ask 5.

Finally, with regard to Ask 6, Massachusetts has taken numerous actions to decrease energy demand through energy efficiency and has been named the most energy efficient state in the nation by the American Council for an Energy-Efficient Economy (ACEEE) for nine consecutive years. The EPA is proposing to find that Massachusetts has satisfied Ask 6's request to consider and report in its SIP measures or programs related to energy efficiency, cogeneration, and other clean distributed generation technologies.

In sum, the EPA is proposing to find—based on Massachusetts' participation in the MANE–VU planning process, how it has addressed the Asks, and the EPA's assessment of Massachusetts' emissions and point sources—that Massachusetts has complied with the requirements of § 51.308(f)(2)(i). Specifically, Massachusetts's application of MANE–VU Asks 1 2, and 3 engages with the requirement that states evaluate and determine the emission reduction measures necessary to make reasonable progress by considering the four statutory factors.

EPA is proposing to find the state's approach meets the regulatory requirements for several reasons. Massachusetts reasonably evaluated and explained its decision to focus on SO_2 and NO_X to address visibility impairment within the MANE–VU region. Massachusetts also adequately supported that decision through reasonable reliance on the MANE–VU technical analyses cited in its submission. In addition, Massachusetts selected the sources with the greatest modeled impacts on visibility and also adequately responded to comments to consider sources identified by the FLMs through the consultation process. Massachusetts's submittal also includes four-factor analyses and demonstrates that the sources of SO_2 and NO_X within the state that would be expected to contribute to visibility impairment have small emissions of NO_X and SO_2, are subject to stringent SIP-approved emission control measures, or both. In addition, Massachusetts's SIP-approved sulfur in fuel rule sets stringent limits for sulfur content and SO_2 emissions for fuels. The Massachusetts SIP submittal also includes a plan approval for Canal Generating Station, requiring fuel oil purchased for EU1 be restricted to 0.3% sulfur content limit.

EPA proposes to find that Massachusetts's SIP submittal satisfies the requirements that states determine the emission reduction measures that are necessary to make reasonable progress by considering the four factors, and that their long-term strategies include the enforceable emission limitations, compliance schedules, and other measures necessary to make reasonable progress.

c. Additional Long-Term Strategy Requirements

The consultation requirements of § 51.308(f)(2)(ii) provide that states must consult with other states that are reasonably anticipated to contribute to visibility impairment in a Class I area to develop coordinated emission management strategies containing the emission reductions measures that are necessary to make reasonable progress. Section 51.308(f)(2)(ii)(A) and (B) require states to consider the emission reduction measures identified by other states as necessary for reasonable progress and to include agreed upon measures in their SIPs, respectively. Section 51.308(f)(2)(ii)(C) speaks to what happens if states cannot agree on what measures are necessary to make reasonable progress.

Massachusetts participated in and provided documentation of the MANE–VU intra- and inter-RPO consultation processes, which included consulting with both MANE–VU and non-MANE–VU states about emissions from Massachusetts reasonably anticipated to contribute to visibility impairment in Class I areas within the MANE–VU area and in adjacent areas. The consultations addressed developing coordinated emission management strategies containing the emission reductions necessary to make reasonable progress at the Class I areas. Massachusetts addressed the MANE–VU Asks by providing information on the measures it has in place that satisfy each Ask.[66] While Massachusetts did not receive any requests from non-MANE–VU states to consider additional measures to address visibility impairment in Class I areas outside MANE–VU, MANE–VU documented disagreements that occurred during consultation. For instance, MANE–VU noted in its Consultation Report that upwind states expressed concern regarding the analyses the RPO utilized for the selection of states for the consultation. MANE–VU agreed that these tools, as all models, have their limitations, but nonetheless deemed them appropriate. Additionally, there were several comments regarding the choice of the 2011 modeling base year. MANE–VU agreed that the choice of base year is critical to the outcome of the study. MANE–VU acknowledged that there were newer versions of the emission inventories and the need to use the best available inventory for each analysis. However, MANE–VU disagreed that the choice of these inventories was not appropriate for the analysis. Additionally, upwind states noted that they would not be able to address the MANE–VU Asks until they finalize their SIPs. MANE–VU believed the assumption of the implementation of the Asks from upwind states in its 2028 control case modeling was reasonable, and Massachusetts included both the 2028 base case and control case modeling results in its SIP, representing visibility conditions at Acadia National Park (Maine) assuming upwind states do not and do implement the Asks, respectively.

In sum, Massachusetts participated in the MANE–VU intra- and inter-RPO consultation and included in its SIP submittal the measures identified and agreed to during those consultations, thereby satisfying § 51.308(f)(2)(ii)(A) and (B). Massachusetts satisfied § 51.308(f)(2)(ii)(C) by participating in MANE–VU's consultation process, which documented the disagreements between the upwind states and MANE–VU and explained MANE–VU's reasoning on each of the disputed issues. Based on the entirety of MANE–VU's intra- and inter-RPO consultation and MANE–VU's and Massachusetts' responses to comments on the SIP submission and various technical analyses therein, we propose to determine that Massachusetts has satisfied the consultation requirements of § 51.308(f)(2)(ii).

The documentation requirement of § 51.308(f)(2)(iii) provides that states

[66] See Appendix 20 ''MANE–VU Regional Haze Consultation Report.''

may meet their obligations to document the technical bases on which they are relying to determine the emission reductions measures that are necessary to make reasonable progress through an RPO, as long as the process has been ''approved by all State participants.'' As explained above, Massachusetts chose to rely on MANE–VU's technical information, modeling, and analysis to support development of its long-term strategy. The MANE–VU technical analyses on which Massachusetts relied are listed in the state's SIP submission and include source contribution assessments, information on each of the four factors and visibility modeling information for certain EGUs, and evaluations of emission reduction strategies for specific source categories. Massachusetts also provided supplemental information to further demonstrate the technical bases and emission information on which it relied on to determine the emission reductions measures that are necessary to make reasonable progress. Based on the documentation provided by the state, we propose to find Massachusetts satisfies the requirements of § 51.308(f)(2)(iii).

Section 51.308(f)(2)(iii) also requires that the emissions information considered to determine the measures that are necessary to make reasonable progress include information on emissions for the most recent year for which the state has submitted triennial emissions data to the EPA (or a more recent year), with a 12-month exemption period for newly submitted data. Massachusetts' SIP submission included 2017 National Emissions Inventory (NEI) data for NO_X, SO_2, PM, VOCs and NH_3 and 2017 Air Markets Program Data (AMPD) emissions for NO_X and SO_2. Based on Massachusetts' consideration and analysis of the 2017 and 2019 emission data in their SIP submittal, the EPA proposes to find that Massachusetts has satisfied the emissions information requirement in 51.308(f)(2)(iii).

We also propose to find that Massachusetts reasonably considered the five additional factors in § 51.308(f)(2)(iv) in developing its long-term strategy. Pursuant to § 51.308(f)(2)(iv)(A), Massachusetts noted that existing and ongoing state and federal emission control programs that contribute to emission reductions through 2028 would impact emissions of visibility impairing pollutants from point and nonpoint sources in the second implementation period. Massachusetts included in its SIP a comprehensive lists of control measures identifying the source category and corresponding Code of Massachusetts Regulations provisions.[67]

Massachusetts' consideration of measures to mitigate the impacts of construction activities as required by § 51.308(f)(2)(iv)(B) includes, in section 6.6 of its SIP submission, measures that Massachusetts has implemented to mitigate the impacts from such activities. Massachusetts has implemented standards that reduce fugitive dust emissions from construction, rules to address exhaust emissions including rules to limit the idling of vehicles and equipment, rules to reduce allowable smoke from on-road diesel engines, and general conformity rules.

Pursuant to § 51.308(f)(2)(iv)(C), source retirements and replacement schedules are addressed in section 6.7 of Massachusetts' submission. Source retirements and replacements were considered in developing the 2028 emission projections, with on the books/on the way retirements and replacements included in the 2028 projections. The EGU point sources included in the inventories used in the MANE–VU contribution assessment and that were subsequently retired are described in Section 4 of the Massachusetts' submission.

In considering smoke management as required in 40 CFR 51.308(f)(2)(iv)(D), Massachusetts explained, in section 6.8 of its submission, that it addresses smoke management through its air regulation at 310 CMR 7.07, which bans open burning in 22 urban municipalities and prohibits the use of open burning to clear commercial or institutional land for non-agricultural purposes. Prescribed burning is allowed upon specific permission from MassDEP. Massachusetts considers these efforts to be sufficient to protect visibility in the Class I areas affected by emission from Massachusetts source, including agricultural and forestry smoke.

Massachusetts considered the anticipated net effect of projected changes in emissions as required by 51.308(f)(2)(iv)(E) by discussing, in Section 6.9 of its submission, the photochemical modeling for the 2018–2028 period it conducted in collaboration with MANE–VU. The two modeling cases run were a 2028 base case, which considered only on-the-books controls, and a 2028 control case that considered implementation of the MANE–VU Ask. The results of that modeling are shown as RPGs on the graphs in Section 2 and detailed in the presentation of RPGs in the MANE–VU visibility report. The 2028 inventory projections demonstrate a substantial reduction in emissions. The modeling shows that projected visibility at all potentially impacted Class I areas will remain well below the URP line in 2028 for the most impaired days and that there will be no degradation in visibility for the least impaired days.

Because Massachusetts has reasonably considered each of the five additional factors, the EPA proposes to find that Massachusetts has satisfied the requirements of 40 CFR 51.308(f)(2)(iv).

F. Reasonable Progress Goals

Section 51.308(f)(3) contains the requirements pertaining to RPGs for each Class I area. Because Massachusetts does not host a Class I area, it is not subject to either § 51.308(f)(3)(i) or 51.308(f)(3)(ii)(A). Section 51.308(f)(3)(ii)(B) requires that, if a state contains sources that are reasonably anticipated to contribute to visibility impairment in a Class I area in *another* state and the RPG for the most impaired days in that Class I area is above the URP, the upwind state must provide the same demonstration.

Table 2–1 of Massachusetts' SIP submittal summarizes baseline visibility conditions (*i.e.,* visibility conditions during the baseline period) for the most impaired and clearest days and the 2028 RPG for the most impaired days for Class I areas in or adjacent to the MANE–VU Region, as well as information on natural visibility conditions, the rate of progress described by the URP in 2017 and 2028, and the modeled 2028 base case (representing visibility conditions in 2028 with existing controls). These visibility conditions, as well as the 2028 reasonable progress goal for the clearest days, are also included in Appendix 21 of Massachusetts' SIP submission. As noted in the submission, the RPGs for all of the Class I areas in or adjacent to the MANE–VU region are well below their respective URP glidepaths. Therefore, § 51.308(f)(3)(ii)(B) is not applicable to Massachusetts.

G. Monitoring Strategy and Other Implementation Plan Requirements

Section 51.308(f)(6) specifies that each comprehensive revision of a state's regional haze SIP must contain or provide for certain elements, including monitoring strategies, emissions inventories, and any reporting, recordkeeping and other measures needed to assess and report on visibility. Since Massachusetts does not contain any Class I areas, it is not required to submit the monitoring strategy referenced in 51.308(f)(6), nor

[67] See tables 6–13 of the MassDEP Regional Haze SIP—Final July 2021.

are the requirements in 51.308(f)(6)(i), (ii), and (iv) applicable.

40 CFR 51.308(f)(6)(iii), however, applies to states with no Class I areas (such as Massachusetts) and requires them to include in their Regional Haze SIPs procedures by which monitoring data and other information are used in determining the contribution of emissions from within the state to visibility impairment at Class I areas in other states. Monitoring in Massachusetts that contributes data for assessing visibility is described in section 2.1 of the Massachusetts SIP submission. Visibility data analysis procedures are described in the MANE–VU visibility data report.[68] Other procedures and data used for determining Massachusetts contribution to visibility impairment are described in section 5 of the Massachusetts SIP and the MANE–VU documents referenced. Two IMPROVE monitors in Massachusetts provide data to assess current visibility, track changes in visibility, and help determine the causes of visibility impairment in Class I areas in the region.

Section 51.308(f)(6)(v) requires SIPs to provide for a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment, including emissions for the most recent year for which data are available and estimates of future projected emissions. It also requires a commitment to update the inventory periodically. Massachusetts provides for emissions inventories and estimates for future projected emissions by participating in the MANE–VU RPO and complying with EPA's Air Emissions Reporting Rule (AERR). In 40 CFR part 51, subpart A, the AERR requires states to submit updated emissions inventories for criteria pollutants to EPA's Emissions Inventory System (EIS) every three years. The emission inventory data is used to develop the NEI, which provides for, among other things, a triennial state-wide inventory of pollutants that are reasonably anticipated to cause or contribute to visibility impairment.

Section 4 of Massachusetts' submission includes tables of NEI data. The source categories of the emissions inventories included are: (1) Point sources, (2) nonpoint sources, (3) non-road mobile sources, and (4) on-road mobile sources. The point source category is further divided into AMPD point sources and non-AMPD point sources. Massachusetts included NEI emissions inventories for the following years: 2002 (one of the regional haze program baseline years), 2008, 2011, 2014, and 2017; and for the following pollutants: SO_2, NO_X, PM_{10}, $PM_{2.5}$, VOCs, and NH_3.

Section 51.308(f)(6)(v) also requires states to include estimates of future projected emissions and include a commitment to update the inventory periodically. Massachusetts relied on the MANE–VU 2028 emissions projections for MANE–VU states. MANE–VU completed two 2028 projected emissions modeling cases—a 2028 base case that considers only on-the-books controls and a 2028 control case that considers implementation of the MANE–VU Asks.[69]

The EPA proposes to find that Massachusetts has met the requirements of 40 CFR 51.308(f)(6) as described above, including through its continued participation in the MANE–VU RPO and its on-going compliance with the AERR, and that no further elements are necessary at this time for Massachusetts to assess and report on visibility pursuant to 40 CFR 51.308(f)(6)(vi). Massachusetts' SIP submittal also includes a commitment to update the statewide emissions inventory periodically.

H. Requirements for Periodic Reports Describing Progress Towards the Reasonable Progress Goals

Section 51.308(f)(5) requires that periodic comprehensive revisions of states' Regional Haze plans also address the progress report requirements of 40 CFR 51.308(g)(1) through (5). The purpose of these requirements is to evaluate progress towards the applicable RPGs for any Class I area within the state and each Class I area outside the state that may be affected by emissions from within that state. Sections 51.308(g)(1) and (2) apply to all states and require a description of the status of implementation of all measures included in a state's first implementation period regional haze plan and a summary of the emission reductions achieved through implementation of those measures. Section 51.308(g)(3) applies only to states with Class I areas within their borders and requires such states to assess current visibility conditions, changes in visibility relative to baseline (2000–2004) visibility conditions, and changes in visibility conditions relative to the period addressed in the first implementation period progress report. Section 51.308(g)(4) applies to all states and requires an analysis tracking changes in emissions of pollutants contributing to visibility impairment from all sources and sectors since the period addressed by the first implementation period progress report. This provision further specifies the year or years through which the analysis must extend depending on the type of source and the platform through which its emission information is reported. Finally, § 51.308(g)(5), which also applies to all states, requires an assessment of any significant changes in anthropogenic emissions within or outside the state that have occurred since the period addressed by the first implementation period progress report, including whether such changes were anticipated and whether they have limited or impeded expected progress towards reducing emissions and improving visibility.

Massachusetts' submission describes the status of measures of the long-term strategy from the first implementation period. As a member of MANE–VU, Massachusetts considered the MANE–VU Asks and adopted corresponding measures into its long-term strategy for the first implementation period. The MANE–VU Asks were: (1) Timely implementation of Best Available Retrofit Technology (BART) requirements; (2) EGU controls including Controls at 167 Key Sources that most affect MANE–VU Class I areas; (3) Low sulfur fuel oil strategy; and (4) Continued evaluation of other control measures. Massachusetts met all the identified reasonable measures requested during the first implementation period. During the first planning period for regional haze, programs that were put in place focused on reducing SO_2 emissions. The reductions achieved led to vast improvements in visibility at the MANE–VU Federal Class I Areas due to reduced sulfates formed from SO_2 emissions. Massachusetts describes the control measures that help control the emissions of VOCs, NO_X, PM and SO_2 from a wide range of sources in Section 3 of the Massachusetts' SIP submission and identifies BART and Alternative to BART requirements in Table 3–1. The state included periodic emission data that demonstrate a decrease in VOCs, NO_X, PM and SO_2 emissions throughout the state.

The EPA proposes to find that Massachusetts has met the requirements of 40 CFR 51.308(g)(1) and (2) because its SIP submission describes the measures included in the long-term

[68] See Appendix 22 ''Mid-Atlantic/Northeast U.S. Visibility Data, 2004–2019 (2nd RH SIP Metrics). MANE–VU (prepared by Maine Department of Environmental Protection). January 21, 2021 revision.''

[69] See appendix 21 ''OTC MANE–VU 2011 Based Modeling Platform Support Document October 2018—Final.''

strategy from the first implementation period, as well as the status of their implementation and the emission reductions achieved through such implementation.

Pursuant to § 51.308(g)(4), in Section 4 of its submittal, Massachusetts provided a summary of emissions of NO_X, SO_2, PM_{10}, $PM_{2.5}$, VOCs, and NH_3 from all sources and activities, including from point, nonpoint, non-road mobile, and on-road mobile sources, for the time period from 2002 to 2017 in Section 4. With respect to sources that report directly to the EPA, Massachusetts also included AMPD state summary data for SO_2 and NO_X emissions for 2018 and 2019.

The reductions achieved by Massachusetts emission control measures are seen in the emissions inventory. Based on Massachusetts' SIP submission, NO_X emissions have continuously declined in Massachusetts from 2002 through 2017, especially in the point, nonroad and onroad mobile sectors. NO_X emissions are expected to continue to decrease as fleet turnover occurs and the older more polluting vehicles and equipment are replaced by newer, cleaner ones. Emissions of SO_2 have shown a decline of 96% in Massachusetts over the period 2002 to 2017, particularly in the point, nonroad and onroad mobile sectors. Massachusetts attributes the reductions in point emissions to controls on EGUs that were part of the first implementation period, fuel switching from coal and oil to natural gas, MassDEP's low sulfur fuel rule, and the retirement of several large older coal and oil burning EGUs in the state. Since some components of the MANE–VU low sulfur fuel strategy were not implemented until 2018, and as MANE–VU states continue to adopt rules to implement the strategy, additional SO_2 emissions reductions have likely been obtained since 2017 and are expected to continue into the future.

In Massachusetts' submission, table 4–3 shows a summary of PM_{10} emissions from all NEI data categories point, nonpoint, non-road, and onroad for the period from 2002 to 2017 in Massachusetts. In Massachusetts, PM_{10} emissions steadily decreased in the point, nonpoint, and nonroad categories for the period from 2002 to 2017. The apparent increase in the onroad emissions is due to changes in emission inventory calculation methodologies, which resulted in higher particulate matter estimates. The variation in emissions in the nonpoint category is due to changes in calculation methodologies for residential wood burning and fugitive dust categories, which have varied significantly.

Table 4–4 of Massachusetts' submission shows a summary of $PM_{2.5}$ emissions from all NEI data categories for the period from 2002 to 2017 in Massachusetts. $PM_{2.5}$ emissions steadily decreased in the nonroad category for the period from 2002 to 2014. The majority of reductions came from the nonpoint category, which Massachusetts attributes to fuel combustion switching from oil to natural gas. The decrease in nonroad $PM_{2.5}$ emissions is because of Federal new engine standards for nonroad vehicles and equipment. There is an overall decrease in onroad emissions due to Federal and State regulations. The increase in emissions in the onroad category from 2002 to 2008 is due to changes in emission inventory calculation methodologies and a model change, as previously explained, which resulted in higher fine particulate matter estimates.

Table 4–7 of Massachusetts' submission shows VOC emissions from all NEI data categories for the period 2002 to 2017 in Massachusetts. VOC emissions have shown a steady decline in Massachusetts over this period. VOC decreases were achieved in all sectors due to Federal new engine standards for onroad and nonroad vehicles and equipment, the National and State low emission vehicle programs, SIP-approved area source rules such as consumer products, portable fuel containers, paints, autobody refinishing, asphalt paving applications, and solvent cleaning operations, and point source controls.

Table 4–8 of Massachusetts' submission shows ammonia (NH_3) emissions from all NEI data categories for the period 2002 to 2017 in Massachusetts. Ammonia decreases were achieved in the onroad sector due to Federal new engine standards for vehicles and equipment. Nonpoint increases and decreases from 2002 to 2017 are due to reporting, grouping and methodology changes. There was little change to nonroad ammonia emissions. Overall, ammonia emissions have decreased from 2008 to 2017.

The EPA is proposing to find that Massachusetts has satisfied the requirements of § 51.308(g)(4) by providing emissions information for NO_X, SO_2, PM_{10}, $PM_{2.5}$, VOCs, and NH_3 broken down by type of source.

Massachusetts uses the emissions trend data in the SIP submission to support the assessment that anthropogenic haze-causing pollutant emissions in Massachusetts have decreased during the reporting period and that changes in emissions have not limited or impeded progress in reducing pollutant emissions and improving visibility. The data Massachusetts presents for NO_X, SO_2, PM_{10}, $PM_{2.5}$, VOCs, and NH_3 show consistently declining emissions of those pollutants. Massachusetts concludes that no significant changes have occurred that have impeded progress in reducing emissions and improving visibility during the reporting period. The EPA is proposing to find that Massachusetts has met the requirements of § 51.308(g)(5).

I. Requirements for State and Federal Land Manager Coordination

Section 169A(d) of the Clean Air Act requires states to consult with FLMs before holding the public hearing on a proposed regional haze SIP, and to include a summary of the FLMs' conclusions and recommendations in the notice to the public. In addition, section 51.308(i)(2)'s FLM consultation provision requires a state to provide FLMs with an opportunity for consultation that is early enough in the state's policy analyses of its emission reduction obligation so that information and recommendations provided by the FLMs can meaningfully inform the state's decisions on its long-term strategy. If the consultation has taken place at least 120 days before a public hearing or public comment period, the opportunity for consultation will be deemed early enough, but the opportunity for consultation must be provided at least sixty days before a public hearing or public comment period at the state level. Section 51.308(i)(2) also requires that the consultation include the opportunity for the FLMs to discuss their assessment of visibility impairment in any Class I area and their recommendations on the development and implementation of strategies to address visibility impairment. Section 51.308(i)(3) requires states, in developing their implementation plans, to include a description of how they addressed FLMs' comments.

The states in the MANE–VU RPO conducted FLM consultation early in the planning process concurrent with the state-to-state consultation that formed the basis of the RPO's decision making process. As part of the consultation, the FLMs were given the opportunity to review and comment on the technical documents developed by MANE–VU. The FLMs were invited to attend the intra- and inter-RPO consultations calls among states and at least one FLM representative was documented to have attended seven intra-RPO meetings and all inter-RPO

meetings. Massachusetts participated in these consultation meetings and calls.[70]

As part of this early engagement with the FLMs, on April 12, 2018, the NPS sent letters to the MANE–VU states requesting that they consider specific individual sources in their long-term strategies.[71] NPS used an analysis of emissions divided by distance (Q/d) to estimate the impact of MANE–VU facilities. To select the facilities, NPS first summed 2014 NEI NO_X, PM_{10}, SO_2, and SO_4 emissions and divided by the distance to a specified NPS mandatory Class I Federal area. NPS summed the Q/d values across all MANE–VU states relative to Acadia, Mammoth Cave and Shenandoah National Parks, ranked the Q/d values relative to each Class I area, created a running total, and identified those facilities contributing to 80% of the total impact at each NPS Class I area. NPS applied a similar process to facilities in Maine but relative to just Acadia National Park. NPS merged the resulting lists of facilities and sorted them by their states. NPS suggested that a state consider those facilities comprising 80% of the Q/d total, not to exceed the 25 top ranked facilities. The NPS identified 10 facilities in Massachusetts in this letter.[72] Massachusetts included the NPS initial letter in its proposed SIP.[73] In a subsequent letter dated October 22, 2018, NPS identified four municipal waste combustor facilities for which more control information was desired.[74] Massachusetts detailed the emission controls and updates to the facilities to address the NPS's request for more information, as discussed previously.[75]

On November 13, 2020, Massachusetts submitted a draft Regional Haze SIP to the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the National Park Service for a 60-day review and comment period pursuant to 40 CFR 51.308(i)(2). Massachusetts received comments from the Forest Service and from the National Park Service by January 15, 2021. Massachusetts responded to the FLM comments and included a summary of the responses in Section 7.3 of its submission to EPA, in accordance with § 51.308(i)(3). In satisfaction of § 51.308(i)(4), Massachusetts explains that it will continue to consult with the FLMs through MANE–VU's planning process (including participation in regular Technical Support Committee meetings that include FLM participation in the development of progress reports and the regional strategy for future RH SIP revisions), MassDEP regulatory and permit notification emails (which provide notification of air quality regulation amendments, SIP revisions, major new source review permits, ambient air monitoring plans), and MassDEP air quality advisory committee meetings.

On April 7, 2021, MassDEP issued a notice of public hearing and comments and the availability of the draft Regional Haze SIP revision for 2018–2028 on MassDEP's Public Notices and Hearings web page and on its SIP web page and emailed the notice to parties that have registered for the MassDEP public notice email list. The notice announced two video conference call public hearings on May 11, 2021 and the opportunity to submit written comments until May 14, 2021. Appendix 43 of the Massachusetts SIP submittal contains a summary of public comments received and MassDEP's responses.

For the reasons stated above, the EPA proposes to find that Massachusetts has satisfied the requirements under 40 CFR 51.308(i) to consult with the FLMs on its regional haze SIP for the second implementation period.

J. Other Required Commitments

Massachusetts' July 22, 2021, SIP submission includes a commitment to revise and submit a regional haze SIP in 2028, and every ten years thereafter. The state's commitment includes submitting periodic progress reports in accordance with § 51.308(f) and a commitment to evaluate progress towards the reasonable progress goal for each mandatory Class I Federal area located within the state and in each mandatory Class I Federal area located outside the state that may be affected by emissions from within the state in accordance with § 51.308(g).

V. Proposed Action

The EPA is proposing to approve the ''Massachusetts Regional Haze State Implementation Plan Revision for the Second Planning Period (2018–2028)'', submitted July 22, 2021 and ''Regional Haze SIP Revision for Massachusetts—Supplement'' source specific requirements for Canal Generating Station, submitted May 26, 2022 as collectively satisfying the regional haze requirements for the second implementation period contained in 40 CFR 51.308(f), (g), and (i).

VI. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference ''Regional Haze SIP Revision for Massachusetts—Supplement'' source specific requirements for Canal Generating Station (Permit number 21–AQ02F–011–APP), submitted May 26, 2022. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 1 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VII. Statutory and Executive Order Reviews

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

[70] See Appendix 20 ''MANE–VU Regional Haze Consultation Report and Consultation Documentation—Final.''

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] See Appendices 24 and 25.

[75] See Appendix 43, ''Summary of Public Comments and MassDEP Responses'' at page 6.

• 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.

In addition, this proposed rulemaking action, pertaining to Massachusetts regional haze SIP submission for the second planning period, is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.'' The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: December 20, 2023.

David Cash,

Regional Administrator, Region 1.

[FR Doc. 2023–28573 Filed 1–9–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

[DOI–2023–0027; DS65100000 DWSN00000.000000 24XD4523WS DP.65102]

RIN 1090–AB28

Privacy Act Regulations; Exemption for the Law Enforcement Records Management System

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Interior (DOI, Department) is proposing to amend its regulations to exempt certain records in the INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS), system of records from one or more provisions of the Privacy Act of 1974 because of criminal, civil, and administrative law enforcement requirements.

DATES: Submit comments on or before March 11, 2024.

ADDRESSES: You may submit comments, identified by docket number [DOI–2023–0027] or Regulatory Information Number (RIN) Number 1090–AB28, by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for sending comments.

• *Email: DOI_Privacy@ios.doi.gov.* Include docket number [DOI–2023–0027] or RIN 1090–AB28 in the subject line of the message.

• *U.S. mail or hand-delivery:* Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240.

Instructions: All submissions received must include the agency name and docket number [DOI–2023–0027] or RIN 1090–AB28 for this rulemaking. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240, *DOI_Privacy@ios.doi.gov* or (202) 208–1605. In compliance with the Providing Accountability Through Transparency Act of 2023, the plain language summary of the proposal is available on *Regulations.gov* in the docket for this rulemaking.

SUPPLEMENTARY INFORMATION:

Background

The Privacy Act of 1974, as amended, 5 U.S.C. 552a, governs the means by which the U.S. Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information about individuals that is maintained in a ''system of records.'' A system of records is a group of any records under the control of an agency from which information about an individual is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. See 5 U.S.C. 552a(a)(4) and (5).

Individuals may request access to records containing information about themselves under the Privacy Act of 1974, 5 U.S.C. 552a(b), (c) and (d). However, the Privacy Act authorizes Federal agencies to exempt systems of records from access by individuals under certain circumstances, such as where the access or disclosure of such information would impede national security or law enforcement efforts. Exemptions from Privacy Act provisions must be established by regulation pursuant to 5 U.S.C. 552a(j) and (k).

The DOI Office of Law Enforcement and Security (OLES) maintains the INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS), system of records to help DOI and its law enforcement bureaus and offices carry out responsibilities to prevent, detect, and investigate known and suspected criminal activity; detain and apprehend those committing crimes on DOI properties or Tribal reservations; manage investigations and law enforcement activities including use of force, critical incidents, property damage claims, traffic accidents, and domestic issues; and prevent visitor accidents or injuries on DOI properties or Tribal reservations. The system also contains statements and records of complaints, reports, correspondence from or about complainants, subjects, and victims of law enforcement investigations. Accordingly, records in the system are used during investigations and law enforcement activities and related criminal

prosecutions, civil proceedings, and administrative actions.

A system of records notice for INTERIOR/DOI–10, Incident Management, Analysis and Reporting System, was previously published in the **Federal Register** at 79 FR 31974 (June 3, 2014); modification published at 86 FR 50156 (September 7, 2021). DOI published an updated notice elsewhere in the **Federal Register** concurrently with this notice of proposed rulemaking (NPRM) to update the title of the system to INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS) and denote changes to the modified system.

Under 5 U.S.C. 552a(j) and (k), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of the Privacy Act of 1974. The INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS), system of records contains law enforcement records and investigatory material that are exempt from provisions of the Privacy Act of 1974 under 5 U.S.C. 552a(j) and (k). The DOI previously promulgated regulations at 43 CFR 2.254 to exempt records in this system from all provisions of the Privacy Act except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) pursuant to 5 U.S.C. 552a(j)(2); and to exempt records from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

In this NPRM, DOI is proposing to amend its existing exemptions under 43 CFR 2.254 subsections (a) and (c) to reflect the new title of the system, INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS), and to claim additional exemptions from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(3), (k)(5), and (k)(6) because this system of records contains material that support law enforcement activities and investigations. DOI may waive exemptions on a case-by-case basis where a release would not interfere with or reveal investigatory material compiled for law enforcement purposes, or reveal records on suitability, eligibility, or qualifications for Federal employment, military service, Federal contracts, or access to classified information, or compromise confidential sources. Exemptions from these subsections are justified for the following reasons:

1. 5 U.S.C. 552a(c)(3). This section requires an agency to make the accounting of each disclosure of records available to the individual named in the record upon request. Records in this system may contain investigatory records and material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Release of accounting of disclosures would alert the subjects of an investigation to the existence of the investigation, law enforcement activity or investigation, and the fact that they are subjects of the investigation or could disclose confidential information that could be detrimental to national security. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature and scope of an investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses and their families, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

2. 5 U.S.C. 552a(d); (e)(4)(G) and (e)(4)(H); and (f). These sections require an agency to provide notice and disclosure to individuals that a system contains records pertaining to the individual, as well as providing rights of access and amendment. Records in this system may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Granting access to these records in the system could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, the nature and scope of the information and evidence obtained, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation; endanger the physical safety of confidential sources, witnesses, and law enforcement personnel, as well as their families; lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony; and disclose investigative techniques and procedures. In addition, granting access to such information could disclose confidential information that could impact national security or could constitute an unwarranted invasion of the personal privacy of others.

3. 5 U.S.C. 552a(e)(1). This section requires the agency to maintain information about an individual only to the extent that such information is relevant or necessary. The application of this provision could impair investigations because it is not always possible to determine the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after information is evaluated that the relevance and necessity of such information can be established for an investigation. In addition, during the course of an investigation, the investigator may obtain information which is incidental to the main purpose of the investigation, but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

4. 5 U.S.C. 552a(e)(4)(I). This section requires an agency to provide public notice of the categories of sources of records in the system. The application of this provision could provide the subject of an investigation with substantial information about the nature and scope of that investigation, could provide information to enable the subject to avoid detection or apprehension, seriously impede or compromise an investigation, or the fabrication of testimony, and disclose investigative techniques and procedures. Additionally, the application of this section could cause sources to refrain from giving such information because of fear of reprisal, or fear of breach of promise(s) of anonymity and confidentiality. This could compromise DOI's ability to conduct investigations and to identify, detect and apprehend violators.

Procedural Requirements

1. Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order (E.O.) 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed

this rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–221)). This proposed rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. The exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the Regulatory Flexibility Act. This proposed rule is not a major rule under 5 U.S.C. 804(2). This proposed rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

3. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or Tribal governments in the aggregate, or on the private sector, of more than $100 million per year. The proposed rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. This proposed rule makes only minor changes to 43 CFR part 2. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

4. Takings (E.O. 12630)

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. This proposed rule makes only minor changes to 43 CFR part 2. A takings implication assessment is not required.

5. Federalism (E.O. 13132)

In accordance with Executive Order 13132, this proposed rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The proposed rule is not associated with, nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A Federalism Assessment is not required.

6. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Does not unduly burden the Federal judicial system.

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

7. Consultation With Indian Tribes (E.O. 13175)

In accordance with Executive Order 13175, the Department of the Interior has evaluated this proposed rule and determined that it would have no substantial effects on Federally Recognized Indian Tribes.

8. Paperwork Reduction Act

This proposed rule does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) is not required.

9. National Environmental Policy Act

This proposed rule does not constitute a major Federal Action significantly affecting the quality for the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.,* is not required because the proposed rule is covered by a categorical exclusion. We have determined the proposed rule is categorically excluded under 43 CFR 46.210(i) because it is administrative, legal, and technical in nature. We also have determined the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

10. Effects on Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

11. Clarity of This Regulation

We are required by Executive Order 12866 and 12988, the Plain Writing Act of 2010 (Pub. L. 111–274), and the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each proposed rule we publish must:

—Be logically organized;
—Use the active voice to address readers directly;
—Use clear language rather than jargon;
—Be divided into short sections and sentences; and
—Use lists and table wherever possible.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Confidential information, Courts, Freedom of Information Act, Privacy Act.

For the reasons stated in the preamble, the Department of the Interior proposes to amend 43 CFR part 2 as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461, the Social Security Number Fraud Prevention Act of 2017, Pub. L. 115–59, September 15, 2017.

■ 2. Amend § 2.254 by:
■ a. Revising paragraph (a)(5);
■ b. Adding paragraph (b)(4);
■ c. Revising paragraph (c)(15); and
■ d. Adding paragraphs (d)(4), (e)(9), and (f)(2).

The additions and revisions read as follows:

§ 2.254 Exemptions.

* * * * *

(a) * * *

(5) INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS).

(b) * * *

(4) INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS).

(c) * * *

(15) INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS).

(d) * * *

(4) INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS).

(e) * * *

(9) INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS).

(f) * * *

(2) INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS).

* * * * *

Teri Barnett,

Departmental Privacy Officer, Department of the Interior.

[FR Doc. 2024–00318 Filed 1–9–24; 8:45 am]

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Notices

Federal Register

Vol. 89, No. 7

Wednesday, January 10, 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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Assembly of the Administrative Conference of the United States adopted four recommendations at its hybrid (virtual and in-person) Eightieth Plenary Session: Best Practices for Adjudication Not Involving an Evidentiary Hearing, Identifying and Reducing Burdens on the Public in Administrative Processes, Improving Timeliness in Agency Adjudication, and User Fees.

FOR FURTHER INFORMATION CONTACT: For Recommendations 2023–5 and 2023–6, Matthew Gluth; Recommendation 2023–7, Lea Robbins; and Recommendation 2023–8, Kazia Nowacki. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *www.acus.gov.*

The Assembly of the Conference met during its Eightieth Plenary Session on December 14, 2023, to consider four proposed recommendations and conduct other business. All four recommendations were adopted.

Recommendation 2023–5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing.* This recommendation examines the wide range of procedures that agencies use when adjudicating cases in programs in which there is no legally required opportunity for an evidentiary hearing. It offers a set of broadly applicable best practices that account for the diversity of matters that agencies decide through truly informal adjudication and promote fairness, accuracy, and efficiency.

Recommendation 2023–6, *Identifying and Reducing Burdens on the Public in Administrative Processes.* This recommendation examines best practices, such as public engagement, that agencies can use to identify unnecessary burdens that members of the public face when they engage with administrative programs or participate in administrative processes. It also recommends strategies agencies can use to reduce unnecessary burdens, such as simplifying processes, digitizing services, and collaborating with other agencies and nongovernmental organizations.

Recommendation 2023–7, *Improving Timeliness in Agency Adjudication.* This recommendation examines strategies—including procedural, technological, personnel, and other reforms—that agencies have used or might use to address backlogs or delays in administrative adjudication. It identifies best practices to help agencies devise plans to promote timeliness in administrative adjudication, in accord with principles of fairness, accuracy, and efficiency.

Recommendation 2023–8, *User Fees.* This recommendation provides best practices for agencies and Congress to consider in designing and implementing user fees in administrative programs. It addresses how Congress and agencies might determine when user fees are appropriate; how agencies might determine fair and reasonable user fees for specific programs, including whether there are reasons for waivers, exemptions, or reduced rates; when and how agencies should engage with the public in determining or modifying user fees; and how agencies should review their user fee programs.

The Conference based its recommendations on research reports and prior history that are posted at: *https://www.acus.gov/event/80th-plenary-session.*

Authority: 5 U.S.C. 595.

Dated: January 4, 2024.

Shawne C. McGibbon,

General Counsel.

APPENDIX—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2023–5

Best Practices for Adjudication Not Involving an Evidentiary Hearing

Adopted December 14, 2023

Federal administrative adjudication takes many forms.[1] Many adjudications include a legally required opportunity for an evidentiary hearing—that is, a proceeding ''at which the parties make evidentiary submissions and have an opportunity to rebut testimony and arguments made by the opposition.'' [2] Such proceedings also follow the exclusive record principle, in which the decision maker is confined to considering ''evidence and arguments from the parties produced during the hearing process (as well as matters officially noticed) when determining factual issues.'' [3]

In many federal administrative adjudications, however, no constitutional provision, statute, regulation, or executive order grants parties the right to an evidentiary hearing.[4] Proceedings of this type include many agency decisions regarding grants, licenses, or permits; immigration and naturalization; national security; the

[1] The term ''adjudication'' as used in this Recommendation refers to the process for formulating an order that is ''a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program.'' Michael Asimow, Admin. Conf. of the U.S., Federal Administrative Adjudication Outside the Administrative Procedure Act 8 (2019).

[2] Asimow, *supra* note 1, at 10.

[3] Asimow, *supra* note 1, at 10. The Administrative Conference has used the term ''Type A adjudications'' to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is covered by the formal adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. 554, 556–557. The Conference has used the term ''Type B adjudications'' to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is not covered by the APA's formal adjudication provisions. *See* Admin. Conf. of the U.S., Recommendation 2016–4, *Evidentiary Hearings Not Required by the Administrative Procedure Act,* 81 FR 94314 (Dec. 23, 2016).

[4] The Conference has used the term ''Type C'' adjudication to refer to adjudications that are not subject to a legally required evidentiary hearing. *See id.*

regulation of banks and other financial matters; requests for records under the Freedom of Information Act; land-use requests; and a wide variety of other matters.[5]

There are many policy reasons why adjudications might be conducted without a legally required opportunity for an evidentiary hearing, though such reasons are beyond the scope of this Recommendation. The stakes in disputes resolved through such adjudications vary widely, but whether the stakes are low or high, each decision matters to the parties. For those involved in or familiar with these adjudications, the most important factor in their view of government may be the way these decisions are made. Accordingly, decision making in such adjudications should be accurate, efficient, and both fair and perceived to be fair, regardless of the stakes involved.

Adjudications without an evidentiary hearing differ in fundamental ways from those that include a legally required opportunity for an evidentiary hearing. In adjudications of all types, a decision maker conducts an investigation and issues an initial, preliminary, or proposed decision. In adjudications that include an evidentiary hearing, if the private party does not acquiesce in that decision, the party is entitled to an evidentiary hearing before a neutral decision maker who, after considering the evidence and arguments, issues a decision. Typically, the private party also can seek review of that decision within the agency, often by the agency head or officials exercising authority delegated by the agency head. By contrast, in adjudications without an evidentiary hearing, often the same decision maker who issued the initial, proposed, or preliminary decision issues the decision, normally after considering input from the affected party. Typically, that party is entitled to seek review of that decision by a different decision maker within the agency. These fundamental differences are reflected in this Recommendation.

No uniform set of procedures applies to all adjudications without evidentiary hearings, nor could one be devised. Some characteristics are common, however. Such adjudications often allow for document exchanges and submission of research studies, oral arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and inspections. Agencies that engage in such adjudications typically employ dispute resolution methodologies without the procedures typical of evidentiary hearings, such as the opportunity to cross examine witnesses, the prohibition of ex parte communications, the separation of adjudicative functions from investigative and prosecutorial functions, and the exclusive record principle.

While not subject to the requirement that a decision be preceded by an evidentiary hearing, adjudications without evidentiary hearings may be subject to other legal requirements. The Due Process Clause of the Constitution's Fifth Amendment may require certain minimum procedures for such adjudications that involve constitutionally protected interests in life, liberty, or property.[6] In addition, agencies conducting such adjudications typically must observe certain general provisions of the Administrative Procedure Act (APA)—in particular 5 U.S.C. 555[7] and 558—and are subject to other generally applicable statutes and regulations addressing the conduct of federal employees, rights of representation,[8] ombuds,[9] and other matters.[10] The procedures employed by agencies conducting these adjudications may also be subject to agency-specific statutes and procedural regulations. Finally, judicial review is available for many such adjudications.

Statutorily required procedures and judicial review, however, may be insufficient to ensure fairness, accuracy, and efficiency in adjudications without an evidentiary hearing. Due process, the APA, and other sources of law external to the agency often do not specifically prescribe the details of agency procedures, and judicial review may be unrealistic because the costs of such review exceed the value of the interests at stake.[11] For these reasons, agency-adopted policies offer the best mechanism for establishing procedural protections for parties, promoting fairness and participant satisfaction, and facilitating the efficient and effective functioning of these adjudications. The public availability of such rules also facilitates external oversight.

This Recommendation identifies a set of best practices for adjudications without an evidentiary hearing and encourages agencies to implement them through their regulations and guidance documents. Many agencies conducting such adjudications already follow these best practices. This Recommendation recognizes that agencies adjudicate a wide range of matters, have different adjudicatory needs and available resources, and are subject to different legal requirements. What works best for one agency may not work for another. Agencies must take into account their own unique circumstances when implementing the best practices that follow. Accordingly, agencies adopting or modifying procedures for adjudication without an evidentiary hearing should tailor these best practices to their individual systems.

Recommendation

Notice of Proposed Action

1. Agencies conducting adjudications without evidentiary hearings should notify parties of the initial, proposed, or preliminary decision, including the reasons for that decision.

2. Such notice should provide sufficient detail and be given in sufficient time to allow parties to contest the initial, proposed, or preliminary decision and submit evidence to support their position. This notice should provide parties with the following information, when applicable:

a. Whether the agency provides a second chance to achieve compliance;

b. The manner by which the party can submit additional evidence and argument to influence the agency's initial, proposed, or preliminary decision;

c. The amount of time before further agency action will be taken; and

d. Whether and, if so, how parties may access materials in the agency's case file.

Opportunity To Submit Evidence and Argument

3. Agencies should allow parties in adjudications without evidentiary hearings to furnish decision makers with evidence and arguments. Depending on the stakes involved, the types of issues involved, and the agency's caseload and adjudicatory resources, the process for furnishing evidence and argument may include written submissions or oral presentations and the opportunity to rebut adverse information. Agencies should make such opportunities available in a manner that permits people with disabilities and people with limited English proficiency to take advantage of them.

4. If credibility issues are presented, the party should be permitted an opportunity to rebut adverse information.

Representation

5. When feasible, agencies should allow participants in their adjudications without evidentiary hearings to be represented by a lawyer or a lay person with relevant expertise.

6. Particularly for self-represented parties, agencies should not prevent participants in their adjudications without evidentiary hearings from obtaining assistance or support from friends, family members, or other individuals in presenting their case.

7. Agencies should make their proceedings as accessible as possible to self-represented parties by providing plain-language resources, such as frequently asked questions (FAQs), and other appropriate assistance, such as offices dedicated to helping the public navigate agency programs.

Decision Maker Impartiality

8. Agencies should tailor neutrality standards appropriately to adjudications without evidentiary hearings, which may be conducted by decision makers who engage in their own investigations or participate in investigative teams and may have prior involvement in the matter.

9. Consistent with government ethics requirements, agencies should require the recusal of employees engaged in adjudications without evidentiary hearings who have financial or other conflicts of interest in matters they are investigating or deciding.

[5] Michael Asimow, Fair Procedure in Informal Adjudication 7 (Dec. 5, 2023) (report to the Admin. Conf. of the U.S.).

[6] *See Mathews* v. *Eldridge,* 424 U.S. 319 (1976); *Brock* v. *Roadway Express, Inc.,* 481 U.S. 252, 262–63 (1987) (applying Mathews principles in a Type C context); *Goss* v. *Lopez,* 415 U.S. 565 (1975) (discussing minimal procedures required for short-term suspension from public school).

[7] *See PBG Corp.* v. *LTV Corp.* 496 U.S. 633 (1990).

[8] *See* Asimow, *supra* note 55, at 36, for a discussion of the right to representation before agencies, including the right to lay representation under many agencies' regulations.

[9] *See* Admin. Conf. of the U.S., Recommendation 2016–5, *The Use of Ombuds in Federal Agencies,* 81 FR 94316 (Dec. 23, 2016).

[10] *See* Asimow, *supra* note 55, at 33.

[11] *Id.* at 46.

10. Agencies should require recusal of employees who reasonably may be viewed as not impartial.

11. When adjudications without evidentiary hearings involve serious sanctions, agencies should consider adopting internal separation of investigative or prosecutorial functions and adjudicatory functions.

Statement of Reasons

12. Agencies conducting adjudications without evidentiary hearings should provide oral or written statements of reasons that follow federal plain-language guidelines setting forth the rationale for the decision, including the factual and other bases for it. The level of detail in the statement should be consistent with the stakes involved in the adjudication.

Administrative Review

13. Agencies should provide for administrative review of their decisions by higher-level decision makers or other reviewers unless it is impracticable because of high caseload, lack of available staff, or time constraints, or because of low stakes.

Procedural Regulations

14. Agency regulations should specify the procedures for each adjudication without an evidentiary hearing the agency conducts. Consistent with Recommendation 92–1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements,* agencies should voluntarily use notice-and-comment rulemaking for the adoption of significant procedural regulations unless the costs outweigh the benefits of doing so.

15. Agencies should ensure their regulations, guidance documents, staff manuals, procedural instructions, and FAQs addressing their adjudications without evidentiary hearings follow federal plain-language guidelines and are easily accessible on the agency's website.

16. Agencies should ensure that their notices, statements, procedural instructions, FAQs, and other documents that contain important information about their adjudications without evidentiary hearings are made available in languages understood by people who frequently appear before the agency.

Ombuds

17. Agencies with an ombuds program should ensure that their ombuds are empowered to handle complaints about adjudications without evidentiary hearings.

18. Agencies without an ombuds program should consider establishing one, particularly if their adjudications without evidentiary hearings have sufficient caseloads, significant stakes, or significant numbers of unrepresented parties. The establishment and standards of such programs should follow the best practices identified in Recommendation 2016–5, *The Use of Ombuds in Federal Agencies.*

19. Agencies with smaller caseloads, lower stakes, or lack of available staff should consider sharing an ombuds program with other similarly situated agencies to address any resource constraints.

20. Agencies that choose not to establish or share an ombuds program should provide alternative procedures for allowing parties to submit feedback or complaints, such as through an agency portal or dedicated email address.

Quality Assurance

21. Agencies conducting adjudications without evidentiary hearings should establish methods for assessing and improving the quality of their decisions to promote accuracy, efficiency, fairness, the perception of fairness, and other goals relevant to those adjudications in accordance with Recommendation 2021–10, *Quality Assurance Systems in Agency Adjudication.* Depending on the caseload, stakes, and available resources, such methods may include formal quality assessments and informal peer review on an individual basis, sampling and targeted case selection on a systemic basis, and case management systems with data analytics and artificial intelligence tools.

Administrative Conference Recommendation 2023–6

Identifying and Reducing Burdens on the Public in Administrative Processes

Adopted December 14, 2023

Each year, millions of people navigate administrative processes to access benefits and services and otherwise engage with government programs to help themselves and their families. These processes can be extraordinarily complex. Additionally, processes can vary significantly across and within government agencies. These variations can make it especially hard when members of the public need to access multiple programs at the same time, for example during key life events such as retirement, birth of a child, or unexpected disaster.

Navigating these processes requires time and effort to learn both about programs and how to access them. Complying with these processes also requires significant work, such as completing forms, obtaining and submitting information, and possibly traveling to in-person interviews or hearings. Efforts to comply can result in stress, stigma, frustration, fear, or other psychological harms. These costs—which may be described as learning, compliance, and psychological costs, respectively—can be collectively understood as administrative burden.[1]

Administrative burdens significantly affect whether and how the public accesses a wide range of government programs, including those related to veterans benefits and services, student financial aid, Social Security benefits, health care, disaster assistance, tax credits, nutrition assistance, housing assistance, and unemployment insurance. These burdens can be exacerbated when programs are not wholly administered by the federal government but in partnership with state, local, or tribal governments. Although some level of administrative burden may be necessary—to establish eligibility for programs with sufficient accuracy or to prevent fraud—research shows the cumulative effect of this burden hinders the ability of agencies to achieve their missions. Billions of dollars in government benefits go unclaimed every year,[2] and administrative burdens are a key reason.[3] Administrative burdens do not fall equally on all members of the public but fall disproportionately on certain members of historically underserved communities (including persons with disabilities),[4] the elderly, persons with limited English proficiency, and persons with poor physical or mental health.[5] Reducing administrative burden, while also taking into account other important public values such as program integrity, can make government work better for everyone.

Various authorities govern how federal agencies identify and reduce administrative burdens. The Paperwork Reduction Act (PRA) has long required agencies to identify burdens associated with information they collect from the public and explain why those burdens are necessary to administer their programs.[6] Office of Management and Budget (OMB) Circular A–11 emphasizes the importance of customer life experiences [7] and human-centered design [8] in how agencies

[1] Pamela Herd, Donald Moynihan & Amy Widman, Identifying and Reducing Burdens in Administrative Processes 4 (Oct. 4, 2023) (report to the Admin. Conf. of the U.S.). This Recommendation uses both ''administrative burden'' and ''administrative burdens.'' The singular is intended to capture the idea of burden as a theoretical concept; the plural reflects the fact that, in practice, burdens are multiple rather than singular. *See* Pamela Herd & Donald Moynihan, Administrative Burden: Policymaking by Other Means 1, 269 (2018); *see also Burden Reduction Initiative,* Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, Exec. Off. of the President, *https://www.whitehouse.gov/omb/information-regulatory-affairs/burden-reduction-initiative* (last visited Dec. 14, 2023).

[2] Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, Exec. Off. of the President, Tackling the Time Tax: How the Federal Government is Reducing Burdens to Accessing Critical Benefits and Services 9 (2023).

[3] *See* Herd et al., *supra* note 1, at 15–17.

[4] Exec. Order No. 13,985, 86 FR 7009 (Jan. 20, 2021).

[5] Tackling the Time Tax, *supra* note 2, at 10; *see also* Herd & Moynihan, *supra* note 1, at 105, 134–135, 157–162, 264; Herd et al., *supra* note 1, at 10–12.

[6] 44 U.S.C. 3501–3521.

[7] Customer life experiences are experiences that require members of the public to navigate government services across multiple programs, agencies, or levels of government. Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular A–11, Preparation, Submission, and Execution of the Budget (2023). As explained in Part 6 § 280.16, OMB will manage the selection of a limited number of customer life experiences to prioritize for government-wide action in line with the President's Management Agenda. *See also* Exec. Order No. 14,058, 86 FR 71357 (Dec. 16, 2021).

[8] OMB Circular A–11, *supra* note 7, § 280.1. Human-centered design is a technique to understand administrative process from the user's perspective and then use those insights to adjust processes to better match human capacities. Herd et al., *supra* note 1, at 22. Journey mapping is a related concept that involves documenting each step that an individual takes when engaging with an administrative process in order to better understand the process and where individuals struggle with it. *Id.*

manage organizational performance to improve service delivery.

While some administrative burdens are imposed by Congress or by state law, federal agencies have an important role to play in reducing the burdens they impose when administering their programs. Agencies employ numerous strategies to reduce those burdens, including simplifying processes, improving access for persons with limited English proficiency and persons with disabilities, expanding the availability of online (instead of solely in-person) processes, and establishing ombuds offices to assist those experiencing burdens.[9] In addition, agencies have achieved success in reducing burdens by establishing devoted customer experience (CX) teams that have sufficient policy knowledge and authority within the agency to be effective.[10]

Collaboration within and between federal agencies, and between federal agencies and state, local, and tribal governments, is also essential for burden reduction. Interagency data sharing that is consistent with the Fair Information Practice Principles [11] and all relevant law and policy, especially when used in conjunction with simplifying onerous processes or eliminating unnecessary ones, can also reduce administrative burdens.[12] In addition to collaboration across the government, federal agency partnerships with non-governmental third parties (such as legal aid organizations and others) also play a crucial role in agency efforts to reduce burden. Third parties assist agencies by providing information about how processes can be improved to serve the public better and by directly assisting members of the public who interact with government programs.[13]

This Recommendation provides best practices for agencies to use in identifying and reducing unnecessary administrative burdens. Building on previous recommendations of the Conference,[14] this Recommendation provides specific consultative techniques agencies should use to gather information from individual members of the public to gain a fuller and more accurate understanding of administrative burdens. The Recommendation encourages the use of online processes and offers other techniques to simplify and streamline processes and to make information about processes more accessible. The Recommendation also identifies broad organizational and collaborative tools agencies should employ in their burden reduction efforts, including outlining how agency leadership and staff [15] should engage with burden reduction initiatives within their agencies and across the government. The primary focus of burden reduction efforts should be with those federal agencies that have frequent or consequential interactions with the public. The tools discussed are intended to reduce burdens on the public and not become a reporting burden on agencies for which they are less relevant.

This Recommendation also includes a recommendation directed to OMB that builds on OMB's prior actions directed at reducing burdens. It recommends that OMB provide agencies with additional guidance for measurement and consideration of administrative burden and forgone benefits and services, as well as provide additional guidance on agencies' consideration of the potential advantages and disadvantages of administrative data sharing. This guidance could take many forms, including written guidance or agency-specific or government-wide training. In addition, again building on past recommendations of the Conference and related implementation efforts,[16] this Recommendation encourages OMB to provide agencies with additional guidance on the use of flexibilities under the PRA to conduct CX research. It also includes a recommendation to Congress that, when developing new legislation that establishes or affects administrative programs, it should provide express statutory authority for agencies to share data where beneficial for achieving the goals of the legislation.

Recommendation

Burden Identification and Reduction Principles

1. Federal agencies should seek to identify and reduce administrative burdens that the public faces when interacting with government programs.

2. Agencies' efforts to identify and reduce burdens should take into account the experiences and perspectives of members of the public who interact with government programs.

3. Because members of the public often interact with multiple government agencies and programs during key life experiences, such as retirement, birth of a child, or unexpected disaster, agency and program officials should collaborate to identify and reduce burdens that would predictably arise during those experiences.

4. When undertaking efforts to identify and reduce burdens, agencies should consider the effects on other important public values, including program integrity.

Burden Identification Strategies

5. Agencies should adopt procedures for consulting with members of the public who interact with government programs to better inform agency officials about the nature of the burdens their processes impose. In seeking to do so, agencies should try to identify and consult with those who may face disproportionate burdens in accessing agency programs. Agencies should employ multiple consultative techniques, including:

a. Client outreach, such as surveys and focus groups;

b. Requests for public comment;

c. Complaint portals available on agency websites;

d. Consultation with agency staff who work with the public, including agency ombuds or public advocate staff; and

e. Consultation with nongovernmental organizations, advocacy groups, and other members of the private sector (such as representatives, program navigators who help members of the public engage with governmental processes, and social workers) who assist members of the public.

6. To help identify burdens, agencies should use the information obtained through such consultation to identify the procedures members of the public face, and resulting burdens, at each step in the process.

7. To determine agencies' authority to reduce burdens, agencies should trace the legal or operational source of identified burdens to determine whether they are imposed by statute or by regulation, guidance, or agency practice, at the federal or state level.

8. Agencies should, to the extent feasible, estimate and quantify any learning, compliance, or psychological costs of interacting with their programs. These costs

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[9] *See* Herd et al., *supra* note 1, at 28; *see also* Tackling the Time Tax, *supra* note 2, at 48–49; White House Legal Aid Interagency Roundtable, Access to Justice through Simplification (2022); Admin. Conf. of the U.S., Recommendation 2016–5, *The Use of Ombuds in Federal Agencies,* 81 FR 94316 (Dec. 23, 2016).

[10] Herd et al., *supra* note 1, at 26. Under Executive Order 14,058, the term ''customer'' refers to any individual, business, or organization that interacts with an agency or program, and the term ''customer experience'' refers to the public's perceptions of and overall satisfaction with interactions with an agency, product, or service. *See* 86 FR at 71358. This Recommendation uses the term ''customer'' following its use in that Executive Order, notwithstanding the debate regarding the appropriateness of referring to members of the public as ''customers.'' *See, e.g., Does DHS Really Have Customers?,* U.S. Dep't of Homeland Sec., *https://www.dhs.gov/news/2022/06/23/does-dhs-really-have-customers* (last visited Dec. 14, 2023).

[11] *Fair Information Practice Principles (FIPPs),* Fed. Priv. Council, Off. of Mgmt. & Budget, Exec. Off. of the President, *https://www.fpc.gov/resources/fipps* (last visited Dec. 14, 2023).

[12] *See* Herd et al., *supra* note 1, at 18, 29–31; *see also* Tackling the Time Tax, *supra* note 2, at 36, 41.

[13] *See* Herd et al., *supra* note 1, at 46; *see also* Admin. Conf. of the U.S. & Legal Servs. Corp., Forum, Assisting Parties in Federal Administrative Adjudication (2023); Admin. Conf. of the U.S., Recommendation 2021–9, *Regulation of Representatives in Agency Adjudicative Proceedings,* 87 FR 1721 (Jan. 12, 2022).

[14] *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2023–4, *Online Processes in Agency Adjudication,* 88 FR 42681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2023–2, *Virtual Public Engagement in Agency Rulemaking,* 88 FR 42680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021–3, *Early Input on Regulatory Alternatives,* 86 FR 36082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2019–3, *Public Availability of Agency Guidance Documents,* 84 FR 38931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018–7, *Public Engagement in Rulemaking,* 86 FR 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017–3, *Plain Language in Regulatory Drafting,* 82 FR 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2016–6, *Self-Represented Parties in Administrative Hearings,* 81 FR 94319 (Dec. 23, 2016).

[15] For the purposes of this Recommendation, agency leadership and staff include a wide range of stakeholders such as general counsels, chief information officers, chief risk officers, and chief data officers, as well as ombuds and officials responsible for compliance with laws such as the Privacy Act (5 U.S.C. 552a) and the PRA.

[16] *See also* Admin. Conf. of the U.S., Recommendation 2018–1, *Paperwork Reduction Act Efficiencies,* 83 FR 30683 (June 29, 2018); Admin. Conf. of the U.S., Recommendation 2012–4, *Paperwork Reduction Act,* 77 FR 47808 (Aug. 10, 2012).

include the time it takes to learn about programs and how to access them, the work it takes to comply with program requirements, and the stress or stigma resulting from engaging with administrative programs, as well as forgone benefits or services.

Burden Reduction Strategies

9. Agencies should periodically review their administrative processes to identify opportunities to simplify them by, as appropriate:

a. Limiting the number of steps in processes;

b. Reducing the length of required forms;

c. Limiting documentation requirements, where possible;

d. Eliminating notary requirements and substituting unsworn statements under penalty of perjury; and

e. Expanding access to persons with limited English proficiency and persons with disabilities.

10. Agencies should allow the public to interact with government programs using online processes while still retaining in-person processes when necessary to ensure access to benefits and services. In particular, agencies should, when possible:

a. Create alternatives (such as digital or telephonic signatures) for requirements for ''wet'' signatures;

b. Allow members of the public to use universal logins used by government agencies;

c. Allow members of the public to interact with agencies by telephone or video conference rather than requiring in-person appointments; and

d. Make agency websites and processes accessible on mobile devices.

11. When permitted by law, agencies should reduce steps members of the public must take to receive benefits or services by using information in the government's possession to determine program eligibility, prepopulate enrollment forms, or automatically select the most beneficial program options for members of the public unless they decide to opt out.

12. Agencies should make information about their programs as easy as possible to find and understand, proactively provide information to members of the public about their eligibility for benefits and services, and allow members of the public to expeditiously access records pertaining to themselves when required for obtaining benefits and services.

13. Agencies should timely provide information in plain language and, when appropriate and feasible, in multiple languages to ensure members of the public can understand and use the information.

14. Agencies should increase the availability of assistance for members of the public interacting with their programs, beyond continuing to enable members of the public to rely on assistance from other persons such as family or friends, by:

a. Working with legal aid organizations and others who provide pro bono or ''low'' bono (below market rate but not free) services to increase availability of representation;

b. Establishing rules authorizing accredited or qualified nonlawyer representatives to practice before the agency; and

c. Expanding the use of agency staff, including front-line staff, ombuds, and public advocates, as well as government-sponsored and -supported entities designed to help members of the public navigate government processes.

15. Agencies should identify unnecessary administrative burdens that are required by statutes in their Supporting Statements under the Paperwork Reduction Act (PRA) and in their annual proposed legislative program submissions to the Office of Management and Budget (OMB) under OMB Circular A–19.

Agency Organization

16. Political appointees, senior executives, and other agency leaders should prioritize burden identification strategies and reduction efforts, using their leadership positions to articulate burden reduction goals for agency staff and outline commitments for achieving them, particularly when such commitments require collaboration between agency units. Agencies should connect their burden reduction goals to their strategic planning and reporting goals under the Government Performance and Results Act.

17. Agencies should identify whether they have particular programs or functions that involve interaction with the public. Agencies with such programs should assemble a team devoted to improving the experiences that these members of the public have when interacting with the agency, often referred to as customer experience (CX) teams. CX teams should have thorough knowledge of relevant agency programs. Senior career staff should partner with one or more political appointees to provide CX teams with sufficient authority within the agency to accomplish their goals.

18. Agencies should include their general counsels and other relevant staff with statutory responsibilities related to burden reduction (for example, privacy officers and PRA officers) in such reduction efforts as early as possible in order to facilitate agency efforts to maximize burden reduction.

Agency Collaboration

19. Federal agencies should expand efforts to collaborate with other entities to maximize burden reduction. In particular, program and legal staff should collaborate with their chief data officer and other relevant officials on ways to share data across federal agencies and between federal and state agencies, consistent with the Fair Information Practice Principles and all relevant law and policy, in order to:

a. Increase outreach to members of the public who may be eligible for administrative programs;

b. Reduce requirements for forms and documentation; and

c. Under certain conditions, provide for automatic enrollment and renewal.

20. Agencies should work with their chief data officers and other relevant officials in cross-agency working groups to share information about best practices for reducing burden and using data-sharing agreements.

Roles for OMB and Congress

21. OMB should provide agencies with additional guidance, potentially including models and training, to inform agency:

a. Measurement and consideration of administrative burden and forgone benefits and services, such as in regulatory impact analyses;

b. Examination of the potential legal or policy advantages and disadvantages of administrative data sharing, in particular providing additional positive examples of data sharing; and

c. Use of flexibilities under the PRA to make it easier for agencies to conduct CX research and to improve agency service delivery.

22. When developing legislation that establishes or affects administrative programs, Congress should provide express statutory authority for agencies to share data where doing so would further the goals of the legislation and not cause undue harm to other legislative purposes or critical privacy interests.

Administrative Conference Recommendation 2023–7

Improving Timeliness in Agency Adjudication

Adopted December 14, 2023

It is often said that justice delayed is justice denied. Indeed, one rationale underlying the adjudication of many types of cases by executive branch agencies is that they often can decide them more quickly through administrative methods than the courts can through judicial methods.

Federal agencies adjudicate millions of cases each year, including applications for benefits and services, applications for licenses and permits, and enforcement actions against persons suspected of violating the law. Members of the public depend on the timely adjudication of their cases. Delayed adjudication, especially given the possible added time of judicial review, can have significant consequences, particularly for members of historically underserved communities.

The time it takes an agency to decide a case depends on, among other variables, the evidentiary and procedural demands of the case, the volume of cases pending before the agency, and the resources available to the agency to adjudicate cases. Many factors can affect these variables, such as the funds appropriated by Congress, which directly impact the resources that agencies can allocate to adjudication. Other factors include the establishment and expansion of programs by Congress, economic and demographic changes, trends in federal employment affecting agencies' ability to recruit and retain personnel involved in adjudication, disruptions to agency operations, such as the COVID–19 pandemic, and agency organizational structures and procedures.[1] When delays or backlogs increase, agencies frequently face pressure from parties, representatives, Congress, the media, and others to process and decide cases more promptly.

Agencies rely on a wide range of procedural, organizational, personnel,

[1] Jeremy S. Graboyes & Jennifer L. Selin, Improving Timeliness in Agency Adjudication (Dec. 11, 2023) (report to the Admin. Conf. of the U.S.).

technological, and other initiatives to promote timeliness and to respond to concerns about timeliness when they arise. The Administrative Conference has adopted many recommendations identifying specific methods that agencies have used or might use to improve timeliness. One of its earliest recommendations encourages agencies to collect and analyze case processing data to ''develop improved techniques fitted to [their] particular needs to reduce delays'' and measure the effectiveness of those techniques.[2] Later recommendations address options including:

- Delegation of final decisional authority subject to discretionary review by the agency head; [3]
- Use of precedential decision making by appellate decision makers; [4]
- Adoption of procedures for summary judgment [5] and prehearing discovery; [6]
- Use of a broad suite of active case management techniques; [7]
- Implementation of electronic case management and publicly accessible online processes; [8]
- Establishment of quality assurance systems; [9]
- Development of reasonable time limits or step-by-step time goals for agency action; [10]
- Use of alternative dispute resolution (ADR) techniques; [11]
- Use of simplified or expedited procedures in appropriate cases; [12]
- Use of remote hearings; [13]
- Aggregation of similar claims; [14] and
- Use of personnel management strategies.[15]

These recommendations remain valuable resources for policymakers charged with promoting and improving timeliness in agency adjudication. As technologies develop, policymakers also are increasingly looking to artificial intelligence and other advanced algorithmic tools to streamline or automate time-consuming, error-prone, or resource-intensive processes.[16]

At the same time, no single method will promote timeliness at all agencies in all circumstances. Each agency has its own mission, serves different communities, adjudicates according to a distinct set of legal requirements, has different resources available to it, and faces different operational realities. Moreover, in promoting timely adjudication, agencies must remain sensitive to other values of administrative adjudication such as decisional quality, procedural fairness, consistency, transparency, customer service, and equitable treatment. Building on earlier recommendations, this Recommendation provides a general framework that agencies and Congress can use to both foster an organizational culture of timeliness in agency adjudication in accord with principles of fairness, accuracy, and efficiency and devise plans to address increased caseloads, delays, backlogs, and other timeliness concerns when they arise.

Recommendation

Information Collection

1. Agencies should ensure their electronic or other case management systems are collecting data necessary for accuracy in monitoring and detecting changes in case processing times at all levels of their adjudication systems (*e.g.,* initial level, hearing level, appellate review level), identify the causes of changes in case processing times, and devise methods to promote or improve timeliness without adversely affecting decisional quality, procedural fairness, or other objectives. Agencies should identify the kinds of data or records that Congress, media representatives, researchers, or other interested persons frequently request to ensure that agency personnel responsible for responding to such requests can do so in an efficient manner. Agencies should ensure that electronic or other case management systems track the following information:

a. The number of proceedings of each type pending, commenced, and concluded during a standard reporting period (*e.g.,* week, month, quarter, year) within and across different levels of their adjudication systems;

b. The current status of each case pending at every level of their adjudication systems; and

c. For each case, the number of days required to meet critical case processing milestones within and across different levels of their adjudication systems.

2. To meet organizational goals and obtain information about expectations for adjudication timelines, agencies should communicate regularly with interested persons within and outside the agency. In addition to formal engagements, agencies should provide ongoing opportunities for interested persons within and outside the agency to provide feedback and suggestions. Methods for obtaining such information include:

a. Surveys of interested persons within and outside the agency;

b. Listening sessions and other meetings;

c. Requests for information published in the **Federal Register**;

d. Online feedback forms; and

e. Use of ombuds.

Performance Goals and Standards

3. Agencies should adopt organizational performance goals that encourage and provide clear expectations for timeliness. Performance goals may take several forms, including goals contained in agency strategic plans, guidelines establishing time limits for concluding cases, and policies instituting step-by-step time goals. In developing organizational performance goals for timeliness, agencies should:

a. Use the information described in Paragraphs 1 and 2 to develop goals that are reasonable and objective;

b. Encourage interested persons within and outside the agency to participate in the development of such goals; and

c. Periodically reevaluate such goals to ensure they (i) continue to be reasonable; (ii) encourage and provide clear expectations for timeliness; and (iii) do not adversely affect decisional quality or the fairness or integrity of proceedings.

4. When agencies use timeliness or productivity measures in appraising the performance of employees, as defined in 5 U.S.C. 4301, and members of the Senior Executive Service, or in setting timeliness or productivity expectations for administrative law judges, who are not subject to performance appraisals, agencies should:

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[2] Admin. Conf. of the U.S., Recommendation 69–1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies,* 38 FR 19784 (July 23, 1973).

[3] Admin. Conf. of the U.S., Recommendation 68–6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency,* 38 FR 19783 (July 23, 1973); *see also* Admin. Conf. of the U.S., Recommendation 2020–3, *Agency Appellate Systems,* 86 FR 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 83–3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act,* 48 FR 57461 (Dec. 30, 1983).

[4] Admin. Conf. of the U.S., Recommendation 2022–4, *Precedential Decision Making in Agency Adjudication,* 88 FR 2312 (Jan. 13, 2023).

[5] Admin. Conf. of the U.S., Recommendation 70–3, *Summary Decision in Agency Adjudication,* 38 FR 19785 (July 23, 1973).

[6] Admin. Conf. of the U.S., Recommendation 70–4, *Discovery in Agency Adjudication,* 38 FR 19786 (July 23, 1973).

[7] Admin. Conf. of the U.S., Recommendation 86–7, *Case Management as a Tool for Improving Agency Adjudication,* 51 FR 46989 (Dec. 30, 1986).

[8] Admin. Conf. of the U.S., Recommendation 2023–4, *Online Processes in Agency Adjudication,* 88 FR 42681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018–3, *Electronic Case Management in Federal Administrative Adjudication,* 83 FR 30686 (June 29, 2018).

[9] Admin. Conf. of the U.S., Recommendation 73–3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation,* 38 FR 16840 (June 27, 1973); Admin. Conf. of the U.S., Recommendation 2021–10, *Quality Assurance Systems in Agency Adjudication,* 87 FR 1722 (Jan. 12, 2022).

[10] Recommendation 86–7, *supra* note 7, ¶ 7; Admin. Conf. of the U.S., Recommendation 78–3, *Time Limits on Agency Actions,* 43 FR 27509 (June 26, 1978).

[11] Admin. Conf. of the U.S., Recommendation 86–3, *Agencies' Use of Alternative Means of Dispute Resolution,* 51 FR 25643 (July 16, 1986); *see also* Admin. Conf. of the U.S., Recommendation 88–5, *Agency Use of Settlement Judges,* 53 FR 26030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 87–5, *Arbitration in Federal Programs,* 52 FR 23635 (June 24, 1987).

[12] Admin. Conf. of the U.S., Recommendation 90–6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission,* 55 FR 53271 (Dec. 28, 1990); Recommendation 86–7, *supra* note 7, ¶ 3.

[13] Admin. Conf. of the U.S., Recommendation 2021–4, *Virtual Hearings in Agency Adjudication,* 86 FR 36083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2014–7, *Best Practices for Using Video Teleconferencing for Hearings,* 79 FR 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011–4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion,* 76 FR 48795 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 86–7, *supra* note 7.

[14] Admin. Conf. of the U.S., Recommendation 2016–2, *Aggregation of Similar Claims in Agency Adjudication,* 81 FR 40260 (June 21, 2016); Recommendation 86–7, *supra* note 7, ¶ 9.

[15] Recommendation 86–7, *supra* note 7, ¶ 1.

[16] *Cf.* David Freeman Engstrom et al., Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies 38, 45 (2020) (report to the Admin. Conf. of the U.S.); Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence,* 86 FR 6616 (Jan. 22, 2021); *see also* Exec. Order No. 14,110, 88 FR 75191 (Nov. 1, 2023).

a. Use the information described in Paragraphs 1 and 2 to develop measures or expectations that are reasonable and objective and provide clear expectations for timeliness;

b. Encourage interested persons within and outside the agency, including employees to whom the measures or expectations apply, to participate in the development of such measures or expectations;

c. Ensure measures or expectations reflect tasks within the control of individual employees;

d. Ensure measures or expectations take into account the range of case types and tasks performed by individual employees as well as resources (*e.g.,* staff support, technology) at their disposal;

e. For employees who decide cases, ensure measures or expectations do not lead them to decide cases in a particular way;

f. For all employees, ensure measures or expectations do not lead them to take actions that would adversely affect decisional quality or the fairness or integrity of proceedings; and

g. Periodically reevaluate such measures or expectations.

Organizational, Procedural, Technological, and Case Management Techniques

The Administrative Conference has adopted many recommendations, listed in the Preamble, that identify organizational, procedural, technological, and case management techniques that agencies should use, in appropriate circumstances, to promote timeliness in adjudication or respond to increased caseloads, delays, backlogs, and other timeliness concerns. Agencies should also implement the following best practices, as appropriate:

5. Agencies should narrow disputes and resolve cases at the lowest possible level of their adjudication systems and, at each level, use the least time- and resource-intensive processes available and appropriate to the circumstances, such as informal prehearing procedures, alternative dispute resolution, streamlined procedures, or decision making on the written record.

6. As appropriate, agencies should adopt procedures for (i) resolving multiple cases in a single proceeding, such as the aggregation of similar claims; and (ii) resolving recurring legal or factual issues, such as precedential decision making or substantive rulemaking.

7. Agencies should adopt processes for screening cases at intake to (i) resolve procedural issues as early as possible; (ii) identify cases that may be appropriate for less time- and resource-intensive processes, such as those described in Paragraphs 5 and 6; (iii) identify cases that can be resolved quickly because they are legally and factually straightforward; and (iv) identify cases that should be prioritized or expedited.

8. Agencies should adopt procedures that standardize the allocation of tasks among adjudicators, managers, staff attorneys, and paralegal support staff.

9. Agencies should review and update as necessary their Human Capital Operating Plans (5 CFR pt. 250) to ensure their hiring and position management needs are aligned properly with their operational goals for adjudication.

10. Agencies should automate routine tasks that do not require a significant exercise of discretion when automation will not adversely affect quality or program integrity. Such tasks may include receiving filings and evidence, establishing new case files, associating records with case files, de-duplicating records, assigning cases to agency personnel for action, screening cases as described in Paragraph 7, and generating and releasing standardized correspondence.

11. Agencies should outsource routine tasks that do not require a significant exercise of discretion—such as transcribing, scanning records, or mailing correspondence—when it would be more efficient and cost-effective for a contractor to perform them and there are no legal or policy reasons to assign the tasks to agency personnel (*e.g.,* restrictions on access to sensitive personal or national security information).

12. Agencies should adopt rules and policies that reflect best practices for case management, including evidentiary development, motions practice, intervention, extensions of time, decision writing, and methods for encouraging prompt action and discouraging undue delay by parties. At the same time, agencies should ensure that adjudicators, managers, and support staff have sufficient flexibility to manage individual cases fairly, accurately, and efficiently, and test alternative case management techniques that may reveal new best practices. Agencies should periodically reevaluate such rules and policies, using the information described in Paragraphs 1 and 2, to ensure they continue to reflect best practices for case management and provide relevant personnel with sufficient flexibility to manage individual cases and test alternative case management techniques.

13. Agencies should establish organizational units, supervisory structures, and central and field operations that reinforce timeliness and facilitate appropriate communication among agency personnel involved in adjudication at all levels of an adjudication system.

14. Agencies should update public websites and electronic case management systems so that they are able to handle the volume of current and future cases efficiently and effectively.

Strategic Planning

15. Agencies should engage in evidence-based and transparent strategic planning to anticipate and address concerns about timeliness, including increased caseloads, delays, and backlogs. In undertaking such strategic planning, agencies should:

a. Use the information described in Paragraphs 1 and 2 to identify case processing trends such as geographical or temporal variations in case intake or case processing times, assess the causes of timeliness concerns, and identify points at all levels of their adjudication systems that are causing delays;

b. Review previous efforts to address timeliness concerns to understand what initiatives have been attempted and which have been effective;

c. Consider a wide range of options for improving timeliness in the adjudication process without adversely affecting decisional quality, procedural fairness, program integrity, or other objectives. Options may include organizational, procedural, technological, case management, and other techniques, including those identified in previous Conference recommendations and Paragraphs 5–14;

d. Engage in candid discussions with adjudicators, managers, and support staff at all levels of their adjudication systems, as well as interested persons outside the agency, regarding the benefits, costs, and risks associated with different options for improving timeliness;

e. Develop proposed plans for addressing timeliness concerns, and solicit feedback on the plans from interested persons within and outside of the agency;

f. Consider pilot studies and demonstration projects before implementing interventions broadly to test the effectiveness of different interventions and identify unintended consequences; and

g. Designate a senior official responsible for coordinating the activities described in this Paragraph.

Coordination and Collaboration

16. Agencies should facilitate communication between components involved in their adjudication systems and other components that carry out functions necessary for timely adjudication, such as those that oversee information technology, human resources, budget planning, office space, and procurement.

17. Agencies should coordinate, as appropriate, with the President and Congress by providing information on recommended legislative changes and appropriations that would promote timeliness generally or address ongoing timeliness concerns.

18. Agencies should partner with federal entities such as the Chief Information Officers Council, the U.S. Digital Service, the General Services Administration, and the Office of Personnel Management to develop and implement best practices for leveraging information technology, human capital, and other resources to promote or improve timeliness.

19. Unless precluded by law or otherwise inappropriate, agencies should share information with each other about their experiences with and practices for promoting timeliness generally and addressing ongoing timeliness concerns. The Office of the Chair of the Administrative Conference should provide for the interchange of such information, as authorized by 5 U.S.C. 594(2).

20. Agencies should develop partnerships with relevant legal service providers, other nongovernmental organizations, and state and local government agencies that advocate for or provide assistance to individuals who participate as parties in agency adjudications.

21. Agencies should make informational materials available to adjudicators, managers, staff attorneys, and paralegal support staff. Agencies should conduct regular training sessions for such personnel on best practices for fair, accurate, and efficient case management.

Communication and Transparency

22. Agencies should provide parties and representatives with resources to help them navigate their adjudication systems, understand procedural alternatives that may expedite decision making in appropriate cases, and learn about best practices for efficient and effective advocacy before the agency. Such resources may include informational materials (*e.g.,* documents written in plain language and available in languages other than English, short videos, decision trees, and visualizations), navigator programs, and counseling for self-represented parties.

23. As early as possible and at key points throughout the adjudication process, agencies should provide self-represented parties with plain-language materials informing them of (i) their right to be represented by an attorney or qualified nonlawyer legal service provider; (ii) potential benefits of representation; and (iii) options for obtaining representation.

24. Agencies should publicly identify case management priorities and procedures that have been adopted to improve timeliness and may result in parties' cases being identified for aggregation, expedition, or similar alternative techniques.

25. Agencies should publicly disclose (i) average processing times and aggregate processing data for claims pending, commenced, and concluded during a standard reporting period; (ii) any deadlines or processing goals for adjudicating cases; and (iii) information about the agency's plans for and progress in addressing timeliness concerns. Agencies should consider whether and to what extent they should disclose such information pertaining to agency subcomponents.

26. When agencies use timeliness or productivity measures in appraising the performance of employees, as defined in 5 U.S.C. 4301, and members of the Senior Executive Service, or in setting timeliness or productivity expectations for administrative law judges, who are not subject to performance appraisals, they should disclose such measures or expectations publicly and explain how they were developed. For employees who are subject to performance appraisal, agencies should disclose publicly (i) how they use such measures to appraise employees, and (ii) whether employees are eligible for incentive awards based on timeliness or productivity.

Consideration for Congress

27. As set forth in Recommendation 78–3, *Time Limits on Agency Actions,* Congress ordinarily should not impose statutory time limits on agency adjudication. If Congress does consider imposing time limits on adjudication by a particular agency, it should first seek information from the agency and interested persons. If Congress does decide to impose time limits, it should do so only after determining that the benefits of such limits outweigh the costs. If Congress then decides time limits are necessary or warranted, it should require agencies to adopt reasonable time limits or, in rare circumstances, impose such limits itself. In setting any statutory time limits, Congress should:

a. Recognize that preexisting statutory or regulatory frameworks or special circumstances (*e.g.,* a sudden substantial increase in an agency's caseload or the complexity of the issues in a particular case) may justify an agency's failure to conclude a case within the proposed statutory time limit;

b. State expressly what should occur if the agency does not meet its statutory deadline;

c. State expressly whether affected persons may or may not enforce the time limit through judicial action and, if so, the nature of the relief available for this purpose; and

d. Consider the need to increase agency resources to enable the agency to meet its statutory deadline.

Administrative Conference Recommendation 2023–8

User Fees

Adopted December 14, 2023

Federal agencies charge user fees as part of many programs. For purposes of this Recommendation, a federal agency ''user fee'' is (1) any fee assessed by an agency for a good or service that the agency provides to the party paying the fee, as well as (2) any fee collected by an agency from an entity engaged in, or seeking to engage in, activity regulated by the agency, either to support a specific regulatory service provided to that entity or to support a regulatory program that at least in part benefits the entity.[1] User fees serve many purposes, for example, to shift the costs of a program from taxpayers to those persons or entities whom the program directly benefits, to supplement general revenue, or to incentivize or discourage certain behavior.

Agencies have assessed user fees since this country was founded. In 1952, Congress enacted the Independent Offices Appropriations Act (IOAA), giving agencies broad authority to charge user fees in connection with specific goods or services that benefit identifiable persons or entities.[2] The Bureau of the Budget, the predecessor to the Office of Management and Budget (OMB), issued Circular A–25 in 1959 to implement the IOAA. Since 1982, when the President's Private Sector Survey on Cost Control urged expanded application of user fees, Congress and agencies increasingly have relied on user fees, instead of or in addition to general revenue, to fund federal programs.

In 1987, the Administrative Conference adopted Recommendation 87–4, *User Fees,* which identified basic principles for Congress and agencies to consider in establishing user fee programs and setting fee levels. Recommendation 87–4 stated that a ''government service for which a user fee is charged should directly benefit fee payers.'' It also identified principles intended to allocate government goods and services efficiently and fairly.[3]

There have been significant developments since ACUS last addressed this topic in 1987. Congress and agencies have continued to expand the collection of and reliance on user fees,[4] and OMB revised Circular A–25 in 2017 to update federal policy regarding fees assessed for government services, resources, and goods; provide information on which activities are subject to user fees and the basis for setting user fees; and provide guidance for implementing and collecting user fees.

Today, user fee programs serve many purposes and vary significantly in their design. Some are established by a specific statute. Such statutes may specify the fee amount, provide a formula for calculating fees, or prescribe a standard for the agency to use in establishing reasonable fees (*e.g.,* full or partial cost recovery). Some statutory authorizations are permanent, while others sunset and require periodic reauthorization. Other programs are established by agencies on their own initiative under the IOAA or other authority. Some fees are transactional, while others are paid on a periodic basis. Some fees are set to achieve economic efficiency, while others are set to advance other values, goals, and priorities. Other statutes impose requirements that apply to a user fees program unless Congress specifies otherwise; one example is the Miscellaneous Receipts Act, which requires that money received by the government from any source be deposited into the U.S. Treasury.[5]

When designing user fee programs, Congress and agencies must also consider possible negative consequences such as the potential for fees to adversely affect the quality of agency decision making or its appearance of impartiality; their potential to affect the behavior of private persons and entities in unintended ways; the impact of the fees on low-income people, members of historically underserved communities, and small businesses and other small entities; the agency's revenue stability; and congressional oversight. The Conference consistently has emphasized the potential for public engagement to help policymakers obtain more comprehensive information, enhance the legitimacy of their decisions, and increase public support for their decisions.[6]

Given expanded reliance on user fees, the development of new models for user fee programs, and updated guidance on user fees from OMB, the Conference decided to revisit the subject. This Recommendation represents the Conference's current views on the objectives, design, and implementation of user fee programs by Congress and agencies, and supplements and updates Recommendation 87–4.[7]

[1] Erika Lietzan, User Fee Programs: Design Choices and Processes 6 (Nov. 9, 2023) (report to the Admin. Conf. of the U.S.).

[2] 31 U.S.C. 9701.

[3] 52 FR 23634 (June 24, 1987).

[4] See Lietzan, *supra* note 1, at 3.

[5] 31 U.S.C. 3302.

[6] *Cf.* Admin. Conf. of the U.S., Recommendation 2018–7, *Public Engagement in Agency Rulemaking,* 84 FR 2146 (Feb. 6, 2019); see also Admin. Conf. of the U.S., Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023); Admin. Conf. of the U.S., Recommendation 2023–2, *Virtual Public Engagement in Agency Rulemaking,* 88 FR 42680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021–3, *Early Input on Regulatory Alternatives,* 86 FR 36082 (July 8, 2021).

[7] This Recommendation does not address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.

Recommendation

General Considerations

1. In creating or modifying user fees, Congress or agencies, as appropriate, should identify the purpose(s) of an agency's user fee program, such as shifting the costs of a program from taxpayers to those persons or entities whom the program benefits, supplementing general revenue, or incentivizing or discouraging certain behavior. Congress or agencies also should consider whether or not there are reasons for waivers, exemptions, or reduced rates.

2. When establishing a user fee-funded program, especially one with a novel fee structure and one that collects fees from regulated entities, Congress or agencies, as appropriate, should consider whether any feature of the program might inappropriately affect or be perceived as inappropriately affecting agency decision making and whether any steps should be taken to mitigate those effects.

3. Congress or agencies, as appropriate, should consider whether a user fee may have a negative or beneficial effect on the behavior of individuals and entities subject to that fee. Congress or agencies also should consider whether the user fee might have other public benefits, such as promoting equity, reducing barriers to market entry, incentivizing desirable behavior, or producing some other socially beneficial outcome, or might have other public costs. Congress or agencies, as appropriate, should set forth procedures for waiving or reducing user fees that would cause undue hardship for low-income individuals, members of historically underserved communities, small businesses, and other small entities.

4. Congress or agencies, as appropriate, should ensure user fees are not disproportionate in relation to government costs or to the benefits that users receive.

Considerations for Congress

5. When Congress enacts a specific statute, separate from the Independent Offices Appropriations Act, authorizing an agency to collect user fees, it should specify, as applicable:

a. *The manner for setting fee levels.* Congress should either determine the amount of the fee, with or without adjustment for inflation, set a formula for calculating it, or alternatively give the agency discretion to determine the appropriate fee (*e.g.,* to achieve a particular purpose or to recover some or all of the costs of providing a good or service or administering a program);

b. *Any circumstances in which the agency may or must charge a fee or, conversely, may or must waive or reduce the fee amount.* Congress should determine whether it is appropriate to reduce or eliminate fees for certain individuals or entities to promote equity, reduce barriers to market entry, incentivize desirable behavior, or produce some other socially beneficial outcome;

c. *Any required minimum process for setting or modifying fees,* either through the notice-and-comment rulemaking process set forth in 5 U.S.C. 553 or an alternative process, including requirements for public engagement;

d. *Any authorizations, limitations, or prescriptions pertaining to the manner in which the agency may collect fees;*

e. *Any required process for enforcing the obligation to pay user fees and any penalties for failure to pay required fees, including interest (specifying rates);*

f. *The availability of collected fees.* Congress should determine whether or not the fees collected by the agency should be deposited in the U.S. Treasury, consistent with the Miscellaneous Receipts Act, 31 U.S.C. 3302, and made available to the agency only after appropriation;

g. *The period during which the agency may expend collected fees.* Should Congress determine that, for reasons of revenue stability, collected fees should remain available to the agency, it should consider, for reasons of oversight, whether they should only be available for a limited period or subject to other requirements or limitations;

h. *Any authorizations or prescriptions for the uses for which the agency may expend collected fees;*

i. *Any requirement that the agency periodically review its user fees and any required method(s) for doing so* (*e.g.,* comparing fee amounts with corresponding costs or recalculating fees based on new developments and information); and

j. *Whether the authority granted under the statute sunsets.*

6. Whenever Congress decides to create a new statutory user fee program, it should reach out to relevant agencies for technical assistance early in the legislative drafting process and it should consider input from interested persons.

7. Congress should maintain oversight of agencies that operate user fee programs, such as through the appropriations process or authorizing legislation that specifies the purpose, time, and availability for money collected through user fee programs.

Considerations for Agencies

8. When an agency establishes a new user fee program or sets fees under an existing program, it should follow the rulemaking requirements of 5 U.S.C. 553 unless Congress has specified otherwise. In engaging with interested members of the public, agencies should follow the best practices suggested in Recommendations 2018–7, *Public Engagement in Rulemaking,* 2021–3, *Early Input on Regulatory Alternatives,* and 2023–2, *Virtual Public Engagement in Agency Rulemaking.*

9. Agencies should communicate clearly to the public the purpose(s) of their user fee programs, the nature of the fee setting process, and the uses for which the agency expends collected fees. Agencies also should be transparent with and engage the public when conducting activities that may affect the design of their user fee programs or the level of their fees, for instance by inviting public participation at early stages such as during cost and demand forecasting and budget formulation.

10. Agencies should maintain an easy-to-find page on their websites describing their user fee-funded programs, identifying and explaining the fees, describing any waivers or exemptions available, identifying the uses for which the agency expends collected fees, and providing links to supporting resources, such as the governing sections of the *United States Code* and the *Code of Federal Regulations,* and recent notices in the **Federal Register**.

11. Agencies should conduct regular reviews, consistent with Recommendation 2021–2, *Periodic Retrospective Review,* of their user fee programs to ensure the programs are meeting their purposes and that the fee levels are appropriate. Agencies also should assess other resulting consequences or effects of the programs, such as those described in Paragraphs 2, 3, and 4.

[FR Doc. 2024–00302 Filed 1–9–24; 8:45 am]

BILLING CODE 6110–01–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0081]

Importation of Fresh Rhizomes of Turmeric (Curcuma longa L.) for Consumption From Mexico Into the United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with importation of fresh rhizomes of turmeric (*Curcuma longa* L.) for consumption from Mexico into the United States. Based on the analysis, we have determined that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh rhizomes of turmeric from Mexico. We are making the pest risk analysis available to the public for review and comment.

DATES: We will consider all comments that we receive on or before March 11, 2024.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2023–0081 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2023–0081, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *www.regulations.gov*

or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. Marc Phillips, Senior Regulatory Policy Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; phone: (301) 851–2114; email: *marc.phillips@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart L—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into or disseminated within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of fruits and vegetables that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the five designated phytosanitary measures listed in paragraph (b) of that section.

APHIS received a request from the national plant protection organization (NPPO) of Mexico to allow the importation of fresh rhizomes of turmeric (*Curcuma longa* L.) for consumption from Mexico into the United States. As part of our evaluation of Mexico's request, we have prepared a pest risk assessment to identify the pests of quarantine significance that could follow the pathway of the importation of fresh rhizomes of turmeric (*Curcuma longa* L.) for consumption from Mexico into the United States. Based on the pest risk assessment, a risk management document (RMD) was prepared to identify phytosanitary measures that could be applied to the fresh rhizomes of turmeric to mitigate the pest risk.

Therefore, in accordance with § 319.56–4(c), we are announcing the availability of our pest risk assessment and RMD for public review and comment. Those documents, as well as a description of the economic considerations associated with the importation of fresh rhizomes of turmeric from Mexico, may be viewed on the *Regulations.gov* website or in our reading room (see **ADDRESSES** above for a link to *Regulations.gov* and information on the location and hours of the reading room). You may request paper copies of the pest risk assessment and RMD by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the subject of the analysis you wish to review when requesting copies.

After reviewing any comments that we receive, we will announce our decision regarding the import status of fresh rhizomes of turmeric from Mexico in a subsequent notice. If the overall conclusions of our analysis and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will authorize the importation of fresh rhizomes of turmeric from Mexico into the United States subject to the requirements specified in the RMD.

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 4th day of January 2024.

Donna Lalli,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2024–00267 Filed 1–9–24; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Region 5 and Region 6; California, Oregon, and Washington; Forest Plan Amendment for Planning and Management of Northwest Forests Within the Range of the Northern Spotted Owl; Correction

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice; correction.

The Office of the Federal Register published a correction in the **Federal Register** of January 2, 2024, which corrected the date in notice document 2023–27742 [88 FR 87393] from January 29, 2024, to February 1, 2024, as the due date for comments to be received. However, the due date needs to match the date sent out in the associated scoping letters to the public and tribes, a date which was set to coordinate with the closing date of the national old growth amendment Notice of Intent.

Correction

In the **Federal Register** of December 18, 2023, in FR Doc. 2023–27742, on page 87393, in the second column toward the end under **DATES**, is listed ''Comments concerning the scope of the analysis are most valuable to the Forest Service if received by January 29, 2024.'' In the **Federal Register** of January 2, 2024, in FR Doc. C1–2023–27742, on page 43, in the first column, January 29, 2024, is corrected to February 1, 2024. The **DATES** caption should read instead:

DATES: Comments concerning the scope of the analysis are most valuable to the Forest Service if received by February 2, 2024.

Dated: January 4, 2024.

Jacqueline Emanuel,

Associate Deputy Chief, National Forest System.

[FR Doc. 2024–00311 Filed 1–9–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Forest Service Manual 2300—Recreation, Wilderness, and Related Resource Management, Chapter 2350—Trail, River, and Similar Recreation Opportunities, Section 2355—Climbing Opportunities; Extension of Comment Period

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of availability for public comment; extension of comment period.

SUMMARY: The Forest Service (Forest Service or Agency) published a notice in the **Federal Register** on November 17, 2023, initiating a 60-day comment period on the proposed directive Forest Service Manual 2300—Recreation, Wilderness, and Related Resource Management, chapter 2350—Trail, River, and Similar Recreation Opportunities, section 2355, Climbing Opportunities. The closing date of the original notice is scheduled for January 16, 2024. The Agency is extending the comment period for an additional 14 days from the previous closing date.

DATES: The comment period for the notice published November 17, 2023, at 88 FR 80269, is extended. Comments must be received in writing by January 30, 2024.

ADDRESSES: Comments may be submitted electronically to *https://cara.fs2c.usda.gov/Public/CommentInput?project=ORMS-3524.* Written comments may be mailed to Peter Mali, National Wilderness Program Manager, 1400 Independence Avenue SW, Washington, DC 20250–1124. All timely comments, including names and addresses, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received

at *https://cara.fs2c.usda.gov/Public/ReadingRoom?project=ORMS-3524.*

FOR FURTHER INFORMATION CONTACT: Peter Mali, National Wilderness Program Manager, *SM.FS.ClimbDir@usda.gov,* (202) 823–0773. Individuals who use telecommunications devices for the hearing impaired may call the Federal Relay Service at 800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: Climbing is a growing sport in the United States. According to the Outdoor Industry Association's 2022 Report on Outdoor Participation Trends, there were nearly 10.3 million climbers in the United States in 2021. Approximately 30 percent of outdoor climbing in the United States occurs on NFS lands. In recent years, line officers have expressed concerns about climbing-related impacts on resources and conflicts among uses. Current Forest Service directives do not provide guidance for climbing opportunities on NFS lands. The Joint Explanatory Statement accompanying the 2021 Consolidated Appropriations Act directs the Forest Service to issue general guidance on climbing opportunities on NFS lands, including the application of the Wilderness Act (16 U.S.C. 1131–1136) to climbing opportunities and appropriate use of fixed anchors and fixed equipment in wilderness. To address impacts associated with increased climbing on NFS lands and consistent with the Joint Explanatory Statement, the Forest Service is proposing revisions to its directives to provide guidance on climbing opportunities on NFS lands.

The proposed directive would provide guidance on climbing opportunities inside and outside wilderness on NFS lands and would provide for climbing opportunities that serve visitor needs; meet land management and recreation policy objectives; emphasize the natural setting of NFS lands; align with natural and cultural resource protection and the Agency's responsibility to Indian Tribes; and are consistent with applicable law, directives, and the applicable land management plan.

The proposed directive would add a new section, 2355, to Forest Service Manual (FSM) 2300—Recreation, Wilderness, and Related Resource Management, chapter 2350—Trail, River, and Similar Recreation Opportunities, which would provide that climbing is an appropriate use of NFS lands (proposed FSM 2355.03, para. 1)—including in wilderness—when conducted in accordance with applicable law and Forest Service directives and consistent with the applicable land management plan (proposed FSM 2355.03, para. 4); that a climbing management plan be developed, as funding and resources allow, for climbing opportunities in wilderness, and for climbing opportunities outside wilderness where the District Ranger determines that climbing is causing adverse resource impacts or use conflicts (proposed FSM 2355.21); that fixed anchors and fixed equipment are installations for purposes of section 4(c) of the Wilderness Act (16 U.S.C. 1133(c)) (proposed FSM 2355.32, para. 1); that a Forest Supervisor may authorize the placement or replacement of fixed anchors and fixed equipment in wilderness based on a case-specific determination that they are the minimum necessary for administration of the area for Wilderness Act purposes, including primitive or unconfined recreation and preservation of wilderness character (proposed FSM 2355.32, para. 1); that existing fixed anchors and fixed equipment in wilderness may be retained pending completion of a Minimum Requirements Analysis, as funding and resources allow, that determines they are the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character (FSM 2355.32, para. 5);); and that the issuance and administration of special use permits are encouraged to enhance visitor access to climbing opportunities and visitor education concerning low impact climbing practices (proposed FSM 2355.03, para. 9).

To allow for enforcement of restrictions and prohibitions in climbing management plans as needed, the Forest Service will be proposing revisions via a separate **Federal Register** notice to its regulations at 36 CFR part 261, subpart A, General Prohibitions.

The minimum 120-day Tribal consultation for the proposed directive was initiated November 8, 2021, and will conclude at the end of the comment period for the proposed directive.

To ensure that all members of the public who have an interest in NFS climbing opportunities have the opportunity to provide comment, we are extending the comment period on the proposed directive to January 30, 2024.

After the public comment period closes, the Forest Service will consider timely comments that are within the scope of the proposed directive in the development of the final directive. A notice of the final directive, including a response to timely comments, will be posted on the Forest Service's web page at *https://www.fs.usda.gov/about-agency/regulations-policies/comment-on-directives.*

Dated: January 4, 2024.

Jacqueline Emanuel,

Associate Deputy Chief, National Forest System.

[FR Doc. 2024–00312 Filed 1–9–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–3–2024]

Foreign-Trade Zone (FTZ) 89, Notification of Proposed Production Activity; Lithion Battery, Inc.; (Lithium-Ion Battery Packs and Accessories); Henderson, Nevada

Lithion Battery, Inc. submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Henderson, Nevada within FTZ 89. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on December 27, 2023.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via *www.trade.gov/ftz.*

The proposed finished products include: battery packs also known as (aka) modules; controllers for battery management systems; housing units for controllers and battery cells aka compacts; and, metal cabinets for storing battery modules (duty rate ranges from duty-free to 3.4%).

The proposed foreign-status materials and components include: battery modules and controllers; cylindrical cells; steel cabinets; shipping containers for storing battery modules; cables of copper wiring and plastic rubber connectors and insulators; plastic frames and cases; metal fasteners; screws; rubber insulation; glues and adhesives; and, wire harnesses (duty rate ranges from duty-free to 3.4%). The request indicates that the materials/components are subject to duties under section 301 of the Trade Act of 1974 (section 301), depending on the country of origin. The applicable section 301 decisions require subject merchandise

to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is February 20, 2024.

A copy of the notification will be available for public inspection in the ''Online FTZ Information System'' section of the Board's website.

For further information, contact Juanita Chen at *juanita.chen@trade.gov.*

Dated: January 5, 2024.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024–00362 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–2–2024]

Foreign-Trade Zone (FTZ) 134, Notification of Proposed Production Activity; Volkswagen Group of America, Inc.; (Passenger Motor Vehicles); Chattanooga, Tennessee

Volkswagen Group of America, Inc., submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Chattanooga, Tennessee within FTZ 134. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on January 4, 2024.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via *www.trade.gov/ftz.* The proposed material(s)/component(s) would be added to the production authority that the Board previously approved for the operation, as reflected on the Board's website.

The proposed foreign-status components include: high voltage heating positive coefficient modules; stainless steel exhaust systems with catalyst; spindle drives; light on detection sensors; and, rain sensors (duty rate ranges from duty-free to 4.2%). The request indicates that certain materials/components are subject to duties under section 232 of the Trade Expansion Act of 1962 (section 232) and section 301 of the Trade Act of 1974 (section 301), depending on the country of origin. The applicable section 232 and section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is February 20, 2024.

A copy of the notification will be available for public inspection in the ''Online FTZ Information System'' section of the Board's website.

For further information, contact Christopher Wedderburn at *Chris.Wedderburn@trade.gov.*

Dated: January 4, 2024.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024–00306 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Rated Orders Under the Defense Priories and Allocations System (DPAS)

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 11, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Commerce.

Title: Rated Orders Under the Defense Priories and Allocations System (DPAS).

OMB Control Number: 0694–0092.

Form Number(s): None.

Type of Request: Extension of a current information collection.

Number of Respondents: 1,436,538.

Average Hours per Response: 1 to 16 minutes.

Burden Hours: 45,432.

Needs and Uses: This information is necessary to support the execution of the President's priorities and allocations authority under the Defense Production Act of 1950 (DPA), as amended (50 U.S.C. 4501, *et seq.*), and the priorities authorities under the Selective Service Act of 1948 (50 U.S.C. 3816), delegated to the Secretary of Commerce and implemented by the Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700). The purpose of this authority is to ensure preferential acceptance and priority performance of contracts and orders for all materials, services, and facilities, including construction materials, the authority for which has not been delegated to other agencies under Executive Order 13603 (referred to as ''industrial resources'') in support of approved national defense programs.

Affected Public: Business or other for-profit organizations.

Frequency: On Occasion.

Respondent's Obligation: Mandatory.

Legal Authority: Defense Protection Act of 1950 (DPA).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0092.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–00359 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–848]

Tin Mill Products From the Republic of Turkey: Final Negative Determination of Sales at Less Than Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that

tin mill products from the Republic of Turkey (Turkey) are not being, or are not likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Rebecca Janz, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2972.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** its preliminary determination in the LTFV investigation of tin mill products from Turkey, in which we also postponed the final determination until January 4, 2023.[1] We invited interested parties to comment on the *Preliminary Determination*.[2] No interested party submitted comments. Accordingly, the final determination of the LTFV investigation remains unchanged from the *Preliminary Determination* and no Issues and Decision Memorandum accompanies this notice.

Scope of the Investigation

The products covered by this investigation are tin mill products from Turkey. For a complete description of the scope of this investigation, *see* the appendix to this notice.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in the appendix to this notice.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Act), in September and October 2023, we conducted verifications of the sales and cost information submitted by Toscelik Profil ve Sac Endustrisi A.S. and Tosyali Toyo Celik A.S., collectively, Tosyali Toyo/Toscelik Profil,[5] for use in our final determination. We used standard verification procedures, including an examination of relevant sales and accounting records, and original source documents provided by Tosyali Toyo/Toscelik Profil.[6]

Changes Since the Preliminary Determination

We are incorporating Tosyali Toyo/Toscelik Profil's revised databases, submitted at Commerce's request, into this final determination, which reflect changes based on minor corrections Tosyali Toyo/Toscelik Profil submitted at verification, as well as minor discrepancies found by Commerce.[7] For additional details, *see* the Final Analysis Memorandum.[8]

Final Determination

The final estimated weighted-average dumping margin is as follows:

Exporter/Producer	Estimated weighted-average dumping margin (percent)
Tosyali Toyo Celik A.S.; Toscelik Profil ve Sac Endustrisi A.S	0.00

Consistent with section 735(a)(4) of the Act, Commerce disregards *de minimis* rates. Accordingly, Commerce determines that the single entity comprised of Tosyali Toyo Celik A.S. and Toscelik Profil ve Sac Endustrisi A.S., *i.e.,* the only individually examined respondent, has not made sales of subject merchandise at LTFV.

Furthermore, Commerce has not calculated an estimated weighted-average dumping margin for all other producers and exporters pursuant to sections 735(c)(1)(B) and (c)(5) of the Act because it has not made an affirmative determination of sales at LTFV.

Disclosure

Commerce intends to disclose its calculations performed in this final determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

In the *Preliminary Determination,* the estimated weighted-average dumping margin for Tosyali Toyo/Toscelik Profil was zero percent and, therefore, we did not suspend liquidation of entries of tin mill products from Turkey.[9] Because Commerce has now made a final negative determination of sales at LTFV with regard to the subject merchandise, Commerce will not direct U.S. Customs and Border Protection to suspend liquidation or to require a cash deposit of estimated antidumping duties for entries of tin mill products from Turkey.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the U.S. International Trade Commission of this final negative determination of sales at LTFV. As our final determination is negative, this proceeding is terminated in accordance with section 735(c)(2) of the Act.

Administrative Protective Order

This notice will serve as the final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a violation which is subject to sanction.

[1] *See Tin Mill Products from the Republic of Turkeys: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 88 FR 57087 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See Preliminary Determination.*

[3] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[5] In the *Preliminarily Determination,* we determined the following companies comprise a single entity: Tosyali Toyo Celik A.S. and Toscelik Profil ve Sac Endustrisi A.S. (*i.e.,* Tosyali Toyo/Toscelik Profil). S*ee* Memorandum, ''Preliminary Affiliation and Collapsing Analysis Memorandum for Tosyali Toyo Celik A.S. and Toscelik Profil ve Sac Endustrisi A.S.,'' dated August 16, 2023. No party challenged this determination for the final determination. Accordingly, we continue to treat these companies as part of a single entity for the purposes of this investigation.

[6] *See* Memorandum, ''Verification of the Sales Response,'' dated November 1, 2023; and Memorandum, ''Verification of the Cost Response,'' dated November 3, 2023.

[7] *See* Tosyali Toyo/Toscelik Profil's Letter, ''Tosyali Toyo Response to Request for Revised Databases,'' dated November 6, 2023.

[8] *See* Memorandum, ''Analysis for the Final Determination for Tosyali Toyo Celik A.S. and Toscelik Profil ve Sac Endustrisi A.S.,'' dated concurrently with, and hereby adopted by, this notice (Final Analysis Memorandum).

[9] *See Preliminary Determination,* 88 FR at 57088.

Notification to Interested Parties

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act, and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

• Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (± 10%) or 0.255 mm (± 10%) with 770 mm (minimum width) (± 1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (± 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).

• Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.

• Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.

• Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70- 130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.

• Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).

• Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

• Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02%

maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.

• Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

[FR Doc. 2024–00327 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–838]

Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From Italy: 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 certain cold-drawn mechanical tubing of carbon and alloy steel (cold-drawn mechanical tubing) from Italy was sold in the United States at less than normal value during the period of review (POR), June 1, 2021, through May 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Colin Thrasher, 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) 482–3004.

SUPPLEMENTARY INFORMATION:

Background

On July 7, 2023, Commerce published the *Preliminary Results* covering one producer/exporter, Dalmine S.p.A. (Dalmine) and invited interested parties to comment.[1] On September 28, 2023, Commerce extended the time period for issuing the final results of this review until January 3, 2024.[2] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3]

Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order[4]

The products covered by this *Order* are cold-drawn mechanical tubing from Italy. For a full description of the scope, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by interested parties in their case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised, and to which we responded in the Issues and Decision Memorandum, is attached to this notice as an appendix. 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 a review of the record and comments received from interested parties, we have revised a revenue-related offset associated with U.S. movement charges. For a more detailed discussion of this change, *see* the Issues and Decision Memorandum.

Final Results of Review

Commerce determines that the following weighted-average dumping margin exists for the POR June 1, 2021, through May 31, 2022:

Exporter/producer	Weighted-average dumping margin (percent)
Dalmine S.p.A	2.00

Disclosure

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

Assessment Rate

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b)(1), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.

Because Dalmine's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce has calculated importer-specific antidumping duty assessment rates. We calculated importer-specific *ad valorem* assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales. Where an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Dalmine 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 established in the original less-than-fair value (LTFV) investigation (*i.e.,* 47.87 percent)[5] if there is no rate for the intermediate company(ies) involved in the transaction.[6]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the

[1] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from Italy: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 43281 (July 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2021–2022,'' dated September 28, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from Italy; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China, the Federal Republic of Germany, India, Italy, the Republic of Korea, and Switzerland: Antidumping Duty Orders; and Amended Final Determinations of Sales at Less Than Fair Value for the People's Republic of China and Switzerland,* 83 FR 26962 (June 11, 2018) (*Order*).

[5] *See Order,* 83 FR at 26966.

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

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 for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Dalmine will be equal to the weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by a company 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 in which it was reviewed; (3) if the exporter is not a firm covered in this review or the original LTFV investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently-completed segment of this proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 47.87 percent,[7] the all-others rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

Administrative Protective Order

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

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h)(2).

Dated: January 3, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00305 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–421–816]

Tin Mill Products From the Netherlands: Final Negative Determination of Sales at Less Than Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that tin mill products from the Netherlands are not being, or are not likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Brittany Bauer, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3860.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** its preliminary determination in the LTFV investigation of tin mill products from the Netherlands, in which we also postponed the final determination until January 4, 2023.[1] We invited interested parties to comment on the *Preliminary Determination*.[2] We received comments on the *Preliminary Determination* from Cleveland-Cliffs Inc. (Cleveland Cliffs) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW).[3] On December 1, 2023, we received a rebuttal brief from Tata Steel IJmuiden BV (TSIJ).[4]

For a complete description of the events that followed the *Preliminary Determination, see* the Issues and Decision Memorandum.[5] The Issues and 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 *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are tin mill products from the Netherlands. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[6]

[7] *See Order,* 83 FR at 26966.

[1] *See Tin Mill Products from the Netherlands: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 88 FR 57096 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See Preliminary Determination,* 88 FR at 57097.

[3] *See* Cleveland-Cliffs' Letter, ''Case Brief Of Petitioner Cleveland-Cliffs Inc.,'' dated November 24, 2023; and USW's Letter, ''Case Brief of Petitioner the United Steelworkers,'' dated November 24, 2023.

[4] *See* TSIJ's Letter, ''Rebuttal Case Brief of Tata Steel IJmuiden BV,'' dated December 1, 2023.

[5] *See* Memorandum, ''Decision Memorandum for the Final Negative Determination in the Less-Than-Fair-Value Investigation of Tin Mill Products from the Netherlands,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[6] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[7] We made no changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in Appendix I to this notice.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Act), in September and October 2023, we conducted verifications of the sales and cost information submitted by TSIJ for use in our final determination. We used standard verification procedures, including an examination of relevant sales and accounting records, and original source documents provided by TSIJ.[8]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached as Appendix II to this notice.

Changes Since the Preliminary Determination

We have made certain changes to the margin calculations for TSIJ since the *Preliminary Determination.* For a discussion of these changes, *see* the Issues and Decision Memorandum.

Final Determination

The final estimated weighted-average dumping margin is as follows:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Tata Steel IJmuiden BV	0.00

Commerce determines that TSIJ, the only individually-examined respondent, has not made sales of subject merchandise at LTFV. Accordingly, Commerce has not calculated an estimated weighted-average dumping margin for all other producers and exporters pursuant to sections 735(c)(1)(B) and (c)(5) of the Act, because it has not made an affirmative determination of sales at LTFV.

Disclosure

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

Suspension of Liquidation

In the *Preliminary Determination,* we calculated an estimated weighted-average dumping margin for TSIJ that was zero percent, and, therefore, we did not suspend liquidation of entries of tin mill products from the Netherlands.[9] Because Commerce has now made a final negative determination of sales at LTFV with regard to the subject merchandise, Commerce will not direct U.S. Customs and Border Protection to suspend liquidation or to require a cash deposit of estimated antidumping duties for entries of tin mill products from the Netherlands.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the International Trade Commission of this final negative determination of sales at LTFV. As our final determination is negative, this proceeding is terminated in accordance with section 735(c)(2) of the Act.

Administrative Protective Order

This notice will serve as the final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act, and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (±10%) or 0.251 mm (90 pound base box) (±10%) or 0.255 mm (±10%) with 770 mm (minimum width) (±1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (±1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024

[7] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[8] *See* Memorandum, ''Verification of the Sales Response of Tata Steel IJmuiden, B.V. in the Less-Than-Fair-Value Investigation of Tin Mill Products from the Netherlands,'' dated October 10, 2023; and Memorandum, ''Verification of the Cost Response of Tata Steel IJmuiden BV. in the Antidumping Duty Investigation of Tin Mill Products from the Netherlands,'' dated November 14, 2023.

[9] *See Preliminary Determination,* 88 FR at 57097.

inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.

• Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70- 130 mg/m², with a chromium oxide layer of 5–30 mg/m², with a tensile strength of 260–440 N/mm², with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.

• Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).

• Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m² and chromium oxide of 10 mg/m², with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

• Tin-free steel coated with a metallic chromium layer between 100–200 mg/m² and a chromium oxide layer between 5–30 mg/m²; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.

• Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00324 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–870]

Tin Mill Products From Taiwan: Final Negative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that tin mill products from Taiwan are not being, or are not likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation

(POI) January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Jacob Saude, 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) 482–0981.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** the preliminary determination in the LTFV investigation of tin mill products from Taiwan, in which it also postponed the final determination until January 4, 2024.[1] Commerce invited interested parties to submit case and rebuttal briefs on the *Preliminary Determination*.[2]

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[3] 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.*

Scope of the Investigation

The products covered by this investigation are tin mill products from Taiwan. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope specific case and rebuttal briefs.[4] We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[5] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in Appendix I.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice as Appendix II.

Verification

Commerce conducted verification of the information relied upon in making its final determination in this investigation, in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Specifically, Commerce conducted on-site verifications of the home market sales, U.S. sales, and cost of production responses submitted by Ton Yi Industrial Corporation (Ton Yi).[6]

Changes Since the Preliminary Determination

During the on-site verification, Ton Yi presented minor corrections to its U.S. sales database.[7] We accepted these minor corrections and included these changes in the margin calculations for the final determination.[8] These minor corrections did not result in a change to the estimated weighted-average dumping margin calculated for Ton Yi from the *Preliminary Determination.*

Final Negative Determination of Critical Circumstances

In accordance with section 735(a)(3) of the Act and 19 CFR 351.206, Commerce continues to find that critical circumstances do not exist for Ton Yi. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Issues and Decision Memorandum.[9]

Final Determination

Commerce determines that the final estimated weighted-average dumping margin exists:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Ton Yi Industrial Corporation	0.00

Consistent with sections 735(c)(1)(B) and (c)(5) of the Act, Commerce has not calculated an estimated weighted-average dumping margin for all other producers and exporters because it has not made an affirmative final determination of sales at LTFV.

Disclosure

Commerce intends to disclose the calculations performed in connection with this final determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

In the *Preliminary Determination,* the estimated weighted-average dumping margin for Ton Yi was zero percent and, therefore, we did not suspend liquidation of entries of tin mill products from Taiwan.[10] Because Commerce has made a final negative determination of sales at LTFV with regard to the subject merchandise, Commerce will not direct U.S. Customs and Border Protection to suspend liquidation or to require a cash deposit of estimated antidumping duties for entries of tin mill products from Taiwan.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission of its final negative determination of sales at

[1] *See Tin Mill Products from the United Kingdom: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 88 FR 57090 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *Id.,* 88 FR at 57091.

[3] *See* Memorandum, ''Decision Memorandum for the Final Negative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances in the Investigation of Tin Mill Products from Taiwan,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[5] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[6] *See* Memoranda, ''Verification of the Cost Response of Ton Yi Industrial Corporation in the Antidumping Duty Investigation of Tin Mill Products from Taiwan,'' dated October 24, 2023; and ''Verification of the Sales Response of Ton Yi Industrial Corporation in the Antidumping Duty Investigation of Tin Mill Products from Taiwan,'' dated November 20, 2023.

[7] *See* Ton Yi's Letter, ''Sales Verification Minor Corrections,'' dated October 24, 2023.

[8] For a discussion of the minor verification corrections accepted for the final determination, see memorandum, ''Final Determination Calculation Memorandum for Ton Yi,'' dated concurrently with this notice.

[9] *See* Issues and Decision Memorandum at 2–3.

[10] *See Preliminary Determination,* 88 FR 57091.

LTFV. As our final determination is negative, this proceeding is terminated in accordance with section 735(c)(2) of the Act.

Administrative Protective Order

This notice will serve as a reminder to the parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (± 10%) or 0.255 mm (± 10%) with 770 mm (minimum width) (± 1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (± 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m2; with a chrome oxide coating restricted to 6 to 25 mg/m2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cutoff of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m2 as type DOS, or 3.5 to 6.5 mg/m2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m2, with a chromium oxide layer of 5–30 mg/m2, with a tensile strength of 260–440 N/mm2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m2 and chromium oxide of 10 mg/m2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish

of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

• Tin-free steel coated with a metallic chromium layer between 100–200 mg/m2 and a chromium oxide layer between 5–30 mg/m2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.

• Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00326 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–851]

Tin Mill Products From Germany: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that imports of tin mill products from Germany are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: George McMahon or Carolyn Adie, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1167 and (202) 482–6250, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of tin mill products from Germany, in which it also postponed the final determination until January 4, 2024.[1] We invited interested parties to comment on the *Preliminary Determination*.

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2] 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.*

Scope of the Investigation

The products covered by this investigation are tin mill products from Germany. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in Appendix I.

Verification

Commerce verified the information relied upon in making its final determination in this investigation, consistent with section 782(i) of the Tariff Act of 1930, as amended (the Act). Specifically, Commerce conducted on-site verifications of the information and data on home market sales, U.S. sales, and cost of production submitted by thyssenkrupp Rasselstein GmbH (TKR).[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice as Appendix II.

[1] *See Tin Mill Products from Germany: Preliminary Affirmative Determination of Sales at Less Than Fair Value,* Preliminary Negative Critical Circumstances Determination, Postponement of Final Determination, and Extension of Provisional Measures, 88 FR 57078 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances in the Investigation of Tin Mill Products from Germany,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[5] *See* Memoranda, ''Verification of the Sales Response of thyssenkrupp Rasselstein GmbH,'' dated October 26, 2023; ''Verification of the Sales Response of thyssenkrupp Steel North America Inc.,'' dated October 30, 2023; and ''Verification of the Cost Response of thyssenkrupp Rasselstein GmbH,'' dated November 2, 2023.

Changes Since the Preliminary Determination

We made certain changes to the margin calculation for TKR since the *Preliminary Determination*. For a discussion of these changes, *see* the Issues and Decision Memorandum.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for individually investigated exporters and producers, excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act, *i.e.,* facts otherwise available.

In this investigation, Commerce calculated an individual estimated weighted-average dumping margin for the sole mandatory respondent, TKR, that is not zero, *de minimis,* or based entirely on facts otherwise available. Consequently, Commerce assigned the estimated weighted-average dumping margin calculated for TKR to all other producers and exporters of the merchandise under consideration, pursuant to section 735(c)(5)(A) of the Act.

Final Negative Determination of Critical Circumstances

In accordance with section 735(a)(3) of the Act and 19 CFR 351.206, Commerce continues to find that critical circumstances do not exist for all companies in Germany. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Issues and Decision Memorandum.[6]

Final Determination

Commerce determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
thyssenkrupp Rasselstein GmbH	6.88
All Others	6.88

Disclosure

Commerce intends to disclose the calculations performed in connection with this final determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of subject merchandise, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after August 22, 2023, the date of publication of the *Preliminary Determination* in the **Federal Register**. These suspension of liquidation instructions will remain in effect until further notice.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), upon the publication of this notice, we will instruct CBP to require a cash deposit for estimated antidumping duties for such entries as follows: (1) the cash deposit rate for the respondent listed in the table above is the company-specific estimated weighted-average dumping margin listed for the respondent in the table; (2) if the exporter is not the respondent listed in the table above, but the producer is, then the cash deposit rate is the company-specific estimated weighted-average dumping margin listed for the producer of the subject merchandise in the table above; and (3) the cash deposit rate for all other producers and exporters is the all-others estimated weighted-average dumping margin listed in the table above.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its final affirmative determination of sales at LTFV. Because Commerce's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of tin mill products no later than 45 days after this final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, all cash deposits posted will be refunded, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed in the ''Continuation of Suspension of Liquidation'' section above.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This final determination is issued and published in accordance with sections 735(d) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

• Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (± 10%) or 0.255 mm (± 10%) with 770 mm (minimum width) (± 1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (± 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31

[6] *See* Issues and Decision Memorandum at 4.

to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).

- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.
- Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.
- Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00322 Filed 1–9–24; 8:45 am]
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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–151]

Tin Mill Products From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, in Part

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of tin mill products from the People's Republic of China (China). The period of investigation is January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Genevieve Coen or Melissa Porpotage, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3251 or (202) 482–1413, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 26, 2023, Commerce published its *Preliminary Determination* [1] in the **Federal Register**. Commerce invited parties to comment on the *Preliminary Determination*.[2]

For a complete description of the events that followed the *Preliminary Determination, see* the Issues and Decision Memorandum.[3] The Issues and 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 Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are tin mill products from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[4] We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[5] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in Appendix I.

Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation, and the issues raised in the case and rebuttal briefs that were submitted by parties in this investigation, are discussed in the Issues and Decision Memorandum. For a list of the issues raised by interested parties and addressed in the Issues and Decision Memorandum, *see* Appendix II.

Methodology

Commerce conducted this investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, Commerce determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[6] For a full description of the methodology underlying our final determination, *see* the Issues and Decision Memorandum.

In making this final determination, Commerce relied, in part, on facts otherwise available, pursuant to sections 776(a) and (b) of the Act. For a full discussion of our application of adverse facts available (AFA), *see* the section ''Use of Facts Available and Adverse Inferences'' in the Issues and Decision Memorandum.

Verification

Commerce was unable to conduct on-site verification of the information relied on in making its final determination in this investigation. However, in August 2023, we took additional steps in lieu of on-site verifications to verify the information relied upon in making this final determination, in accordance with section 782(i) of the Act, by conducting virtual verification of one of the mandatory respondents, Shougang Jingtang United Iron & Steel Co., Ltd. (Jingtang Iron).

Final Affirmative Determination of Critical Circumstances, in Part

In accordance with sections 703(e)(1), and 776(a) and (b) of the Act, and 19 CFR 351.206, as well as our analysis of comments received regarding our affirmative preliminary determination of critical circumstances,[7] Commerce continues to find that critical circumstances exist with respect to imports of tin mill products from China for one of the mandatory respondents, Baoshan Iron & Steel Co., Ltd. (Baoshan Iron). In addition, we continue to find that critical circumstances do not exist with respect to imports of tin mill products from Jingtang Iron and companies not individually examined. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Issues and Decision Memorandum.

Changes Since the Preliminary Determination

Based on our review and analysis of the information at verification and comments received from interested parties, we made changes to the subsidy rate calculations for Jingtang Iron. For a discussion of the comments received, *see* the Issues and Decision Memorandum.

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[1] *See Tin Mill Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination,* 88 FR 41373 (June 26, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *Preliminary Determination,* 88 FR at 41373.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Tin Mill Products from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[5] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; *see also* section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] *See* Issues and Decision Memorandum at Comment 1.

All-Others Rate

Pursuant to section 705(c)(5)(A)(i) of the Act, Commerce will determine an all-others rate equal to the weighted-average countervailable subsidy rates established for exporters and/or producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely under section 776 of the Act. In this investigation, Commerce calculated a total subsidy rate for Baoshan Iron determined entirely under section 776 of the Act. Therefore, the only rate that is not zero, *de minimis,* or based entirely on facts otherwise available is the rate calculated for Jingtang Iron. Consequently, the rate calculated for Jingtang Iron is also assigned as the rate for all other producers and exporters.

Final Determination

Commerce determines that the following estimated countervailable subsidy rates exist: [8]

Company	Subsidy rate (percent *ad valorem*)
Baoshan Iron & Steel Co., Ltd	649.98
Shougang Jingtang United Iron & Steel Co., Ltd	331.88
All Others	331.88

Disclosure

Commerce intends to disclose to interested parties the calculations performed in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of the publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

As a result of our *Preliminary Determination* and pursuant to sections 703(d)(1)(B) and (d)(2) of the Act, we instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise from China that were entered, or withdrawn from warehouse, for consumption, on or after June 26, 2023, the date of publication of the *Preliminary Determination* in the **Federal Register**. Because we preliminarily determined that critical circumstances existed with respect to Baoshan Iron, we instructed CBP to suspend such entries on or after March 28, 2023, which is 90 days prior to the date of the publication of the *Preliminary Determination* in the **Federal Register**.[9] In accordance with section 703(d) of the Act, we instructed CBP to discontinue the suspension of liquidation of all entries of subject merchandise entered or withdrawn from warehouse, on or after October 24, 2023.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a countervailing duty (CVD) order, reinstate the suspension of liquidation under section 706(a) of the Act, and require a cash deposit of estimated CVDs for entries of subject merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated, and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our final affirmative determination that countervailable subsidies are being provided to producers and exporters of pressure washers from China. Because the final determination in this proceeding is affirmative, in accordance with section 705(b) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of pressure washers from China no later than 45 days after our final determination. In addition, we are making available to the ITC all non-privileged and nonproprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance. If the ITC determines that material injury or threat of material injury does not exist, this proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, Commerce will issue a CVD order directing CBP to assess, upon further instruction by Commerce, CVDs on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Administrative Protective Order

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to an APO of their responsibility concerning the destruction of proprietary information disclosed under APO, in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act, and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (± 10%) or 0.255 mm (±10%) with 770 mm (minimum width)

[8] Commerce finds the following companies to be cross-owned with Jingtang Iron: Shougang Group Co., Ltd.; Shougang Casey Steel Co., Ltd.; Beijing Shougang Co., Ltd.; Beijing Shougang Steel Trade Management Co., Ltd.; Beijing Shougang Machinery & Electric Co., Ltd.; Beijing Shougang Gas Co., Ltd.; Qinhuangdao Shougang Machinery Co., Ltd.; Beijing Shoujian Equipment Maintenance Co., Ltd.; Beijing Shougang Lujiashan Limestone Mine Co., Ltd.; Hebei Shoulang New Energy Technology Co., Ltd.; Tangshan Caofeidian Industrial Zone Shouhanxin Industry Co., Ltd.; and China Shougang International Trade & Engineering Corporation.

[9] *See Countervailing Duty Investigation of Tin Mill Products from the People's Republic of China: Preliminary Determination of Critical Circumstances, in Part,* 88 FR 46738 (July 20, 2023).

(± 1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (± 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 1/2 anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).

- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of 3/4 pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch(3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of 1/4 inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of 1/8 inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. in., with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.
- Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.
- Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00321 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–412–827]

Tin Mill Products From the United Kingdom: Final Negative Determination of Sales at Less Than Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that tin mill products from the United Kingdom (UK) are not being, or are not likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation (POI) January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Charles DeFilippo, 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) 482–3797.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** the preliminary determination in the LTFV investigation of tin mill products from the UK, in which it also postponed the final determination until January 4, 2024.[1] Commerce invited interested parties to submit case and rebuttal briefs on the *Preliminary Determination*.[2] No interested party submitted comments. Accordingly, the final determination of the LTFV investigation remains unchanged from the *Preliminary Determination* and no Issues and Decision Memorandum accompanies this notice.

Scope of the Investigation

The products covered by this investigation are tin mill products from the UK. For a complete description of the scope of this investigation, *see* the appendix to this notice.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope specific case and rebuttal briefs.[3] We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in the appendix to this notice.

Verification

Commerce conducted verification of the information relied upon in making its final determination in this investigation, in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Specifically, Commerce conducted on-site verifications of the home market sales, U.S. sales, and cost of production responses submitted by Tata Steel UK Ltd. (TSUK).[5]

Changes Since the Preliminary Determination

During the on-site verification, TSUK presented minor corrections to its home market and U.S. sales databases.[6] We accepted these minor corrections and included these changes in the margin calculations for the final determination.[7] These minor corrections did not result in a change to the estimated weighted-average dumping margin calculated for TSUK from the *Preliminary Determination.*

Final Determination

Commerce determines that the final estimated weighted-average dumping margin exists:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Tata Steel UK Ltd	0.00

Consistent with sections 735(c)(1)(B) and (c)(5) of the Act, Commerce has not calculated an estimated weighted-average dumping margin for all other producers and exporters because it has not made an affirmative final determination of sales at LTFV.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this final determination within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

In the *Preliminary Determination,* the estimated weighted-average dumping margin for TSUK was zero percent and, therefore, we did not suspend liquidation of entries of tin mill products from the UK.[8] Because Commerce has made a final negative determination of sales at LTFV with

[1] *See Tin Mill Products from the United Kingdom: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 88 FR 57084 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *Id.,* 88 FR at 57085.

[3] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[5] *See* Memoranda, ''Verification of the Sales Response of Tata Steel UK Ltd. in the Antidumping Investigation of Tin Mill Products from the United Kingdom,'' dated November 2, 2023; and ''Verification of the Cost Response of Tata Steel UK Ltd. in the Antidumping Duty Investigation of Tin Mill Products from the United Kingdom,'' dated November 13, 2023.

[6] *See* TSUK's Letter, ''Minor Correction,'' dated October 17, 2023.

[7] For a discussion of the minor verification corrections accepted for the final determination, *see* the Memorandum, ''Final Determination Calculation Memorandum for Tata Steel UK Ltd.,'' dated concurrently with this notice.

[8] *See Preliminary Determination,* 88 FR 57085.

regard to the subject merchandise, Commerce will not direct U.S. Customs and Border Protection to suspend liquidation or to require a cash deposit of estimated antidumping duties for entries of tin mill products from the UK.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission of its final negative determination of sales at LTFV. As our final determination is negative, this proceeding is terminated in accordance with section 735(c)(2) of the Act.

Administrative Protective Order

This notice will serve as a reminder to the parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (± 10%) or 0.255 mm (± 10%) with 770 mm (minimum width) (± 1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (± 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m2; with a chrome oxide coating restricted to 6 to 25 mg/m2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cutoff of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m2 as type DOS, or 3.5 to 6.5 mg/m2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70- 130 mg/m2, with a chromium oxide layer of 5–30 mg/m2, with a tensile strength of 260–440 N/mm2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch(3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m2 and chromium oxide of 10 mg/m2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8

temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

• Tin-free steel coated with a metallic chromium layer between 100–200 mg/m2 and a chromium oxide layer between 5–30 mg/m2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.

• Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

[FR Doc. 2024–00328 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–857, C–122–858]

Certain Softwood Lumber Products From Canada: Continuation of Antidumping and Countervailing Duty Orders

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) and countervailing duty (CVD) orders on certain softwood lumber products (softwood lumber) from Canada would likely lead to the continuation or recurrence of dumping and countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of these AD and CVD orders.

DATES: Applicable December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Zachary Shaykin, 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) 482–2638.

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2018, Commerce published in the **Federal Register** the AD and CVD orders on softwood lumber from Canada.[1] On December 1, 2022, the ITC instituted,[2] and Commerce initiated,[3] the first sunset review of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its reviews, Commerce determined that revocation of the *Orders,* would likely lead to the continuation or recurrence of dumping and countervailable subsidies, and therefore, notified the ITC of the magnitude of the margins of dumping and subsidy rates likely to prevail should the *Orders* be revoked.[4]

On December 28, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Orders

The merchandise covered by the *Orders* is softwood lumber, siding, flooring, and certain other coniferous wood (softwood lumber products). The scope includes:

• Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.

• Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.

• Coniferous drilled and notched lumber and angle cut lumber.

• Coniferous lumber stacked on edge and fastened together with nails, whether or not with plywood sheathing.

• Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above.

Finished products are not covered by the scope of these *Orders.* For the purposes of this scope, finished products contain, or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products, and such products can be readily differentiated from merchandise subject to these *Orders* at the time of importation. Such differentiation may, for example, be shown through marks of special adaptation as a particular product. The following products are illustrative of the

[1] *See Certain Softwood Lumber Products from Canada: Antidumping Duty Order and Partial Amended Final Determination,* 83 FR 350 (January 3, 2018); and *Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 83 FR 347 (January 3, 2018) (collectively, *Orders*).

[2] *See Softwood Lumber Products from Canada; Institution of Five-Year Reviews,* 87 FR 73778 (December 1, 2022).

[3] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 73757 (December 1, 2022).

[4] *See Certain Softwood Lumber Products from Canada: Final Results of the Expedited Sunset Review of the Countervailing Duty Order,* 88 FR 19613 (April 3, 2023), and accompanying Issues and Decision Memorandum (IDM); *see also Certain Softwood Lumber Products from Canada: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order,* 88 FR 20479 (April 6, 2023), and accompanying IDM.

[5] *See Softwood Lumber Products from Canada,* 88 FR 89726 (December 28, 2023).

type of merchandise that is considered ''finished'' for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.

The following items are excluded from the scope of these *Orders:*

- Softwood lumber products certified by the Atlantic Lumber Board as being first produced in the Provinces of Newfoundland and Labrador, Nova Scotia, or Prince Edward Island from logs harvested in Newfoundland and Labrador, Nova Scotia, or Prince Edward Island.
- U.S.-origin lumber shipped to Canada for processing and imported into the United States if the processing occurring in Canada is limited to one or more of the following: (1) kiln drying; (2) planing to create smooth-to-size board; or (3) sanding.
- Box-spring frame kits if they contain the following wooden pieces—two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails must be radius-cut at both ends. The kits must be individually packaged and must contain the exact number of wooden components needed to make a particular box-spring frame, with no further processing required. None of the components exceeds 1″ in actual thickness or 83″ in length.
- Radius-cut box-spring-frame components, not exceeding 1″ in actual thickness or 83″ in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantially cut so as to completely round one corner.

Softwood lumber product imports are generally entered under Chapter 44 of the Harmonized Tariff Schedule of the United States (HTSUS). This chapter of the HTSUS covers ''Wood and articles of wood.'' Softwood lumber products that are subject to these *Orders* are currently classifiable under the following ten-digit HTSUS subheadings in Chapter 44: 4406.91.0000; 4407.10.01.01; 4407.10.01.02; 4407.10.01.15; 4407.10.01.16; 4407.10.01.17; 4407.10.01.18; 4407.10.01.19; 4407.10.01.20; 4407.10.01.42; 4407.10.01.43; 4407.10.01.44; 4407.10.01.45; 4407.10.01.46; 4407.10.01.47; 4407.10.01.48; 4407.10.01.49; 4407.10.01.52; 4407.10.01.53; 4407.10.01.54; 4407.10.01.55; 4407.10.01.56; 4407.10.01.57; 4407.10.01.58; 4407.10.01.59; 4407.10.01.64; 4407.10.01.65; 4407.10.01.66; 4407.10.01.67; 4407.10.01.68; 4407.10.01.69; 4407.10.01.74; 4407.10.01.75; 4407.10.01.76; 4407.10.01.77; 4407.10.01.82; 4407.10.01.83; 4407.10.01.92; 4407.10.01.93; 4407.11.00.01; 4407.11.00.02; 4407.11.00.42; 4407.11.00.43; 4407.11.00.44; 4407.11.00.45; 4407.11.00.46; 4407.11.00.47; 4407.11.00.48; 4407.11.00.49; 4407.11.00.52; 4407.11.00.53; 4407.12.00.01; 4407.12.00.02; 4407.12.00.17; 4407.12.00.18; 4407.12.00.19; 4407.12.00.20; 4407.12.00.58; 4407.12.00.59; 4407.13.0000; 4407.14.0000; 4407.19.0001; 4407.19.0002; 4407.19.0054; 4407.19.0055; 4407.19.0056; 4407.19.0057; 4407.19.0064; 4407.19.0065; 4407.19.0066; 4407.19.0067; 4407.19.0068; 4407.19.0069; 4407.19.0074; 4407.19.0075; 4407.19.0076; 4407.19.0077; 4407.19.0082; 4407.19.0083; 4407.19.0092; 4407.19.0093; 4409.10.05.00; 4409.10.10.20; 4409.10.10.40; 4409.10.10.60; 4409.10.10.80; 4409.10.20.00; 4409.10.90.20; 4409.10.90.40; 4418.30.0100; 4418.50.0010; 4418.50.0030; 4418.50.0050; and 4418.99.10.00.

Subject merchandise as described above might be identified on entry documentation as stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts. Items so identified might be entered under the following ten-digit HTSUS subheadings in Chapter 44: 4415.20.40.00; 4415.20.80.00; 4418.99.9105; 4418.99.9120; 4418.99.9140; 4418.99.9195; 4421.99.70.40; and 4421.99.9880.

Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these *Orders* is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* is December 28, 2023.[6]

[6] *Id.*

Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year reviews of the *Orders* not later than 30 days prior to fifth anniversary of the date of the last determination by the ITC.

Administrative Protective Order (APO)

This notice also serves as a final 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

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act and 19 CFR 351.218(f)(4).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement & Compliance.

[FR Doc. 2024–00330 Filed 1–9–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–150]

Tin Mill Products From the People's Republic of China: Final Affirmative Determination of Sales at Less-Than-Fair Value and Final Affirmative Determination of Critical Circumstances

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that imports of tin mill products from the People's Republic of China (China) are being, or are likely to be, sold in the United States at less-than-fair value (LTFV). The period of investigation is July 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Rachel Jennings, 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) 482–1110.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of tin mill products from China.[1] We invited parties to comment on the *Preliminary Determination.* On September 12, 2023, Commerce published in the **Federal Register**, pursuant to 19 CFR 351.210(g), notice of postponement of the final determination to January 4, 2024.[2]

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination may be found in the Issues and Decision Memorandum.[3] 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.*

Scope of the Investigation

The products covered by this investigation are tin mill products from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[4] We received comments from parties on the Preliminary Scope Memorandum, which we address in the Final Scope Decision Memorandum.[5] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in Appendix I.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II.

Final Affirmative Determination of Critical Circumstances

We continue find that critical circumstances exist for imports of tin mill products from China for the China-wide entity pursuant to sections 735(a)(3)(A) and (B) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.206.[6] For a discussion and analysis of comments regarding the results of Commerce's critical circumstances analysis, *see* the Issues and Decision Memorandum.[7]

China-Wide Entity and Use of Adverse Facts Available (AFA)

For the purposes of this final determination, consistent with the *Preliminary Determination,*[8] we relied solely on the application of AFA for the rate assigned to China-wide entity, pursuant to sections 776(a) and (b) of the Act. Further, because no companies are eligible for a rate separate from the China-wide entity, we continue to find that all known exporters of Chinese tin mill products are part of the China-wide entity. After review and consideration of parties' comments, as explained in the Issues and Decision Memorandum, we made no changes to the China-wide entity's dumping margin for the final determination.[9]

Combination Rates

In the *Initiation Notice,* Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation.[10] Because no Chinese exporters are eligible for a separate rate in this investigation, we did not calculate producer/exporter combination rates for this final determination.

Final Determination

The final estimated weighted-average dumping margin is as follows:

Exporter/producer	Estimated weighted-average dumping margin (percent)	Estimated weighted-average dumping margin adjusted for export subsidy offset(s) (percent)
China-Wide Entity	122.52	111.98

Disclosure

Normally, Commerce will disclose to the parties in a proceeding the calculations performed in connection with a final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because Commerce continues to find that all Chinese exporters of tin mill products are part of the China-wide entity and continues to rely solely on the application of AFA for the China-wide entity, there are no calculations to disclose for this final determination.

[1] *See Tin Mill Products from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less-Than-Fair Value and Preliminary Affirmative Determination of Critical Circumstances,* 88 FR 57099 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Tin Mill Products from the People's Republic of China: Postponement of Final Determination in the Less-Than-Fair-Value Investigation,* 88 FR 62542 (September 12, 2023).

[3] *See* Memorandum, ''Decision Memorandum for the Final Affirmative Determination of Sales at Less-Than-Fair-Value and Final Affirmative Critical Circumstances Determination of Tin Mill Products from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[5] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this notice (Final Scope Decision Memorandum).

[6] *See* Issues and Decision Memorandum.

[7] *Id.*

[8] *See Preliminary Determination* PDM at 9–12.

[9] *Id.*

[10] *See Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 9481, 9486 (February 14, 2023) (*Initiation Notice*).

Continuation of Suspension of Liquidation

In accordance with sections 735(c)(1)(B) and 735(c)(4)(A) of the Act, for the China-wide entity, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of subject merchandise as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption, on or after May 24, 2023, which is 90 days prior to the date of publication of the *Preliminary Determination* in the **Federal Register**. These suspension of liquidation instructions will remain in effect until further notice.

To determine the cash deposit rate, Commerce normally adjusts the estimated weighted-average dumping margin by the amount of domestic subsidy pass-through and export subsidies determined in a companion countervailing duty (CVD) proceeding when CVD provisional measures are in effect. Accordingly, where Commerce makes an affirmative determination for domestic subsidy pass-through or export subsidies, Commerce offsets the calculated estimated weighted-average dumping margin by the appropriate rates. Commerce has continued to adjust the cash deposit rate for the China-wide entity for export subsidies in the companion CVD investigation by the appropriate export subsidy rate as indicated in the above chart.[11] However, suspension of liquidation of provisional measures in the companion CVD case has been discontinued; [12] therefore, we are not instructing CBP to collect cash deposits based upon the adjusted estimated weighted-average dumping margin for those export subsidies at this time.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), we will instruct CBP to require a cash deposit for such entries of merchandise equal to the amount by which the normal value exceeds the U.S. price as follows: (1) for all Chinese exporters of subject merchandise, the cash deposit rate will be equal to the estimated dumping margin established for the China-wide entity; and (2) for all third country exporters of subject merchandise, the cash deposit rate is also the cash deposit rate applicable to the China-wide entity. These suspension of liquidation instructions will remain in effect until further notice.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the U.S. International Trade Commission (ITC) of our final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of tin mill products from China no later than 45 days after this final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded or canceled, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This final determination and notice are issued and published in accordance with sections 735(d) and 777(i) of the Act, and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products within the scope of the investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double- reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of the investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of the investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (± 10%) or 0.255 mm (± 10%) with 770 mm (minimum width) (± 1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (± 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024

[11] *See* Issues and Decision Memorandum at ''Adjustment to Cash Deposit Rate for Export Subsidies.''

[12] *See Tin Mill Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination,* 88 FR 41373 (June 26, 2023); *see also* section 703(d) of the Act, which states that the provisional measures may not be in effect for more than four months, which in the companion CVD case is 120 days after the publication of the preliminary determination, or October 24, 2023.

inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.

• Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m², with a chromium oxide layer of 5–30 mg/m², with a tensile strength of 260–440 N/mm², with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.

• Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).

• Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m² and chromium oxide of 10 mg/m², with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

• Tin-free steel coated with a metallic chromium layer between 100–200 mg/m² and a chromium oxide layer between 5–30 mg/m²; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.

• Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to the investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00320 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–062, C–570–063]

Cast Iron Soil Pipe Fittings From the People's Republic of China: Continuation of Antidumping Duty Order and Countervailing Duty Order

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order and countervailing duty (CVD) order on cast iron soil pipe fittings (soil pipe fittings) from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD and CVD orders.

DATES: Applicable December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Katherine Johnson or Henry Wolfe, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–0574, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 31, 2018, Commerce published in the **Federal Register** the AD order and CVD order on soil pipe fittings from China.[1] On July 3, 2023, the ITC instituted [2] and Commerce initiated [3] the first five-year (sunset) reviews of the *Orders,* pursuant to sections 751(c) and 752 of the Tariff Act of 1930, as amended (the Act). As a result of its reviews, Commerce determined that revocation of the *Orders* would likely lead to a continuation or recurrence of dumping and countervailable subsidies, and therefore, notified the ITC of the magnitude of the margins of dumping and subsidy rates likely to prevail should the *Orders* be revoked.[4]

On December 28, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Orders

The merchandise covered by these *Orders* is cast iron soil pipe fittings, finished and unfinished, regardless of industry or proprietary specifications, and regardless of size. Cast iron soil pipe fittings are nonmalleable iron castings of various designs and sizes, including, but not limited to, bends, tees, wyes, traps, drains, and other common or special fittings, with or without side inlets.

Cast iron soil pipe fittings are classified into two major types—hubless and hub and spigot. Hubless cast iron soil pipe fittings are manufactured without a hub, generally in compliance with Cast Iron Soil Pipe Institute (CISPI) specification 301 and/or American Society for Testing and Materials (ASTM) specification A888. Hub and spigot pipe fittings have hubs into which the spigot (plain end) of the pipe or fitting is inserted. Cast iron soil pipe fittings are generally distinguished from other types of nonmalleable cast iron fittings by the manner in which they are connected to cast iron soil pipe and other fittings.

Excluded from the scope are all drain bodies. Drain bodies are normally classified in subheading 7326.90.86.88 of the Harmonized Tariff Schedule of the United States (HTSUS).

The subject imports are normally classified in subheading 7307.11.0045 of the HTSUS: Cast fittings of nonmalleable cast iron for cast iron soil pipe. They may also be entered under HTSUS 7324.29.0000 and 7307.92.3010. The HTSUS subheadings and specifications are provided for convenience and customs purposes only; the written description of the scope of these *Orders* is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to a continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, pursuant to sections 751(c) and 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be December 28, 2023.[6] Pursuant to section 751(c)(2) of the Act, Commerce intends to initiate the next five-year reviews of these *Orders* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order (APO)

This notice also serves as a final 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

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with 777(i) the Act, and 19 CFR 351.218(f)(4).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–00329 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Cast Iron Soil Pipe Fittings from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 83 FR 44570 (August 31, 2018); and *Cast Iron Soil Pipe Fittings from the People's Republic of China: Countervailing Duty Order,* 83 FR 44566 (August 31, 2018) (collectively, *Orders*).

[2] *See Cast Iron Soil Pipe Fittings from China; Institution of Five-Year Reviews,* 88 FR 42753 (July 3, 2023).

[3] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 42688 (July 3, 2023).

[4] *See Cast Iron Soil Pipe Fittings from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order,* 88 FR 76171 (November 6, 2023), and accompanying Issues and Decision Memorandum (IDM); *see also Cast Iron Soil Pipe Fittings from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order,* 88 FR 76184 (November 6, 2023), and accompanying IDM.

[5] *See Cast Iron Soil Pipe Fittings from China,* 88 FR 89727 (December 28, 2023).

[6] *Id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–869]

Tin Mill Products From Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that imports of tin mill products from Canada are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5760.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of tin mill products from Canada, in which it also postponed the final determination until January 4, 2024.[1] We invited interested

[1] *See Tin Mill Products from Canada: Preliminary Affirmative Determination of Sales at Less Than*

parties to comment on the *Preliminary Determination.*

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2] 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.*

Scope of the Investigation

The products covered by this investigation are tin mill products from Canada. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination,* as noted in Appendix I.

Verification

Commerce verified the information relied upon in making its final determination in this investigation, consistent with section 782(i) of the Tariff Act of 1930, as amended (the Act). Specifically, Commerce conducted on-site verifications of the information and data on home market sales, U.S. sales, and cost of production submitted by ArcelorMittal Dofasco G.P. (Dofasco).[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice as Appendix II.

Changes Since the Preliminary Determination

We made certain changes to the margin calculation for Dofasco since the *Preliminary Determination.* For a discussion of these changes, *see* the Issues and Decision Memorandum.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for individually investigated exporters and producers, excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act, *i.e.,* facts otherwise available.

In this investigation, Commerce calculated an individual estimated weighted-average dumping margin for the sole mandatory respondent, Dofasco, that is not zero, *de minimis,* or based entirely on facts otherwise available. Consequently, Commerce assigned the estimated weighted-average dumping margin calculated for Dofasco to all other producers and exporters of the merchandise under consideration, pursuant to section 735(c)(5)(A) of the Act.

Final Negative Determination of Critical Circumstances

In accordance with section 735(a)(3) of the Act and 19 CFR 351.206, Commerce continues to find that critical circumstances do not exist for all companies in Canada. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Issues and Decision Memorandum.[6]

Final Determination

Commerce determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
ArcelorMittal Dofasco G.P	5.27
All Others	5.27

Disclosure

Commerce intends to disclose the calculations performed in connection with this final determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of subject merchandise, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after August 22, 2023, the date of publication of the *Preliminary Determination* in the **Federal Register**. These suspension of liquidation instructions will remain in effect until further notice.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), upon the publication of this notice, we will instruct CBP to require a cash deposit for estimated antidumping duties for such entries as follows: (1) the cash deposit rate for the respondent listed in the table above is the company-specific estimated weighted-average dumping margin listed for the respondent in the table; (2) if the exporter is not the respondent listed in the table above, but the producer is, then the cash deposit rate is the company-specific estimated weighted-average dumping margin listed for the producer of the subject merchandise in the table above; and (3) the cash deposit rate for all other producers and exporters is the all-others estimated weighted-average dumping margin listed in the table above.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of

Fair Value, Preliminary Negative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures, 88 FR 57081 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances in the Investigation of Tin Mill Products from Canada,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] See Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[5] *See* Memoranda, ''Sales Verification Report,'' dated November 1, 2023; and ''Verification of the Cost Response of ArcelorMittal Dofasco G.P.,'' dated November 2, 2023.

[6] *See* Issues and Decision Memorandum at 3.

its final affirmative determination of sales at LTFV. Because Commerce's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of tin mill products no later than 45 days after this final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, all cash deposits posted will be refunded, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed in the ''Continuation of Suspension of Liquidation'' section above.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This final determination and notice are issued and published in accordance with sections 735(d) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (±10%) or 0.255 mm (±10%) with 770 mm (minimum width) (±1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (±1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70- 130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch(3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/

dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.
- Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.
- Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00319 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–915]

Tin Mill Products From the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that tin mill products from the Republic of Korea (Korea) are being, or are likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation (POI) January 1, 2022, through December 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Preston Cox, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2924 or (202) 482–5041, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published in the **Federal Register** its preliminary negative determination in the LTFV investigation of tin mill products from Korea, in which we also postponed the final determination until January 4, 2023.[1] We invited interested parties to comment on the *Preliminary Determination*.[2] No interested party submitted comments. Consequently, no decision memorandum accompanies this notice.

Scope of the Investigation

The products covered by this investigation are tin mill products from Korea. For a complete description of the scope of this investigation, *see* the appendix to this notice.

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of this investigation from the scope published in the *Preliminary Determination,* as noted in the appendix to this notice.

Verification

Commerce verified the sales and cost information submitted by KG Dongbu Steel Co., Ltd. (KG Dongbu) and TCC Steel Corp. (TCC) for use in our final determination, consistent with section 782(i) of the Tariff Act of 1930, as amended (the Act). We used standard verification procedures, including an examination of relevant sales and accounting records, and original source documents provided by KG Dongbu and TCC.[5]

Changes Since the Preliminary Determination

We made certain changes to the preliminary weighted-average margin

[1] *See Tin Mill Products from the Republic of Korea: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 88 FR 57093 (August 22, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Preliminary Determination,* 88 FR at 57094.

[3] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated August 16, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this memorandum (Final Scope Decision Memorandum).

[5] *See* Memoranda, ''Verification of the Cost Response of TCC Steel Corp.,'' dated November 6, 2023; ''Verification of the Cost Response of KG Dongbu Steel Co., Ltd.,'' dated November 28, 2023 (KG Dongbu Cost Verification Report); ''Sales Verification Report for KG Dongbu Steel Co., Ltd.,'' dated December 4, 2023 (KG Dongbu Sales Verification Report); ''Constructed Export Price Sales Verification Report for KG Steel USA,'' dated December 4, 2023 (KG Steel USA Sales Verification Report); ''Verification of the Sales Response of TCC Steel Corp.'' dated December 4, 2023 (TCC Sales Verification Report); and ''Verification of the Sales Response of TCC America Corporation,'' dated December 5, 2023 (TAC Sales Verification Report).

calculations for KG Dongbu and TCC to incorporate the minor corrections submitted by each company at verification.[6] For KG Dongbu, this resulted in no change to the company's preliminary weighted-average dumping margin (*i.e.,* 0.00 percent).[7] For TCC, this resulted in a change to the company's weighted-average dumping margin; for this final determination, we calculate a weighted-average dumping margin of 2.69 percent. [8]

We revised the sales data reported by TCC to incorporate the corrections provided by the company at verification.[9] Based on the revised data, the application of the Cohen's *d* confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods.[10] This difference is meaningful because the weighted-average dumping margin crosses the *de minimis* threshold when calculated using the average-to-average method and when calculated using alternative comparison methods.[11] Further, in accordance with Commerce's practice, if the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support applying an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method and application of the average-to-average method to those sales identified as not passing the Cohen's *d* test.[12] On this basis, for purposes of this final determination, we are applying the average-to-transaction method to those U.S. sales which passed the Cohen's *d* test and the average-to-average method to those sales which did not pass the Cohen's *d* test to calculate the weighted-average dumping margin for TCC (*i.e.,* mixed-alternative method). This change from the *Preliminary Determination* [13] results in an estimated weighted-average dumping margin for TCC of 2.69 percent for this final determination.[14]

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for individually investigated exporters and producers, excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act, *i.e.,* facts otherwise available.

In this investigation, Commerce calculated an individual estimated weighted-average dumping margin for TCC that is not zero, *de minimis,* or based entirely on facts otherwise available. Consequently, Commerce assigned the estimated weighted-average dumping margin calculated for TCC to all other producers and exporters of the merchandise under consideration, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

Commerce determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
KG Dongbu Steel Co., Ltd	0.00
TCC Steel Corp	2.69
All Others	2.69

Disclosure

Commerce intends to disclose the calculations performed in connection with this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of tin mill products from Korea as described in the appendix, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, except for those entries of subject merchandise produced and exported by KG Dongbu.

Because the estimated weighted-average dumping margin for KG Dongbu as the producer and exporter is zero, entries of shipments of subject merchandise that are produced and exported by KG Dongbu will not be subject to suspension of liquidation or cash deposit requirements. Accordingly, Commerce will direct CBP not to suspend liquidation of entries of subject merchandise produced and exported by KG Dongbu. In accordance with section 735(a)(4) of the Act and 19 CFR 351.204(e)(1), should the investigation result in an antidumping duty order pursuant to section 736 of the Act, entries of shipments of subject merchandise from this producer/exporter combination will be excluded from the order. However, entries of shipments of subject merchandise from this company in any other producer/exporter combination, or by third parties that sourced subject merchandise from the excluded producer/exporter combination, will be subject to suspension of liquidation at the all-others rate.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed in the table above is the company-specific cash deposit rate listed for the respondent in the table; (2) if the exporter is not a respondent identified in the table above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the U.S. International Trade Commission (ITC) of this final affirmative determination of sales at LTFV. Because Commerce's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of tin mill products no later than 45 days after this final determination. If the ITC determines

[6] *See* KG Dongbu Cost Verification Report at 2; *see also* KG Dongbu Sales Verification Report at 2–3; KG Steel USA Sales Verification Report at 2–3; TCC Sales Verification Report at 2–3; and TAC Sales Verification Report at 2–3.

[7] *See* Memorandum, ''Final Determination Analysis Memorandum for KG Dongbu Steel Co., Ltd.,'' dated concurrently with this notice.

[8] *See* Memorandum, ''Final Analysis Memorandum for TCC Steel Corp.,'' dated concurrently with this notice (TCC Final Analysis Memorandum).

[9] TCC Sales Verification Report at 2–3.

[10] *Id.*

[11] *Id.*

[12] *See Preliminary Determination* PDM at 6.

[13] *Id.* at 7; *see also* Memorandum, ''Preliminary Analysis Memorandum for TCC Steel Corp.,'' dated August 16, 2023, at 3; and ''Analysis of Ministerial Error Allegation for TCC Steel Corp.,'' dated September 22, 2023, at Attachment II.

[14] *See* TCC Final Analysis Memorandum.

that such injury does not exist, this proceeding will be terminated, all cash deposits posted will be refunded, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed in the ''Continuation of Suspension of Liquidation'' section above.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: January 4, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (±10%) or 0.251 mm (90 pound base box) (±10%) or 0.255 mm (±10%) with 770 mm (minimum width) (±1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (±1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8

temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

• Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.

• Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

[FR Doc. 2024–00323 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, 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 Shanghai Tainai Bearing Co., Ltd. (Tainai) sold tapered roller bearings and parts thereof, finished and unfinished, (TRBs) from the People's Republic of China (China) at less than normal value (NV) during the period of review (POR), June 1, 2021, through May 31, 2022.

DATES: Applicable January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Jerry Xiao, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2273.

SUPPLEMENTARY INFORMATION:

Background

On July 7, 2023, Commerce published in the **Federal Register** the *Preliminary Results* [1] of the 2021–2022 administrative review of the antidumping duty (AD) order on TRBs from China [2] and invited interested parties to comment.[3] Subsequent to the *Preliminary Results,* we received a case brief from Tainai and a rebuttal brief from the Timken Company (the petitioner).[4] On October 6, 2023, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), Commerce extended the deadline for issuing these final results until January 3, 2024.[5] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[6]

Scope of the Order

The merchandise covered by the *Order* is tapered roller bearings and parts thereof, finished and unfinished, from China. A full description of the scope of the Order is contained in the Issues and Decision Memorandum.[7]

Analysis of Comments Received

All issues raised in case and rebuttal briefs filed by parties in this administrative review are addressed in the Issues and Decision Memorandum and are listed in the appendix to this notice. The Issues and Decision Memorandum is a public document and 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,* and for the reasons explained in the Issues and Decision Memorandum, we made certain changes to the margin calculations for Tainai and updated the rate assigned to the non-examined, separate-rate respondent, Zhejiang Jingli Bearing Technology Co., Ltd. (Jingli).[8]

Rate for Non-Examined Separate Rate Respondent

In the *Preliminary Results,* we determined that Jingli demonstrated its eligibility for a separate rate. We did not receive any comments or argument since the issuance of the *Preliminary Results* that provide a basis for reconsideration of this determination. Therefore, for these final results, we continue to find that Jingli is eligible for a separate rate.

The statute and our regulations do not address the establishment of a rate to be

[1] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 43290 (July 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China,* 52 FR 22667 (June 15, 1987), as amended in *Tapered Roller Bearings from the People's Republic of China; Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order in Accordance with Decision Upon Remand,* 55 FR 6669 (February 26, 1990) (collectively, *Order*).

[3] *See Preliminary Results,* 88 FR at 43290.

[4] *See* Tainai's Letter, ''Case Brief,'' dated August 7, 2023; and Petitioner's Letter, ''Rebuttal Brief,'' dated August 14, 2023.

[5] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated October 6, 2023.

[6] *See* Memorandum, ''Decision Memorandum for the Final Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[7] *Id.*

[8] *Id.*

assigned to respondents not selected for individual examination when we limit our examination of companies subject to the administrative review pursuant to section 777A(c)(2)(B) of the Act. Generally, we look 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 rate for respondents not individually examined in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' Accordingly, in the final results of review, we are assigning to Jingli, the estimated weighted-average margin calculated for Tainai, the sole mandatory respondent in this review.

Final Results of Review

For the companies subject to this review that established their eligibility for a separate rate, Commerce determines that the following estimated weighted-average dumping margins exist for the period June 1, 2021, through May 31, 2022:

Exporter	Weighted-average dumping margin (percent)
Shanghai Tainai Bearing Co., Ltd	24.78
Zhejiang Jingli Bearing Technology Co., Ltd	24.78

Disclosure

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

China-Wide Entity

In the *Preliminary Results,* we found that C&U Group Shanghai Bearing Co., Ltd. (C&U Group), Hangzhou C&U Automotive Bearing Co., Ltd. (C&U Automotive), Hangzhou C&U Metallurgy Bearing Co., Ltd. (C&U Metallurgy), Huangshi C&U Bearing Co., Ltd. (Huangshi C&U), and Sichuan C&U Bearing Co., Ltd. (Sichuan C&U) failed to rebut *de facto* and *de jure* control by the Government of China.[9] We received no comments on this decision for these final results. Accordingly, we continue to find that C&U Group, C&U Automotive, C&U Metallurgy, Huangshi C&U, and Sichuan C&U are not eligible for a separate rate and are, therefore, part of the China-wide entity.

Under Commerce's current policy regarding the conditional review of the China-wide entity, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity.[10] Because no party requested a review of the China-wide entity in this review, the entity is not under review, and the entity's rate is not subject to change (*i.e.,* 92.84 percent).[11]

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b)(1), Commerce intends to determine, and U.S. Customs and Border Protections (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

For Tainai, Commerce will calculate importer-specific assessment rates for antidumping duties, in accordance with 19 CFR 351.212(b)(1). Where the respondent reported reliable entered values, Commerce intends to calculate importer-specific *ad valorem* assessment rates by aggregating the amount of dumping calculated for all U.S. sales to the importer and dividing this amount by the total entered value of the merchandise sold to the importer.[12] Where the respondent did not report entered values, Commerce will calculate importer-specific assessment rates by dividing the amount of dumping for reviewed sales to the importer by the total quantity of those sales. Commerce will calculate an estimated *ad valorem* importer-specific assessment rate to determine whether the per-unit assessment rate is *de minimis;* however, Commerce will use the per-unit assessment rate where entered values were not reported.[13] Where an importer-specific *ad valorem* assessment rate is not zero or *de minimis,* Commerce will instruct CBP to collect the appropriate duties at the time of liquidation. Where either the respondent's weighted average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.

For Jingli, the non-selected separate rate respondent, we will direct CBP to assess antidumping duties at a rate equal to the weighted-average dumping margin determined for Tainai in these final results.

Commerce determined that C&U Group, C&U Automotive, C&U Metallurgy, Huangshi C&U, and Sichuan C&U did not qualify for a separate rate. Therefore, we will instruct CBP to assess antidumping duties on entries of subject merchandise from these entities at 92.84 percent, the established weighted-average dumping margin for the China-wide entity.

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 of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies subject to this review will be the rate established in the final results of this review; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that currently have a separate rate, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding where the exporter received that separate rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity, 92.84 percent; [14] and (4) for all non-Chinese exporters of subject merchandise that have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter.

These deposit requirements, when imposed, shall remain in effect until further notice.

[9] *See Preliminary Results* PDM at 9–11.

[10] *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).

[11] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 3987, 3989 (January 22, 2009).

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

[13] *Id.*

[14] *See Order.*

Notification to Importers

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

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (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 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)(1) of the Act and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h)(2).

Dated: January 3, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–00304 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD580]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of issuance of letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico (GOM), notification is hereby given that a Letter of Authorization (LOA) has been issued to Anadarko Petroleum Corporation (Anadarko) for the take of marine mammals incidental to geophysical survey activity in the GOM.

DATES: The LOA is effective from January 15, 2024, through May 15, 2024.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Rachel Wachtendonk, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which: (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively ''industry operators''), in U.S. waters of the GOM over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take

authorized under the LOA is of no more than small numbers.

Summary of Request and Analysis

Anadarko plans to conduct a one-dimensional vertical seismic profile (VSP) within Mississippi Canyon Block MC–40. The survey area has water depths of approximately 1,070 meters (m). Anadarko plans to use either a 12-element, 2,400 cubic inch (in^3) airgun array, or a 6-element, 1,500 in^3 airgun array. The survey is planned to occur for up to 8 days in February 2024. Please see Anadarko's application for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by Anadarko in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5322, January 19, 2021). In order to generate the appropriate take number for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone); [1] (3) number of days; and (4) season.[2] The acoustic exposure modeling performed in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

No VSP surveys were included in the modeled survey types, and use of existing proxies (*i.e.,* two-dimensional (2D), three-dimensional narrow azimuth (3D NAZ), 3D wide-azimuth (WAZ), Coil) is generally conservative for use in evaluation of VSP survey effort. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29212, June 22, 2018). Coil was selected as the best available proxy survey type because the spatial coverage of the planned survey is most similar to that associated with the coil survey pattern.

For the planned survey, the seismic source array will be deployed from a drilling rig at or near the borehole, with the seismic receivers (*i.e.,* geophones) deployed in the borehole on wireline at specified depth intervals. The coil survey pattern in the model was assumed to cover approximately 144 kilometers squared (km^2) per day (compared with approximately 795 km^2, 199 km^2, and 845 km^2 per day for the 2D, 3D NAZ, and 3D WAZ survey patterns, respectively). Among the different parameters of the modeled survey patterns (*e.g.,* area covered, line spacing, number of sources, shot interval, total simulated pulses), NMFS considers area covered per day to be most influential on daily modeled exposures exceeding Level B harassment criteria. Because Anadarko's planned survey is expected to cover no additional area as a stationary source, the coil proxy is most representative of the effort planned by Anadarko in terms of predicted Level B harassment.

In addition, all available acoustic exposure modeling results assume use of a 72-element, 8,000 in^3 array. Thus, estimated take numbers for this LOA are considered conservative due to the differences in both the airgun array (maximum of 12 elements and 2,400 in^3), and in daily survey area planned by Anadarko (as mentioned above), as compared to those modeled for the rule.

The survey is planned to occur in zone 5. The survey could take place in any season. Therefore, the take estimates for each species are based on the season that has the greater value for the species (*i.e.,* winter or summer).

Additionally, for some species, take estimates based solely on the modeling yielded results that are not realistically likely to occur when considered in light of other relevant information available during the rulemaking process regarding marine mammal occurrence in the GOM. The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. This can result in unrealistic projections regarding the likelihood of encountering particularly rare species and/or species not expected to occur outside particular habitats. Thus, although the modeling conducted for the rule is a natural starting point for estimating take, our rule acknowledged that other information could be considered (see, *e.g.,* 86 FR 5322 (January 19, 2021), discussing the need to provide flexibility and make efficient use of previous public and agency review of other information and identifying that additional public review is not necessary unless the model or inputs used differ substantively from those that were previously reviewed by NMFS and the public). For this survey, NMFS has other relevant information reviewed during the rulemaking that indicates use of the acoustic exposure modeling to generate a take estimate for Rice's whales and killer whales produces results inconsistent with what is known regarding their occurrence in the GOM. Accordingly, we have adjusted the calculated take estimates for those species as described below.

NMFS' final rule described a ''core habitat area'' for Rice's whales (formerly known as GOM Bryde's whales) [3] located in the northeastern GOM in waters between 100–400 m depth along the continental shelf break (Rosel *et al.,* 2016). However, whaling records suggest that Rice's whales historically had a broader distribution within similar habitat parameters throughout the GOM (Reeves *et al.,* 2011; Rosel and Wilcox, 2014). In addition, habitat-based density modeling identified similar habitat (*i.e.,* approximately 100–400 m water depths along the continental shelf break) as being potential Rice's whale habitat (Roberts *et al.,* 2016), although the core habitat area contained approximately 92 percent of the predicted abundance of Rice's whales. See discussion provided at, *e.g.,* 83 FR 29228 (June 22, 2018); 83 FR 29280 (June 22, 2018); 86 FR 5418 (January 19, 2021).

Although Rice's whales may occur outside of the core habitat area, we expect that any such occurrence would be limited to the narrow band of suitable habitat described above (*i.e.,* 100–400 m) and that, based on the few available records, these occurrences would be rare. Anadarko's planned activities will occur in water depths of approximately 1,070 m in the central GOM. Thus, NMFS does not expect there to be the reasonable potential for take of Rice's whale in association with this survey and, accordingly, does not authorize take of Rice's whale through the LOA.

Killer whales are the most rarely encountered species in the GOM, typically in deep waters of the central GOM (Roberts *et al.,* 2015; Maze-Foley and Mullin, 2006). As discussed in the final rule, the density models produced by Roberts *et al.* (2016) provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. GOM. The predictions represent the output of models derived from multi-year observations and associated environmental parameters that incorporate corrections for detection bias. However, in the case of killer whales, the model is informed by few data, as indicated by the coefficient of variation associated with the abundance predicted by the model (0.41, the second-highest of any GOM species model; Roberts *et al.,* 2016). The

[1] For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

[2] For purposes of acoustic exposure modeling, seasons include winter (December-March) and summer (April-November).

[3] The final rule refers to the GOM Bryde's whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice's whale (*Balaenoptera ricei*) (Rosel *et al.,* 2021).

model's authors noted the expected non-uniform distribution of this rarely-encountered species (as discussed above) and expressed that, due to the limited data available to inform the model, it ''should be viewed cautiously'' (Roberts *et al.,* 2015).

NOAA surveys in the GOM from 1992 to 2009 reported only 16 sightings of killer whales, with an additional 3 encounters during more recent survey effort from 2017 to 2018 (Waring *et al.,* 2013; *https://www.boem.gov/gommapps*). Two other species were also observed on fewer than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale.[4]) However, observational data collected by protected species observers (PSOs) on industry geophysical survey vessels from 2002 to 2015 distinguish the killer whale in terms of rarity. During this period, killer whales were encountered on only 10 occasions, whereas the next most rarely encountered species (Fraser's dolphin) was recorded on 69 occasions (Barkaszi and Kelly, 2019). The false killer whale and pygmy killer whale were the next most rarely encountered species, with 110 records each. The killer whale was the species with the lowest detection frequency during each period over which PSO data were synthesized (2002–2008 and 2009–2015). This information qualitatively informed our rulemaking process, as discussed at 86 FR 5322 (January 19, 2021) and 86 FR 5334 (January 19, 2021), and similarly informs our analysis here.

The rarity of encounter during seismic surveys is not likely to be the product of high bias on the probability of detection. Unlike certain cryptic species with high detection bias, such as *Kogia* spp. or beaked whales, or deep-diving species with high availability bias, such as beaked whales or sperm whales, killer whales are typically available for detection when present and are easily observed. Roberts *et al.* (2015) stated that availability is not a major factor affecting detectability of killer whales from shipboard surveys, as they are not a particularly long-diving species. Baird *et al.* (2005) reported that mean dive durations for 41 fish-eating killer whales for dives greater than or equal to 1 minute in duration was 2.3–2.4 minutes, and Hooker *et al.* (2012) reported that killer whales spent 78 percent of their time at depths between 0–10 m. Similarly, Kvadsheim *et al.* (2012) reported data from a study of 4 killer whales, noting that the whales performed 20 times as many dives 1–30 m in depth than to deeper waters, with an average depth during those most common dives of approximately 3 m.

In summary, killer whales are the most rarely encountered species in the GOM and typically occur only in particularly deep water. This survey would take place in deep waters that would overlap with depths in which killer whales typically occur. While this information is reflected through the density model informing the acoustic exposure modeling results, there is relatively high uncertainty associated with the model for this species, and the acoustic exposure modeling applies mean distribution data over areas where the species is in fact less likely to occur. In addition, as noted above in relation to the general take estimation methodology, the assumed proxy source (72-element, 8,000-in^3 array) results in a significant overestimate of the actual potential for take to occur. NMFS' determination in reflection of the information discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales will generally result in estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5322, January 19, 2021; 86 FR 5403, January 19, 2021). In this case, use of the acoustic exposure modeling produces an estimate of three killer whale exposures. Given the foregoing, it is unlikely that any killer whales would be encountered during this at most 8-day survey, and accordingly no take of killer whales is authorized through this LOA.

In addition, in this case, use of the exposure modeling produces results that are smaller than average GOM group sizes for one species (Maze-Foley and Mullin, 2006). NMFS' typical practice in such a situation is to increase exposure estimates to the assumed average group size for a species in order to ensure that, if the species is encountered, exposures will not exceed the authorized take number. However, other relevant considerations here lead to a determination that increasing the estimated exposures to the average group size would likely lead to an overestimate of actual potential take. In this circumstance, the very short survey duration (maximum of 8 days) and relatively small Level B harassment isopleths produced through use of the (at most) 12-element, 2,400-in^3 airgun array (compared with the modeled 72-element, 8,000 in^3 array) mean that it is unlikely that certain species would be encountered at all, much less that the encounter would result in exposure of a greater number of individuals than is estimated through use of the exposure modeling results. As a result, in this case NMFS has not increased the estimated exposure values to assumed average group sizes in authorizing take.

Based on the results of our analysis, NMFS has determined that the level of taking expected for this survey and authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations for the affected species or stocks of marine mammals. See table 1 in this notice and table 9 of the rule (86 FR 5322, January 19, 2021).

Small Numbers Determination

Under the GOM rule, NMFS may not authorize incidental take of marine mammals in an LOA if it will exceed ''small numbers.'' In short, when an acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS' discussion of the MMPA's small numbers requirement provided in the final rule (86 FR 5322, January 19, 2021; 86 FR 5438, January 19, 2021).

The take numbers for authorization, which are determined as described above, are used by NMFS in making the necessary small numbers determinations through comparison with the best available abundance estimates (see discussion at 86 FR 5322, January 19, 2021 and 86 FR 5391, January 19, 2021). For this comparison, NMFS' approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and model-predicted abundance information (*https://seamap.env.duke.edu/models/Duke/GOM*). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.,* 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of

[4] However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in table 1.

TABLE 1—TAKE ANALYSIS

Species	Authorized take [a]	Abundance [b]	Percent abundance
Rice's whale	0	51	n/a
Sperm whale	210	2,207	9.5
Kogia spp.	[c] 89	4,373	1.8
Beaked whales	929	3,768	24.6
Rough-toothed dolphin	160	4,853	3.3
Bottlenose dolphin	757	176,108	0.4
Clymene dolphin	449	11,895	3.8
Atlantic spotted dolphin	302	74,785	0.4
Pantropical spotted dolphin	2,039	102,361	2
Spinner dolphin	546	25,114	2.2
Striped dolphin	176	5,229	3.4
Fraser's dolphin	[d] 50	1,665	3
Risso's dolphin	132	3,764	3.5
Melon-headed whale	295	7,003	4.2
Pygmy killer whale	69	2,126	3.3
False killer whale	111	3,204	3.5
Killer whale	0	267	n/a
Short-finned pilot whale	85	1,981	4.3

[a] Scalar ratios were not applied in this case due to brief survey duration.
[b] Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.,* 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For Rice's whale and killer whale, the larger estimated SAR abundance estimate is used.
[c] Includes 4 takes by Level A harassment and 76 takes by Level B harassment.
[d] Modeled exposure estimate less than assumed average group size (Maze-Foley and Mullin, 2006).

Based on the analysis contained herein of Anadarko's proposed survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes (*i.e.,* less than one-third of the best available abundance estimate) and therefore the taking is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to Anadarko authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: January 4, 2024.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2024–00299 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD622]

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a meeting of the South Atlantic Fishery Management Council's Law Enforcement Advisory Panel.

SUMMARY: The South Atlantic Fishery Management Council's (Council) will hold a meeting of the Law Enforcement Advisory Panel (AP) January 29–30, 2024, in Charleston, SC.

DATES: The Law Enforcement AP will meet from 1 p.m. until 5 p.m. on January 29, and from 9 a.m. until 5 p.m. on January 30, 2024.

ADDRESSES: *Meeting address:* The meeting will be held at the Crowne Plaza, 4831 Tanger Outlet Blvd., North Charleston, SC 29418.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Meeting information, including the agenda, overview, briefing book materials, and an online public comment form will be posted on the Council's website at: *https://safmc.net/advisory-panel-meetings/* 2 weeks prior to the meeting. The meeting is open to the public and available via webinar as it occurs. The webinar registration link will be available from the Council's website. Public comment will also be taken during the meeting.

The agenda for the Law Enforcement AP meeting includes: an update on developing amendments; discussion of enforcement components of amendments for wreckfish management (Snapper Grouper Amendment 48), recreational permitting for the Snapper Grouper Fishery (Snapper Grouper Amendment 46), and on-demand gear for black sea bass pots (Snapper Grouper Regulatory Amendment 36). The AP will also receive an overview and discuss tournament sales of king mackerel; updates on compliance with for-hire reporting, descending devices, and protected areas; and general updates from Federal and state enforcement representatives. The AP will provide input and recommendations on agenda items for the Council's consideration and address other items as needed.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

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

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

Dated: January 5, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–00364 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD624]

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 (Pacific Council) will convene a meeting of the Scientific and Statistical Committee's (SSC) Groundfish Subcommittee (GFSC) to review public comments associated with the 2021 stock assessment and 2023 rebuilding analyses of quillback rockfish off California. The SSC GFSC meeting is open to the public and will be conducted in person with a web broadcast that provides the opportunity for remote public comment.

DATES: The SSC GFSC meeting will be held Friday, January 26, 2024 from 8:30 a.m. until 3:30 p.m. (Pacific standard time) or when business for the day has been completed.

ADDRESSES: The SSC GFSC meeting will be held in the Wallingford/Fremont Rooms of the Watertown Hotel/Inn, 4242 Roosevelt Way NE, Seattle, WA 98105; telephone 206–826–4242.

This meeting is being conducted in person with a web broadcast that provides the opportunity for remote public comment. Specific meeting information, materials, and instructions for how to connect to the meeting remotely 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 503–820–2280, extension 412 for technical assistance.

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

FOR FURTHER INFORMATION CONTACT: Marlene A. Bellman, Staff Officer, Pacific Council; telephone: (503) 820–2414, email: *marlene.bellman@noaa.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the SSC GFSC meeting is to review public comments associated with the 2021 stock assessment and 2023 rebuilding analyses of quillback rockfish off California, as provided during the November 2023 Pacific Council meeting. The review meeting will follow Terms of Reference designed for this specific review as requested by the Pacific Council, as well as SSC operational guidelines.

No management actions will be decided by the SSC GFSC. The meeting participants' role will be the development of recommendations and reports for consideration by the full SSC and Pacific Council at the March 2024 meeting in Fresno, California.

Although non-emergency issues not contained in the meeting agendas may be discussed, those issues may not be the subject of formal action during these meetings. 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: January 5, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–00358 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD636]

Marine Mammals; File No. 27607

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Sean Todd, Ph.D., College of the Atlantic, 105 Eden Street, Bar Harbor, ME 04609, has applied in due form for a permit for scientific research on marine mammal parts.

DATES: Written comments must be received on or before February 9, 2024.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 27607 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 27607 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Erin Markin, Ph.D., or Shasta McClenahan, Ph.D., (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The applicant proposes to receive, import, and export parts for research from up to 150 individual cetaceans and 500 individual pinnipeds of any species, annually. Sources of parts may include animals in foreign countries stranded alive or dead or that died

during rehabilitation; and other authorized persons. Parts from U.S. stranded animals received under separate authorization may be exported for analysis. The parts would be used to understand persistent organic pollutants, heavy metals, and trace elements in marine mammals. The permit would be valid for 5 years from the date of issuance.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: January 5, 2024.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2024–00349 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD607]

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of hybrid meeting open to the public offering both in-person and virtual options for participation.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a 4-day hybrid meeting to consider actions affecting the Gulf of Mexico fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will convene Monday, January 29 through Thursday, February 1, 2024, 8:30 a.m.—5 p.m., CST daily.

ADDRESSES:

Meeting address: The meeting will take place at Hyatt Centric French Quarter, located at 800 Iberville Street, New Orleans, LA 70112.

Council address: Gulf of Mexico Fishery Management Council, 4107 W. Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Dr. Carrie Simmons, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Monday, January 29, 2024; 8:30 a.m.–5 p.m., CST

The meeting will begin with the Administrative/Budget Committee reviewing and discussing the Proposed Standing and Special Scientific and Statistical Committee (SSC) Reorganization for June 2024 Appointments, Ad Hoc and Standing Advisory Panels, Proposed 2024 Activities and Budget, and the 2020–2023 Administrative Award Anticipated Funding and Proposed Carryover Projects. The committee will review and approve Proposal Activities for Phase II Inflation Reduction Act Funding for the Regional Management Councils and finalize the Steering Committee makeup for the Recreational Initiative.

The Law Enforcement Committee will review summaries from the Law Enforcement Technical Committee discussion on Red Snapper Individual Fishing Quota (IFQ) Advanced Landings Notifications and additional topics.

The Data Collection Committee will receive a summary report from the Ad Hoc Charter For-hire Data Collection Advisory Panel meeting including recommendations and next steps for For-hire Electronic Reporting. Hold a discussion on Marine Recreational Information Program-Fishing Effort Survey (MRIP–FES) Inventory and Action Plan for the Gulf of Mexico and receive an update on the Status of the Timeline on the Implementation of the Commercial Logbooks.

The Shrimp Committee will receive an update on Early Adopter Program for Shrimp Cellular Vessel Monitoring Systems (cVMS) and discuss Shrimp Future Project: Workshops to Address Current Challenges and Future Scenario Planning.

Tuesday, January 30, 2024; 8:30 a.m.–5 p.m., CST

The Reef Fish Committee will review and discuss draft options for Modification of Mid-Water Snapper Complex Composition and Catch Limits, Gag Grouper Management Measures and Final Action: Draft Abbreviated Framework Action: Modifications to Catch Limits for Gulf of Mexico Lane Snapper. The committee will also review Permit Requirements for Participation in Individual Fishing Quota (IFQ) Programs and review the 2023 Gulf Red Grouper Recreational Landings and Quota Closure.

The Sustainable Fisheries Committee will discuss Allocations and Allocation Review Policy and Summary of SSC Discussion on Incorporation Social Science Theory and methods in Ecosystem Assessments.

Immediately following the Sustainable Fisheries Committee, National Marine Fisheries Service (NMFS) will Host a General Question and Answer Session.

Wednesday, January 31, 2024; 8:30 a.m.–5 p.m., CST

The Outreach and Education Committee will review the 2023 Communications Improvement Plan Progress and 2023 Analytics, 2023 In-Person Event Outreach Progress and 2024 Plan, and Communications Guidelines Book Review. The committee will discuss Fishery Ecosystem Plan Outreach, Coastal Migratory Pelagics Stakeholder Engagement and Management Timeline Tool. The committee will receive an update on Return 'Em Right Best Practices Manual and review other items from the O&E Technical Committee Summary.

At approximately 10:45 a.m., CST, the Council will reconvene with a Call to Order, Announcements and Introductions, Adoption of Agenda and Approval of Minutes. The Council will receive updates on NMFS National Seafood Strategy Regional Implementation Plan, update from Bureau of Ocean Energy Management (BOEM) on Wind Energy Development in the Gulf of Mexico and Opportunities to Advance Equity and Environmental Justice (EEJ) in Gulf of Mexico Fisheries through the Southeast EEJ Implementation Plan; and, discuss Exempted Fishing Permit Application.

Following lunch, the Council will hold public comment testimony from 1:30 p.m. to 5 p.m., CST for Final Action Item: Draft Abbreviated Framework Action: Modifications to Catch Limits for Gulf of Mexico Lane Snapper, receive comments on the Southeast EEJ Implementation Plan and Exempted Fishing Permit Application; including, open testimony on other fishery issues or concerns. Public comment may begin earlier than 1:30 p.m. CST but will not conclude before that time. Persons wishing to give public testimony in-person must register at the registration kiosk in the meeting room. Persons wishing to give public testimony virtually must sign up via the link on the Council website. Registration for virtual testimony is open at the start of the meeting, Monday, January 29, at 8:30 a.m., CST and closes 1 hour before public

testimony begins on Wednesday, January 31, at 12:30 p.m. CST. Public testimony may end before the published agenda time if all registered in-person and virtual participants have completed their testimony.

Thursday, February 1, 2024; 8:30 a.m.–5 p.m., CST

The Council will receive Committee reports from Administrative/Budget, Law Enforcement, Data Collection, Shrimp, Reef Fish, Sustainable Fisheries, Education and Outreach, and recommendations on Exempted Fishing Permit Application. The Council will receive updates from the following supporting agencies: Louisiana Law Enforcement Efforts; South Atlantic Fishery Management Council; NOAA Office of Law Enforcement (OLE); Gulf States Marine Fisheries Commission; U.S. Coast Guard; U.S. Fish and Wildlife Service; and Department of State.

The Council will discuss Council Planning and Primary Activities and Other Business items, Litigation Update.

Meeting Adjourns

The meeting will be a hybrid meeting; both in-person and virtual participation available. You may register for the webinar to listen-in only by visiting *https://www.gulfcouncil.org* and click on the Council meeting on the calendar.

The timing and order in which agenda items are addressed may change as required to effectively address the issue, and the latest version along with other meeting materials will be posted on the website as they become available.

Although other non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meeting. Actions 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 that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid or accommodations should be directed to Kathy Pereira, (813) 348–1630, at least 15 days prior to the meeting date.

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

Dated: January 5, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–00363 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2024–0055]

USPTO Public Engagement Partnership: Public Meeting Series To Enhance Outreach to the Public on Patent Policies and Procedures

AGENCY: United States Patent and Trademark Office, U.S. Department of Commerce.

ACTION: Notice of meetings.

SUMMARY: The United States Patent and Trademark Office (USPTO) is announcing the Public Engagement Partnership meeting series to facilitate increased engagement with the public about the patent system. The USPTO will host the first meeting of the Public Engagement Partnership series virtually and in person at the USPTO headquarters on March 1, 2024. The purpose of this meeting is to provide education about the patent system and to share ideas, experiences, and insights related to the administration of the system.

DATES: The first public meeting will take place on March 1, 2024, from 1–5 p.m. ET. Persons seeking to attend, either virtually or in person, must register by February 29, 2024, at the web page in the **ADDRESSES** section below.

ADDRESSES: Register at *www.uspto.gov/patents/initiatives/PublicEngagementPartnership.* The first public meeting will take place virtually and in person at the USPTO headquarters, Clara Barton Auditorium, 600 Dulany St., Alexandria, VA 22314. Registration is required for both virtual and in-person attendance. All major entrances to the building are accessible to people with disabilities.

FOR FURTHER INFORMATION CONTACT: Linda Horner, Acting Senior Lead Administrative Patent Judge, at 571–272–4596 or *Linda.Horner@uspto.gov.* You can also send inquiries to *PublicEngagementPartnership@uspto.gov.* Please direct all media inquiries to the Office of the Chief Communications Officer at 571–272–8400.

SUPPLEMENTARY INFORMATION: The USPTO's mission is to drive U.S. innovation, inclusive capitalism, and global competitiveness with the ultimate goal of increasing innovation, entrepreneurship, and creativity for the benefit of all Americans and people around the world. In fulfilling this mission, the USPTO appreciates that its work impacts our country's economic prosperity and, in turn, the public. In January of 2023, the USPTO engaged with the public at a listening session regarding USPTO collaboration with other government agencies to ensure that the patent system is not being used to unjustifiably delay competition beyond that reasonably contemplated by applicable law. At this listening session, members of the public expressed a desire to increase engagement with the USPTO about the patent system.

To expand outreach efforts, the USPTO seeks to form a partnership with members of the public, including, for example, advocacy groups, public interest-focused nonprofits, academics, and civil society. The Public Engagement Partnership will provide an opportunity to bring the public and the USPTO together through a series of engagements to offer education about the patent system and to share ideas, experiences, and insights related to the administration of the system.

The USPTO will hold the inaugural meeting of the Public Engagement Partnership meeting series virtually and in person at the USPTO headquarters in Alexandria, Virginia, on March 1, 2024. Presentations at this first meeting will provide foundational education about the patent system and the USPTO's practices and policies. The meeting will also include a panel discussion with representatives of the public interest community and advocacy groups on areas of particular interest. Subsequent meetings in the series will build on this foundational information. For example, future meetings will include presentations on tools for understanding a patent and existing mechanisms for participation in the patent procurement process, such as third-party submissions. Meetings will also cover participation in the enforcement of patents before the USPTO via ex parte reexamination requests, and petitions for inter partes review and post-grant review before the Patent Trial and Appeal Board. These mechanisms are available to the public at large.

Instructions for and Information on the Public Meeting

The public meeting will take place virtually and in person at the USPTO headquarters, Clara Barton Auditorium, 600 Dulany St., Alexandria, VA 22314, on March 1, 2024, from 1–5 p.m. ET. The agenda is available on the USPTO

website at *www.uspto.gov/patents/initiatives/PublicEngagementPartnership.* Those interested in attending the meeting can register on the same web page.

Katherine Kelly Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2024–00317 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Initial Patent Applications

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The United States Patent and Trademark Office (USPTO), as required by the Paperwork Reduction Act of 1995, invites comments on the extension and revision of an existing information collection: 0651–0032 Initial Patent Applications. The purpose of this notice is to allow 60 days for public comment preceding submission of the information collection to OMB.

DATES: To ensure consideration, comments regarding this information collection must be received on or before March 11, 2024.

ADDRESSES: Interested persons are invited to submit written comments by any of the following methods. Do not submit Confidential Business Information or otherwise sensitive or protected information.

- *Email: InformationCollection@uspto.gov.* Include ''0651–0032 comment'' in the subject line of the message.
- *Federal Rulemaking Portal: http://www.regulations.gov.*
- *Mail:* Justin Isaac, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Raul Tamayo, Senior Legal Advisor, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7728; or by email at *raul.tamayo@uspto.gov* with ''0651–0032 comment'' in the subject line. Additional information about this information collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

The United States Patent and Trademark Office (USPTO) is required by title 35 of the United States Code, including 35 U.S.C. 131, to examine applications for patents. The USPTO administers the patent statutes relating to examination through various rules in chapter 37 of the Code of Federal Regulations (CFR), such as, for example, 37 CFR 1.16 through 1.84. Each patent applicant must provide sufficient information to allow the USPTO to properly examine the application to determine whether it meets the criteria set forth in the patent statutes and regulations for issuance as a patent. The patent statutes and regulations require that an application for patent include the following information:

(1) A specification containing a description of the invention and at least one claim defining the property right sought by the applicant;

(2) A drawing(s) or photograph(s), where necessary for an understanding of the invention;

(3) An oath or declaration signed by the applicant (under 35 U.S.C. 115(f), the time for filing the oath or declaration is no later than the date on which the issue fee for the patent is paid); and

(4) A filing fee.

Various types of patent applications are covered under this information collection:

- Noncontinuing, nonprovisional utility, plant and design applications,
- Provisional applications,
- Continuation/divisional applications of international applications,
- Continued prosecution applications (design), and
- Continuation/divisional and continuation-in-part applications of utility, plant, and design applications.

In addition, this information collection covers certain other papers filed by applicants, such as, for example, petitions to accept an unintentionally delayed priority or benefit claim, petitions to accept a filing by other than all of the inventors or a person not the inventor, and petitions requesting that applications filed under 37 CFR 1.495(b) be accorded a receipt date.

Furthermore, this information collection incorporates the lone item in 0651–0073 (Patent Law Treaty): petitions to restore the right of priority to a foreign application under 37 CFR 1.55(c) or the benefit of a prior-filed provisional application under 37 CFR 1.78(b). The petitions are used to extend the 12-month periods set forth in 35 U.S.C. 119(a) and (e) by an additional 2 months where there is an unintentional delay in filing an application claiming priority to a foreign application or the benefit of a provisional application. Once this information collection is renewed, and the petitions are added, 0651–0073 will be discontinued.

II. Method of Collection

The items in this information collection can be submitted through the USPTO patent electronic filing system (Patent Center), the USPTO's online filing and viewing system for patent applications and related documents. The USPTO also will accept submissions by mail, hand delivery, and facsimile, except that facsimile submission of the information in this collection is limited to certain items in accordance with 37 CFR 1.6(d).

III. Data

OMB Control Number: 0651–0032.

Forms: (AIA = America Invents Act; SB = Specimen Book)

- PTO/AIA/01 (Declaration (37 CFR 1.63) for Utility or Design Patent Application using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01CN (Chinese (simplified) Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01DE (German Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01ES (Spanish Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01FR (French Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01IT (Italian Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01JP (Japanese Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01KR (Korean Language Declaration (37 CFR 1.63) for Utility or Design Application Using An Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01NL (Dutch Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))

- PTO/AIA/01RU (Russian Language Declaration (37 CFR 1.63) for Utility or Design Application Using An Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01SE (Swedish Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/02 (Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02CN (Chinese (Simplified) Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02DE (German Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02ES (Spanish Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02FR (French Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02IT (Italian Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02JP (Japanese Language Substitute Statement In Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02KR (Korean Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02NL (Dutch Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02RU (Russian Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02SE (Swedish Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/03 (Declaration (37 CFR 1.63) for Plant Patent Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/04 (Substitute Statement in Lieu of an Oath or Declaration for Plant Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/08 (Declaration for Utility or Design Patent Application (37 CFR 1.63))
- PTO/AIA/09 (Plant Patent Application (35 U.S.C. 161) Declaration (37 CFR 1.162))
- PTO/AIA/10 (Supplemental Sheet for Declaration (Additional Inventor(s), Supplemental Sheet for PTO/AIA/08, 09))
- PTO/AIA/11 (Substitute Statement Supplemental Sheet (Inventor(s), Supplemental Sheet for PTO/AIA/02, 04, 07))
- PTO/AIA/14 (Application Data Sheet 37 CFR 1.76)
- PTO/AIA/15 (Utility Patent Application Transmittal)
- PTO/AIA/18 (Design Patent Application Transmittal)
- PTO/AIA/19 (Plant Patent Application Transmittal)
- PTO/SB/01 (Declaration for Utility or Design Patent Application (37 CFR 1.63))
- PTO/SB/01A (Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/SB/02 consisting of PTO/SB/02A (Declaration (Additional Inventor(s), Supplemental Sheet)) and PTO/SB/02B (Declaration—Supplemental Priority Data Sheet)
- PTO/SB/02CN (Declaration (Additional Inventors) and Supplemental Priority Data Sheets [2 pages] (Chinese Language Declaration for Additional Inventors)
- PTO/SB/02DE (Declaration (Additional Inventors) and Supplemental Priority Data Sheets [2 pages] (German Language Declaration for Additional Inventors))
- PTO/SB/02ES (Declaration (Additional Inventors) and Supplemental Priority Data Sheet [2 pages] (Spanish Language Declaration for Additional Inventors))
- PTO/SB/02FR (Declaration (Additional Inventors) and Supplemental Priority Data Sheet [2 pages] (French Language Declaration for Additional Inventors))
- PTO/SB/02IT (Declaration (Additional Inventors) and Supplemental Priority Data Sheet [2 pages] (Italian Language Declaration for Additional Inventors))
- PTO/SB/02JP (Japanese Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/SB/02KR (Declaration (Additional Inventors) and Supplemental Priority Data Sheet [2 pages] (Korean Language Declaration for Additional Inventors))
- PTO/SB/02NL (Declaration (Additional Inventors) and Supplemental Priority Data Sheet [2 pages] (Dutch Language Declaration for Additional Inventors))
- PTO/SB/02RU (Declaration (Additional Inventors) and Supplemental Priority Data Sheet [2 pages] (Russian Language Declaration for Additional Inventors))
- PTO/SB/02SE (Declaration (Additional Inventors) and Supplemental Priority Data Sheet [2 pages] (Swedish Language Declaration for Additional Inventors))
- PTO/SB/02LR (Declaration Supplemental Sheet for Legal Representatives (35 U.S.C. 117) on Behalf of a Deceased or Incapacitated Inventor)
- PTO/SB/03 (Plant Patent Application (35 U.S.C. 161) Declaration (37 CFR 1.63))
- PTO/SB/04 (Supplemental Declaration for Utility or Design Patent Application (37 CFR 1.67))
- PTO/SB/05 (Utility Plant Application Transmittal)
- PTO/SB/06 (Patent Application Fee Determination Record (Substitute for Form PTO–875)
- PTO/SB/07 (Multiple Dependent Claim Fee Calculation Sheet (Substitute for Form PTO–1360; For Use With Form PTO/SB/06)
- PTO/SB/16 (Provisional Application for Patent Cover Sheet)
- PTO/SB/17 (Fee Transmittal)
- PTO/SB/29 (For Design Applications Only: Continued Prosecution Application (CPA) Request Transmittal)
- PTO/SB/29A (For Design Applications Only: Receipt for Facsimile Transmitted CPA)
- PTO/SB/101 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Chinese Language Declaration)
- PTO/SB/102 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Dutch Language Declaration)
- PTO/SB/103 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (German Language Declaration)
- PTO/SB/104 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Italian Language Declaration)
- PTO/SB/105 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (French Language Declaration)
- PTO/SB/106 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Japanese Language Declaration)
- PTO/SB/107 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Russian Language Declaration)

- PTO/SB/108 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Swedish Language Declaration)
- PTO/SB/109 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Spanish Language Declaration)
- PTO/SB/110 (Declaration for Utility or Design Patent Application (37 CFR 1.63) (Korean Language Declaration)
- PTO/SB/445 (Petition To Accept an Unintentionally Delayed Claim Under 35 U.S.C. 119(e) (37 CFR 1.78(c)) and/or To Accept an Unintentionally Delayed Claim Under 35 U.S.C. 120, 121, 365(c), or 386(c) (37 CFR 1.78(e)) for the Benefit of a Prior-Filed Application)
- PTO/SB/458 (Petition To Accept an Unintentionally Delayed Claim Under 35 U.S.C. 119(a)–(d) or (f), 365(a) or (b), or 386(a) or (b) for the Right of Priority to a Prior-Filed Foreign Application (37 CFR 1.55(e))
- PTO/SB/459 (Petition To Restore the Benefit of a Provisional Application (37 CFR 1.78(b)) or To Restore the Priority to a Foreign Application (37 CFR 1.55(c))

Type of Review: Extension and revision of a currently approved information collection.

Affected Public: Private sector.

Respondent's Obligation: Required to obtain or retain benefits.

Estimated Number of Annual Respondents: 588,255 respondents.

Estimated Number of Annual Responses: 588,255 responses.

Estimated Time per Response: The USPTO estimates that the responses in this information collection will take the public approximately between 45 minutes (0.75 hours) and 40 hours to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

Estimated Total Annual Respondent Burden Hours: 12,543,215 hours.

Estimated Total Annual Respondent Hourly Cost Burden: $5,606,817,105.

TABLE 1—TOTAL BURDEN HOURS AND HOURLY COSTS TO PRIVATE SECTOR RESPONDENTS

Item No.	Item	Estimated annual respondents (a)	Responses per respondent (b)	Estimated annual responses (year) (a) × (b) = (c)	Estimated time for response (hours) (d)	Estimated annual burden (hour/year) (c) × (d) = (e)	Rate [1] ($/hour) (f)	Estimated annual burden (e) × (f) = (g)
1	Noncontinuing, Nonprovisisional Utility Applications.	214,000	1	214,000	40	8,560,000	447	3,826,320,000
2	Noncontinuing, Nonprovisisional Plant Applications.	1,000	1	1,000	9	9,000	447	4,023,000
3	Noncontinuing, Nonprovisisional Design Applications.	42,000	1	42,000	7	294,000	447	131,418,000
4	Continuation/Divisional of an International Application.	26,000	1	26,000	4	104,000	447	46,488,000
5	Utility Continuation/Divisional Applications.	114,000	1	114,000	4	456,000	447	203,832,000
6	Plant Continuation/Divisional Application.	5	1	5	3	15	447	6,705
7	Design Continuation/Divisional Application.	6,000	1	6,000	1	6,000	447	2,682,000
8	Continued Prosecution Applications—Design (Request Transmittal and Receipt).	1,500	1	1,500	1	1,500	447	670,500
9	Utility Continuation-in-Part Applications.	11,000	1	11,000	20	220,000	447	98,340,000
10	Design Continuation-in-Part Applications.	850	1	850	3	2,550	447	1,139,850
11	Provisional Application for Patent Cover Sheet.	160,000	1	160,000	18	2,880,000	447	1,287,360,000
12	Petition To Accept Unintentionally Delayed Priority or Benefit Claim.	1,100	1	1,100	1	1,100	447	491,700
13	Petition to be the applicant under 37 CFR 1.46(b) by a person who otherwise shows a sufficient proprietary interest in the matter.	3,000	1	3,000	1	3,000	447	1,341,000
14	Papers filed under the following: 1.41(c) or 1.41(a)(2) (pre-AIA)—to supply the name or names of the inventor or inventors after the filing date without a cover sheet as prescribed by 37 CFR 1.51(c)(1) in a provisional application. 1.48(d)—for correction of inventorship in a provisional application.	7,000	1	7,000	.75	5,250	447	2,346,750

TABLE 1—TOTAL BURDEN HOURS AND HOURLY COSTS TO PRIVATE SECTOR RESPONDENTS—Continued

Item No.	Item	Estimated annual respondents (a)	Responses per respondent (b)	Estimated annual responses (year) (a) × (b) = (c)	Estimated time for response (hours) (d)	Estimated annual burden (hour/year) (c) × (d) = (e)	Rate [1] ($/hour) (f)	Estimated annual burden (e) × (f) = (g)
15	1.53 (c)(2) or 1.53(c)(2) (pre-PLT (AIA))—to convert a nonprovisional application filed under 1.53(b) to a provisional application filed under 1.53(c). Petition To Restore the Right of Priority under 37 CFR 1.55(c). Or Petition To Restore the Benefit of a Prior-Filed Provisional Application under 37 CFR 1.78(b).	800	1	800	1	800	447	357,600
Totals	.....	588,255	.....	588,255	.....	12,543,215	.....	5,606,817,105

[1] 2023 Report of the Economic Survey, published by the Committee on Economics of Legal Practice of the American Intellectual Property Law Association (AIPLA); pg. F–41. The USPTO uses the average billing rate for intellectual property work in all firms which is $447 per hour (*https://www.aipla.org/home/news-publications/economic-survey*).

Estimated Total Annual Respondent Non-hourly Cost Burden: $1,156,494,847 per year.

There are no capital start-up, maintenance, or recordkeeping costs associated with this information collection. However, there is non-hour cost burden in the way of filing fees, drawing costs, and postage costs.

The total annual (non-hour) respondent cost burden for this collection is estimated to be $1,156,494,847, which includes $672,189,140 in filing fees, $484,123,750 in drawing costs, and $181,957 in postage.

Fees

The filing fees associated with this information collection are listed in the table below.

TABLE 2—FILING FEE COSTS TO PRIVATE SECTOR RESPONDENTS

Item No.	Fee code	Item	Estimated annual responses (a)	Amount (b)	Totals (a) × (b) = (c)
1, 4	1011	Basic Filing Fee—Utility (Paper Filing—Also Requires Non-Electronic Filing Fee Under 1.16(t)) (undiscounted entity).	250,450	$320	$80,144,000
1, 4	2011	Basic Filing Fee—Utility (Paper Filing—Also Requires Non-Electronic Filing Fee Under 1.16(t)) (small entity).	260	128	33,280
1, 4	3011	Basic Filing Fee—Utility (Paper Filing—Also Requires Non-Electronic Filing Fee Under 1.16(t)) (micro entity).	14,520	64	929,280
1, 4	4011	Basic Filing Fee—Utility (electronic filing for small entities)	84,760	64	5,424,640
1, 4	1081	Utility Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (undiscounted entity).	20,640	420	8,668,800
1, 4	2081	Utility Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (small entity).	11,630	168	1,953,840
1, 4	3081	Utility Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (micro entity).	220	84	18,480
1, 4	1111	Utility Search Fee (undiscounted entity)	248,740	700	174,118,000
1, 4	2111	Utility Search Fee (small entity)	83,900	280	23,492,000
1, 4	3111	Utility Search Fee (micro entity)	14,330	140	2,006,200
1, 4	1311	Utility Examination Fee (undiscounted entity)	249,600	800	199,680,000
1, 4	2311	Utility Examination Fee (small entity)	84,100	320	26,912,000
1, 4	3311	Utility Examination Fee (micro entity)	14,360	160	2,297,600
1,2 4–6, and 9.	1201	Each Independent Claim in Excess of Three (undiscounted entity).	42,020	480	20,169,600
1,2 4–6, and 9.	2201	Each Independent Claim in Excess of Three (small entity)	14,500	192	2,784,000
1,2 4–6, and 9.	3201	Each Independent Claim in Excess of Three (micro entity)	1,400	96	134,400
1,2 4–6, and 9.	1202	Each Claim in Excess of 20 (undiscounted entity)	304,230	100	30,423,000
1,2 4–6, and 9.	2202	Each Claim in Excess of 20 (small entity)	158,280	40	6,331,200
1,2 4–6, and 9.	3202	Each Claim in Excess of 20 (micro entity)	7,790	20	155,800

TABLE 2—FILING FEE COSTS TO PRIVATE SECTOR RESPONDENTS—Continued

Item No.	Fee code	Item	Estimated annual responses (a)	Amount (b)	Totals (a) × (b) = (c)
1,2 4–6, and 9.	1203	Multiple Dependent Claim (undiscounted entity)	730	860	627,800
1,2 4–6, and 9.	2203	Multiple Dependent Claim (small entity)	470	344	161,680
1,2 4–6, and 9.	3203	Multiple Dependent Claim (micro entity)	70	172	12,040
2, 5	1313	Plant Examination Fee (undiscounted entity)	490	660	323,400
2, 5	2313	Plant Examination Fee (small entity)	480	264	126,720
2, 5	3313	Plant Examination Fee (micro entity)	10	132	1,320
2, 5	1013	Basic Filing Fee—Plant (undiscounted entity)	490	220	107,800
2, 5	2013	Basic Filing Fee—Plant (small entity)	480	88	42,240
2, 5	3013	Basic Filing Fee—Plant (micro entity)	10	44	440
2, 5	1113	Plant Search Fee (undiscounted entity)	490	440	215,600
2, 5	2113	Plant Search Fee (small entity)	480	176	84,480
2, 5	3113	Plant Search Fee (micro entity)	10	88	880
2, 5	1083	Plant Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (undiscounted entity).	1	420	420
2, 5	2083	Plant Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (small entity).	1	168	168
2, 5	3083	Plant Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (micro entity).	1	84	84
3, 6	1012	Basic Filing Fee—Design (undiscounted entity)	20,0200	220	4,404,400
3, 6	2012	Basic Filing Fee—Design (small entity)	19,480	88	1,714,240
3, 6	3012	Basic Filing Fee—Design (micro entity)	15,890	44	699,160
3, 6	1017	Basic Filing Fee—Design (CPA) (undiscounted entity)	920	220	202,400
3, 6	2017	Basic Filing Fee—Design (CPA) (small entity)	500	88	44,000
3, 6	3017	Basic Filing Fee—Design (CPA) (micro entity)	85	44	3,740
3, 6	1082	Design Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (undiscounted entity).	170	420	71,400
3, 6	2082	Design Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (small entity).	90	168	15,120
3, 6	3082	Design Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (micro entity).	30	84	2,520
3, 6	1112	Design Search Fee (undiscounted entity)	20,660	160	3,305,600
3, 6	2112	Design Search Fee (small entity)	19,690	64	1,260,160
3, 6	3112	Design Search Fee (micro entity)	15,880	32	508,160
3, 6	1312	Design Examination Fee (undiscounted entity)	20,670	640	13,228,800
3, 6	2312	Design Examination Fee (small entity)	19,710	256	5,045,760
3, 6	3312	Design Examination Fee (micro entity)	15,880	128	2,032,640
11	1085	Provisional Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (undiscounted entity).	11,180	420	4,695,600
11	2085	Provisional Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (small entity).	11,360	168	1,908,480
11	3085	Provisional Application Size Fee—For Each Additional 50 Sheets That Exceeds 100 Sheets (micro entity).	110	84	9,240
11	1005	Provisional Application Filing Fee (undiscounted entity)	63,710	300	19,113,000
11	2005	Provisional Application Filing Fee (small entity)	69,250	120	8,310,000
11	3005	Provisional Application Filing Fee (micro entity)	23,150	60	1,389,000
1–11	1051	Surcharge—Late Filing Fee, Search Fee, Examination Fee, Inventor's Oath or Declaration, or Application Filed Without at least One Claim or by Reference (undiscounted entity).	78,200	160	12,512,000
1–11	2051	Surcharge—Late Filing Fee, Search Fee, Examination Fee, Inventor's Oath or Declaration, or Application Filed Without at least One Claim or by Reference (small entity).	33,010	64	2,112,640
1–11	3051	Surcharge—Late Filing Fee, Search Fee, Examination Fee, Inventor's Oath or Declaration, or Application Filed Without at least One Claim or by Reference (micro entity).	3,370	32	107,840
1–11	1052	Surcharge—Late Provisional Filing Fee or Cover Sheet (undiscounted entity).	1,700	60	102,000
1–11	2052	Surcharge—Late Provisional Filing Fee or Cover Sheet (small entity).	2,440	24	58,560
1–11	3052	Surcharge—Late Provisional Filing Fee or Cover Sheet (micro entity).	2,574	12	30,888
13	1463	Electronic Petition To Be the Applicant Under 37 CFR 1.46 by a Person Who Otherwise Shows Sufficient Proprietary Interest in the Matter (undiscounted entity).	1,800	220	396,000

TABLE 2—FILING FEE COSTS TO PRIVATE SECTOR RESPONDENTS—Continued

Item No.	Fee code	Item	Estimated annual responses (a)	Amount (b)	Totals (a) × (b) = (c)
13	2463	Electronic Petition To Be the Applicant Under 37 CFR 1.46 by a Person Who Otherwise Shows Sufficient Proprietary Interest in the Matter (small entity).	900	88	79,200
13	3463	Electronic Petition To Be the Applicant Under 37 CFR 1.46 by a Person Who Otherwise Shows Sufficient Proprietary Interest in the Matter (micro entity).	300	44	13,200
15	1454	Grantable Petition To Restore the Right of Priority Under 37 CFR 1.55(c) (undiscounted entity).	310	2,100	651,000
15	2454	Grantable Petition To Restore the Right of Priority Under 37 CFR 1.55(c) (small entity).	65	840	54,600
15	3454	Grantable Petition To Restore the Right of Priority Under 37 CFR 1.55(c) (micro entity).	25	420	10,500
15	1454	Grantable Petition To Restore the Benefit of a Prior-Filed Provisional Application Under 37 CFR 1.78(b) (undiscounted entity).	310	2,100	651,000
15	2454	Grantable Petition To Restore the Benefit of a Prior-Filed Provisional Application Under 37 CFR 1.78(b) (small entity).	65	840	54,600
15	3454	Grantable Petition To Restore the Benefit of a Prior-Filed Provisional Application Under 37 CFR 1.78(b) (micro entity).	25	420	10,500
Total Filing Fees			2,083,472	.....	672,189,140

Drawing Costs

Patent applicants can submit drawings with their utility, design, plant, and provisional applications. Applicants can prepare these drawings on their own or they can hire patent illustration services firms to create them. As a basis for estimating the drawing costs, the USPTO expects that all applicants will have their drawings prepared by a patent illustration firm.

Estimates for the patent drawing can vary greatly, depending on the number of figures to be produced, the total number of pages for the drawings, and the complexity of the drawings. Because there are many variables involved, the USPTO is using the average of the estimated cost ranges for the application drawings to derive the estimated cost per sheet that is then used to calculate the total drawing costs seen the table below.

The utility, plant, and design continuation and divisional applications use the same drawings as the initial filings, so they are not included in these totals. New drawings may be submitted in the continuation-in-part applications, so those numbers are included in these estimates. The drawings for the continued prosecution applications also are included in the drawing cost totals for designs. There are no continuation, divisional, or continuation-in-part provisional applications.

- Utility Application Drawings—The USPTO estimates that the costs to produce these drawings can range from $50 to $200 per sheet. Taking the average of this range, the USPTO estimates that it can cost $125 per sheet to produce the drawings and that, on average, 10 sheets of drawings are submitted for an average cost of $1,250 to produce the utility drawings. Out of 339,000 utility applications submitted, the USPTO estimates that 68% (or 230,520) applications will be submitted with drawings.
- Plant Application Drawings—In general, photographs are submitted for the plant applications, although drawings can also be submitted. The USPTO estimates that the cost to produce the photographs or drawings for the plant applications can range from $50 to $100. Taking the average of this range, the USPTO estimates that it can cost $75 per sheet to produce the photographs or drawings for the plant applications. On average, 10 sheets of drawings are submitted for an average cost of $750 to produce the photographs/drawings for the plant applications. Out of 1,005 plant applications submitted per year, the USPTO estimates that all of them will be submitted with drawings.
- Design Application Drawings—The USPTO estimates that the costs to produce design drawings can range from $50 to $350 per sheet. Taking the average of this range, the USPTO estimates that it can cost $200 per sheet to produce design drawings. On average, 10 sheets of drawings are submitted for an average cost of $2,000 to produce the design drawings. Out of 48,850 design applicants submitted per year, the USPTO estimates that all of them will be submitted with drawings.
- Provisional Application Drawings—The USPTO estimates that the cost to produce the provisional drawings can range from $30 to $200 per sheet. Taking the average of this range, the USPTO estimates that it can cost $115 per sheet to produce the provisional drawings. On average, 10 sheets of drawings are submitted for an average cost of $1,150 to produce the provisional drawings. Out of 160,000 provisional applications submitted per year, the USPTO estimates that 53% (or 84,800) applications will be submitted with drawings.

TABLE 3—DRAWING COSTS TO PRIVATE SECTOR RESPONDENTS

Item No.	Item	Estimated annual responses (a)	Estimated drawing costs amount ($) (b)	Drawing cost totals (a) × (b) = (c)
1	Utility Application Drawings	230,520	$1,250	$288,150,000
2	Plant Application Drawings (Photographs)	1,005	750	753,750
3	Design Applications Drawings	48,850	2,000	97,700,000
11	Provisional Application Drawings	84,800	1,150	97,520,000
	Total Drawing Costs		365,175	484,123,750

Postage

Although the USPTO prefers that the items in this information collection be submitted electronically, the items may be submitted by mail through the United States Postal Service (USPS). The USPTO estimates the following:

• If an applicant decides to file a patent application covered under this information collection by mail, the USPTO recommends that the patent application be filed by Priority Mail Express® in accordance with 37 CFR 1.10 to establish the date of deposit with the USPS as the filing date (otherwise the filing date of the application will be the date that it is received at the USPTO). The USPTO estimates that about 1.5% of patent applicants (lines 1–10) will be filed by mail resulting in 6,245 mailed applications. Using the Priority Mail Express® flat rate cost for mailing envelopes, the USPTO estimates that the average cost for sending a patent application by Priority Mail Express® will be $28.95; resulting in a cost of $180,793.

• If an applicant decides to file a petition or a paper filed under 37 CFR 1.41(c), 1.41(a)(2) (pre-AIA), 1.48(d), 1.53(c)(2), 1.53(c)(2) (pre-PLT (AIA)), 1.55(c), or 1.78(b) by mail, the USPTO estimates that the petition or paper will be sent by Priority Mail. The USPTO estimates that about 1.5% of these petitions (lines 14 and 15) will be filed by mail resulting in 117 mailed items. Using the Priority Mail USPTO further estimates that the average cost for a Priority Mail legal flat rate envelope shipped via USPS is $9.95; resulting in an cost of $1,164.

Therefore, the total estimated postage cost for this collection is $181,957.

IV. Request for Comments

The USPTO is soliciting public comments to:

(a) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected; and

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

All comments submitted in response to this notice are a matter of public record. USPTO will include or summarize each comment in the request to OMB to approve this information collection. Before including an address, phone number, email address, or other personally identifiable information (PII) in a comment, be aware that the entire comment—including PII—may be made publicly available at any time. While you may ask in your comment to withhold PII from public view, USPTO cannot guarantee that it will be able to do so.

Justin Isaac,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2024–00268 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2023–0013]

Guidelines for Assessing Enablement in Utility Applications and Patents in View of the Supreme Court Decision in Amgen Inc. et al. v. Sanofi et al.

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO) is publishing guidelines for USPTO employees to use, regardless of the technology, for ascertaining compliance with the enablement requirement of the patent laws during the examination of utility patent applications and the review of utility patents in light of the recent U.S. Supreme Court decision in *Amgen Inc. et al.* v. *Sanofi et al.* These guidelines, which also inform the public of the USPTO's practices, provide that when considering whether claims in a utility patent application or patent are enabled, USPTO personnel will continue to use the *In re Wands* factors to ascertain whether the amount of experimentation required to enable the full scope of the claimed invention is reasonable. Publishing these guidelines will promote consistent analysis of the enablement requirement of the patent laws by USPTO employees and will result in clearer USPTO communications to applicants, patentees, and relevant third parties concerning any deficiencies in enablement compliance. These guidelines will also promote the consistent treatment of enablement, both by the patent examining corps in patent applications and reexamination proceedings and by the Patent Trial and Appeal Board (PTAB) in ex parte appeals and post-patent issuance proceedings.

DATES: These guidelines are effective January 10, 2024.

FOR FURTHER INFORMATION CONTACT: Mary C. Till, Senior Legal Advisor, Office of Patent Legal Administration, at *Mary.Till@uspto.gov* or 571–272–7755; or Andrea S. Grossman, Legal Advisor, Office of Patent Legal Administration, at *Andrea.Grossman@uspto.gov* or 571–270–3314.

SUPPLEMENTARY INFORMATION: These guidelines are intended to inform USPTO personnel and the public on the USPTO's implementation of the Supreme Court decision in *Amgen Inc. et al.* v. *Sanofi et al.,* 143 S. Ct. 1243 (2023) (hereafter *Amgen*). These

guidelines will assist USPTO personnel in assessing enablement under 35 U.S.C. 112(a) and, where a lack of enablement has been found, they will assist in providing appropriate supporting rationale in view of the *Amgen* decision. These guidelines are based on the USPTO's current understanding of the law, and are believed to be fully consistent with the binding precedent of the Federal Circuit and the Supreme Court.

These guidelines do not constitute substantive rulemaking and therefore do not have the force and effect of law. They have been developed as a matter of internal USPTO management and are not intended to create any right or benefit, substantive or procedural, enforceable by any party against the USPTO. Rejections will continue to be based on the substantive law, and it is the rejections that are appealable. Consequently, any failure by USPTO personnel to follow the guidelines, by itself, does not create a new ground to appeal or petition.

These guidelines are not intended to announce any major changes to USPTO practice or procedure, and are incorporating guidance from the *Amgen* decision and several post-*Amgen* enablement court decisions that are consistent with current USPTO policy. If earlier guidance from the USPTO, including certain sections of the current Manual of Patent Examining Procedure (9th ed., Rev. 07.2022, February 2023) (MPEP), is inconsistent with the guidance set forth in this notice, USPTO personnel are to follow these guidelines. The *Amgen* decision and the guidance in these guidelines will be incorporated into the MPEP in due course.

Enablement Requirement

The enablement requirement refers to the requirement of 35 U.S.C. 112(a) that the specification must describe the invention in such terms that one skilled in the art can make and use the claimed invention. As discussed in section 2164.01 of the MPEP, any analysis of whether a particular claim is supported by the disclosure in an application requires a determination of whether that disclosure, when filed, contained sufficient information regarding the subject matter of the claim so as to enable one skilled in the pertinent art to make and use the claimed invention. In *Amgen Inc.* v. *Sanofi, Aventisub LLC,* 987 F.3d 1080 (Fed. Cir. 2021) (hereafter *Sanofi-Aventisub*), the Federal Circuit applied the factors from *In re Wands,* 858 F.2d 731, 737 (Fed. Cir. 1988) (hereafter *Wands*), to assess whether the specification of Amgen's patent provided sufficient enablement, for purposes of 35 U.S.C. 112(a), to make and use the full scope of the claimed invention. The *Wands* factors include, but are not limited to: (A) the breadth of the claims, (B) the nature of the invention, (C) the state of the prior art, (D) the level of one of ordinary skill, (E) the level of predictability in the art, (F) the amount of direction provided by the inventor, (G) the existence of working examples, and (H) the quantity of experimentation needed to make and use the invention based on the content of the disclosure. MPEP 2164.01(a).

In *Amgen,* the Supreme Court, in a unanimous decision, affirmed *Sanofi-Aventisub* and held that claims drawn to a genus of monoclonal antibodies, which were functionally claimed, were invalid due to a lack of enablement. The patents at issue (U.S. Patent Nos. 8,829,165 and 8,859,741) concerned a genus of monoclonal antibodies that bind to specific amino acid residues on the PCSK9 protein and block the binding of PCSK9 to a particular cholesterol receptor, LDLR. The claims at issue were functional in that they defined the genus by its function (the ability to bind to specific residues of PCSK9) as opposed to reciting a specific structure (the amino acid sequence of the antibodies in the genus). In affirming the Federal Circuit's decision, the Supreme Court concluded that the patents at issue failed to adequately enable the full scope of the genus of antibodies that performed the function of binding to specific amino acid residues on PCSK9 and blocking the binding of PCSK9 to the LDLR cholesterol receptor.

In *Sanofi-Aventisub,* the Federal Circuit relied on its prior precedential opinions when determining whether the full scope of a genus was enabled. These decisions included *McRO, Inc.* v. *Bandai Namco Games Am. Inc.,* 959 F.3d 1091 (Fed. Cir. 2020) (hereafter *McRO*); *Wyeth & Cordis Corp.* v. *Abbott Laboratories,* 720 F.3d 1380 (Fed. Cir. 2013) (hereafter *Wyeth*); *Enzo Life Sciences, Inc.* v. *Roche Molecular Systems, Inc.,* 928 F.3d 1340 (Fed. Cir. 2019) (hereafter *Enzo*); and *Idenix Pharmaceuticals LLC* v. *Gilead Sciences Inc.,* 941 F.3d 1149 (Fed. Cir. 2019) (hereafter *Idenix*).

The Federal Circuit, citing *McRO,* provided guidance on the application of enablement to genus claims, holding that ''[a]lthough a specification does not need to describe how to make and use every possible variant of the claimed invention, when a range is claimed, there must be reasonable enablement of the scope of the range.'' *Sanofi-Aventisub,* 987 F.3d at 1085 (internal quotations omitted). Additionally, the Federal Circuit characterized *Wyeth* as holding ''that due to the large number of possible candidates within the scope of the claims and the specification's corresponding lack of structural guidance, it would have required undue experimentation to synthesize and screen each candidate to determine which compounds in the claimed class exhibited the claimed functionality.'' *Id.* at 1086. Similarly, the Federal Circuit characterized *Enzo* as holding ''that the specification failed to teach one of skill in the art whether the many embodiments of the broad claims would exhibit that required functionality.'' *Id.* Finally, the Federal Circuit characterized *Idenix* as affirming ''the district court's determination that the claims had both structural and functional limitations, and that undue experimentation would have been required to synthesize and screen the billions of possible compounds because, given a lack of guidance across that full scope, finding functional compounds would be akin to finding a 'needle in a haystack.' '' *Id.*

Turning to the claims at issue in *Sanofi-Aventisub,* the Federal Circuit analyzed the *Wands* factors and found that there was a lack of enablement for the broad functional genus claims. See *Sanofi-Aventisub,* 987 F.3d at 1087–1088. The court relied on evidence showing that the scope of the claims encompassed millions of antibodies and that it was necessary to screen each candidate antibody in order to determine whether it met the functional limitations of the claim. *Id.* at 1088. Consequently, the Federal Circuit concluded that there was a lack of enablement.

Thus, the Federal Circuit decision in *Sanofi-Aventisub* positioned the Supreme Court to answer the question of what is required to satisfy the enablement requirement for a patent claim directed to a functional genus. The Supreme Court held that ''[i]f a patent claims an entire class of processes, machines, manufactures, or compositions of matter, the patent's specification must enable a person skilled in the art to make and use the entire class. . . . The more one claims, the more one must enable.'' *Amgen,* 143 S. Ct. at 1254. While the specification in *Amgen* identified 26 exemplary antibodies that performed the claimed function by their amino acid sequences, the claims at issue were directed to a class that included ''a 'vast' number of additional antibodies'' that Amgen had not described by their amino acid sequences. *Id.* at 1256. The Supreme Court found that Amgen sought to monopolize an entire class of antibodies

by their function, which was much broader than the 26 exemplary antibodies disclosed by their amino acid structure.

The Supreme Court clarified that the specification does not always need to ''describe with particularity how to make and use every single embodiment within a claimed class.'' *Id.* at 1254. Rather, the specification may require a reasonable amount of experimentation to make and use the invention, and what is reasonable will depend on the nature of the invention and the underlying art. For example, ''it may suffice to give an example (or a few examples) if the specification also discloses some general quality . . . running through the class that gives it a peculiar fitness for the particular purpose,'' and ''disclosing that general quality may reliably enable a person skilled in the art to make and use all of what is claimed, not merely a subset.'' *Id.* at 1254–1255 (internal quotations omitted). However, the Supreme Court found that Amgen failed to enable all that it claimed, even if allowing for a reasonable degree of experimentation.

The Supreme Court's conclusion rested on the examination of the particular claims in light of the Court's precedent, including *O'Reilly* v. *Morse,* 56 U.S. 62 (1854) (hereafter *Morse*); *The Incandescent Lamp Patent,* 159 U.S. 465 (1895) (hereafter *Incandescent Lamp*); and *Holland Furniture Co.* v. *Perkins Glue Co.,* 277 U.S. 245 (1928) (hereafter *Holland Furniture*). While each of these decisions involved different technologies than *Amgen,* the Supreme Court stated that ''these decisions are no less instructive for it.'' *Amgen,* 143 S. Ct. at 1252. The Supreme Court compared the claims in *Amgen* to the claims of *Morse, Incandescent Lamp,* and *Holland Furniture.* The Court found that ''Amgen seeks to claim 'sovereignty over [an] entire kingdom' of antibodies,'' just as ''Morse sought to claim all telegraphic forms of communication, Sawyer and Man sought to claim all fibrous and textile materials for incandescence, and Perkins sought to claim all starch glues that work as well as animal glue for wood veneering.'' *Id.* at 1256. The Supreme Court further stated that ''if our cases teach anything, it is that the more a party claims, the broader the monopoly it demands, the more it must enable. That holds true whether the case involves telegraphs devised in the 19th century, glues invented in the 20th, or antibody treatments developed in the 21st.'' *Id.* The Supreme Court emphasized that while *Amgen* involved a new technology, antibodies, the Court has applied the same legal principle for over 150 years for many different technologies. Thus, since the Supreme Court relied on precedent from a wide variety of technologies, there is no reason to treat the decision as limited to antibodies or biotechnology; the principles set forth in this decision regarding the enablement requirement apply to all fields of technology.

In reviewing the Federal Circuit's enablement determination, the Supreme Court stated that the specification is not necessarily inadequate just because it leaves the skilled artisan to perform some measure of adaptation or testing. The Supreme Court, citing *Wood* v. *Underhill,* 46 U.S. 1 (1846), and *Minerals Separation, Ltd.* v. *Hyde,* 242 U.S. 261 (1916) (hereafter *Minerals Separation*), stated that the specification may call for a reasonable amount of experimentation to make and use the claimed invention. *Amgen,* 143 S. Ct. at 1246. The Court in *Amgen,* citing to *Minerals Separation,* opined that ''[w]hat is reasonable in any case will depend on the nature of the invention and the underlying art.'' *Id.* That reasonableness standard is still the one to be applied following the Supreme Court decision in *Amgen.*

Determining ''Reasonableness of Experimentation''

To assess the amount of experimentation required by the specification so as to determine compliance with the enablement prong of 35 U.S.C. 112(a), the Federal Circuit developed a framework of factors in *Wands,* 858 F.2d at 737, referred to as the *Wands* factors. The Supreme Court did not explicitly address the *Wands* factors in *Amgen;* however, the Court emphasized that the specification may call for a reasonable amount of experimentation to make and use the full scope of the claimed invention. The *Wands* factors are probative of the essential inquiry in determining whether one must engage in more than a reasonable amount of experimentation and were applied or at least discussed by the Federal Circuit in several post-*Amgen* enablement decisions. See *Baxalta Inc. et al.* v. *Genentech Inc.,* 2023 U.S. App. LEXIS 24863 (Fed. Cir. 2023) (hereafter *Baxalta*); *Medytox, Inc.* v. *Galderma S.A.,* 71 F.4th 990 (Fed. Cir. 2023) (hereafter *Medytox*); and *In re Starrett,* 2023 WL 3881360 (Fed. Cir. 2023) (non-precedential) (hereafter *Starrett*). Therefore, consistent with the Federal Circuit in *Sanofi-Aventisub* and in post-*Amgen* enablement decisions, the *Wands* factors, which were used by the USPTO prior to *Amgen,* will continue to be used to assess whether the experimentation required by the specification to make and use the entire scope of the claimed invention is reasonable. See MPEP 2164.01(a). Federal Circuit precedent applying the *Wands* factors prior to *Amgen* is still informative as to how the *Wands* factors should be analyzed in different situations.

For more recent guidance on how to determine whether experimentation is reasonable, it is instructive to look at the *Sanofi-Aventisub* decision, which the Supreme Court affirmed, and the Federal Circuit's post-*Amgen* enablement decisions. In *Amgen,* 143 S. Ct. at 1256, the Supreme Court agreed with the Federal Circuit's determination, which the Federal Circuit rendered utilizing the *Wands* factors, that Amgen failed ''to enable all that it has claimed, even allowing for a reasonable degree of experimentation.'' While both *Wands* and *Sanofi-Aventisub* are antibody cases, the Federal Circuit distinguished *Wands* based on the facts and evidence and stated in *Sanofi-Aventisub* that its decision was not inconsistent with *Wands.* 987 F.3d at 1088. The court weighed the *Wands* factors and found that the scope of the claims was far broader in functional diversity than the disclosed examples, that the invention was in an unpredictable field of science with respect to satisfying the full scope of the functional limitations, and that there was not adequate guidance in the specification. *Id.* at 1087–1088. While the Federal Circuit did not hold ''that the effort required to exhaust [*i.e.,* make and use the full scope of] a genus is dispositive,'' the court relied on the evidence that showed that the scope of the claims encompassed millions of antibodies and that it was necessary to first generate and then screen each candidate to determine whether it met the functional limitations. *Id.* at 1088. The Federal Circuit concluded that there was a lack of enablement, which was affirmed by the Supreme Court in *Amgen.*

In *Baxalta,* a post-*Amgen* enablement decision, the Federal Circuit affirmed a district court's grant of summary judgment that the claims of a patent directed to a functionally defined genus of antibodies were not enabled. *Baxalta,* 2023 U.S. App. LEXIS 24863 at *1. The court found that the ''facts of this case are materially indistinguishable from those in *Amgen.*'' *Id.* at *9. Although the scope of the claims potentially encompassed millions of antibodies, the patent only disclosed 11 antibodies and a method of producing and screening antibodies to determine whether they met the claimed functional limitations. *Id.* at *10. The court found that, just like

in *Amgen,* the method ''simply directs skilled artisans to engage in the same iterative, trial-and-error process the inventors followed to discover the eleven antibodies they elected to disclose'' and that ''[u]nder *Amgen,* such random trial-and-error discovery, without more, constitutes unreasonable experimentation that falls outside the bounds required by § 112(a).'' *Id.* at *8, *10. In response to an argument that the district court's enablement determination was inconsistent with *Wands,* the Federal Circuit stated, ''[w]e do not interpret *Amgen* to have disturbed our prior enablement case law, including *Wands* and its factors,'' and ''[w]e see no meaningful difference between *Wands'* 'undue experimentation' and *Amgen's* '[un]reasonable experimentation' standards.'' *Id.* at *10.

In *Medytox,* another post-*Amgen* enablement decision, the Federal Circuit affirmed a PTAB decision in a post-grant review proceeding using the *Wands* factors and found that the full scope of a substitute claim was not enabled. *Medytox,* 71 F.4th at 998–999. The substitute claim was directed to a method of using an animal protein-free botulinum toxin composition that exhibited a longer-lasting effect in the patient than an animal protein-containing botulinum toxin composition, and included a responder rate limitation of 50% or greater. *Id.* at 993. The Federal Circuit interpreted the responder rate limitation as having an upper limit of 100%. *Id.* at 997. The specification contained, at most, three examples of responder rates above 50%. *Id.* at 998. Employing the *Wands* factors, the PTAB found that a skilled artisan, reading the specification, would not have been able to achieve higher than 62% for the responder rate limitation without undue experimentation. *Id.* at 998–99. Citing *Amgen,* the Federal Circuit stated that ''[t]he more one claims, the more one must enable'' and that although the specification does not need to always ''describe with particularity how to make and use every single embodiment within a claimed class, it must nevertheless enable the full scope of the invention as defined by its claims, for example by disclosing [a] general quality of the class that may reliably enable a person skilled in the art to make and use all of what is claimed.'' *Id.* at 998 (internal quotations omitted). The Federal Circuit found that the PTAB provided an adequate explanation and reasoning for its enablement finding, which utilized the *Wands* factors, and found no error in the PTAB's determination of a lack of enablement. *Id.* at 999.

Finally, in *Starrett,* another post-*Amgen* enablement decision, the Federal Circuit affirmed a PTAB decision in an ex parte appeal upholding an examiner's rejection for a lack of enablement of a claim to a non-transitory computer readable medium for maintaining augmented telepathic data for telepathic communication. *Starrett,* 2023 WL 3881360 at 1. While reviewing the examiner's enablement rejection, the PTAB treated the claim as a genus claim because it contained 47 ''or'' clauses and potentially covered over 140 trillion embodiments. *Id.* at 2. The PTAB affirmed the examiner's determination of a lack of enablement and found that the examiner properly analyzed all the relevant *Wands* factors when making the determination that the claim lacked enablement. *Id.* The Federal Circuit once again cited *Amgen* for the proposition that ''the specification must enable the full scope of the invention as defined by its claims,'' and the ''more one claims, the more one must enable.'' *Id.* at 4. The Federal Circuit found that, as in *Amgen,* ''[h]ere, much is claimed, and little is enabled.'' *Id.* In reliance on *Amgen,* the Federal Circuit stated that ''[a]lthough a finding of enablement is not precluded by a skilled artisan's need[ ] to engage in some measure of experimentation, the extent of that experimentation must be reasonable.'' *Id.* The Federal Circuit endorsed using the *Wands* factors to determine whether the amount of experimentation required in *Starrett* was reasonable when it stated that ''[t]he determination as to whether the extent of experimentation is undue or reasonable is informed by the eight *Wands* factors.'' *Id.* In concluding that the claim lacked enablement, the Federal Circuit found that nothing in the specification or claims undermined the PTAB's reliance on the examiner's *Wands* factor analysis and that the examiner's discussion of the *Wands* factors ''properly faulted the specification for failing to describe *how* the claim elements function,'' thereby indicating that the *Wands* factors should be used to determine whether the experimentation was reasonable. *Id.* at 4–5 (emphasis in original).

Conclusion

Therefore, consistent with *Amgen* and the Federal Circuit's post-*Amgen* decisions of *Baxalta, Medytox,* and *Starrett,* when assessing whether the claims in a utility patent application or patent are enabled, regardless of the technology, USPTO personnel will continue to use the *Wands* factors to ascertain whether the experimentation required to enable the full scope of the claimed invention is reasonable. The explanation in an enablement rejection or in a PTAB determination that a claim is not enabled should focus on those factors and the reasons and evidence that led the examiner or decision-maker to arrive at their conclusion. See MPEP 2164.04. The *Wands* analysis should provide adequate explanation and reasoning for a lack of enablement finding in order to facilitate the USPTO's clarity of the record goals, as well as the USPTO's goals of providing consistency between examination and post-grant challenges.

Katherine Kelly Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2024–00259 Filed 1–9–24; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Army

Army Education Advisory Committee Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open committee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory committee meeting of the Army Education Advisory Committee (AEAC). This meeting is open to the public.

DATES: The Army Education Advisory Committee will meet from 8 a.m. to 5 p.m. on both January 24–25, 2024.

ADDRESSES: Army Education Advisory Committee, 950 Jefferson Avenue, Building 950, U.S. Training and Doctrine Command (TRADOC) Headquarters, Conference Room 2047, Ft. Eustis, VA 23604.

FOR FURTHER INFORMATION CONTACT: Dr. Justin M. Green, the Designated Federal Officer for the committee, in writing at ATTN: ATTG–TRI–G, TRADOC, 950 Jefferson Ave, Fort Eustis, VA 23604, by email at *justin.m.green12.civ@army.mil,* or by telephone at (757) 501–9935.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer, the Army Education Advisory Committee was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its January 24–25, 2024 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41

CFR 102–3.150(b), waives the 15-calendar day notification requirement.

The committee meeting is being held under the provisions of the Federal Advisory Committee Act (FACA; 5 U.S.C. 10), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to review TRADOC Priorities, the AEAC Charter, and to conduct mandatory annual ethics training. The Committee will also receive an overview of the Fiscal Year 2024 AEAC Study which will focus on the modernization of the Special Operations School of Excellence (SOCoE).

Agenda: January 24 and 25: The committee is chartered to provide independent advice and recommendations to the Secretary of the Army on the educational, doctrinal, and research policies and activities of U.S. Army educational programs. The committee will complete all FACA annual requirements, will begin discussions related to the modernization of the Special Operations School of Excellence (SOCoE), and discuss and deliberate provisional findings and recommendations submitted by its subcommittees.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. Seating is on a first to arrive basis. Attendees are requested to submit their name, affiliation, and daytime phone number seven business days prior to the meeting to Dr. Green, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section.

Because the meeting of the committee will be held in a Federal Government facility on a military base, security screening is required. A photo ID is required to enter base. Please note that security and gate guards have the right to inspect vehicles and persons seeking to enter and exit the installation. TRADOC Headquarters is fully handicap accessible. Wheelchair access is available in front at the main entrance of the building. For additional information about public access procedures, contact Dr. Green, the committee's Designated Federal Officer, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments or Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the committee in response to the stated agenda of the open meeting or in regard to the committee's mission in general. Written comments or statements should be submitted to Dr. Green, the committee Designated Federal Officer, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or statement must include the author's name, title or affiliation, address, and daytime phone number. The Designated Federal Official will review all submitted written comments or statements and provide them to members of the committee for their consideration. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the Designated Federal Official at least seven business days prior to the meeting to be considered by the committee. Written comments or statements received after this date may not be provided to the committee until its next meeting.

Pursuant to 41 CFR 102–3.140d, the Committee is not obligated to allow a member of the public to speak or otherwise address the Committee during the meeting. Members of the public will be permitted to make verbal comments during the Committee meeting only at the time and in the manner described below. If a member of the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least seven business days in advance to the committee's Designated Federal Official, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. The Designated Federal Official will log each request, in the order received, and in consultation with the committee Chair, determine whether the subject matter of each comment is relevant to the committee's mission and/or the topics to be addressed in this public meeting. A 15-minute period near the end of the meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described above, will be allotted no more than three minutes during the period, and will be invited to speak in the order in which their requests were received by Designated Federal Official.

James W. Satterwhite Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2024–00308 Filed 1–9–24; 8:45 am]

BILLING CODE 3710–02–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2544–000]

Hydro Technology Systems; Notice of Authorization for Continued Project Operation

The license for the Meyers Falls Hydroelectric Project No. 2544 was issued for a period ending December 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2544 is issued to Hydro Technology Systems for a period effective January 1, 2024, through December 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before December 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the

Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Hydro Technology Systems is authorized to continue operation of the Meyers Falls Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: January 4, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00337 Filed 1–9–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–773–000]

Escalante Solar, 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 Escalante Solar, 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 24, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *https://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 (*https://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: January 4, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00334 Filed 1–9–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number

[1] Emailed comments from Nancy Shimeall and 10 other individuals.

field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket Nos.	File date	Presenter or requester
Prohibited:		
1. CP22–2–000	12–20–2023	FERC Staff.[1]
Exempt:		
None.		

Dated: January 4, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00332 Filed 1–9–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15330–000]

Kram Hydro 3, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 27, 2023, Kram Hydro 3, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of hydropower project to be located at the U.S. Army Corps of Engineers' (Corps) Emmett Sanders Lock and Dam near the City of Pine Bluff, Jefferson County, Arkansas. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Emmett Sanders Lock and Dam Hydroelectric Project would consist of the following: (1) a 90-foot-wide, 200–350-foot-long armored intake channel, upstream of the powerhouse; (2) a 100-foot-long, 180-foot-wide concrete powerhouse located downstream of the existing Corps dam on the northeast bank, housing two identical Kaplan turbine-generator units with a combined generating capacity of 20.0 megawatts; (3) a 200-foot-long, 100-foot wide unlined tailrace; (4) a 300-foot-long concrete retaining wall to be constructed downstream of the powerhouse; and (5) a 7-mile-long, 115 kilovolt transmission line. The proposed project would have an estimated annual generation of 90,300 megawatt-hours.

Applicant Contact: Kristen Fan, Kram Hydro 3, 12333 Sowden Rd., Suite B, PMB 50808, Houston, TX 77080; phone: (772) 418–2705.

FERC Contact: Prabharanjani Madduri; phone: (202) 502–8017, or by email at *prabharanjani.madduri@ferc.gov*.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/eFiling.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15330–000.

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*.

More information about this project, including a copy of the application, can be viewed, or printed on the ''eLibrary'' link of the Commission's website at *https://elibrary.ferc.gov/eLibrary/search.* Enter the docket number (P–15330) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: January 4, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00335 Filed 1–9–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator and Foreign Utility Company Status

	Docket Nos.
Nova Power, LLC	EG24–1–000
Crow Creek Solar, LLC	EG24–2–000
Inertia Energy Storage, LLC	EG24–3–000
Torrecillas Energy Storage, LLC	EG24–4–000
Ben Milam Solar 1 LLC	EG24–5–000
Ben Milam Solar 3 LLC	EG24–6–000
Salt Creek Township Solar, LLC	EG24–7–000
BCD 2024 Fund 1 Lessee, LLC	EG24–8–000
South Cheyenne Solar, LLC	EG24–9–000
Sunlight Storage II, LLC	EG24–10–000
Willowbrook Solar I, LLC	EG24–11–000
Cedar Creek Wind, LLC	EG24–12–000
St. Gall Energy Storage I, LLC	EG24–13–000
Silver Peak Energy, LLC	EG24–14–000
Wild Springs Solar, LLC	EG24–15–000
Skysol, LLC	EG24–16–000
Beaumont ESS, LLC	EG24–17–000
Placerita ESS, LLC	EG24–18–000
Poblano Energy Storage, LLC	EG24–19–000

[1] Emailed comments from Nancy Shimeall and 10 other individuals.

	Docket Nos.
Century Oak Wind Project, LLC	EG24–20–000
Black Walnut Energy Storage, LLC	EG24–21–000
CPV Stagecoach Solar, LLC	EG24–22–000
Faraday Interconnection LLC	EG24–23–000
Faraday Solar B LLC	EG24–24–000
Condor Energy Storage, LLC	EG24–25–000
Babbitt Ranch Energy Center, LLC	EG24–26–000
Windpark Duben Süd GmbH & Co. KG	FC24–1–000

Take notice that during the month of December 2023, the status of the above-captioned entities as Exempt Wholesale Generators or Foreign Utility Companies became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2022).

Dated: January 4, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00336 Filed 1–9–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–516–000; CP23–516–001]

East Tennessee Natural Gas, LLC; Notice of Amendment of Authorization and Establishing Intervention Deadline

Take notice that on December 19, 2023, East Tennessee Natural Gas, LLC (East Tennessee), 915 North Eldridge Parkway, Suite 1100, Houston, Texas 77079, filed an amendment to its application in Docket No. CP23–516–000, pursuant to sections 7(c) of the Natural Gas Act (NGA) and part 157 of the Commission's regulations requesting authorization to amend its proposed Ridgeline Expansion Project (Project) that was filed on July 18, 2023. Specifically, East Tennessee is amending the application to change the proposed 8-mile-long, 24-inch-diameter pipeline lateral to an approximately 8-mile-long, 30-inch-diameter pipeline segment on East Tennessee's mainline in Morgan and Roane Counties, Tennessee. The amendment will not materially change the Project capacity or cost, all as more fully set forth in the amendment which is on file with the Commission and open for 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 regarding the proposed project should be directed to Amish George, Manger, Rates and Certificates at East Tennessee Natural Gas LLC, P.O. Box 1642, Houston, Texas 77251–1642 by phone at (713) 627–5120, or by email at *anish.george@enbridge.com.*

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file comments on the project, you can protest the filing, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5 p.m. eastern time on January 25, 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.*

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections, to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be.

Protests

Pursuant to sections 157.10(a)(4)[2] and 385.211[3] of the Commission's regulations under the NGA, any person[4] may file a protest to the application. Protests must comply with the requirements specified in section 385.2001[5] of the Commission's regulations. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

To ensure that your comments or protests are timely and properly recorded, please submit your comments on or before January 25, 2024.

There are three methods you can use to submit your comments or protests to the Commission. In all instances, please reference the Project docket number CP23–516–001 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the

[1] 18 CFR (Code of Federal Regulations) 157.9.

[2] 18 CFR 157.10(a)(4).

[3] 18 CFR 385.211.

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

[5] 18 CFR 385.2001.

Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments or protests electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments or protests by mailing them to the following address below. Your written comments must reference the Project docket number (CP23–516–001).

To file via USPS: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[6] 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 [7] and the regulations under the NGA [8] by the intervention deadline for the project, which is January 25, 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.*

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP23–516–001 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit *https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf.;* or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below. Your motion to intervene must reference the Project docket number CP23–516–001.

To file via USPS: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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

Protests and motions to intervene must be served on the applicant either by mail or email at: Amish George, Manger, Rates and Certificates at East Tennessee Natural Gas LLC, P.O. Box 1642, Houston, Texas 77251–1642, or at *anish.george@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. Service can be via email with a link to the document.

All timely, unopposed [9] motions to intervene are automatically granted by operation of Rule 214(c)(1).[10] Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.[11] A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

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

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

Intervention Deadline: 5 p.m. eastern time on January 25, 2024.

Dated: January 4, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00331 Filed 1–9–24; 8:45 am]

BILLING CODE 6717–01–P

[6] 18 CFR 385.102(d).

[7] 18 CFR 385.214.

[8] 18 CFR 157.10.

[9] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[10] 18 CFR 385.214(c)(1).

[11] 18 CFR 385.214(b)(3) and (d).

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 196007]

Privacy Act of 1974; System of Records

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC, Commission, or Agency) proposes to modify an existing system of records, FCC/OMD–23, Cadapult Space Management Center (CSMS), subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The Commission uses this system to allocate the offices, workstations, and facility workstations for FCC employees and contractors following the FCC/National Treasury Union (NTEU) space assignment policy. This modification makes various necessary changes and updates, including formatting changes required by the Office of Management and Budget (OMB) Circular A–108 since its previous publication, the addition of six new routine uses, as well as the revision of three existing routine uses.

DATES: This modified system of records will become effective on January 10, 2024. Written comments on the routine uses are due by February 9, 2024. The routine uses in this action will become effective on February 9, 2024 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Brendan McTaggart, Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Brendan McTaggart, (202) 418–1738, or *privacy@fcc.gov* (and to obtain a copy of the Narrative Statement and the Supplementary Document, which includes details of the modifications to this system of records).

SUPPLEMENTARY INFORMATION: This notice serves to update and modify FCC/OMD–23, as a result of various necessary changes and updates. The substantive changes and modifications to the previously published version of the FCC/OMD–23 system of records include:

1. Updating the language in the Security Classification to follow OMB guidance.

2. Updating the language in the Purposes section to be consistent with the language and phrasing currently used generally in the FCC's SORNs.

3. Modifying the language in the Categories of Individuals and Categories of Records to be consistent with the language and phrasing currently used in the FCC's SORNs.

4. Updating and/or revising language in the following routine uses (listed by current routine use number): (8) Congressional Inquiries; (9) Government-wide Program Management and Oversight; and (10) Breach Notification, the revision of which is required by OMB Memorandum No. M–17–12.

5. Adding the following new routine uses (listed by current routine use number): (4) Labor Relations; (5) Litigation; (6) Adjudication; (7) Law Enforcement and Investigation; (11) Assistance to Federal Agencies and Entities Related to Breaches, the addition of which is required by OMB Memorandum No. M–17–12; and (12) Non-Federal Personnel to allow contractors, vendors, grantees, or volunteers performing or working on a contract, grant, or cooperative agreement for the Federal Government to have access to needed information.

6. Updating the SORN to include the relevant National Archives and Records Administration (NARA) records schedules.

The system of records is also updated to reflect various administrative changes related to the system managers and system addresses; policy and practices for storage and retrieval of the information; administrative, technical, and physical safeguards; and updated notification, records access, and contesting records procedures.

SYSTEM NAME AND NUMBER:

FCC/OMD–23, Cadapult Space Management System (CSMS).

SECURITY CLASSIFICATION:

No information in the system is classified.

SYSTEM LOCATION:

Office of Managing Director (OMD), Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554.

SYSTEM MANAGER(S):

Office of Managing Director (OMD), Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 40 U.S.C. 468, 44 U.S.C. 3101, Executive Order 12411, Government Work Space Management Reforms, and the NTEU/FCC Basic Negotiated Agreement, Article 9, Employee Space and Facilities.

PURPOSE(S) OF THE SYSTEM:

The FCC uses the information in this information system for purposes that include, but are not limited to, the allocation of the offices, workstations, facility workspaces, and hoteling workspaces for FCC employees and contractors following the FCC/NTEU space assignment policy, as well as tracking workstation occupancy, vacancy, and utilization rates; evaluating bureau and office housing and realignments based on utilization and reorganizations; and calculating and documenting FCC bureau and office rent reporting. Additionally, in the event of an emergency, OMD staff uses information from this system to devise a ''Reconstitution Plan'' to create the space requirements for alternative work location(s) in other buildings to be used to relocate FCC employees and/or contractors.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals whose records are maintained in this system include, but are not limited to, FCC employees and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records in this system include, but are not limited to, the name, organization (bureau/office/division), pay type, grade, supervisory status, bargaining unit status, workspace requirements, workspace location (office or workstation), and work telephone number for each employee or contractor.

RECORD SOURCE CATEGORIES:

Sources of records in this system include FCC employees and contractor; FCC information systems and applications used in the onboarding, offboarding, and reassignment processes; and diagrams and drawings.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. Emergency Response—A record on an individual in this system of records may be disclosed to emergency medical

personnel, *e.g.,* doctors, nurses, and/or paramedics, or to law enforcement officials in case of a medical or other emergency involving the FCC employee without the subsequent notification to the individual identified in 5 U.S.C. 552a(b)(8).

2. First Responders—A record from this system of records may be disclosed to law enforcement officials, Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA), Department of Defense (DOD), National Telecommunications and Information Administration (NTIA), White House Communications Agency (WHCA), other federal agencies, and state and local emergency response officials, *e.g.,* fire, safety, and rescue personnel, etc., and medical personnel, *e.g.,* doctors, nurses, and paramedics, etc., in case of an emergency situation at FCC facilities without the subsequent notification to the individual identified in 5 U.S.C. 552a(b)(8).

3. Reconstitution Plan—A record from this system of records may be disclosed to the General Services Administration (GSA), the National Telecommunications and Information Administration (NTIA), the Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA); District of Columbia, Virginia, and Maryland state government agencies; and any other Federal, state, and local agencies involved in Federal agency evacuation, emergency facilities, space management, and/or relocation policies and plans, or related issues.

4. Labor Relations—A record from this system may be disclosed to officials of labor organizations recognized under 5 U.S.C. chapter 71 upon receipt of a formal request and in accord with the conditions of 5 U.S.C. 7114 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

5. Litigation—To disclose records to the Department of Justice (DOJ) when: (a) the FCC or any component thereof; (b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where the DOJ or the FCC has agreed to represent the employee; or (d) the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and the use of such records by the Department of Justice is for a purpose that is compatible with the purpose for which the FCC collected the records.

6. Adjudication—To disclose records in a proceeding before a court or adjudicative body, when: (a) the FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and that the use of such records is for a purpose that is compatible with the purpose for which the agency collected the records.

7. Law Enforcement and Investigation—When the FCC investigates any violation or potential violation of a civil or criminal law, regulation, policy, executed consent decree, order, or any other type of compulsory obligation, to disclose pertinent information as it deems necessary to the target of an investigation, as well as with the appropriate Federal, State, local, Tribal, international, or multinational agencies, or a component of such an agency, responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, order, or other requirement.

8. Congressional Inquiries—To provide information to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the written request of that individual.

9. Government-wide Program Management and Oversight—To DOJ to obtain that Department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or to OMB to obtain that office's advice regarding obligations under the Privacy Act.

10. Breach Notification—To appropriate agencies, entities, and persons when: (a) the Commission suspects or has confirmed that there has been a breach of the system of records; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

11. Assistance to Federal Agencies and Entities Related to Breaches—To another Federal agency or Federal entity, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

12. Non-Federal Personnel—To disclose information to non-Federal personnel, including contractors, other vendors (*e.g.,* identity verification services), grantees, and volunteers who have been engaged to assist the FCC in the performance of a contract, service, grant, cooperative agreement, or other activity related to this system of records and who need to have access to the records in order to perform their activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

This an electronic system of records that resides on the FCC's or a vendor's network.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information in the electronic database can be retrieved by searching electronically for the FCC employee or contractor's name, workspace location, and organizational unit, *e.g.,* bureau/office.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The information in this electronic system is maintained and disposed of in accordance with the relevant NARA records schedules, including General Records Schedule (GRS) 5.1: Common Office Records, DAA–GRS–2016–0016; and GRS 5.3: Continuity and Emergency Planning Records, DAA–GRS–2016–0004.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The electronic records, files, and data are stored within FCC or a vendor's accreditation boundaries and maintained in a database housed in the FCC's or vendor's computer network databases. Access to the electronic and paper files is restricted to authorized employees and contractors; and in the case of electronic files to IT staff, contractors, and vendors who maintain the IT networks and services. Other employees and contractors may be granted access on a need-to-know basis. The electronic files and records are protected by the FCC and third-party privacy safeguards, a comprehensive

and dynamic set of IT safety and security protocols and features that are designed to meet all Federal privacy standards, including those required by the Federal Information Security Modernization Act of 2014 (FISMA), OMB, and the National Institute of Standards and Technology (NIST).

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to and/or amendment of records about themselves should follow the Notification Procedures below.

CONTESTING RECORD PROCEDURES:

Individuals wishing to request access to and/or amendment of records about themselves should follow the Notification Procedures below.

NOTIFICATION PROCEDURES:

Individuals wishing to determine whether this system of records contains information about themselves may do so by writing to *privacy@fcc.gov.* Individuals requesting record access or amendment must also comply with the FCC's Privacy Act regulations regarding verification of identity as required under 47 CFR part 0, subpart E.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

(75 FR 56533) (September 16, 2010).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2024–00340 Filed 1–9–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[GN Docket No. 19–329; FR ID 195674]

Federal Advisory Committee Act; Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC or Commission) Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States (Task Force) will hold its next meeting live and via live internet link.

DATES: January 31, 2024. The meeting will come to order at 10 a.m. EST.

ADDRESSES: The meeting will be open to the public and held in the Commission Meeting Room at FCC Headquarters, located at 45 L Street NE, Washington, DC 20554, and will also be available via live feed from the FCC's web page at *www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Christi Shewman, Designated Federal Officer, at (202) 418–0646, or *Christi.Shewman@fcc.gov;* Emily Caditz, Deputy Designated Federal Officer, at (202) 418–2268, or *Emily.Caditz@fcc.gov;* or Thomas Hastings, Deputy Designated Federal Officer, at (202) 418–1343, or *Thomas.Hastings@fcc.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be held on January 31, 2024 at 10 a.m. EST in the Commission Meeting Room at FCC Headquarters, 45 L Street NE, Washington, DC, and will be open to the public, with admittance limited to seating availability. Any questions that arise during the meeting should be sent to *PrecisionAgTF@fcc.gov* and will be answered at a later date. Members of the public may submit comments to the Task Force in the FCC's Electronic Comment Filing System, ECFS, at *www.fcc.gov/ecfs.* Comments to the Task Force should be filed in GN Docket No. 19–329.

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice). Such requests should include a detailed description of the accommodation needed. In addition, please include a way the FCC can contact you if it needs more information. Please allow at least five days' advance notice; last-minute requests will be accepted but may not be possible to fill.

Proposed Agenda: At this meeting, the Task Force plans to introduce members of the Task Force, describe the focus of each working group, review policies relevant to the Task Force's duties, and begin discussing strategies to advance broadband deployment on agricultural land and promote precision agriculture. This agenda may be modified at the discretion of the Task Force Chair and the Designated Federal Officer.

(5 U.S.C. app 2 10(a)(2))

Federal Communications Commission.

Jodie May,

Division Chief, Competition Policy Division, Wireline Competition Bureau.

[FR Doc. 2024–00342 Filed 1–9–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

[DOCKET NO. 24–01]

Visual Comfort & Co., Complainant v. COSCO Shipping Lines (North America) Inc., Respondent; Notice of Filing of Complaint and Assignment

Served: January 4, 2024.

Notice is given that a complaint has been filed with the Federal Maritime Commission (the ''Commission'') by Visual Comfort & Co. (the ''Complainant'') against COSCO Shipping Lines (North America) Inc. (the ''Respondent''). Complainant states that the Commission has jurisdiction over the complaint pursuant to 46 U.S.C. 41301 through 41309 and personal jurisdiction over Respondent as an ocean common carrier as defined in 46 CFR 520.2.

Complainant is a corporation organized under the laws of Texas with its principal place of business located in Houston, Texas, and is a shipper as defined in 46 U.S.C. 40102(23).

Complainant identifies Respondent as a Chinese global ocean carrier with an office in the United States located in Secaucus, New Jersey, and as a vessel-operating ocean common carrier as defined in 46 U.S.C. 40102(18).

Complainant alleges that Respondent violated 46 U.S.C. 41102(c) and 41104(a)(10) and 46 CFR 545.5 regarding a failure to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering property; and an unreasonable refusal to deal or negotiate. Complainant alleges these violations arose from assessment of demurrage, detention, per diem, and yard storage charges during periods of time in which the charges were not just or reasonable because of circumstances outside the control of the Complainant and its agents and service providers, and because of acts or omissions of the Respondent.

An answer to the complaint must be filed with the Commission within 25 days after the date of service.

The full text of the complaint can be found in the Commission's electronic Reading Room at *https://www2.fmc.gov/readingroom/proceeding/24-01/.* This proceeding has been assigned to the Office of Administrative Law Judges.

The initial decision of the presiding judge shall be issued by January 6, 2025, and the final decision of the Commission shall be issued by July 21, 2025.

Alanna Beck,

Federal Register Alternate Liaison Officer, Federal Maritime Commission.

[FR Doc. 2024–00280 Filed 1–9–24; 8:45 am]

BILLING CODE 6730–02–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 25, 2024.

A. 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. *Kristine L. MacDonald Ixonia Trust, Kristine L. MacDonald, as settlor, Joan P. Lubar Ixonia Trust, Joan P. Lubar, as settlor, Susan A. Lubar Ixonia Trust, Susan A. Lubar, as settlor, and Sheldon B. and Marianne Lubar Ixonia Trust, Sheldon B. and Marianne Lubar, as co-settlors, all of Milwaukee, Wisconsin; David J. Lubar, as trustee to all the aforementioned trusts, Fox Point, Wisconsin; Ixonia Control Trust, Milwaukee, Wisconsin, David J. Lubar, as trustee, and Patrick Lubar, as secondary trustee, both of Fox Point, Wisconsin; David J. Lubar Ixonia Trust, Milwaukee, Wisconsin, David J. Lubar, as settlor, and Patrick Lubar, as trustee; and Ixonia Bancshares Investors, LP, a Delaware limited partnership and qualified family partnership, Ixonia, Wisconsin;* to join the Lubar Family Control Group, a group acting in concert, to acquire voting shares of Ixonia Bancshares, Inc., and thereby indirectly acquire voting shares of Ixonia Bank, both of Ixonia, Wisconsin. This notification replaces the document published on November 15, 2023 at 88 FR 78362.

A. 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. *Adams Land Improvement, Inc., Arapahoe, Nebraska;* to acquire voting shares of Central Bancshares, Inc., and thereby indirectly acquire voting shares of First Central Bank, both of Cambridge, Nebraska, First Central Bank McCook, McCook, Nebraska, Republic Corporation and United Republic Bank, both of Omaha, Nebraska.

2. *Marcus Houghton and Corbin Houghton, both of Wichita, Kansas;* to acquire additional voting shares of PBT Bancshares, Inc., and thereby indirectly acquire additional voting shares of Peoples Bank and Trust Company, both of McPherson, Kansas. Additionally, Corbin Houghton to become a member of the Houghton Family Control Group, a group acting in concert.

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2024–00360 Filed 1–9–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10549]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by March 11, 2024.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10549 Generic Clearance for Questionnaire Testing and Methodological Research for the Medicare Current Beneficiary Survey (MCBS)

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. Type of Information Collection Request: Extension without change of a currently approved collection; *Title of Information Collection:* Generic Clearance for Questionnaire Testing and Methodological Research for the Medicare Current Beneficiary Survey (MCBS); *Use:* The purpose of this OMB clearance package is to extend the approval of the current generic clearance for the Medicare Current Beneficiary Survey (MCBS). The MCBS Questionnaire Testing and Methodological Research encompasses development and testing of MCBS questionnaires, instrumentation, and data collection protocols, as well as a mechanism for conducting methodological experiments. The current clearance includes six types of potential research activities: (1) cognitive interviewing, (2) focus groups, (3) usability testing, (4a) field testing within the MCBS production environment, (4b) field testing as a separate data collection effort outside of the MCBS production environment, (5) respondent debriefings, and (6) research about incentives.

The MCBS is a continuous, multipurpose survey of a nationally representative sample of aged, disabled, and institutionalized Medicare beneficiaries. The MCBS, which is sponsored by the Centers for Medicare & Medicaid Services (CMS), is the only comprehensive source of information on the health status, health care use and expenditures, health insurance coverage, and socioeconomic and demographic characteristics of the entire spectrum of Medicare beneficiaries. The core of the MCBS is a series of interviews with a stratified random sample of the Medicare population, including aged and disabled enrollees, residing in the community or in institutions. Questions are asked about enrollees' patterns of health care use, charges, insurance coverage, and payments over time. Respondents are asked about their sources of health care coverage and payment, their demographic characteristics, their health and work history, and their family living circumstances. In addition to collecting information through the core questionnaire, the MCBS collects information on special topics. *Form Number:* CMS–10549 (OMB control number: 0938–1275); *Frequency:* Occasionally; *Affected Public:* Individuals or Households; *Number of Respondents:* 11,655; *Total Annual Responses:* 11,655; *Total Annual Hours:* 3,947. (For policy questions regarding this collection contact William Long at 410–786–7927.)

Dated: January 4, 2024.

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–00270 Filed 1–9–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Physician-Focused Payment Model Technical Advisory Committee; Meetings

ACTION: Notice of meetings.

SUMMARY: This notice announces the 2024 meetings of the Physician-Focused Payment Model Technical Advisory Committee (PTAC). These meetings include deliberation and voting on proposals for physician-focused payment models (PFPMs) submitted by individuals and stakeholder entities and may include discussions on topics related to current or previously submitted PFPMs. All meetings are open to the public.

DATES: The 2024 PTAC meetings will occur on the following dates:

- Monday–Tuesday, March 25–26, 2024, from 9 a.m. to 5 p.m. ET.
- Monday–Tuesday, June 10–11, 2024, from 9 a.m. to 5 p.m. ET.
- Monday–Tuesday, September 16–17, 2024, from 9 a.m. to 5 p.m. ET.
- Monday–Tuesday, December 2–3, 2024, from 9 a.m. to 5 p.m. ET.

Please note that times are subject to change. If the times change, the ASPE PTAC website will be updated (*https://aspe.hhs.gov/ptac-physician-focused-payment-model-technical-advisory-committee*) and registrants will be notified directly via email.

ADDRESSES: All PTAC meetings will be held virtually or in the Great Hall of the Hubert H. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Lisa Shats, Designated Federal Officer at *Lisa.Shats@hhs.gov* (202) 875–0938.

SUPPLEMENTARY INFORMATION:

Agenda and Comments. PTAC will hear presentations on proposed PFPMs that have been submitted by individuals and stakeholder entities and/or discussion on topics related to current or previously submitted PFPMs. Regarding proposed PFPMs, following each presentation, PTAC will deliberate on the proposed PFPM. If PTAC completes its deliberation, PTAC will vote on the extent to which the proposed PFPM meets criteria established by the Secretary of Health and Human Services and on an overall recommendation to the Secretary (if applicable). Time will be allocated for public comments. The agenda and other documents will be posted on the PTAC section of the ASPE website, *https://aspe.hhs.gov/ptac-physician-focused-payment-model-technical-advisory-committee,* prior to the meeting. The agenda is subject to change. If the agenda does change, registrants will be notified directly via email, the website will be updated, and notification will be sent out through the PTAC email listserv (*https://list.nih.gov/cgi-bin/wa.exe?A0=PTAC* to subscribe).

Meeting Attendance. These meetings are open to the public and may be hosted in-person or virtually. We intend that in-person meetings will be held in the Great Hall of the Hubert H. Humphrey Building. The public may attend in person, when feasible, virtually, or view the meeting via livestream at *www.hhs.gov/live.* Information about how to access the meeting virtually or via livestream will be sent to registrants prior to the meeting; and a telephone number will be sent to registrants participating via the dial-in only option prior to the

meeting. Space may be limited, and registration is preferred. When registration opens, a link to the registration page will be available at *https://aspe.hhs.gov/collaborations-committees-advisory-groups/ptac/ptac-meetings* prior to the meeting. Registrants will receive a confirmation email shortly after completing the registration process.

Special Accommodations. If sign language interpretation or other reasonable accommodation for a disability is needed, please contact *PTAC@hhs.gov,* no later than two weeks prior to the scheduled meeting.

Authority. 42 U.S.C. 1395(ee); section 101(e)(1) of the Medicare Access and CHIP Reauthorization Act of 2015; section 51003(b) of the Bipartisan Budget Act of 2018.

PTAC is governed by provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. app.), which sets forth standards for the formation and use of federal advisory committees.

Dated: December 29, 2023.

Miranda Lynch-Smith,

Deputy Assistant Secretary for Human Services Policy, Performing the delegable duties of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 2024–00314 Filed 1–9–24; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

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

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

Name of Committee: Cell Biology Integrated Review Group; Development—2 Study Section.

Date: February 5–6, 2024.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rass M. Shayiq, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov*.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Cellular, Molecular and Integrative Reproduction Study Section.

Date: February 6–7, 2024.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Anthony Wing Sang Chan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 809K, Bethesda, MD 20892, (301) 496–9392, *chana2@csr.nih.gov*.

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Maximizing Investigators' Research Award B Study Section.

Date: February 6–7, 2024.

Time: 9:30 a.m. to 7:30 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: Sudha Veeraraghavan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7846, Bethesda, MD 20892, (301) 827–5263, *sudha.veeraraghavan@nih.gov*.

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Biobehavioral Mechanisms of Emotion, Stress and Health Study Section.

Date: February 6–7, 2024.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Brittany L. Mason-Mah, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000A, Bethesda, MD 20892, (301) 594–3163, *masonmahbl@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 4, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00294 Filed 1–9–24; 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; Biomarkers of Cognitive Decline.

Date: March 27, 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: Gianina Ramona Dumitrescu, Ph.D., MPH, Scientific Review Officer, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2N300, 7201 Wisconsin Avenue, Bethesda, MD 28092, 301–827–0696, *dumitrescurg@.nih.gov*.

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

Dated: January 4, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00291 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Interagency Autism Coordinating Committee, January 24, 2024, 9:00 a.m. to January 24, 2024, 5:00 p.m., National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 which was published in the **Federal Register** on November 8, 2023, FR Doc. No. 2023–24705, 88 FR 77102.

This Notice is being amended to change the meeting start time from 9:00 a.m. to 10:00 a.m. The location remains the same. This hybrid meeting will also be accessible remotely at *https://videocast.nih.gov/watch=53783.* The meeting is open to the public.

Dated: January 4, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00288 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Environmental Health Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIEHS Videocast at the following link: *https://www.niehs.nih.gov/news/webcasts/index.cfm.*

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 Advisory Environmental Health Sciences Council.

Date: February 12–13, 2024.

Open: February 12, 2024, 9:00 a.m. to 3:45 p.m.

Agenda: Discussion of program policies and issues/Council Discussion.

Place: NIEHS, 111 TW Alexander Drive, Research Triangle Park, NC 27709.

Closed: February 12, 2024, 4:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS, 111 TW Alexander Drive, Research Triangle Park, NC 27709.

Open: February 13, 2024, 9:00 a.m. to 12:45 p.m.

Agenda: Discussion of program policies and issues/Council Discussion.

Place: NIEHS, 111 TW Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: David M. Balshaw, Ph.D., Director, Division of Extramural Research and Training, National Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–27, Research Triangle Park, NC 27709–2233, 984–287–3234, *balshaw@niehs.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.niehs.nih.gov/dert/c-agenda.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: January 4, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00310 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK RC2 Review.

Date: March 28, 2024.

Time: 10:00 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *yangj@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 4, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00289 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Gut–Brain Interactions (Parkinson's Disease).

Date: April 19, 2024.

Time: 12:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Maria E. Davila–Bloom, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7017, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 4, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00293 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

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

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

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Population Sciences.

Date: January 17, 2024.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rebecca I. Tinker, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, (301) 435–0637, *tinkerri@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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics on HIV Therapeutics.

Date: January 26, 2024.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael L. Bloom, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7804, Bethesda, MD 20892, 301–451–0132, *bloomm2@mail.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: January 4, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00292 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meetings

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

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

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Clinical, Treatment and Health Services Research Study Section.

Date: February 6, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2109 Bethesda, MD 20817, (301) 443–8599, *espinozala@mail.nih.gov.*

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Fellowship Review Panel.

Date: March 8, 2024.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2109 Bethesda, MD 20892, (301) 443–8599, *espinozala@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: January 4, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00287 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

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

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

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Translating Socioenvironmental Influences

on Neurocognitive Development and Addiction Risk (TranSINDA).

Date: February 9, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Caitlin Elizabeth Angela Moyer, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 443–4577, *caitlin.moyer@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Chemical Countermeasures Research Program Initiative: Research on Counteracting the Deleterious Effects of Acute Opioid Exposure.

Date: February 15, 2024.

Time: 12:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Li Rebekah Feng, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–7245, *rebekah.feng@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Advancing Psychedelics Research for Treating Addiction.

Date: February 21, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Brian Stefan Wolff, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20852, (301) 480–1448, *brian.wolff@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: January 5, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00361 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

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

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

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–22–233: Time-Sensitive Opportunities for Health Research.

Date: January 29, 2024.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Hoa Thi Vo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1002B2, Bethesda, MD 20892, (301) 594–0776, *voht@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Behavioral Neuroendocrinology, Neuroimmunology, Rhythms, and Sleep Study Section.

Date: February 1–2, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844 Bethesda, MD 20892, 301–435–1119, *selmanom@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group, Psychosocial Development, Risk and Prevention Study Section.

Date: February 1–2, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anna L Riley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759 Bethesda, MD 20892, 301- 435–2889, *rileyann@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Drug and Biologic Therapeutic Delivery Study Section.

Date: February 1–2, 2024.

Time: 9:00 a.m. to 6:00 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: Janice Duy, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–594–3139, *janice.duy@nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Social Sciences and Population Studies A Study Section.

Date: February 1–2, 2024.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770 Bethesda, MD 20892, (301) 435–1712, *ryansj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 4, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00290 Filed 1–9–24; 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; Alpha Herpes Viruses and Alzheimer's Disease Progression.

Date: January 26, 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 Branch, NIA, 7201 Wisconsin Ave., Rm 100, Bethesda, MD 20814, (301) 555–1212, *ivan.rebustini@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. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 4, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00283 Filed 1–9–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, contact the SAMHSA Reports Clearance Officer at *samhsapra@samhsa.hhs.gov.*

Comments are invited on: (a) whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Project: 2023–2026 Advancing Wellness and Resilience in Education and Trauma Informed Services in Schools Cross-Site Evaluation—New Collection

The Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Mental Health Services (CMHS) is requesting clearance for data collection associated with a national cross-site evaluation of process, outcomes, and impact for the Advancing Wellness and Resilience in Education (hereinafter referred to as Project AWARE) and Trauma-Informed Services in Schools (TISS) programs.

The purpose of the Project AWARE–TISS Cross-Site Evaluation is to better understand how each program is implemented, the extent to which they facilitate collaboration between education agencies and mental health systems, and how each program contributes to access and referral to mental health services and improved outcomes for youth.

The AWARE–TISS Cross-Site Evaluation incorporates four evaluation components to provide a robust understanding of the implementation (process), outcomes, and associated impacts of the AWARE and TISS Programs and includes program-specific components to ensure programmatic differences and commonalities are understood. With this integrated evaluation design, SAMHSA maintains the ability to evaluate and report on each program separately, while additionally benefiting from the ability to understand the overarching impact of both programs collectively.

Approval is being requested for data collection associated with a Process Evaluation and an Outcome Evaluation. Several program specific sub-studies and cross-program impact analyses will also be conducted to assess implementation and outcomes overall as well as those outcomes specific to high-need subpopulations and under-resourced communities. A behavioral health equity and cultural equity lens will be applied to each area of evaluation to ensure a culturally specific understanding of intervention implementation, outcomes, and impacts.

The Process Evaluation will contain two studies (Implementation and Sustainability Study and Systems Change Study) that examine strategies common to both programs related to program implementation facilitators and barriers, workforce development, and grantees' plans to sustain critical program components beyond their grant period. This assessment of common elements will provide a means to compare the implementation strategies that are successful across both AWARE and TISS grantees and identify successes and challenges in changing systems, policies, service provision, and school climate; increasing behavioral health equity in access and service delivery; and increasing social and emotional development and well-being in school-aged children and youth. The Process Evaluation will also address implementation of program-specific components.

For AWARE, the evaluation will document how the grantees implement the three-tiered public health model in schools and the referral pathways to increase access to mental health promotion, prevention, and intervention. The evaluation will assess the grantee collaborative efforts and grantee activities intended to increase workforce capacity to identify the signs and symptoms of mental illness and ability to refer to appropriate services promptly.

For TISS, the Process Evaluation will focus on examining what innovative strategies the grantees use to increase access to trauma informed services for school-aged youth and how the collaborative efforts of grantees and their partners develop/improve a school-based system for identification, referral, early intervention, treatment, and supportive services. Additionally, the Process Evaluation will assess the implementation of training to improve school capacity to address trauma support needs and engagement of families and communities to increase awareness of the effects of trauma on children and youth.

The Outcome Evaluation will include two studies that examine important facets of the AWARE and TISS programs: (1) identification and referral infrastructure (Identification and Referral Study); and (2) youth resiliency and outcomes (Youth Resiliency and Outcomes Study). Both studies will provide critical information about the effectiveness of the AWARE and TISS programs in establishing and enhancing school-based mental health supports for students.

Program specific sub-studies, inclusive of two TISS case studies and an AWARE Suicide Awareness and Prevention Sub-Study, will be conducted to provide more extensive contextual and implementation information related to the AWARE and TISS programs.

Finally, in addition to assessing the process and outcomes of each of the AWARE and TISS programs, we will

conduct two cross-program analyses that examine the associated impacts of the both programs on the establishment and enhancement of school-based mental health supports for students (Cross-Program Impact Analysis) and the relationships of program and contextual factors with outcomes (Behavioral Health Equity Cross-Study Analysis).

The proposed multimethod approach considers allowable and required activities, variation in the partnerships and provider networks/infrastructure, program settings, populations being served, the range of program implementation plans and goals, existing data systems, and grant infrastructures that support implementation and evaluation participation. In addition, the design considers the stage of implementation of currently funded grantees to seamlessly integrate cohorts appropriately into the evaluation studies.

Fourteen primary data collection activities compose the AWARE–TISS Cross-Site Evaluation.

Instrument Descriptions

- *IS:* The IS is a web-based survey that includes questions on protocols, policies, and structures present as part of schools' AWARE and TISS implementation processes; school/community integration; barriers and facilitators to implementation, and sustainability capacity. The survey also includes questions to gather program-specific information—for example, implementation of the pyramid model and suicide prevention policies in the case of AWARE grantees and details on trauma-informed services in the case of TISS grantees. The IS will be completed by project coordinator and program staff representatives annually. IS data will inform the Implementation and Sustainability Study, AWARE Suicide Awareness and Prevention Sub-Study and Behavioral Health Equity Cross-Study Analysis.
- *IKII:* Supplementing IS findings, IKIIs will be conducted to obtain in-depth information about AWARE and TISS program implementation and sustainability based on the perspectives of grantee program staff and local mental health system partner staff. In each year of the 3-year data collection period, individual semi-structured interviews will be conducted with key representatives of each grantee's collaborative partnership group. Questions will focus on partnership development, coordination, and shared decision-making; perspectives on implementation including challenges, strategies, and successes; contextual, systems, or other factors that affect implementation; and approaches to planning for program sustainability. Interviews will be conducted in person during training and technical assistance (TTA) site visits or virtually when needed. IKII data will inform the Implementation and Sustainability Study, TISS Case Studies and Behavioral Health Equity Cross-Study Analysis.
- *YFFG–Y and YFFG–F:* The YFFG–Y and YFFG–F will be used to conduct focus groups with youth (aged 14–18 or older if appropriate) who attend schools implementing the AWARE or TISS programs and/or their parents/family representatives. The moderator guides will be semi-structured and include open-ended questions to understand experiences and perspectives related to school climate, positive supports, youth or parent engagement, student resiliency and coping skills, awareness of school-based programs or resources to promote mental health literacy and meet mental health needs, mental health resource availability, and satisfaction with the program. Youth and family focus groups will be conducted annually and will include youth or parents representing a sample of AWARE and TISS grantees per year, such that all grantees will participate in the focus groups at least once during the evaluation. The YFFG–Y and YFFG–F will inform the Implementation and Sustainability Study and Behavioral Health Equity Cross-Study Analysis. Data collected through the YFFG–Y will also inform the Youth and Resiliency Outcomes Study.
- *CPS:* CPS is a web-based survey that assesses communication, working relationships, leadership, role-expectations, resources, and partner engagement/commitment. Respondents will also be asked whether their organization currently has a formal, signed memorandum of agreement with the grantee and what changes to policy and infrastructure have been made in the past year. State and local entities, including project coordinators, school administrators, and mental health providers, identified as partners by AWARE and TISS Grantees will be considered for participation. The CPS will be administered annually and will inform the Systems Change Study.
- *TSF:* TSF is a web-based form that will be used annually by AWARE and TISS grantees to document training and educational seminars. It will include training dates, length of time of training (in hours), topic of the training, training objectives, format of training delivery (in-person, webinar, online asynchronous, etc.), intended audience, and number of training participants. It is estimated that grantees will conduct up to 10 trainings annually for different groups (*e.g.,* teachers, mental health professionals, instructional support personnel). The TSF will inform the Systems Change Study and AWARE Suicide Awareness and Prevention Sub-Study.
- *PFF:* The PFF is a web-based form that assesses perceptions of immediate and longer-term benefits in training areas that research has linked to effective implementation and practice change. The PFF will be completed annually by grantee training participants after training events to gather perception of the training experience and perceived feasibility of using the information. The PFF will inform the Systems Change Study.
- *APPTS and TPPTS:* The APPTS and TPPTS are web-based surveys intended to be taken before and after AWARE or TISS grantee trainings across the 3-year data collection period. The APPTS will be completed by a sample of training participants per AWARE grantee annually and assesses knowledge, attitudes, and beliefs related to identifying students in need of mental health services and referring them for mental health services, mental health literacy, attitudes, beliefs (including stigma), and self-efficacy to provide support and referrals to youth experiencing mental health symptoms. The TPPTS will be completed by sample of training participants per TISS grantee annually and assesses trainee's knowledge of and self-efficacy to use trauma-informed strategies in their work. The APPTS and TPPTS will inform the Systems Change Study.
- *WFS:* The WFS is a web-based survey that assesses barriers and facilitators to training use and the extent to which participants identified students in need of mental health services and referred them to services. The WFS will be administered to approximately 50% of AWARE and TISS training participants that also completed the APPTS or TPPTS. The WFS will be completed 3- and 12-months after training events and will be used to measure behavioral changes and longer-term impact on systems and communities. The WFS will inform the Systems Change Study.
- *STCSS, SSCSS, and PCSS:* The STCSS, SSCSS, and PCSS are web-based surveys assessing school climate and safety among students attending grantee LEAs, parents of students, school personnel, and LEA staff. Surveys will be administered in year one and in year three of the evaluation and assess availability and utilization of referral for

services (for students, parents, and school staff), trauma-informed practices (for school staff), respect for diversity (for school staff), racial climate (for students). The STCSS, SSCSS, and PCC will inform the Systems Change Study.

- *SIRF:* The SIRF is a web-based form that gathers existing data detailing each how youth in need of mental health, substance use, or trauma-specific support services were identified because of an AWARE or TISS program, whether and to which services youth were referred, and resulting services received. Establishing identification and referral systems, including coordination with support service providers equipped to meet the needs of youth, is a core component of AWARE and TISS grant requirements. The SIRF will be completed by grantee program staff for up to 100 youth annually per grantee as part of a record review for each youth identified and referred to support services. Information about the initial identification, including the location and pathway to identification (*e.g.,* individual, screening tool, staff role), is obtained, along with information about referrals and support services received following identification. The form also includes deidentified demographic information about the youth receiving the identification, referral, and follow-up care. SIRF data can be extracted from case records of school-based care coordinators or mental health providers, or other existing data sources, including any school staff, support service provider, and family members who make a mental health, substance use, or trauma-related identification and referral. No personal identifiers are requested on the SIRF. SIRF data will inform the Identification and Referral Study and Behavioral Health Equity Cross-Study Analysis.

The estimated response burden to collect this information associated with the AWARE–TISS Cross-Site Evaluation is as follows annualized over the requested 3-year clearance period is presented below. Annual Burden (hours) and Total Cost ($) are rounded to the nearest whole number.

TOTAL AND ANNUALIZED AVERAGES: RESPONDENTS, RESPONSES, AND HOURS

Instrument	Type of respondent	Number of respondents	Responses per respondent	Total number of responses	Burden per response (hours)	Annual burden (hours)	Hourly wage rate ($)	Total cost ($)
IS	Project Coordinator	143	1	143	0.5	72	[1] $35.52	$2,557
IS	Program Staff	15	1	15	0.5	8	[2] 21.71	174
IKII	Project Coordinator	94	1	94	1	94	35.52	3,339
IKII	Mental Health Provider	141	1	141	1	141	[3] 69.39	9,784
IKII	School Administrator	47	1	47	1	47	[4] 54.21	2,548
YFFG–Y	Youth	79	1	79	1.5	119	[5] 7.25	863
YFGG–F	Parent of Youth	79	1	79	1.5	119	7.25	863
CPS	Project Coordinator	143	1	143	0.25	36	35.52	1,279
CPS	Program Staff	47	1	47	0.25	12	21.71	261
CPS	School Administrator	47	1	47	0.25	12	54.21	651
TSF	Program Staff	47	10	470	0.15	71	21.71	1,541
PFF	Program Trainee	2,775	1	2,775	0.15	416	[6] 26.81	11,153
APPTS	Program Trainee	4,000	2	8,000	0.25	2,000	26.81	53,620
TPPTS	Program Trainee	750	2	1,500	0.25	375	26.81	10,054
WFS	Program Trainee	2,391	2	4,782	0.25	1,196	26.81	32,065
PCSS	Parent of Youth	282	1	282	0.4	113	7.25	819
STCSS	Youth	282	1	282	0.4	113	7.25	819
SSCSS	School Staff	282	1	282	0.5	141	[7] 30.20	4,258
SSCSS	School Administrator	188	1	188	0.5	94	54.21	5,096
SIRF	Program Staff	47	100	4,700	0.5	2,350	21.71	51,019
Total		11,879		24,096		7,529		192,763

[1] BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates average annual salary for Community and Social Service Specialists, All Other (code 21–1099); *https://www.bls.gov/oes/current/oes_nat.htm#21-0000.*

[2] BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates average annual salary for Community and Social Service Assistants (code 21–1093); *https://www.bls.gov/oes/current/oes_nat.htm#21-0000.*

[3] BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates average annual salary for Healthcare Diagnosing or Treating Practitioners (code 29–1000); *https://www.bls.gov/oes/current/naics5_541720.htm#29-0000.*

[4] BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates average annual salary for Educational Administrators, All Other (code 11–9039); *https://www.bls.gov/oes/current/naics5_541720.htm#11-0000.*

[5] *https://www.usa.gov/minimum-wage.*

[6] BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates average annual salary for Community and Social Service Occupations (code 21–0000); *https://www.bls.gov/oes/current/oes_nat.htm#21-0000.*

[7] BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates average annual salary for Educational, Guidance, and Career Counselors and Advisors (code 21–2012); *https://www.bls.gov/oes/current/naics5_541720.htm#21-0000.*

Send comments to Carlos Graham, SAMHSA Reports Clearance Officer at *samhsapra@samhsa.hhs.gov*. Written comments should be received by March 11, 2024.

Alicia Broadus,

Public Health Advisor.

[FR Doc. 2024–00303 Filed 1–9–24; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6436–N–01]

Changes to the Methodology Used for Calculating Section 8 Income Limits Under the United States Housing Act of 1937

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The United States Housing Act of 1937 provides for assisted housing for ''low-income families'' and ''very low-income families.'' These designations are defined as percentages of area median family income and are known as income limits. Since FY 2010, HUD has limited the increase from year to year in its income limits as the higher of five percent or twice the percentage change in national median family income. This notice adds an express stipulation that the annual income limit increase may never exceed ten percent. HUD further clarifies the definition of national median family income for purposes of setting income limits.

DATES: Comment Due Date: February 8, 2024.

ADDRESSES: HUD invites interested persons to submit comments on this notice. Communications must refer to the above docket number and title.

There are two methods for submitting public comments.

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

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

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

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

Public Inspection of Public Comments. All properly submitted comments and communications regarding this notice submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Questions on this notice may be addressed to Adam Bibler, Director, Program Parameters and Research Division, Office of Economic Affairs, Office of Policy Development and Research, HUD Headquarters, 451 7th Street SW, Room 8208, Washington, DC 20410, telephone number (202) 402–6057; or via email at *pprd@hud.gov.* HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

This **Federal Register** notice will be available electronically from the HUD User page at *https://www.huduser.gov/portal/datasets/fmr.html.* **Federal Register** notices also are available electronically from *https://www.federalregister.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The United States Housing Act of 1937 (the 1937 Act) provides for assisted housing for ''low-income families'' and ''very low-income families.'' Section 3(b)(2) of the 1937 Act defines ''low-income families'' and ''very low-income families'' as families whose incomes are below 80 percent and 50 percent, respectively, of the area median family income, with adjustments for family size. These income limits are referred to as ''Section 8 income limits'' because of the historical and statutory links with that program, although the same income limits are also used as eligibility criteria for several other federal programs. The 1937 Act specifies conditions under which Section 8 income limits are to be adjusted either on a designated area basis or because of family incomes or housing-cost-to-income relationships that are unusually high or low.[1] Section 8 income limits use the same area definitions as Section 8 Fair Market Rent (FMR) area definitions, which in turn are based on Office of Management and Budget (OMB) metropolitan statistical area definitions.

HUD issues updated area median family income estimates and Section 8 income limits annually. Since Fiscal Year (FY) 2010, HUD has limited the amount that the income limit for an area could increase or decrease.[2] Prior to FY 2010, income limits could not decrease at all and there was no limitation on annual increases. Under the current methodology, HUD does not allow income limits to decrease by more than 5 percent from the prior year's level and does not allow income limits to increase by more than the higher of 5 percent or twice the change in the national median family income.

There are several reasons for these limits on increases and decreases. First, HUD's calculation of area median family income estimates is based on survey data from the Census Bureau's American Community Survey (ACS). Survey estimates of income are subject to measurement error and may fluctuate from year to year even when the true median income for a given area is unchanged. The limits on increases and decreases ensure that outlier estimates of area median family income changes do not cause undue administrative burden or negatively impact program participants through wildly fluctuating income limit levels.

Second, several programs, most notably the Low-Income Housing Tax Credit (LIHTC), use Section 8 income limits to determine eligibility and rent levels for low-income households. By limiting decreases in income limits to no more than 5 percent, HUD helps ensure the financial viability of affordable housing properties.[3] By limiting increases in income limits, HUD decreases the burden on low-income households who may face large rent increases resulting from higher income limits.

II. Determination of the Limit (Cap) on Annual Income Limit Increases

This notice announces a change to the FY 2010 criteria for determining the maximum possible increase in income limits. For FY 2024 income limits and thereafter, HUD intends to set the maximum possible increase in income limits at the higher of five percent or

[1] The 1937 Act is codified at 42 U.S.C. 1437a.

[2] *Final Notice on Ending the ''Hold Harmless'' Policy in Calculating Section 8 Income Limits Under the United States Housing Act of 1937,* 75 FR 27564 (May 17, 2010).

[3] Effective income limits for properties financed with Low Income Housing Tax Credits may not decrease once the properties are placed in service. However, the viability of future properties and properties under development may suffer if the income limit decreases before the property is placed in service.

twice the change in national median family income, with an absolute cap of ten percent. HUD believes that this adjustment to the current methodology will align the cap rule with its intended purpose in high income-growth periods. In such periods, doubling the year-to-year change in national median family income produces a cap that is significantly higher than the upper range of income growth experienced by areas while limiting the possibility of overly burdensome rent increases for LIHTC tenants.

Additionally, HUD is formally establishing the definition of ''national median family income'' used in the calculation of the cap in income limit increases. From FY 2010 to FY 2014 HUD used an estimate of national median family income based on the ACS estimate of national family income adjusted in part with an inflation adjustment and in part on historical trends in national median family income. From FY 2015 to FY 2021 HUD used estimates of ACS national median income adjusted with actual and forecast inflation alone. For FY 2022 and FY 2023, HUD used unadjusted estimates of national median family income from the ACS.

For FY 2024 and thereafter, HUD intends to continue calculating the cap on income limit increases using the most recent unadjusted estimates of median family income provided by the Census Bureau via the ACS. Therefore, for FY 2024 income limits, the cap would be based on the change in national median family income from ACS 2021 to ACS 2022 (see the discussion below regarding HUD's income limit release schedule). By continuing to remove inflation adjustments from its cap calculation, HUD is keeping the calculation in line with its purpose of capturing trends in median family income data addressing survey volatility rather than volatility introduced by accelerating or decelerating inflation.

III. ACS Basis for Median Family Incomes and Income Limits Release Schedule

HUD released FY 2023 income limits on May 15, 2023. HUD would ordinarily have based the 2023 income limits on ACS 2020 data. However, the Census Bureau did not release normal ACS 2020 one-year data as a result of difficulties with the ACS data collection during the COVID–19 pandemic. Therefore, HUD elected to ''skip'' 2020 and instead base the FY 2023 income limits on ACS 2021 data. HUD intends to preserve this two-year gap between the vintage of the ACS data and the fiscal year for which the income limits are published. FY 2024 income limits will therefore be based on ACS 2022 data. An exception to this practice may occur in years in which the ACS implements new metropolitan statistical area definitions that HUD has not yet captured in its Fair Market Rent calculations. HUD believes it can implement this two-year gap and still release income limits on or around April 1 of each year.

IV. Request for Comments

While HUD invites comments on any aspect of this notice, HUD is particularly interested in receiving comments in response to the following specific questions:

Question for comment #1: Is a cap of ten percent appropriate for HUD's income limit calculation methodology? If not, is there an alternative cap that would be more appropriate? Would such a cap harm planned or in development LIHTC-financed properties (*i.e.,* do such properties assume rent growth in excess of 10 percent)?

Question for comment #2: In updating its income limits each year, HUD's goal is to allow income limits to rise with prevailing income growth, thus allowing similar numbers of households to be eligible for assistance each year. Many HUD eligible households receive fixed incomes. A number of fixed income programs, such as social security and veteran disability benefits, are adjusted for inflation in a different way than HUD income limits. Have income limits kept pace in your community with other social programs that provide basic income for individuals and households who would also need housing assistance such as elderly, disabled, and homeless veterans? That is, are individuals or families that would have been eligible in previous years now no longer eligible because income limits have not kept pace in your area? Or are more eligible than had been the case previously?

Question for comment #3: In its calculation of income limits, HUD may adjust income limits away from the legislatively defined percentages of Area Median Family Income for places with high and low housing costs relative to Area Median Family Income, or where incomes are otherwise unusually high or low. Currently, beyond the limit on increases and decreases discussed in this notice, HUD also implements high- and low-housing cost adjustments and sets a floor for each State based on the State non-metropolitan median family income (for more information on the current methodology, see *https://www.huduser.gov/portal/datasets/il//il23/IncomeLimitsMethodology-FY23.pdf* as well as HUD's online individual area income limit documentation tool available at *https://www.huduser.gov/portal/datasets/il.html#query_2023*). What other criteria, if any, should HUD use when considering whether to make such adjustments in addition to those in existing policy? For example, should there be a national minimum income limit to reflect a minimum rent needed to operate and maintain rental housing in the lowest cost housing markets? Should the same criteria be used in United States territories?

Question for comment #4: HUD recognizes the tension inherent in the use of an income-based measurement for setting rents, where the costs of operating affordable housing rental properties may grow faster or slower than prevailing incomes, due to a number of factors including, for example, recent rises in insurance costs. For LIHTC property owners, in the past have you raised your rents in LIHTC units to the maximum allowable year-over-year increases? For purposes of HUD better understanding the context of your answers, please indicate the location of the property (*e.g.,* ZIP code, city, or county) to which the answer applies.

○ If yes, why have you done so, and have the increases been adequate to operate and maintain your property?

○ In the years where you raised rents to the maximum allowable amount, did you see any changes in the turnover of your units as compared with turnover in years when you did not raise rents to the maximum allowable amount?

○ If no, what factors do you use in determining how much you raise your rents? In what years have HUD income limit changes been adequate for a LIHTC property to keep up with operating and maintenance costs, and in what years has it not been adequate?

Question for comment #5: Should income limits consider direct measures of costs, such as wages or insurance, instead of, or in addition to, its high housing cost adjustment, recognizing that HUD may currently lack the statutory authority to do so? If so, which specific costs should HUD consider, and which measurements or data would you recommend as a reference?

Question for comment #6: Does HUD's income limits methodology help or hinder the use of Housing Choice Vouchers in LIHTC-financed properties?

To what extent does this impact vary for places with high and low housing costs?

Solomon Greene,

Principal Deputy Assistant Secretary for Policy Development and Research.

[FR Doc. 2024–00279 Filed 1–9–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7092–N–06]

Privacy Act of 1974; System of Records

AGENCY: Office of Public Indian Housing, HUD.

ACTION: Notice of a rescindment of a system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Housing and Urban Development (HUD), the Office of Public Indian Housing, is issuing a public notice of its intent to rescind the Grants Interface Management System (GIMS) because the system was decommissioned by the Office of Chief Information Officer in 2022.

DATES: Comments will be accepted on or before February 9, 2024. This proposed action will be effective immediately upon publication.

ADDRESSES: You may submit comments, identified by one of the following methods:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; The Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White, Chief Privacy Officer, 451 Seventh Street SW, Room 10139; Washington, DC 20410; telephone number (202) 708–3054 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION: The Grants Interface Management System (GIMS) was created to receive grant applications from the *Grants.gov* portal. HUD used this system as the repository for the electronic application received. Paper Records were typically stored in locked cabinets and limited to those personnel who service the records. Records are no longer maintained by HUD and have run the record retention period. The records were wiped from the system.

SYSTEM NAME AND NUMBER:

Grants Interface Management System (GIMS), P017.

HISTORY:

The previously published notice in the **Federal Register** [Docket Number FR–5130–N–09], on August 2, 2007, 72 FR 42423.

Ladonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2024–00276 Filed 1–9–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7092–N–05]

Privacy Act of 1974; System of Records

AGENCY: Office of Public and Indian Housing, HUD.

ACTION: Notice of a rescindment of a system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Housing and Urban Development (HUD), the Office of Public and Indian Housing, Office of Public Housing and Voucher Programs, is issuing a public notice of its intent to rescind the Disaster Information System (DIS) because the requirement for the Disaster Housing Assistance Program (DHAP) which ended in 2011.

DATES: Comments will be accepted on or before February 9, 2024. This proposed action will be effective immediately upon publication.

ADDRESSES: You may submit comments, identified by one of the following methods:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; The Executive Secretariat; 451 Seventh Street SW, Room 10139, Washington, DC 20410–0001.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White, Chief Privacy Officer, 451 Seventh Street SW, Room 10139, Washington, DC 20410; telephone number (202) 708–3054 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION: The Disaster Information System (DIS) was used for program implementation activities related to the Disaster Housing Assistance Program (DHAP) case management services. DHAP is a Federal Emergency Management Agency (FEMA) pilot grant program to provide temporary rental subsidies and case management for non-HUD assisted individuals and families displaced by Hurricanes Katrina or Rita. HUD was the servicing agency that administers the DHAP program for FEMA. The program ended in 2011 and none of the records are active because the information would not be eligible for existing HUD or FEMA programs and as such would no longer be needed. Records are no longer maintained by HUD and have run the record retention period. The records were wiped from the system. The electronic records were destroyed in accordance with schedule 20 of the National Archives and Records Administration General Records Schedule. System no longer exists in IAS or CSAM.

SYSTEM NAME AND NUMBER:

Disaster Information System (DIS).

HISTORY:

The previously published notice in the **Federal Register** [Docket Number

FR–5693–N–02], on February 6, 2013, at 78 FR 8552.

Ladonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2024–00275 Filed 1–9–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7092–N–07]

Privacy Act of 1974; System of Records

AGENCY: Office of the Chief Financial Officer, HUD.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Housing and Urban Development (HUD), Office of the Chief Financial Officer (OCFO) Accounting Operations Center, is issuing a public notice of its intent to create a new system of records titled, ''HUD Remittance and Debt Collection.'' The purpose of the HUD Remittance and Debt Collection (HRDC) is to provide OCFO with the ability to track debts and remittances.

DATES: Comments will be accepted on or before February 8, 2024. This proposed action will be effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number or by one of the following methods:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: www.privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; The Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001; telephone number (202) 708–3054 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION: HUD, Office of the Chief Financial Officer (OCFO) maintains the ''HUD Remittance and Debt Collection (HRDC)'' system of records. HRDC allows data from multiple sources to be integrated into a single store. It tracks remittances and debts along with debtor information to facilitate debt servicing and posting transactions in the general ledger. Information is collected from multiple sources. OCFO Accounting Operations Center collects via encrypted email, paper/mail, official form (sent via mail/encrypted email), and/or federal (public) information system. The gathered researched data is then entered into the Remittance Management and Debt Tracking database.

The Debt Tracking sources are Program Office Action Officials (Repayment Agreements), Office of the Inspector General, District Courts (Judgment in a Criminal Case), and the Public Access to Court Electronic Records (PACER) System.

The Remittance Management sources are Treasury's Collection Information Repository (CIR) which includes Fedwire—Federal Reserve Bank of New York, Electronic Check Processing (ECP)—Lockboxes, and *Pay.gov*; and Treasury's Intra-governmental Payments and Collections (IPAC) System.

SYSTEM NAME AND NUMBER:

HUD Remittance and Debt Collection (HRDC), HUD/CFO–05.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the HUD OCFO, Accounting Operations Center, 307 W 7th St., Suite 1000, Fort Worth, TX 76102–5100.

SYSTEM MANAGER(S):

Mary L. Dominguez, Director, Office of the Chief Financial Officer, Accounting Operations Center, 307 W 7th St., Suite 1000, Fort Worth, TX 76102–5100; Phone (817) 978–5669.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Debt Collection Act of 1982, Public Law 97–365, 96 Stat. 1749 (1982), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701–3720E (original version at Pub. L. 104–134, 110 Stat. 132 (1996)), the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001–3308 (original version at Pub. L. 101–647, 104 Stat. 4789 (1990)) and chapter 31 of title 44, United States Code, and HUD Debt Collection Handbook, 1900.25 Rev–5.

PURPOSE(S) OF THE SYSTEM:

The HRDC database allows HUD OCFO to track remittances and debts. OCFO Accounting Operations Centers collects and maintains debtors' information to locate and correspond with them to collect/resolve their debts. The information is used to perform legal, financial, and administrative services associated with the collection of debts due to the United States, ultimately posting to debtor accounts (general ledger) and for financial reporting.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals or grantees that have been adjudicated to owe a debt or criminal restitution to the United States.

CATEGORIES OF RECORDS IN THE SYSTEM:

Debtor's full name, social security number (SSN), Home address and telephone number.

RECORD SOURCE CATEGORIES:

The Debt Tracking sources are Program Office Action Officials (Repayment Agreements), Office of the Inspector General (Form 15–G), District Courts (Judgment in a Criminal Case), and the Public Access to Court Electronic Records (PACER) System.

The Remittance Management sources are Treasury's Collection Information Repository (CIR) which includes Fedwire—Federal Reserve Bank of New York, Electronic Check Processing (ECP)—Lockboxes, and *Pay.gov*; and Treasury's Intra-governmental Payments and Collections (IPAC) System.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

(1) To the Department of Treasury, Bureau of Fiscal Service, who provides debt and cash collection services for HUD as follows:

(a) *Administrative Offset (Debt Collection):* offsets Federal tax refund payments and non-tax payments certified for disbursement to the debtor to recover a delinquent debt.

(b) *Cross-servicing (Debt Collection):* pursues recovery of delinquent debts on behalf of Federal agencies using debt collection tools authorized by statute,

such as private collection agencies, administrative wage garnishment, or public dissemination of an individual's delinquent indebtedness; or any other legitimate debt collection purpose.

(2) To the Department of Treasury, Internal Revenue Services (IRS) for the purposes of reporting canceled debt on form IRS 1099–C.

(3) To appropriate agencies, entities, and persons when (1) HUD suspects or has confirmed that there has been a breach of the system of records, (2) HUD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HUD's (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(4) To another Federal agency or Federal entity, when HUD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

(5) To appropriate Federal, State, local, tribal, or other governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforce civil or criminal laws, when such records, either alone or in conjunction with other information, indicate a violation or potential violation of law.

(6) To a court, magistrate, administrative tribunal, or arbitrator in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, mediation, or settlement negotiations; or in connection with criminal law proceedings; when HUD determines that use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where HUD has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

(7) To any component of the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when HUD determines that the use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where the Department of Justice or agency conducting the litigation has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

(8) To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract, service, grant, cooperative agreement, or other agreement with HUD, when necessary to accomplish an agency function related to a system of records. Disclosure requirements are limited to only those data elements considered relevant to accomplishing an agency function.

(9) To a congressional office from the record of an individual, in response to an inquiry from the congressional office made at the request of that individual.

Pursuant to 31 U.S.C. 3711(e) that information contained in this system of records may also be disclosed to a consumer reporting agency when trying to collect a claim owed on behalf of the government.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper and Electronic.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Debtor's Full Name, SSN, Home Address, Telephone number, and Assigned Account Number.

POLICIES AND PRACTICIES FOR RETENTION AND DISPOSAL OF RECORDS:

Record retention is in conformance with National Archives and Records Administration (NARA) General Records Schedule (GRS) 1.1: Financial Management and Reporting Records; DAA–GRS–2013–0003. Financial transaction records related to procuring goods and services, paying bills, collecting debts and accounting records. Destroy 6 years after final payment or cancellation, but longer if required for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Only authorized users in the OCFO, Accounting Operations Center will have access to system data. Entities outside of the Accounting Operations Center do not have direct access to the database. All OCFO employees are required to complete information systems security training annually and are reminded periodically about policies and procedures in this area.

Other safeguards are implemented. Paper records are stored in locked file cabinets.

Administrative Safeguards: Paper records are stored in locked file cabinets.

Technical Safeguards: Comprehensive electronic records are maintained and stored on a shared drive in an electronic encryption database system. These records can only be accessed based off the user's rights and privileges to the system. Electronic records are stored on the Shared Drive environment, which runs on the Department's network (HUD). This environment complies with the security and privacy controls and procedures as described in the Federal Information Security Management Act (FISMA), National Institute of Standards and Technology (NIST) Special Publications, and Federal Information Processing Standards (FIPS). A valid HSPD–12 ID Credential, access to HUD's LAN, a valid User ID and Password and a Personalized Identification Number (PIN) is required to access the records. These records are restricted to only those persons with a role in the Anti-Harassment Program, having a need to access them in the performance of their official duties.

For Electronic Records (cloud based): Comprehensive electronic records are secured and maintained on a cloud-based software server and operating system that resides in Federal Risk and Authorization Management Program (FedRAMP) and Federal Information Security Management Act (FISMA) Moderate dedicated hosting environment. All data located in the cloud-based server is firewalled and encrypted at rest and in transit. The security mechanisms for handing data at rest and in transit are in accordance with HUD encryption standards.

RECORD ACCESS PROCEDURES:

Individuals requesting records of themselves should address written inquiries to the Department of Housing Urban and Development, 451 7th Street SW, Washington, DC 20410–0001. For verification, individuals should provide their full name, current address, and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4.

CONTESTING RECORD PROCEDURES:

The HUD rule for contesting the content of any record pertaining to the individual by the individual concerned is published in 24 CFR 16.8 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals requesting notification of records of themselves should address written inquiries to the Department of Housing Urban Development, 451 7th Street SW, Washington, DC 20410–0001. For verification purposes, individuals should provide their full name, office or organization where assigned, if applicable, and current address and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

N/A.

HISTORY:

N/A.

LaDonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2024–00277 Filed 1–9–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2023–N087; FXES11140400000–234–FF04E00000]

Restoration Planning To Address 1999 Oregon-Washington Coast Mystery Oil Spill

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to conduct restoration planning.

SUMMARY: Notice is hereby given of the trustees' (Department of the Interior, and Washington Department of Fish and Wildlife) intent to proceed with restoration planning actions to address injuries to natural resources resulting from the discharge of oil associated with a 1999 mystery spill along the northern Oregon and southern Washington coastline. The purpose of this restoration planning effort is to assess injuries to natural resources resulting from the spill and develop and implement a plan for the restoration of these injured resources.

FOR FURTHER INFORMATION CONTACT: For further information, contact the following trustee representatives: Mike Szumski (U.S. Fish and Wildlife Service), via email at *Mike_Szumski@fws.gov* or via phone at 541–867–4550, or Donald Noviello (Washington Department of Fish and Wildlife), via email at *Donald.Noviello@dfw.wa.gov* or via phone at 360–280–9376. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

On March 4, 1999, Federal and State natural resource agencies received reports of tarballs and oiled birds coming ashore on beaches in northern Oregon and southern Washington. The event lasted several days, during which response crews collected the carcasses of 272 seabirds, primarily rhinoceros auklets (*Cerorhinca monocerata*), Cassin's auklets (*Ptychoramphus aleuticus*), common murres (*Uria aalge*), and northern fulmars (*Fulmarus glacialis*). At the time, the trustees were responding to the *New Carissa* oil spill, which had occurred 120 miles to the south, near Waldport, Oregon. The *New Carissa* was initially suspected as the source of the spill, but chemical analysis of tarballs and oiled bird feathers indicated that the oil in the northern Oregon and southern Washington area did not match the *New Carissa* source samples. The vessel responsible for the spill was never identified. Therefore, we are referring to the northern Oregon/southern Washington spill as the Oregon-Washington Coast Mystery Spill (or incident).

Under the Oil Pollution Act of 1990 (OPA; 33 U.S.C. 2701 *et seq.*), and in accordance with the provisions of regulations in title 15 of the Code of Federal Regulations (CFR) at §§ 990.42 and 990.44 (15 CFR 990.42 and 990.44), the trustees are initiating a natural resource damage assessment (NRDA), which will include injury assessment and restoration planning for the incident.

The purpose of the OPA is to make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge of oil. Pursuant to section 1006(b) of OPA (33 U.S.C. 2706(b)), the Department of the Interior (U.S. Fish and Wildlife Service) and the State of Washington (Washington Department of Fish and Wildlife) are joint trustees (trustees) for natural resources injured by the incident. Per section 1006 of OPA (33 U.S.C. 2706), the trustees are authorized to assess the type and extent of injury to natural resources from an oil spill and then develop a plan that will restore injured resources back to baseline, a process known as restoration planning. With this **Federal Register** notice, the trustees announce their intent to assess the injuries and damages to natural resources caused by the incident and prepare a plan for the restoration of those resources (damage assessment/restoration plan).

The NRDA process will identify and quantify the nature and extent (both temporal and spatial) of injuries to natural resources and resource services arising out of the incident, and enable the trustees to develop plans for the restoration, replacement, or rehabilitation of those injured resources, or for the acquisition of equivalent resources or resource services. The assessment will be conducted pursuant to the regulations for NRDA at 15 CFR part 990. The NRDA will address natural resources and resource services, primarily bird injury, along the northern Oregon and southern Washington coastline for which injuries attributable to the incident have been, or can be, determined.

Section 1006 of the OPA, 33 U.S.C. 2706, authorizes the trustees to seek damages from the responsible party to pay for the implementation of the restoration plan. In the event that a viable responsible party cannot be identified, the trustees are authorized (33 U.S.C. 1321) to seek funding for natural resource damage claims for damage costs from the Oil Spill Liability Trust Fund (OSLTF), which is administered by the U.S. Coast Guard National Pollution Funds Center (Center). The trustees are proceeding in accordance with the regulations for NRDA at 15 CFR part 990, and plan to seek funding from the Center for costs associated with the Oregon-Washington Coast Mystery Spill NRDA and restoration.

Determination of Jurisdiction

The trustees have made the following determinations pursuant to 15 CFR 990.41 and 990.42:

1. A spill of undetermined volume began on or about March 4, 1999, into the waters of the Pacific Ocean, off the coasts of northern Oregon and southern Washington. This occurrence constituted an ''incident'' within the meaning of 15 CFR 990.30.

2. The incident was not permitted under a permit issued under Federal, State, or local law; was not from a public vessel; and was not from an onshore facility subject to the Trans-Alaska Pipeline Authority Act (43 U.S.C. 1651 *et seq.*).

3. Oil discharged during the incident adversely affected marine and shoreline habitats, and wildlife. Consequently, natural resources under the trusteeship of the trustees have been injured as a result of the incident.

4. As a result of the foregoing determinations, the trustees have jurisdiction to pursue restoration under the OPA.

Determination To Conduct Restoration Planning

The trustees have determined, pursuant to 15 CFR 990.42(a), that:

1. Pre-assessment data collected and analyzed pursuant to 15 CFR 990.43 demonstrate that injuries to a wide variety and number of seabirds have resulted from the incident, including marbled murrelets (*Brachyramphus marmoratus,* a species listed as threatened under the Endangered Species Act (16 U.S.C. 1531 *et seq.*)). Specifically, 272 dead seabirds of various species were collected during the incident. The trustees plan to undertake additional assessment activities to determine the total number of birds injured and services lost from the incident.

2. Response actions during cleanup have not adequately addressed the injuries and lost services resulting from the incident. Response efforts consisted of cleaning up oil stranded along affected beaches and the collection of injured birds. These efforts reduced the magnitude and duration of impacts to shoreline habitats and wildlife but did not eliminate all injuries or make restoration unnecessary. Data from numerous oil spills demonstrate that the bird carcasses collected during an oil spill represent only a portion of the birds killed by the oil, suggesting that additional birds likely died as a result of the incident.

3. Assessment procedures are available to estimate total injury, identify appropriate restoration projects, and scale those projects to compensate for the injury. Procedures consist of, but are not limited to, the following.

a. Analysis of mortality data collected during the incident;

b. Analysis of reproductive and demographic parameters of key species;

c. Modeling environmental parameters such as historical winds and currents;

d. Analysis of historic seabird population data; and

e. Analysis of habitat information to scale restoration.

4. Feasible restoration alternatives exist to address injuries from the incident. Restoration activities are expected to focus on seabirds. Restoration could include enhancement or protection of seabird nesting habitat through acquisition, predator management, invasive species removal, habitat creation, habitat enhancement, education, or other means. During restoration planning, the trustees evaluate potential projects, determine the scale of restoration actions needed to make the environment and the public whole, and release a draft damage assessment and restoration plan for public review and comment.

Based upon the foregoing determinations, the trustees intend to proceed with restoration planning for this incident.

Administrative Record

The trustees have opened an administrative record (''record'') in compliance with 15 CFR 990.45. The record will include documents relied upon by the trustees during the assessment of natural resource damages being performed in connection with the incident. The public may view the record online at *https://www.cerc.usgs.gov/orda_docs/CaseDetails?ID=1099.*

Opportunity To Comment

Pursuant to 15 CFR 990.14(d), the trustees intend to seek public comment on the draft damage assessment and restoration plan once it is completed. A separate **Federal Register** notice will be issued when the draft damage assessment and restoration plan is available for comment.

Bridget Fahey,

Acting Regional Director—Pacific Region, U.S. Fish and Wildlife Service; Lead Administrative Trustee, Oregon-Washington Coast Mystery Spill Natural Resource Damage Assessment.

[FR Doc. 2024–00348 Filed 1–9–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2023–0252; FXIA16710900000–234–FF09A30000]

Endangered Species; Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species. We issue these permits under the Endangered Species Act (ESA).

ADDRESSES: Information about the applications for the permits listed in this notice is available online at *https://www.regulations.gov.* See **SUPPLEMENTARY INFORMATION** for details.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, by phone at 703–358–2185 or via email at *DMAFR@fws.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), have issued permits to conduct certain activities with endangered and threatened species in response to permit applications that we received under the authority of section 10(a)(1)(A) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

After considering the information submitted with each permit application and the public comments received, we issued the requested permits subject to certain conditions set forth in each permit. For each application for an endangered species, we found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in section 2 of the ESA.

Availability of Documents

The permittees' original permit application materials, along with public comments we received during public comment periods for the applications, are available for review. To locate the application materials and received

comments, go to *https://www.regulations.gov* and search for the appropriate permit number (*e.g.,* 12345C) provided in the following table:

ENDANGERED SPECIES

Permit No.	Applicant	Permit issuance date
82001D	Cherokee Exotic Adventures	April 21, 2022.
83956D	Utica Zoological Society	August 23, 2022.
85065D	Russell Corbett-Detig	December 7, 2022.
PER0038856	Continental Ranch Hunts/Kothman Ranch Co	December 7, 2022.
PER0038858	Continental Ranch Hunts/Kothman Ranch Co	December 7, 2022.
PER0037184	NNNN Operations, LLC	December 8, 2022.
PER0037185	NNNN Operations, LLC	December 8, 2022.
PER0044495	University of California Davis Wildlife Health Center	December 21, 2022.
PER0036502	Safari Game Search Foundation	January 30, 2023.
60450D	Loyd D. Keith, Jr	March 27, 2023.
PER0326840	Browder Lee Graves	April 4, 2023.
PER0054702	USGS Western Ecological Research Center	April 12, 2023.
PER1642140	Memphis Zoo, dba Memphis Zoological Society	April 18, 2023.
PER0884554	Zoological Society of San Diego, DBA San Diego Zoo Wildlife Alliance	May 22, 2023.
PER0092994	International Center for the Preservation of Wild Animals dba The Wilds	May 23, 2023.
PER1992989	Smithsonian National Zoo and Conservation Biology Institute	June 7, 2023.
PER1200907	Fossil Rim Wildlife Center, Inc	June 7, 2023.
PER2209279	Colter Lee Combs	June 8, 2023.
PER2209312	Jamie Combs-Hunter	June 13, 2023.
PER2209131	James Lee Combs	June 13, 2023.
PER2208121	Ryan James Combs	June 13, 2023.
PER0036455	Safari Wild Animal Park	June 20, 2023.
PER0613031	Brent C. Oxley	June 20, 2023.
PER1322675	Scott Swasey	June 29, 2023.
PER0017418	Reid Park Zoological Society	July 20, 2023.
33093D	Amy C. Evans	August 1, 2023.
PER2484762	University of Georgia, College of Veterinary Medicine	August 1, 2023.
PER2499014	Smithsonian National Zoo and Conservation Biology Institute	August 1, 2023.
93301C	Richard Prager	August 3, 2023.
PER2525954	Oregon Zoo	August 7, 2023.
PER3108901	Cincinnati Zoo & Botanical Garden	September 21, 2023.
PER3941571	Alexandria Zoological Park	September 26, 2023.
PER0054384	Smithsonian National Zoo and Conservation Biology Institute	September 28, 2023.
PER0054387	Smithsonian National Zoo and Conservation Biology Institute	September 28, 2023.
PER4095187	Smithsonian National Zoo and Conservation Biology Institute	October 2, 2023.
PER3130634	Fresno Chaffee Zoo Corporation	October 10, 2023.
PER3214118	Milwaukee County Zoological	November 1, 2023.
PER3560967	Smithsonian Institution National Museum of Natural History	November 8, 2023.
PER4459661	Sammy Shaw	December 12, 2023.
PER4459612	Teddy Dickerson	December 12, 2023.

Authority

We issue this notice under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2024–00351 Filed 1–9–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2023–N098; FXES11130200000–245–FF02ENEH00]

Endangered Wildlife; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for a permit to conduct activities intended to recover and enhance endangered species survival. With some exceptions, the Endangered Species Act (ESA) prohibits certain activities that may impact endangered species, unless a Federal permit allows such activity. The ESA also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please submit your written comments by February 9, 2024.

ADDRESSES:

Document availability: Request documents from the contact in the **FOR FURTHER INFORMATION CONTACT** section.

Comment submission: Submit comments by email to *fw2_te_permits@fws.gov.* Please specify the permit application you are interested in by number (*e.g.,* Permit Record No. PER1234567).

FOR FURTHER INFORMATION CONTACT: Marty Tuegel, Supervisor, Environmental Review Division, by phone at 505–248–6651, or via email at *marty_tuegel@fws.gov.* Individuals in the United States who are deaf,

deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

With some exceptions, the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of ''take'' includes hunting, shooting, harming, wounding, or killing, and also such activities as pursuing, harassing, trapping, capturing, or collecting.

The ESA and our implementing regulations in the Code of Federal Regulations (CFR) at title 50, part 17, provide for issuing such permits and require that we invite public comment before issuing permits for activities involving listed species.

A recovery permit we issue under the ESA, section 10(a)(1)(A), authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or enhance the species' propagation or survival. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

Documents and other information submitted with these applications are available for review by any party who submits a request as specified in **ADDRESSES**. Our release of documents is subject to Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552) requirements.

Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild. We invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies. Please refer to the permit record number when submitting comments.

Permit record No.	Applicant	Species	Location	Activity	Type of take	Permit action
PER2817285 ...	Boone, Aaron; San Antonio, Texas.	Golden-cheeked warbler (*Setophaga chrysoparia*), lesser prairie-chicken (*Tympanuchus pallidicinctus*), red-cockaded woodpecker (*Picoides borealis*).	New Mexico, Texas.	Presence/absence surveys, lek surveys.	Harass, harm ...	Renew/Amend.
PER2182165 ...	Ubias, Ryan; Dallas, Texas.	Golden-cheeked warbler (*Setophaga chrysoparia*)	Texas	Presence/absence surveys.	Harass, harm ...	New.
PER4919195 ...	Veni, George; Carlsbad, New Mexico.	Coffin Cave mold beetle (*Batrisodes texanus*), Comal Springs riffle beetle (*Heterelmis comalensis*), Helotes mold beetle (*Batrisodes venyivi*), no common name (*Rhadine exilis*), no common name (*Rhadine infernalis*), Tooth Cave ground beetle (*Rhadine persephone*), Comal Springs dryopid beetle (*Stygoparnus comalensis*), Kretschmarr Cave mold beetle (*Texamaurops reddelli*), Texas hornshell (*Popenaias popeii*), diminutive amphipod (*Gammarus hyalleloides*), Peck's Cave amphipod (*Stygobromus (=Stygonectes) pecki*), Leon Springs pupfish (*Cyprinodon bovinus*), Comanche Springs pupfish (*Cyprinodon elegans*), fountain darter (*Etheostoma fonticola*), Pecos gambusia (*Gambusia nobilis*), Cokendolpher Cave harvestman (*Texella cokendolpheri*), Bee Creek Cave harvestman (*Texella reddelli*), Bone Cave harvestman (*Texella reyesi*), Tooth Cave pseudoscorpion (*Tartarocreagris texana*), Texas blind salamander (*Eurycea rathbuni*), Barton Springs salamander (*Eurycea sosorum*), Austin blind salamander (*Eurycea waterlooensis*), Pecos assiminea snail (*Assiminea pecos*), Noel's amphipod (*Gammarus desperatus*), Koster's springsnail (*Juturnia kosteri*), diamond tryonia (*Pseudotryonia adamantina*), Roswell springsnail (*Pyrgulopsis roswellensis*), phantom springsnail (*Pyrgulopsis texana*), phantom tryonia (*Tryonia cheatumi*), Gonzales tryonia (*Tryonia circumstriata (=stocktonensis)*), Government Canyon Bat Cave meshweaver (*Cicurina vespera*), Madla Cave meshweaver (*Cicurina madla*), Robber Baron Cave meshweaver (*Cicurina baronia*), Government Canyon Bat Cave spider (*Tayshaneta microps*), Tooth Cave spider (*Tayshaneta myopica*).	New Mexico, Texas.	Presence/absence surveys.	Harass, harm, collect.	New.
PER4843810 ...	Gladstone, Nicholas; Austin, Texas.	Golden-cheeked warbler (*Setophaga chrysoparia*)	Texas	Presence/absence surveys.	Harass, harm ...	Amend.
PER5007100 ...	University of Arizona. Pasch Lab; Tucson, Arizona.	Mount Graham red squirrel (*Tamiasciurus fremonti grahamensis*).	Arizona	Capture, handle, tag, monitor, bio-sample.	Harass, harm, capture.	Renew/Amend.

Permit record No.	Applicant	Species	Location	Activity	Type of take	Permit action
PER3115044 ...	Transcon Environmental, Inc.; Mesa, Arizona.	Southwestern willow flycatcher (*Empidonax traillii extimus*).	Arizona, California, Colorado New Mexico, Texas, Utah.	Presence/absence surveys.	Harass, harm ...	Renew/Amend.
PER4948896 ...	Kanye, Zakhiah; Tijeras, New Mexico.	Jemez Mountains salamander (*Plethodon neomexicanus*).	New Mexico	Presence/absence surveys.	Harass, harm ...	New.
PER5034327 ...	New Mexico Department of Game & Fish; Santa Fe, New Mexico.	Lesser prairie-chicken (*Tympanuchus pallidicinctus*) ...	New Mexico	Presence/absence surveys, lek surveys.	Harass, harm ...	Amend.
PER5161122 ...	Olsson; Oklahoma City, Oklahoma.	Fat pocketbook (*Potamilus capax*), northern long-eared bat (*Myotis septentrionalis*), Indiana bat (*Myotis sodalis*), gray bat (*Myotis grisescens*), Ozark big-eared bat (*Corynorhinus (=Plecotus) townsendii ingens*).	Arkansas	Presence/absence surveys, capture, translocate, handle, tag.	Harass, harm, capture.	Amend.
PER5200853 ...	Regan Smith Energy Solutions, Inc.; Oklahoma City, Oklahoma.	Lesser prairie-chicken (*Tympanuchus pallidicinctus*), red-cockaded woodpecker (*Picoides borealis*).	Alabama, Arkansas, Colorado, Florida, Georgia, Kentucky, Kansas, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia.	Presence/absence surveys, lek surveys.	Harass, harm ...	Renew/Amend.
PER5200854 ...	Blanton & Associates, Inc.; Austin, Texas.	Gulf Coast jaguarundi (*Puma yagouaroundi cacomitli*), ocelot (*Leopardus (=Felis) pardalis*), Attwater's greater prairie-chicken (*Tympanuchus cupido attwateri*), golden-cheeked warbler (*Setophaga chrysoparia*), lesser prairie-chicken (*Tympanuchus pallidicinctus*), northern aplomado falcon (*Falco femoralis septentrionalis*), red-cockaded woodpecker (*Picoides borealis*), southwestern willow flycatcher (*Empidonax traillii extimus*), whooping crane (*Grus americana*), Houston toad (*Bufo houstonensis*), Barton Springs salamander (*Eurycea sosorum*), Austin blind salamander (*Eurycea waterlooensis*), Texas blind salamander (*Eurycea rathbuni*), Comal Springs riffle beetle (*Heterelmis comalensis*), Comal Springs dryopid beetle (*Stygoparnus comalensis*), Peck's Cave amphipod (*Stygobromus (=Stygonectes) pecki*), diamond tryonia (*Pseudotryonia adamantina*), Gonzales tryonia (*Tryonia circumstriata (=stocktonensis)*), phantom tryonia (*Tryonia cheatumi*), phantom springsnail (*Pyrgulopsis texana*), Pecos amphipod (*Gammarus pecos*), Pecos assiminea snail (*Assiminea pecos*), diminutive amphipod (*Gammarus hyalleloides*), no common name (*Rhadine exilis*), no common name (*Rhadine infernalis*), Helotes mold beetle (*Batrisodes venyivi*), Cokendolpher Cave harvestman (*Texella cokendolpheri*), Robber Baron Cave meshweaver (*Cicurina baronia*), Madla Cave meshweaver (*Cicurina madla*), Government Canyon Bat Cave meshweaver (*Cicurina vespera*), Government Canyon Bat Cave spider (*Tayshaneta microps*), Tooth Cave spider (*Tayshaneta myopica*), Tooth Cave pseudoscorpion (*Tartarocreagris texana*), Bee Creek Cave harvestman (*Texella reddelli*), Kretschmarr Cave mold beetle (*Texamaurops reddelli*), Tooth Cave ground beetle (*Rhadine persephone*), Bone Cave harvestman (*Texella reyesi*), Coffin Cave mold beetle (*Batrisodes texanus*).	Colorado, Kansas, New Mexico, Oklahoma, Texas.	Presence/absence surveys, lek surveys, capture, anesthetize, bio-sample, tag, salvage.	Harass, harm, capture.	Renew/Amend.

Permit record No.	Applicant	Species	Location	Activity	Type of take	Permit action
PER5201354 ...	Aransas National Wildlife Refuge; Austwell, Texas.	Whooping crane (*Grus americana*)	Alabama, California, District of Columbia, Florida, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Tennessee, Texas, Virginia, Wisconsin.	Capture, biosample, propagation, collect eggs, transport, salvage, educational display, provide health care, reintroduction, rehabilitation, shipment of dead specimens and their parts.	Harass, harm, capture.	Renew/Amend.

Public Availability of Comments

All comments we receive become part of the public record associated with this action. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, National Environmental Policy Act, and Service and Department of the Interior policies and procedures. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

We provide this notice under section 10 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Jeffrey Fleming,

Acting Regional Director, Southwest Region, U.S. Fish and Wildlife Service.

[FR Doc. 2024–00347 Filed 1–9–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[DOI–2023–0023; DS65100000 DWSN00000.000000 24XD4523WS DP.65102]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Interior (DOI, Department) is issuing a public notice of its intent to modify the Privacy Act system of records, INTERIOR/DOI–10, Incident Management, Analysis and Reporting System. DOI is revising this notice to change the title of the system, propose new and modified routine uses, and update all sections of the system notice to accurately reflect the scope of the system. This modified system will be included in DOI's inventory of systems of records.

DATES: This modified system will be effective upon publication. New and modified routine uses will be effective February 9, 2024. Submit comments on or before February 9, 2024.

ADDRESSES: You may send comments identified by docket number [DOI–2023–0023] by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for sending comments.
- *Email: DOI_Privacy@ios.doi.gov.* Include docket number [DOI–2023–0023] in the subject line of the message.
- *U.S. Mail or Hand-Delivery:* Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240.

Instructions: All submissions received must include the agency name and docket number [DOI–2023–0023]. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240, *DOI_Privacy@ios.doi.gov* or (202) 208–1605.

SUPPLEMENTARY INFORMATION:

I. Background

The DOI Office of Law Enforcement and Security (OLES) maintains the INTERIOR/DOI–10, Incident Management, Analysis and Reporting System, as a unified Department-wide law enforcement records management system. This system of records helps DOI protect life and resources, manage law enforcement incidents and investigations, measure performance, meet reporting requirements, and foster public trust through transparent and accountable law enforcement programs. The system also provides the capability to prevent, detect, and investigate known and suspected criminal activity and violations of fish and wildlife laws; transmit information to Federal law enforcement databases and repositories; analyze and prioritize protection efforts; provide information to justify law enforcement funding requests and expenditures; assist in managing visitor use and protection programs; investigate, detain and apprehend those committing crimes on DOI properties, including National Wildlife Refuges, National Parks, and Tribal reservations (for the purpose of this system of

records notice, Tribal reservations include contiguous areas policed by Tribal or Bureau of Indian Affairs (BIA) law enforcement officers) managed by Native American Tribes under BIA; and investigate and prevent visitor accidents and injuries on DOI properties or Tribal reservations. Incident and non-incident data related to criminal activity will be collected in support of law enforcement, homeland security, and security (physical, personnel, suitability, and industrial) activities. This may include data documenting criminal and administrative investigations and other law enforcement activities, use of force and critical incidents, traffic safety, property damage claims, motor vehicle crashes, domestic violence incidents, and information sharing and analysis activities. This notice covers all DOI law enforcement records, investigations, and case files in any medium that are created, collected, maintained, or managed by DOI bureaus and offices, excluding the Office of Inspector General, which maintains its own investigations system of records. DOI law enforcement bureaus and offices include OLES, Office of the Secretary, BIA, Bureau of Land Management, Bureau of Reclamation, the U.S. Fish and Wildlife Service, and the National Park Service. The OLES has Department-wide coordination and oversight responsibilities of law enforcement activities; however, each bureau and office is responsible for managing their records in this system for the administration of their law enforcement programs.

DOI is proposing to change the title of the system of records to INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS) to reflect the modified scope of the system; update the system manager and system location sections; expand on categories of individuals covered by the system, the categories of records and records source categories sections; update authorities for maintenance of the system; update the storage, safeguards, and records retention schedule; update the notification, records access and contesting procedures; and provide general updates in accordance with the Privacy Act of 1974 and Office of Management and Budget (OMB) Circular A–108, *Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act.*

DOI is also changing the routine uses from a numeric to alphabetic list and is proposing to modify existing routine uses to provide clarity and transparency and reflect updates consistent with standard DOI routine uses. The notice of disclosure to consumer reporting agencies in former routine use 13 was moved to the end of this section. Routine use A has been modified to further clarify disclosures to the Department of Justice or other Federal agencies when necessary in relation to litigation or judicial proceedings. Routine use B has been modified to clarify disclosures to a congressional office to respond to or resolve an individual's request made to that office. Routine use H has been modified to expand the sharing of information with territorial organizations in response to court orders or for discovery purposes related to litigation. Routine use I has been modified to include the sharing of information with grantees and shared service providers that perform services requiring access to these records on DOI's behalf to carry out the purposes of the system. Routine use J was slightly modified to allow DOI to share information with appropriate Federal agencies or entities when reasonably necessary to prevent, minimize, or remedy the risk of harm to individuals or the Federal Government resulting from a breach in accordance with OMB Memorandum M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information.* Routine use N was modified to clarify the sharing of information with the news media and the public to assure public safety related to potential or imminent threats to life, health, or property. Routine use P was modified to add the sharing of information when permitted by Federal law, statute, regulation, executive order, and DOI policy. Routine use Q was modified to add shared service providers who may need to access records in order to perform authorized activities on DOI's behalf.

Proposed routine use O allows DOI to share information with the news media and the public where there exists a legitimate public interest in the disclosure of information and it is necessary to preserve the confidence in the integrity of the DOI, demonstrate DOI's commitment to serving the public and the accountability of its officers and employees. Proposed routine use T allows DOI to share information with adjudicative or regulatory agencies when necessary and appropriate to adjudicate decisions affecting individuals who are subjects of investigations or covered by this system notice. Proposed routine use U allows DOI to share information with complainants, victims, family members, and representatives to the extent necessary to provide information on results of investigations or cases or matters they may be involved in. Proposed routine use V allows DOI to share information with an official or employee regarding a matter within that individual's area of responsibility or when relevant and necessary to respond to official inquiries by the Department or other authority. Proposed routine use W allows DOI to share information with Tribal organizations when necessary and relevant under the Indian Self-Determination and Education Assistance Act.

Pursuant to the Privacy Act, 5 U.S.C. 552a(b)(12), DOI may disclose information from this system to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)) to aid in the collection of outstanding debts owed to the Federal Government.

In a Notice of Proposed Rulemaking published separately in the **Federal Register**, DOI is proposing to claim additional exemptions for records maintained in this system pursuant to the Privacy Act of 1974, 5 U.S.C. 552a(k)(1), (k)(3), (k)(5), and (k)(6).

II. Privacy Act

The Privacy Act of 1974, as amended, embodies fair information practice principles in a statutory framework governing the means by which Federal agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to records about individuals that are maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. The Privacy Act defines an individual as a United States citizen or lawful permanent resident. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DOI by complying with DOI Privacy Act regulations at 43 CFR part 2, subpart K, and following the procedures outlined in the Records Access, Contesting Record, and Notification Procedures sections of this notice.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the existence and character of each system of records that the agency maintains and the routine uses of each system. The INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS), system of records notice is published in its entirety below. In accordance with 5

U.S.C. 552a(r), DOI has provided a report of this system of records to the Office of Management and Budget and to Congress.

III. Public Participation

You should be aware your entire comment including your personally identifiable information, such as your address, phone number, email address, or any other personal information in your comment, may be made publicly available at any time. While you may request to withhold your personally identifiable information from public review, we cannot guarantee we will be able to do so.

SYSTEM NAME AND NUMBER:

INTERIOR/DOI–10, DOI Law Enforcement Records Management System (LE RMS).

SECURITY CLASSIFICATION:

Classified and Unclassified.

SYSTEM LOCATION:

Office of Law Enforcement and Security, U.S. Department of the Interior, 1849 C Street NW, Washington, DC 20240; Albuquerque Data Center, 1011 Indian School Road, Northwest, Albuquerque, NM 87104; DOI facilities and data centers; DOI-approved cloud service providers; and DOI bureaus and offices that manage law enforcement programs as identified in the System Manager section below.

SYSTEM MANAGER(S):

(1) Director, Office of Law Enforcement and Security, U.S. Department of the Interior, 1849 C Street NW, Mail Stop Room 3411, Washington, DC 20240.

(2) Bureau of Indian Affairs, Office of Justice Services, 1849 C Street NW, Mail Stop MS–3662–MIB, Washington, DC 20240.

(3) Director, Office of Law Enforcement and Security, Bureau of Land Management, 1849 C Street NW, Mail Stop: Fifth Floor, Room #5618, Washington, DC 20240.

(4) Bureau of Reclamation, Policy and Programs Directorate, Denver Security Division, Supervisory Security Specialist, P.O. Box 25007, Denver, CO 80225.

(5) Director, Office of Law Enforcement, U.S. Fish and Wildlife Service, MS: OLE, 5275 Leesburg Pike, Falls Church, Virginia 22041.

(6) National Park Service, Program Manager, National Park Service Law Enforcement, Security, and Emergency Services, U.S. Department of the Interior, 1849 C Street NW, Mailstop 2560, Washington, DC 20240.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Uniform Federal Crime Reporting Act, 28 U.S.C. 534; Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108–458); Homeland Security Act of 2002 (Pub. L. 107–296); USA PATRIOT ACT of 2001 (Pub. L. 107–56); USA PATRIOT Improvement Act of 2005 (Pub. L. 109–177); Tribal Law and Order Act of 2010 (Pub. L. 111–211); Fish and Wildlife Act of 1956, 16 U.S.C. 742a–742j–l; Refuge Recreation Act, 16 U.S.C. 460k–460k–4; Endangered Species Act of 1973, 16 U.S.C. 1531–1544; Lacey Act, 18 U.S.C. 42; Executive Order 14074: Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, May 25, 2022; Homeland Security Presidential Directive 7—Critical Infrastructure Identification, Prioritization, and Protection; Homeland Security Presidential Directive 12—Policy for a Common Identification Standard for Federal Employees and Contractors; Criminal Intelligence Systems Operating Policies, 28 CFR part 23; Law and Order, 25 CFR part 10, Indian Country Detention Facilities and Programs; Courts of Indian Offenses and Law and Order Code, 25 CFR part 11; and Indian Country Law Enforcement, 25 CFR part 12.

PURPOSE(S) OF THE SYSTEM:

The LE RMS system of records is an incident management and reporting system used to prevent, detect, and investigate known and suspected criminal activity; protect natural and cultural resources; capture, integrate and share law enforcement and related information and observations from other sources; measure performance of law enforcement programs and management of emergency incidents; meet reporting requirements; foster public trust through transparent and accountable law enforcement programs; transmit information to Federal law enforcement databases and repositories; analyze and prioritize protection efforts; assist in managing visitor use and protection programs; enable the ability to investigate, detain and apprehend those committing crimes on DOI properties or Tribal reservations; and to investigate and prevent visitor accident incidents and injuries on DOI properties or Tribal reservations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered in the system include current and former Federal employees, consultants, contractors, subcontractors, and grantees; Federal, Tribal, State, local and foreign law enforcement officers and officials; witnesses, complainants, informants, and parties who have been identified as potential subjects or parties to an investigation; and individuals or entities who are or have been the subject of investigations and other individuals associated with alleged violation(s) of Federal law, regulations, or rules of conduct.

Additionally, this system contains information regarding members of the general public, including individuals and/or groups of individuals involved with law enforcement incidents involving Federal assets or occurring on public lands and Tribal reservations, such as witnesses, individuals making complaints, individuals involved in reports of traffic accidents on DOI managed properties and Tribal reservations, and individuals being investigated or arrested for criminal or traffic offenses or involved in certain types of non-criminal incidents.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system includes law enforcement incident reports, law enforcement personnel records, and law enforcement training records, which contain the following information: names, home addresses, work addresses, telephone numbers, email addresses and other contact information, emergency contact information; dates of birth, place of birth; gender, ethnicity and race; biometric information such as physical or distinguishing attributes of an individual; Social Security numbers, driver's license numbers, passport numbers, identification numbers for non-citizens, Federal Bureau of Investigation (FBI) Universal Control Numbers, State identification numbers; Tribal identification numbers or other Tribal enrollment data; vehicle identification numbers, license plate numbers, boat registration or hull number; work history, educational history, affiliations, and other related data; criminal history, arrest and incarceration records, prior contacts with law enforcement, and records related to the transport of individuals.

Incident and investigation records related to or documenting criminal and administrative investigations and other law enforcement activities, use of force, critical incidents, traffic safety, property damage claims, motor vehicle crashes, domestic violence incidents, information sharing and analysis, and other law enforcement activities may include, but are not limited to: incident reports, case files and notes; attachments such as photos or digital images, video recordings from body worn cameras, vehicle mounted

cameras, hand-held cameras or devices, closed circuit television or other surveillance including sketches; medical reports; correspondence, email and text messages; letters, memoranda, and other documents citing complaints of alleged criminal, civil, or administrative misconduct; reports of investigations with related statements, affidavits or records obtained during investigations; prior criminal or noncriminal records of individuals related to investigations; reports from or to other law enforcement bodies; information obtained from informants; identifying information on suspects and allegations made against suspects; and public source materials; and information concerning response to and outcome of incidents and investigations.

Records in this system also include information concerning Federal civilian employees and contractors, Federal, Tribal, State, and local law enforcement officers and may contain information regarding an officer's name, contact information, station and career history, firearms qualifications, medical history, background investigation and status, date of birth, and Social Security number. Information regarding officers' equipment, such as firearms, electronic control devices, body armor, vehicles, computers and special equipment related skills is also included in this system.

RECORD SOURCE CATEGORIES:

Sources of information in the system include current and former DOI officials and employees; officials of Federal, State, Tribal, local, and foreign law enforcement and non-law enforcement agencies and organizations including the FBI and Department of Justice; subjects of investigations, complainants, informants, suspects, victims, witnesses, private citizens, and visitors to Federal properties; photos and recordings captured from law enforcement body worn cameras, vehicle mounted cameras, hand-held cameras or other devices, closed circuit television, or other surveillance methods; and public source materials. Records may also be obtained from other internal and external sources such as personnel, training or other systems of records, DOI personnel, contractors, and other parties for matters related to the maintenance of this system, and information sharing partners.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DOI as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including Offices of the U.S. Attorneys, or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

(1) DOI or any component of DOI;

(2) Any other Federal agency appearing before the Office of Hearings and Appeals;

(3) Any DOI employee or former employee acting in their official capacity;

(4) Any DOI employee or former employee acting in their individual capacity when DOI or DOJ has agreed to represent that employee or pay for private representation of the employee; or

(5) The United States Government or any agency thereof, when DOJ determines that DOI is likely to be affected by the proceeding.

B. To a congressional office when requesting information on behalf of, and at the request of, the individual who is the subject of the record, to the extent the records have not been exempted from disclosure pursuant to 5 U.S.C. 552a(j) and (k).

C. To the Executive Office of the President in response to an inquiry from that office made at the request of the subject of a record or a third party on that person's behalf, or for a purpose compatible with the reason for which the records are collected or maintained, to the extent the records have not been exempted from disclosure pursuant to 5 U.S.C. 552a(j) and (k).

D. To any criminal, civil, or regulatory law enforcement authority (whether Federal, State, territorial, local, Tribal or foreign) when a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature, and the disclosure is compatible with the purpose for which the records were compiled.

E. To an official of another Federal agency to provide information needed in the performance of official duties related to reconciling or reconstructing data files or to enable that agency to respond to an inquiry by the individual to whom the record pertains.

F. To Federal, State, territorial, local, Tribal, or foreign agencies that have requested information relevant or necessary to the hiring, firing or retention of an employee or contractor, or the issuance of a security clearance, license, contract, grant or other benefit, when the disclosure is compatible with the purpose for which the records were compiled.

G. To representatives of the National Archives and Records Administration (NARA) to conduct records management inspections under the authority of 44 U.S.C. 2904 and 2906.

H. To State, territorial and local governments and Tribal organizations to provide information needed in response to court order and/or discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

I. To an expert, consultant, grantee, shared service provider, or contractor (including employees of the contractor) of DOI that performs services requiring access to these records on DOI's behalf to carry out the purposes of the system.

J. To appropriate agencies, entities, and persons when:

(1) DOI suspects or has confirmed that there has been a breach of the system of records;

(2) DOI has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DOI (including its information systems, programs, and operations), the Federal Government, or national security; and

(3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DOI's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

K. To another Federal agency or Federal entity, when DOI determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in:

(1) responding to a suspected or confirmed breach; or

(2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

L. To the Office of Management and Budget (OMB) during the coordination and clearance process in connection with legislative affairs as mandated by OMB Circular A–19.

M. To the Department of the Treasury to recover debts owed to the United States.

N. To the news media and the public in support of the law enforcement activities, including obtaining public

assistance with identifying and locating criminal suspects and lost or missing individuals, providing the public with alerts about dangerous individuals, and assuring public safety related to potential or imminent threats to life, health, or property.

O. To the news media and the public (including select members of the public, such as victims' family members) when:

(1) Release of the specific information would not constitute an unwarranted invasion of personal privacy, and

(2) There exists a legitimate public interest in the disclosure of the information and its release would:

(a) Preserve public confidence and trust in the integrity of DOI;

(b) Demonstrate DOI's commitment to serving the public and achieving its mission; or

(c) Reveal the accountability of DOI's officers, employees, or individuals covered by the system.

P. To the Department of Justice, the Department of Homeland Security, or other Federal, State, Tribal, and local law enforcement agencies for the purpose of information exchange on law enforcement activity or as required by Federal law, statute, regulation, executive order, and DOI policy.

Q. To agency contractors, grantees, shared service providers, or volunteers for DOI or other Federal Departments who have been engaged to assist the Government in the performance of a contract, grant, cooperative agreement, or other activity related to this system of records and who need to have access to the records in order to perform the activity.

R. To any of the following entities or individuals, for the purpose of providing information on traffic accidents, personal injuries, or the loss or damage of property:

(1) Individuals involved in such incidents;

(2) Persons injured in such incidents;

(3) Owners of property damaged, lost or stolen in such incidents; and/or

(4) These individuals' duly verified insurance companies, personal representatives, administrators of estates, and/or attorneys.

The release of information under these circumstances should only occur when it will not interfere with ongoing law enforcement proceedings; risk the health or safety of an individual; reveal the identity of an information or witness that has received an explicit assurance of confidentiality; or reveal protected or confidential law enforcement techniques and practices. Social Security numbers and Tribal identification numbers should not be released under these circumstances unless the Social Security number or Tribal identification number belongs to the individual requester.

S. To any criminal, civil, or regulatory authority (whether Federal, State, territorial, local, Tribal or foreign) for the purpose of providing background search information on individuals for legally authorized purposes, including but not limited to background checks on individuals residing in a home with a minor or individuals seeking employment opportunities requiring background checks.

T. To an administrative forum, including ad hoc forums, which may include an Administrative Law Judge, public hearings/proceedings, or other established adjudicatory or regulatory agencies (*e.g.,* the Merit Systems Protection Board, the National Labor Relations Board), or other agencies with similar or related statutory responsibilities, where necessary to adjudicate decisions affecting individuals who are the subject of investigations and/or who are covered by this system, to affect any necessary remedial actions, disciplinary or other appropriate personnel action, or other law enforcement related actions, where appropriate.

U. To complainants, victims, decedent's estate representative, or family members of victims, and their attorney or legal representative, to the extent necessary to provide such persons with information concerning the results of an investigation or case arising from the matters of which they complained and/or of which they were the subject of law enforcement activity.

V. To a former official or employee of the Department when relevant and necessary to respond to an official inquiry by a Federal, State, or local government entity or professional licensing authority, in accordance with applicable Department regulations; or to facilitate communications with a former official or employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance regarding a matter within that person's former area of responsibility.

W. To Tribal organizations when necessary and relevant to the assumption of a program under Public Law 93–638, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records are maintained in information systems or stored on magnetic disc, tape or digital media. Paper records are maintained in file cabinets in secure facilities.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by multiple identifiers including Social Security number, first or last name, badge number, address, phone number, vehicle information and physical attributes.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system are retained and disposed of in accordance with Office of the Secretary Records Schedule 8151, Incident, Management, Analysis and Reporting System, which was approved by the National Archives and Records Administration (NARA) (N1–048–09–5), and other NARA approved bureau or office records schedules. The specific record schedule for each type of record or form is dependent on the subject matter and records series. After the retention period has passed, temporary records are disposed of in accordance with the applicable records schedule and DOI policy. Disposition methods include burning, pulping, shredding, erasing, and degaussing in accordance with Departmental records policy. Permanent records that are no longer active or needed for agency use are transferred to the National Archives for permanent retention in accordance with NARA guidelines.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The records contained in this system are safeguarded in accordance with 43 CFR 2.226 and other applicable security and privacy rules and policies. During normal hours of operation, paper records are maintained in locked file cabinets under the control of authorized personnel. Computer servers on which electronic records are stored are located in secured DOI controlled facilities with physical, technical and administrative levels of security to prevent unauthorized access to the DOI network and information assets. Access granted to authorized personnel is password-protected, and each person granted access to the system must be individually authorized to use the system. A Privacy Act Warning Notice appears on computer monitor screens when records containing information on individuals are first displayed. Data exchanged between the servers and the system is encrypted. Backup tapes are encrypted and stored in a locked and controlled room in a secure, off-site location.

Computerized records systems follow the National Institute of Standards and Technology privacy and security standards as developed to comply with the Privacy Act of 1974, as amended, 5 U.S.C. 552a; Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.;* Federal Information Security Modernization Act of 2014, 44 U.S.C. 3551 *et seq.;* and the Federal Information Processing Standards 199: Standards for Security Categorization of Federal Information and Information Systems. Security controls include user identification, passwords, database permissions, encryption, firewalls, audit logs, and network system security monitoring, and software controls.

Access to records in the system is limited to authorized personnel who have a need to access the records in the performance of their official duties, and each user's access is restricted to only the functions and data necessary to perform that person's job responsibilities. System administrators and authorized users are trained and required to follow established internal security protocols and must complete all security, privacy, and records management training and sign the DOI Rules of Behavior. A Privacy Impact Assessment was conducted to ensure that Privacy Act requirements are met and appropriate privacy controls were implemented to safeguard the personally identifiable information contained in the system.

RECORD ACCESS PROCEDURES:

DOI has exempted portions of this system from the access provisions of the Privacy Act of 1974 pursuant to 5 U.S.C. 552a(j) and (k). DOI will make access determinations on a case-by-case basis.

To the extent that portions of this system are not exempt, an individual requesting access to their records should send a written inquiry to the applicable System Manager identified above. DOI forms and instructions for submitting a Privacy Act request may be obtained from the DOI Privacy Act Requests website at *https://www.doi.gov/privacy/privacy-act-requests.* The request must include a general description of the records sought and the requester's full name, current address, and sufficient identifying information such as date of birth or other information required for verification of the requester's identity. The request must be signed and dated and be either notarized or submitted under penalty of perjury in accordance with 28 U.S.C. 1746. The request must include the specific bureau or office that maintains the record to facilitate location of the applicable records. Requests submitted by mail must be clearly marked ''PRIVACY ACT REQUEST FOR ACCESS'' on both the envelope and letter. A request for access must meet the requirements of 43 CFR 2.238.

CONTESTING RECORD PROCEDURES:

DOI has exempted portions of this system from the amendment provisions of the Privacy Act of 1974 pursuant to 5 U.S.C. 552a(j) and (k). DOI will make amendment determinations on a case-by-case basis.

To the extent that portions of this system are not exempt, an individual requesting amendment of their records should send a written request to the applicable System Manager as identified above. DOI instructions for submitting a request for amendment of records are available on the DOI Privacy Act Requests website at *https://www.doi.gov/privacy/privacy-act-requests.* The request must clearly identify the records for which amendment is being sought, the reasons for requesting the amendment, and the proposed amendment to the record. The request must include the requester's full name, current address, and sufficient identifying information such as date of birth or other information required for verification of the requester's identity. The request must be signed and dated and be either notarized or submitted under penalty of perjury in accordance with 28 U.S.C. 1746. Requests submitted by mail must be clearly marked ''PRIVACY ACT REQUEST FOR AMENDMENT'' on both the envelope and letter. A request for amendment must meet the requirements of 43 CFR 2.246.

NOTIFICATION PROCEDURES:

DOI has exempted portions of this system from the notification procedures of the Privacy Act of 1974 pursuant to 5 U.S.C. 552a(j) and(k). DOI will make notification determinations on a case-by-case basis.

To the extent that portions of this system are not exempt, an individual requesting notification of the existence of records about them should send a written inquiry to the applicable System Manager as identified above. DOI instructions for submitting a request for notification are available on the DOI Privacy Act Requests website at *https://www.doi.gov/privacy/privacy-act-requests.* The request must include a general description of the records and the requester's full name, current address, and sufficient identifying information such as date of birth or other information required for verification of the requester's identity. The request must be signed and dated and be either notarized or submitted under penalty of perjury in accordance with 28 U.S.C. 1746. Requests submitted by mail must be clearly marked ''PRIVACY ACT INQUIRY'' on both the envelope and letter. A request for notification must meet the requirements of 43 CFR 2.235.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system contains law enforcement and investigatory records that are exempt from certain provisions of the Privacy Act of 1974, 5 U.S.C. 552a(j) and (k). In accordance with 5 U.S.C. 553(b), (c) and (e), DOI has promulgated rules separately in the **Federal Register** to claim exemptions for this system pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(5), and (k)(6).

Pursuant to 5 U.S.C. 552a(j)(2), DOI has exempted this system from the provisions of the Privacy Act except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i). DOI has also exempted portions of this system from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a (k)(1), (k)(2), (k)(3), (k)(5), and (k)(6). Additionally, when this system receives a record from another system that is exempted in that source system under 5 U.S.C. 552a(j) or (k), DOI claims the same exemptions for those records that are claimed in the primary systems of records from which they originated and any additional exemptions set forth here.

HISTORY:

79 FR 31974 (June 3, 2014); modification published at 86 FR 50156 (September 7, 2021).

Teri Barnett,

Departmental Privacy Officer, Department of the Interior.

[FR Doc. 2024–00325 Filed 1–9–24; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AK_FRN_MO4500173007]

Notice of New Recreation Fees on Public Lands in the Central Yukon Field Office, Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of new recreation fees.

SUMMARY: Pursuant to applicable provisions of the Federal Lands Recreation Enhancement Act (FLREA), the Bureau of Land Management (BLM), Central Yukon Field Office, intends to

establish recreation fees for expanded amenities at Coldfoot, Alaska.

DATES: All new fees will take effect on July 8, 2024.

ADDRESSES: The business plan and information concerning the proposed fees may be reviewed at the Fairbanks District Office Public Room, 222 University Avenue, Fairbanks, AK 99709; or online at *www.blm.gov/programs/recreation/permits-and-fees/business-plans.*

FOR FURTHER INFORMATION CONTACT: William Hedman, Acting Field Manager, Central Yukon Field Office, telephone: (907) 474–2375, email: *whedman@blm.gov.*

Individuals in the United States who are deaf, blind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Mr. La Marr. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The FLREA directs the Secretary of the Interior to publish a six-month advance notice in the **Federal Register** whenever new recreation fee areas are established.

The BLM intends to establish recreation fees for expanded amenities at the Coldfoot Cabin at milepost (MP) 175 along the Dalton Highway. The Central Yukon Field Office administers the BLM utility corridor and adjacent lands along the Dalton Highway from MP 56 to just south of MP 300 for recreation under the Dalton Highway Special Recreation Management Area. The Coldfoot Cabin is currently used administratively during the summer months and will be made available for rent as a public use cabin during the winter months.

The Coldfoot Cabin qualifies as a site where visitors can be charged an ''Expanded Amenity Recreation Fee'' under FLREA (16 U.S.C. 6802(g)). The cabin provides toilet facilities, refuse containers, picnic tables, access roads and parking, visitor protection, and fee collection by management personnel.

Effective July 8, 2024, the Central Yukon Field Office will initiate new fee collection at the facility unless the BLM publishes a **Federal Register** notice to the contrary. The BLM will begin collecting fees of $42 per night for cabin site rentals.

In accordance with BLM recreation fee program policy, the Central Yukon Field Office has developed a recreational fee business plan that is available as listed in the **ADDRESSES** section. The business plan explains the fee collection process and outlines how fees will be used at the fee site. Any future adjustments in the fee amounts would be handled in accordance with the business plan, with public notice before any fee increase.

The BLM notified and involved the public at each stage of the planning process for the new fees. The BLM posted written notices of the proposed fees at the fee site on April 20, 2023. It announced a 30-day public comment period on the draft business plan on April 20, 2023, through a BLM news release, BLM social media, and the BLM website. The draft business plan was publicly available for review and comment at the BLM Fairbanks District Office and on the BLM Alaska business plan website from April 20, 2023, to May 20, 2023.

(Authority: 16 U.S.C. 6803(b) and 43 CFR 2933)

Erika Reed,

BLM Alaska Acting State Director.

[FR Doc. 2024–00365 Filed 1–9–24; 8:45 am]

BILLING CODE 4331–10–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–VRP–WS–NPS37177; PPWOVPADW0—244—PPMPRLE1Y.LB0000]

Evaluation and Authorization Procedures for Fixed Anchors and Fixed Equipment in National Park Service Wilderness Areas—Extension of Public Comment Period

AGENCY: National Park Service, Interior.

ACTION: Notice of availability; extension of public comment period.

SUMMARY: The National Park Service extends the public comment period for a draft Wilderness Stewardship Reference Manual 41 guidance governing the management of climbing activities in wilderness areas in the National Park System. Extending the comment period will allow more time for the public to review the proposal and submit comments.

DATES: The public comment period for the draft Wilderness Stewardship Reference Manual 41 guidance that published on November 17, 2023 (88 FR 80333), is extended. We will accept comments received or postmarked on or before 11:59 p.m. MT on January 30, 2024.

ADDRESSES:

Document Availability: The draft guidance is available online at: *https://parkplanning.nps.gov/RM41_fixed_anchors.*

Comment Submission: You may submit written comments by one of the following methods:

- *Electronically: https://parkplanning.nps.gov/RM41_fixed_anchors.*
- *Mail or Hand Deliver to:* Fixed Anchors, National Park Service, 1849 C Street NW, MS–2457, Washington, DC 20240.

Instructions: Comments will not be accepted by fax, email, or in any way other than those specified above. Comments delivered on external electronic storage devices (flash drives, compact discs, etc.) will not be accepted. Bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted.

FOR FURTHER INFORMATION CONTACT: Roger Semler, Wilderness Stewardship Division Manager, National Park Service, (202–430–7615), *fixed_anchors@nps.gov.*

SUPPLEMENTARY INFORMATION: On November 17, 2023, the National Park Service (NPS) published in the **Federal Register** (88 FR 80333) a notice of availability of a draft Wilderness Stewardship Reference Manual 41 guidance governing the management of climbing activities in wilderness areas in the National Park System. The public comment period for this proposal is scheduled to close on Tuesday, January 16, 2024. In order to give the public additional time to review and comment on the proposal, the NPS is extending the public comment period until Tuesday, January 30, 2024. Comments previously submitted on the draft guidance need not be resubmitted.

Michael P. Michener,

Deputy Associate Director, Visitor and Resource Protection, National Park Service.

[FR Doc. 2024–00315 Filed 1–9–24; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–24–001]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: January 18, 2024 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. Nos. 701–TA–589 and 731–TA–1394–1396 (Review)(Forged Steel Fittings (FSF) from China, Italy, and Taiwan). The Commission currently is scheduled to complete and file its determinations and views of the Commission on January 26, 2024.
5. Outstanding action jackets: none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, Supervisory Hearing and Information Officer, 202–205–2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: January 8, 2024.

Sharon Bellamy,

Supervisory and Hearings Information Officer.

[FR Doc. 2024–00464 Filed 1–8–24; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Wage and Hour Division

Notice of Approved Agency Information Collection; Information Collection: Nondisplacement of Qualified Workers Under Service Contracts

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA), the Wage and Hour Division (WHD) is providing notice to the public that the WHD sponsored information collection request (ICR) titled ''Nondisplacement of Qualified Workers Under Service Contracts'' has been approved by the Office of Management and Budget (OMB). WHD is notifying the public that the information collection has been approved and is effective immediately through January 31, 2027.

DATES: The OMB approval of the new collection of information is effective immediately with an expiration date of January 31, 2027.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number) or by sending an email to *WHDPRAComments@dol.gov.* Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: The Department of Labor submitted a proposed new information collection titled Nondisplacement of Qualified Workers Under Service Contracts (OMB Control Number 1235–0NEW) in conjunction with a proposed rule published in the **Federal Register** on July 15, 2022 (87 FR 42552) and a final rule. On August 16, 2022, OMB filed comment and assigned OMB Control Number 1235–0033 to the proposed collection, directing the agency to address any comments received during the open comment period and resubmit for review at the time the final rule published. The final rule titled ''Nondisplacement of Qualified Workers Under Service Contracts'' published in the **Federal Register** on December 14, 2023 (88 FR 86736). OMB issued a Notice of Action (NOA) on January 3, 2024, approving the collection and providing the expiration of the collection as January 31, 2027, under OMB Control Number 1235–0033.

Section (k) of 5 CFR 1320.11, ''Clearance of Collections of Information in Proposed Rules,'' states: ''After receipt of notification of OMB's approval, instruction to make a substantive or material change to, disapproval of a collection of information, or failure to act, the agency shall publish a notice in the **Federal Register** to inform the public of OMB's decision.'' This notice fulfills the Department's obligation to notify the public of OMB's approval of the information collection request.

Amy Hunter,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2024–00278 Filed 1–9–24; 8:45 am]

BILLING CODE 4510–27–P

NUCLEAR REGULATORY COMMISSION

712th Meeting of the Advisory Committee on Reactor Safeguards (ACRS)

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232(b)), the Advisory Committee on Reactor Safeguards (ACRS) will hold meetings on February 7–9, 2024. The Committee will be conducting meetings that will include some Members being physically present at the NRC while other Members participate remotely. Interested members of the public are encouraged to participate remotely in any open sessions via MS Teams or via phone at 301–576–2978, passcode 619018704#. A more detailed agenda including the MSTeams link may be found at the ACRS public website at *https://www.nrc.gov/reading-rm/doc-collections/acrs/agenda/index.html.* If you would like the MSTeams link forwarded to you, please contact the Designated Federal Officer (DFO) as follows: *Quynh.Nguyen@nrc.gov,* or *Lawrence.Burkhart@nrc.gov.*

Wednesday, February 7, 2024

1 p.m.–1:05 p.m.: Opening Remarks by the ACRS Chair (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

1:05 p.m.–3 p.m.: Integrated Low Level Radioactive Waste Disposal Proposed Rule (Open)—The Committee will have presentations and discussion with the NRC staff regarding the subject topic.

3 p.m.–4 p.m.: Integrated Low Level Radioactive Waste Disposal Proposed Rule Committee Deliberation (Open)—The Committee will have presentations and discussion with the NRC staff regarding the subject topic.

4 p.m.–6 p.m.: NuScale Topical Reports on Subchannel Analysis and Rod Ejection Accident Methodologies/ Preparation of Reports (Open/Closed) (WK/MS)—The Committee will hear presentations from NuScale representatives and NRC staff regarding the subject topical reports. The Committee will also discuss topics with the presenters. The Committee will also undertake preparation of reports on this and other subjects of this meeting.

[NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

Thursday, February 8, 2024

8:30 a.m.–6 p.m.: Planning and Procedures Session/Future ACRS Activities/Reconciliation of ACRS Comments and Recommendations/ Preparation of Reports (Open/Closed)—The Committee will hear discussion of the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS meetings, and/or proceed to preparation of reports as determined by the Chairman. [NOTE: Pursuant to 5 U.S.C. 552b(c)(2), a portion of this meeting may

be closed to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS.]

[NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

Friday, February 9, 2024

8:30 a.m.–6 p.m.: Committee Deliberation/Preparation of Reports (Open/Closed)—The Committee will deliberate and continue its discussion of proposed ACRS reports.

[NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on June 13, 2019 (84 FR 27662). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, Cognizant ACRS Staff and the DFO (Telephone: 301–415–5844, Email: *Quynh.Nguyen@nrc.gov*), 5 days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the cognizant ACRS staff if such rescheduling would result in major inconvenience.

An electronic copy of each presentation should be emailed to the cognizant ACRS staff at least one day before the meeting.

In accordance with subsection 10(d) of Public Law 92–463 and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agendas, meeting transcripts, and letter reports are available through the NRC Public Document Room (PDR) at *pdr.resource@nrc.gov,* or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System component of NRC's Agencywide Documents Access and Management System, which is accessible from the NRC website at *https://www.nrc.gov/reading-rm/adams.html* or *https://www.nrc.gov/reading-rm/doc-collections/#ACRS/.*

Dated: January 5, 2024.

Russell E. Chazell,

Federal Advisory Committee Management Officer, Office of the Secretary.

[FR Doc. 2024–00307 Filed 1–9–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0214]

Biennial Review of Fees for the Criminal History Program: Fee Recovery for Fiscal Year 2024

AGENCY: Nuclear Regulatory Commission.

ACTION: Notification to applicants and licensees of a criminal history program fee decrease.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) will decrease the current fee of $35 assessed to applicants and licensees for criminal history records checks to $32. This fee is necessary to recover the full cost for the administration of the Criminal History Program (CHP). Information regarding this change can be found on the NRC's CHP public website at *https://www.nrc.gov/security/chp.html.*

DATES: The fee decrease will begin on February 1, 2024.

ADDRESSES: Please refer to Docket ID NRC–2023–0214 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:

- *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.*
- *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: Doreen Turner, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7553; email: *Doreen.Turner@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to requirements in the Chief Financial Officers Act of 1990 (31 U.S.C. 902(a)(8)), the NRC conducts biennial reviews of the fees assessed to applicants and licensees for criminal history records checks. Specifically, the purpose of these reviews is to determine the suitability of fees to cover the costs charged by the Federal Bureau of Investigation (FBI) and the costs of NRC to administer the program. The latest biennial review was completed on September 14, 2023. As a result of this review, the Chief Financial Officer approved a decrease in fees to be implemented in fiscal year 2024.

ll. Discussion

During this biennial review cycle, the NRC was able to identify contract cost savings and obtain more accurate cost information for supporting CHP services (*e.g.,* associated Electronic Information Exchange costs) that can be passed on to applicants and licensees. Accordingly, the NRC will decrease the current fee of $35 assessed to applicants and licensees for criminal history records checks to $32. This fee is the sum of the user fee charged by the FBI ($11.25 effective January 1, 2019) plus NRC's direct and indirect costs incurred in processing fingerprints.

As a reminder, payment is due upon fingerprint card submission, and the NRC's preferred method of payment is through *Pay.gov* at *https://www.pay.gov,* which includes payment by debit or credit card or electronic funds transfer (e-check). Although electronic payment is preferred, the NRC will also accept cashier checks or money orders made payable to the U.S. Nuclear Regulatory Commission through September 30, 2024. Effective October 1, 2024, the NRC will only accept electronic payment methods. Fingerprint cards along with proof of payment should be sent to: U.S. Nuclear Regulatory Commission, Director, Division of Physical and Cyber Security Policy, Attn: Criminal History Program/Mail Stop—T–07D04M, 11545 Rockville Pike, Rockville, MD 20852–2738.

Contact: Doreen Turner, Criminal History Program Manager, Ph. 301–415–7553, *Doreen.Turner@nrc.gov.*

Dated: January 4, 2024.

For the Nuclear Regulatory Commission.

Gregory T. Bowman,

Director, Division of Physical and Cyber Security Policy, Office of Nuclear Security and Incident Response.

[FR Doc. 2024–00296 Filed 1–9–24; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–158 and CP2024–164; MC2024–159 and CP2024–165]

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 12, 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).:* MC2024–158 and CP2024–164; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 169 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* January 4, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* January 12, 2024.

2. *Docket No(s).:* MC2024–159 and CP2024–165; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 42 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* January 4, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* January 12, 2024.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2024–00344 Filed 1–9–24; 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).

SCIENCE AND TECHNOLOGY POLICY OFFICE

National Nanotechnology Initiative Meetings

AGENCY: Office of Science and Technology Policy (OSTP).

ACTION: Notice of public meetings.

SUMMARY: The National Nanotechnology Coordination Office (NNCO), on behalf of the Nanoscale Science, Engineering, and Technology (NSET) Subcommittee of the Committee on Technology, National Science and Technology Council (NSTC), will facilitate stakeholder discussions of targeted nanotechnology topics through workshops and webinars, as well as community of research and network meetings, between the publication date of this Notice and December 31, 2024.

DATES: The NNCO will hold workshops and webinars, as well as meetings from communities of research and networks, between the publication date of this Notice and December 31, 2024.

ADDRESSES: Information about upcoming workshops, webinars, and other events, will be posted on *https://www.nano.gov/.* For information about upcoming workshops and webinars, please visit *https://www.nano.gov/get-involved/research-community/meetings-and-events* and *https://www.nano.gov/PublicWebinars.* For more information on the networks and communities of research, please visit *https://www.nano.gov/get-involved/research-community/networks-and-communities.*

FOR FURTHER INFORMATION CONTACT: Patrice Pages at *info@nnco.nano.gov* or 202–517–1041.

SUPPLEMENTARY INFORMATION: These public meetings address the charge in the 21st Century Nanotechnology Research and Development Act for NNCO to provide ''for public input and outreach . . . by the convening of regular and ongoing public discussions.'' Workshop and webinar topics may include technical subjects; environmental, health, and safety issues related to nanomaterials (nanoEHS); business case studies; or other areas of potential interest to the nanotechnology community. Areas of focus for the communities of research may include research on nanoEHS; nanotechnology education; nanomedicine; nanomanufacturing; climate change; nanometrology; or other areas of potential interest to the nanotechnology community. The communities of research are not intended to provide any government agency with advice or recommendations; such action is outside of their purview.

Registration: Due to space limitations, pre-registration for workshops is required. Workshop registration is on a first-come, first-served basis. Registration information will be available at *https://www.nano.gov/get-involved/research-community/meetings-and-events.* Registration for the webinars will open approximately two weeks prior to each webinar and will be capped at 500 participants or as space limitations dictate. Individuals planning to attend a webinar can find registration information at *https://www.nano.gov/PublicWebinars.* Written notices of participation in workshops, webinars, networks, or communities of research should be sent by email to *info@nnco.nano.gov.*

Meeting Accommodations: Individuals requiring special accommodation to access any of these public events should contact *info@nnco.nano.gov* at least 10 business days prior to the event, so that appropriate arrangements can be made.

Dated: January 4, 2024.

Stacy Murphy,

Deputy Chief Operations Officer/Security Officer.

[FR Doc. 2024–00298 Filed 1–9–24; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99274; File No. SR–IEX–2023–14]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Correct Six Typographical Citation and Cross-Reference Errors in the IEX Rule Book

January 4, 2024.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 22, 2023, Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Act,[4] and Rule 19b–4 thereunder,[5] IEX is filing with the Commission a proposed rule change to correct six typographical citation and cross-reference errors in the IEX Rule Book. The Exchange has designated this rule change as ''non-controversial'' under Section 19(b)(3)(A) of the Act [6] and provided the Commission with the notice required by Rule 19b–4(f)(6) thereunder.[7]

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange makes this filing to correct six typographical citation and cross-reference errors in the IEX Rule Book. Specifically, the Exchange proposes to update external citations to subsections of Rule 600(b) of Regulation NMS under the Act in IEX Rules 10.160(f), 11.210(a)(2), 11.230(b), 11.610(y), and 11.610(qq) (''Regulation NMS citations''); the Exchange also proposes to update an internal cross-reference error attributable to a recent rule change.

With respect to the Regulation NMS citations, IEX notes that in 2021, the Commission amended Regulation NMS in connection with the adoption of the Market Data Infrastructure Rules.[8] As part of that initiative, the Commission adopted new definitions in Rule 600(b) of Regulation NMS and renumbered the remaining definitions. The Exchange accordingly proposes to update the relevant citations to Regulation NMS in the IEX Rule Book as follows:

- The citation to the Regulation NMS definition of Intermarket Sweep Order in IEX Rule 10.160(f) would be changed from Rule 600(b)(30) to Rule 600(b)(38);
- The citation to the Regulation NMS definition of NMS Stock in IEX Rule 11.210(a)(2) would be changed from Rule 600(b)(46) [9] to Rule 600(b)(55);
- The citation to the Regulation NMS definition of Protected Quotation in IEX Rule 11.230(b) would be changed from Rule 600(b)(58) to Rule 600(b)(71);
- The citation to the Regulation NMS definition of Listed Option in IEX Rule 11.610(y) would be changed from Rule 600(b)(35) to Rule 600(b)(43);
- The citation to the Regulation NMS definition of NMS Stock in IEX Rule 11.610(y) would be changed from Rule 600(b)(47) to Rule 600(b)(55);

With respect to the internal cross-reference, IEX Rule 11.190(b)(2)(G) cross-references IEX Rule 11.190(b)(7)(E)(v), when it should cross-reference IEX Rule 11.190(b)(7)(F)(v). This cross-reference error stems from a recent rule filing that renumbered IEX Rule 11.190(b)(7) without updating the cross-reference contained in IEX Rule 11.190(b)(2)(G).[10] IEX therefore proposes to amend IEX Rule 11.190(b)(2)(G) to cross-reference IEX Rule 11.190(b)(7)(F)(v) instead of 11.190(b)(7)(E)(v).

IEX notes that both the proposed changes to the Regulation NMS citations and the internal cross-reference do not substantively modify system functionality or processes on the Exchange, but solely correct outdated cross-references.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of Section 6(b) [11] of the Act in general, and furthers the objectives of Section 6(b)(1) of the Act [12] in particular, in that it is designed to enforce compliance by the Exchange's Members [13] and persons

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4.

[8] *See* Securities Exchange Act Release No. 90610, 86 FR 18596 (April 9, 2021) (S7–03–20).

[9] IEX Rule 11.210(a)(2), which reads in relevant part ''the security is an NMS stock pursuant to Commission Rule 600(b)(46)'' contains a typographical error; the rule should have referred to Rule 600(b)(47), not 600(b)(46). This proposed rule change corrects this typographical error.

[10] *See* Securities Exchange Act Release No. 96611 (January 9, 2023), 88 FR 2379, 2380 (January 13, 2023) (SR–IEX–2022–10).

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(1).

[13] *See* IEX Rule 1.160(s).

associated with its Members, with the provisions of the rules of the Exchange.

The Exchange believes that the proposed changes to the Regulation NMS citations would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes are designed to update external and internal rule references. The Exchange believes that Members would benefit from the increased clarity, thereby reducing potential confusion and ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the Exchange's rules.

The Exchange also believes that the proposed rule change is consistent with the public interest and the protection of investors because it will provide increased clarity in the Exchange's rules, thereby reducing potential confusion, as described above.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As described in the Purpose and Statutory Basis sections, this rule filing merely proposes to correct five external citations and one internal cross-reference. The proposed rule change is not intended to address competitive issues but rather would modify Exchange rules to update citations to Regulation NMS and an internal cross-reference. Since the proposal does not substantively modify system functionality or processes on the Exchange, the proposed changes will not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) [14] of the Act and Rule 19b–4(f)(6) [15] thereunder. Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.[16]

The Exchange believes that the proposed rule change meets the criteria of subparagraph (f)(6) of Rule 19b–4 [17] because it would not significantly affect the protection of investors or the public interest, nor does it impose any burden on competition because it merely corrects six typographical errors in existing rule provisions without substantively changing such provisions. This rule filing does not substantively modify system functionality or processes on the Exchange. Accordingly, the Exchange believes that the proposed rule change is noncontroversial and satisfies the requirements of Rule 19b–4(f)(6).[18]

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, because this rule filing merely corrects typographical errors for which the rest of the rule is otherwise clear. Therefore, IEX believes there is no need to delay implementation of this rule change, so that the Exchange may promptly correct these typographical errors and avoid any potential confusion during such time period on the part of market participants.

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 under Section 19(b)(2)(B) [21] of the Act to determine whether the proposed rule change 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–IEX–2023–14 on the subject line.

Paper Comments

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

All submissions should refer to file number SR–IEX–2023–14. 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–IEX–2023–14 and should be submitted on or before January 30, 2024.

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00285 Filed 1–9–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99275; File No. SR–MEMX–2023–39]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule To Adopt Connectivity and Application Session Fees for MEMX Options

January 4, 2024.

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 21, 2023, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the Fee Schedule to: (i) apply the Exchange's current Connectivity and Application Session fees to MEMX Options Users, (ii) implement a waiver of Connectivity and Application Session fees solely related to participation on MEMX Options until February 1, 2024, and (iii) make an organizational change to its existing fee schedule for the Exchange's pre-existing equities market (''MEMX Equities''), in order to create a separate fee schedule for Connectivity Fees (for both MEMX Equities and MEMX Options). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The text of the proposed rule change is provided in Exhibit 5.

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

The Exchange is filing a proposal to amend the Fee Schedule to: (i) apply the Exchange's current Connectivity and Application Session fees to MEMX Options Users, (ii) implement a waiver of Connectivity and Application Session fees solely related to participation on MEMX Options until February 1, 2024, and (iii) make an organizational change to its existing fee schedule for the Exchange's pre-existing equities market (''MEMX Equities''), in order to create a separate fee schedule for Connectivity Fees (for both MEMX Equities and MEMX Options). The Exchange believes that these changes will provide greater transparency to Members about how the Exchange assesses fees, as well as allowing Members to more easily validate their bills on a monthly basis. The Exchange notes that none of these changes amend any existing fee applicable to MEMX Equities. The Exchange is proposing to implement the proposal immediately. The Exchange previously filed the proposal on October 24, 2023 (SR–MEMX–2023–29) (the ''Initial Proposal''). The Exchange has withdrawn the Initial Proposal and replaced the proposal with the current filing (SR–MEMX–2023–39).

As set forth below, the Exchange believes that its proposal provides a great deal of transparency regarding the cost of providing connectivity services and anticipated revenue and that the proposal is consistent with the Act and associated guidance. The Exchange is re-filing this proposal promptly following the withdrawal of the Initial Proposal in order to provide additional details not contained in the Initial Proposal and modify the original proposed Options Connectivity and Application Session fee waiver end date from January 1, 2024, to February 1, 2024.

(i) Fees for Connectivity to MEMX Options

As noted above, the Exchange is proposing to apply the current fees it charges to Members and non-Members [3] for physical connectivity to the Exchange and for application sessions (otherwise known as ''logical ports'') that a Member utilizes in connection with their participation on the Exchange (together with physical connectivity, collectively referred to in this proposal as ''connectivity services'', as described in greater detail below) to both Users of MEMX Equities and MEMX Options.[4] Specifically, the Exchange will continue to charge $6,000 per month for a physical connection in the data center where the Exchange primarily operates under normal market conditions (''Primary Data Center''), and $3,000 per month for a physical connection at the geographically diverse data center, which is operated for backup and disaster recovery purposes (''Secondary Data Center''). These physical connections can be used to access both platforms, accordingly, a firm that is a Member of both MEMX Equities and MEMX Options may use a single physical connection to access its application sessions at both MEMX Equities and MEMX Options. This differs from application sessions in that a firm that is a Member of both MEMX Equities and MEMX Options would need to purchase separate application sessions for each trading platform in order to access each such trading platform. These application session fees will continue to be $450 per month for an application session used for order entry (''Order Entry Port'') and $450 per month for an application session for receipt of drop copies (''Drop Copy Port''), to the extent such ports are in the Primary Data Center. As is true today for MEMX Equities, the Exchange will not charge for Order Entry Ports or Drop Copy Ports in the Secondary Data Center. The Exchange's proposal to apply the same fees to Equities and Options stems from the same cost analysis it conducted in adopting those

[3] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services to Members, and thus, may access application sessions on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[4] MEMX Options launched on September 27, 2023.

fees to its Equities Members,[5] which the Exchange has reviewed and updated for 2024 as detailed below. Given that the Exchange has only recently launched MEMX Options, however, and the fact that its analysis is based on projections across all potential revenue streams, the Exchange is committing to conduct a one-year review after these fees are applied. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs, or to decrease fees in the event that revenue materially exceeds expectations.

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services to MEMX Options, the Exchange has sought to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related services, and also carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[6] and Rule 19b–4 thereunder,[7] with respect to the types of information self-regulatory organizations (''SROs'') should provide when filing fee changes, and Section 6(b) of the Act,[8] which requires, among other things, that exchange fees be reasonable and equitably allocated,[9] not designed to permit unfair discrimination,[10] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[11] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[12]

As detailed below, MEMX calculated its aggregate annual costs for providing physical connectivity to both MEMX Equities and MEMX Options in 2024 at $11,448,322 and its aggregate annual costs for providing application sessions at $5,918,788. In order to cover the aggregate costs of providing connectivity to its Options and Equities Users (both Members and non-Members) going forward and to make a modest profit, as described below, the Exchange is proposing to modify its Fee Schedule, pursuant to MEMX Rules 15.1(a) and (c), to charge a fee to Options Users, as it currently does to Equities Users, of $6,000 per month for each physical connection in the Primary Data Center and of $3,000 per month for each physical connection in the Secondary Data Center. The Exchange also proposes to modify its Fee Schedule, pursuant to MEMX Rules 15.1(a) and (c), to charge a fee to Options Users, as it currently does to Equities Users, of $450 per month for each Order Entry Port and Drop Copy Port in the Exchange's Primary Data Center, as further described below.[13]

Cost Analysis

Background on Cost Analysis

In September 2023, MEMX completed a study of its aggregate projected costs to produce market data and connectivity across both its Equities and Options platforms in 2024 (the ''Cost Analysis''). The Cost Analysis required a detailed analysis of MEMX's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services and trading permits, regulatory services, physical connectivity, and application sessions (which provide order entry, cancellation and modification functionality, risk functionality, ability to receive drop copies, and other functionality). MEMX separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers''). Next, MEMX adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (70%), with smaller allocations to logical ports (2%), and the remainder to the provision of transaction execution, regulatory services, and market data services (28%). In contrast, costs that are driven largely by client activity (*e.g.,* message rates), were not allocated to physical connectivity at all but were allocated primarily to the provision of transaction execution and market data services (80%) with a smaller allocation to application sessions (20%). The allocation methodology was decided through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, MEMX was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has four primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these four primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume

[5] *See* Securities Exchange Act Release No. 59846 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–026).

[6] 15 U.S.C. 78s(b)(1).

[7] 17 CFR 240.19b–4.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78f(b)(8).

[12] In 2019, Commission staff published guidance suggesting the types of information that SROs may use to demonstrate that their fee filings comply with the standards of the Exchange Act (''Fee Guidance''). While MEMX understands that the Fee Guidance does not create new legal obligations on SROs, the Fee Guidance is consistent with MEMX's view about the type and level of transparency that exchanges should meet to demonstrate compliance with their existing obligations when they seek to charge new fees. *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) available at *https://www.sec.gov/tm/staff-guidancesro-rule-filings-fees.*

[13] As proposed, fees for connectivity services would be assessed based on each active connectivity service product at the close of business on the first day of each month. If a product is cancelled by a Member's submission of a written request or via the MEMX User Portal prior to such fee being assessed then the Member will not be obligated to pay the applicable product fee. MEMX will not return pro-rated fees even if a product is not used for an entire month.

market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below.

Through the Exchange's extensive Cost Analysis, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity services. In turn, the Exchange allocated certain costs more to physical connectivity and others to application sessions, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, MEMX estimates that the cost drivers to provide connectivity services in 2024, including both physical connections and application sessions, will result in an aggregate annual cost of $17,367,110, as further detailed below. The Exchange notes that it utilized the same principles to generate the 2021 Cost Analysis, applicable to Equities only, and at that time, the estimated annual aggregate cost to provide connectivity services was $13,724,580. The differences between such estimated costs and the overall analysis are primarily based on: (1) the addition of MEMX Options, (ii) increased, and in some cases decreased, costs projected by the Exchange, (iii) and changes made to reallocate certain costs into categories that more closely align the Exchange's audited financial statements, as further described below.

Costs Related to Offering Physical Connectivity

The following chart details the individual line-item costs considered by MEMX to be related to offering physical connectivity as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 17% of its overall Human Resources cost to offering physical connectivity).

Costs driver	Costs	% of all
Human Resources	$4,685,902	17
Connectivity	413,032	75
Data Center	2,654,732	70
Technology (Hardware, Software Licenses, etc.)	842,258	21
Depreciation	2,030,846	33
External Market Data	.....	0
Allocated Shared Expenses	821,552	12
Total	11,448,322	20.7

Below are additional details regarding each of the line-item costs considered by MEMX to be related to offering physical connectivity, as well as any relevant discussion of how the costs projected for 2024 differ, if any, from the Exchange's previous Cost Analysis conducted in 2021 in adopting Connectivity Fees for its Equities platform, which are the same fees the Exchange is proposing to apply for its Options platform in this filing.[14]

Human Resources

In allocating personnel (Human Resources) costs, in order to not double count any allocations, the Exchange first excluded any employee time allocated towards options regulation in order to recoup costs via the Options Regulatory Fee (''ORF'').[15] Of the remaining employee time left over, MEMX then calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the MEMX network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity) and for which the Exchange allocated 75% of each employee's time. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who do support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (30%).[16] The Exchange notes that it has fewer than 100 employees and each department leader has direct knowledge of the time spent by those spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing physical connectivity. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

In 2021, 13.8% of the Exchange's Human Resources costs were allocated towards the provision of physical connectivity, which is slightly lower than the 17% allocation in the current Cost Analysis. The Exchanges notes that this increase is due to additional hiring necessary to support network infrastructure, and that in advance of the launch of MEMX Options, this hiring started at the beginning of 2023.

[14] *See supra* note 6.

[15] *See* Securities Exchange Act Release No. 98585 (September 28, 2023), 88 FR 68692 (October 4, 2023) (SR–MEMX–2023–25).

[16] To reiterate, these allocations are applied to the percentage of employee time left over after the ORF allocation. As such, if 10% of an employee's time was allocated towards options regulation, the percentage of time allocated to physical connectivity in this example would apply to the 90% of the employee's time left over.

Connectivity

The Connectivity cost includes external fees paid to connect to other exchanges and third parties. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS. Approximately 75% of the Exchange's connectivity costs are allocated towards the provision of physical connectivity, which is the same percentage identified in the 2021 Cost Analysis. Of note, the 2021 Cost Analysis allocated approximately $162,000 per month of connectivity costs towards physical connectivity, which is notably higher than the $34,420 [17] per month allocated under the current Cost Analysis. The Exchange notes that this is due to a substantial redesign in the Exchange's connectivity plan which achieved the cost savings noted. Additionally, in the 2021 Cost Analysis, certain costs were included in the Connectivity category that have since been moved into the broader Technology category.

Data Center

Data Center costs include an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (70%) to physical connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity of participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants. This slight decrease over the allocation of Data Center costs to physical connectivity from 2021 (75%) is due to the fact that at the time of the 2021 Cost Analysis there were certain one-time costs in establishing the Exchange's data center presence that it will not have in 2024, as well as the fact that in the 2021 Cost Analysis, additional costs were included in the Data Center category that are not included in the current Analysis.

Technology

The Technology category includes the Exchange's network infrastructure, other hardware, software, and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange. Of note, certain of these costs were included in the Connectivity and a separate Hardware and Software Licenses category in the 2021 Cost Analysis; however, in order to align more closely with the Exchange's audited financial statements these costs were combined into the broader Technology category. The Exchange allocated approximately 21% of its Technology costs to physical connectivity in 2024.

Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. As noted above, the Exchange allocated 33% of all depreciation costs to providing physical connectivity. This is a higher percentage than was allocated to providing physical connectivity in 2021 (18.5%), and this increase is due to a high amount of capital expenditures required to build the Exchange's options platform, none of which began to depreciate until the launch of options in September 2023. The Exchange notes, however, that it did not allocate depreciation costs for any internally developed software to build the Exchange's trading platforms to physical connectivity, as such software does not impact the provision of physical connectivity.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange notes that it did not allocate any External Market Data fees to the provision of physical connectivity as market data is not related to such services.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to physical connectivity as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide physical connectivity. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange notes that the cost of paying directors to serve on its Board of Directors is also included in the Exchange's general shared expenses, and thus a portion of such overall cost amounting to 23% of the overall cost for directors was allocated to providing physical connectivity. The Exchange notes that the 12% allocation of general shared expenses for physical connectivity is lower than that allocated to general shared expenses for application sessions based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), physical connectivity does not require as many broad or indirect resources as other Core Services.

As a final part of the Exchange's analysis related to physical connectivity, the Exchange determined the total *monthly* cost of providing physical connections, (*i.e.* the annual cost of $11,448,322 noted in the table above divided by 12), $954,027, and it divided that by the total number of physical connections (for both Equities and Options) the Exchange maintained at the time the proposed pricing was determined (200.5),[18] to arrive at a cost

[17] This figure is arrived at by dividing the annual allocated Connectivity costs in the table on page 12 ($413,032) by 12.

[18] As of September 1, 2023, the Exchange's customers maintained 182 physical connections in the Primary Data Center and 37 connections in the Secondary Data Center. For purposes of calculating profit margin, however, the Exchange divided the total number of actual Secondary Data Center connections by two (2), given that it charges half price for those connections relative to Primary Data Center connections, but its calculation assumes $6,000 earned per connection. This is necessary in order to calculate profit margin, given that the Exchange's costs related to physical connectivity are not separated out for Primary or Secondary Data Center connections, and as such, there are no separate Secondary Data Center costs to use as a

Continued

of $4,758.24 per month, per physical connection. Thus, revenue based on this number of connections under the proposed pricing herein results in a physical connectivity profit margin of approximately 20%.[19] The Exchange notes that this projected profit margin represents an increase over the projected profit margin noted in the 2021 Cost Analysis related to physical connectivity,[20] which is in part due to certain cost savings noted above associated with a redesign in the Exchange's external connectivity plan. Nevertheless, the Exchange believes that the projected profit margin is reasonable and well within the range of where a similarly situated company would expect to be after three years of growth, especially upon launching a new trading platform that provides scale. While the Exchange does not anticipate a significant change to physical connectivity during 2024 (*i.e.,* neither a significant increase nor a significant decrease), it is possible that participants will shift the way that they connect to the Exchange and a reduction occurs or that additional connectivity is established, resulting in an increase.

Costs Related to Offering Application Sessions

The following chart details the individual line-item costs considered by MEMX to be related to offering application sessions as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 12% of its overall Human Resources cost to offering application sessions).

Costs driver	Costs	% of all
Human Resources	$3,251,548	12
Connectivity	7,097	0
Data Center	86,513	2
Technology (Hardware, Software Licenses, etc.)	459,116	11
Depreciation	553,931	9
External Market Data	420,394	18
Allocated Shared Expenses	1,140,189	17
Total	5,918,788	10.7

Human Resources

With respect to application sessions, MEMX calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing application sessions and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). The estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing application sessions and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing application sessions and maintaining performance thereof. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing application sessions and maintaining performance thereof. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions. As shown in the table above, for 2024, the Exchange allocated approximately 12% of its Human Resources costs to providing application sessions, which is higher than the 7.7% it allocated in 2021. This increase is again due to additional hiring needed to support the addition of MEMX Options.

Connectivity

The Connectivity cost includes external fees paid to connect to other exchanges, as described above. The Exchange did not allocate any Connectivity costs to application sessions in the current Cost Analysis, which differs from the 2.6% allocated towards application sessions in the 2021 Cost Analysis. This difference is due to the fact that certain formerly categorized Connectivity costs are now categorized under Technology in the current 2024 Cost Analysis.

Data Center

Data Center costs include an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment as well as related costs (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties). As shown in the table, the Exchange allocated 2% of its Data Center costs to application sessions in the current Cost Analysis, which is in line with the 2.6% it allocated in the 2021 Cost Analysis.

Technology

The Technology category includes the Exchange's network infrastructure, other hardware, software, and software licenses used to monitor the health of the order entry services provided by the Exchange. The Exchange allocated 11% of its Technology costs to the provision of application sessions, which is in line with the 10.1% it allocated in the 2021 Cost Analysis.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange allocated 18% of External Market Data fees to the provision of application sessions as such market data is necessary to offer certain services related to such sessions, such as validating orders on entry against the National Best Bid and National Best

denominator for Secondary Data Center connection revenue. Thus, the Exchange's total number of physical connections for purposes of the profit margin calculation includes all 182 Primary Data Center connections plus 18.5 (*i.e.* one-half) of the Exchange's Secondary Data Center connections, totaling 200.5 connections.

[19] The Exchange calculated margin by dividing the total profit ($248,972.88) by the total revenue ($1,203,000) and multiplying by 100.

[20] The 2021 Cost Analysis projected a profit margin for physical connections of 8%.

Offer (''NBBO'') and checking for other conditions (*e.g.,* whether a symbol is halted or subject to a short sale circuit breaker). Thus, as market data from other exchanges is consumed at the application session level in order to validate orders before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to application sessions. The increase in allocation of External Market Data costs to the provision of application sessions compared to the 2021 Cost Analysis, in which 7.5% of its External Market Data costs were allocated, is due to a restructuring of the category. Specifically, in 2021, External Market Data only included those costs incurred to receive data from other exchanges, while costs to receive the SIP feeds and other non-exchange data feeds were categorized under Hardware and Software Licenses. These costs are now all categorized under External Market Data.

Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 9% of all depreciation costs to providing application sessions. In contrast to physical connectivity, described above, the Exchange did allocate depreciation costs for depreciated internally developed software to build the Exchange's platforms to application sessions because such software is related to the provision of such connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall application session costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide application sessions. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 20% of the overall cost for directors was allocated to providing application sessions. The Exchange notes that the 17% allocation of general shared expenses for application sessions is higher than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), application sessions require a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange determined the total *monthly* cost of providing application sessions, (*i.e.* the annual cost of $5,918,788 noted in the table above divided by 12), $493,232.33, and it divided that by the total number of application sessions (for both Equities and Options) the Exchange maintained at the time the proposed pricing was determined (1,165), to arrive at a cost of approximately $423.38 per month per physical connection. Thus, revenue based on this number of connections under the proposed pricing herein results in an application session profit margin of approximately 6%.[21] This profit margin for application sessions is slightly lower than the projected profit margin noted in the 2021 Cost Analysis,[22] and stems from multiple factors, but in part, is due to the fact that the number of application sessions used by participants can and does vary significantly from month to month, and this particular profit margin was calculated based on the number of application sessions for one month in 2023. While the Exchange expects the number of application sessions to increase throughout 2024 (which would result in a higher profit margin), it is also possible that participants shift the way that they connect and a reduction occurs. Nevertheless, the Exchange believes that the margin is again, reasonable and well within the range of where the Exchange would expect it to be at this time.

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or application sessions) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filing it recently submitted proposing the establishment of an ORF.[23] For instance, in calculating the Human Resources expenses to be allocated to physical connections, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the time of such personnel (75%) given their focus on functions necessary to provide physical connections. The time of those same personnel were allocated only 6% to application sessions and the remaining 19% was allocated to transactions and market data. Of note, this allocation applied only to the network infrastructure employee's time that was left over after allocating for options regulation support. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group outside of a smaller allocation (30%) of the employee time associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of employee time (15% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing application sessions. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain application sessions but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 17% of its Human Resources costs to providing physical connections and 12% of its Human Resources costs to providing application sessions, for a total allocation of 29% of its Human Resources expense to provide connectivity services. In turn, the Exchange allocated the remaining 71% of its Human Resources expense to Regulatory Services (21%), membership (2%) and transactions and market data

[21] The Exchange calculated margin by dividing the total profit ($31,012.30) by the total revenue ($524,250) and multiplying by 100.

[22] The 2021 Cost Analysis projected an application session profit margin of approximately 8%.

[23] See *supra* note 16.

(48%). Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and application sessions, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 42% of the Exchange's overall depreciation and amortization expense to connectivity services (33% attributed to physical connections and 9% to application sessions). The Exchange allocated the remaining depreciation and amortization expense (approximately 58%) toward regulatory services (approximately 8%), and to providing transaction services and market data (approximately 50%).

Looking at the Exchange's operations holistically, the estimated total monthly costs to the Exchange for offering core services in 2024 is $4,604,583, compared to the $3,954,537 noted in the 2021 Cost Analysis. Based on its projections, the Exchange expects to collect approximately $1,768,800 on a monthly basis for connectivity services. Incorporating this amount into the Exchange's overall projected revenue, including projections related to the ORF, the Exchange anticipates monthly revenue of approximately $5,988,620 from all sources (*i.e.,* connectivity fees and membership fees, transaction fees, ORF, and revenue from market data, both through the fees adopted in April 2022 [24] and through the revenue received from the SIPs). As such, applying the Exchange's holistic Cost Analysis to a holistic view of anticipated revenues, the Exchange would earn approximately 23% margin on its operations as a whole. The Exchange believes that this amount is reasonable.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. As a new entrant to the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing options clients that wish to maintain physical connectivity and/or application sessions or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis was based on the Exchange's operations in 2023 (which is currently underway) and projections for the next year. As such, the Exchange believes that its costs will remain relatively similar in future years (as demonstrated by the comparison of the 2021 Cost Analysis to the 2024 Cost Analysis). It is possible however that such costs will either decrease or increase. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases. However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange would propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Proposed Fees

Physical Connectivity Fees

MEMX offers its Members the ability to connect to the Exchange in order to transmit orders to and receive information from the Exchange. Members can also choose to connect to MEMX indirectly through physical connectivity maintained by a third-party extranet. Extranet physical connections may provide access to one or multiple Members on a single connection. Users of MEMX physical connectivity services (both Members and non-Members [25]) seeking to establish one or more connections with the Exchange submit a request to the Exchange via the MEMX User Portal or directly to Exchange personnel. Upon receipt of the completed instructions, MEMX establishes the physical connections requested by the User. The number of physical connections assigned to each User (for both equities and options) as of October 1, 2023, ranges from one (1) to 30, depending on the scope and scale of the Member's trading activity on the Exchange as determined by the Member, including the Member's determination of the need for redundant connectivity. Separate physical connections are not required to access the Exchange's Options and Equities platforms, as such, a User could use a single connection to access both platforms. The Exchange notes that 52% of its Members do not maintain a physical connection directly with the Exchange in the Primary Data Center (though many such Members have connectivity through a third-party provider) and 24 members, or 32% have either one or two physical ports to connect to the Exchange in the Primary Data Center.[26] Thus, only a limited number of Members, (12 members, or 16%), maintain three or more physical

[24] *See* Securities Exchange Act Release No. 97130 (March 13, 2013), 88 FR 16491 (March 17, 2023) (SR–MEMX–2023–04).

[25] *See supra* note 4.

[26] Of those 24 members, six (6) have designated certain of their physical ports will be used to connect to MEMX Options.

ports to connect to the Exchange in the Primary Data Center.[27]

As described above, the Exchange has previously justified its pricing with respect to MEMX Equities and believes the most fair approach, absent a significant differentiation between application costs to Equities and Options, is to apply the same pricing to all participants of either platform. As such, in order to cover the aggregate costs of providing physical connectivity to Options and Equities Users and make a modest profit, as described below, the Exchange is proposing to charge a fee of $6,000 per month for each physical connection in the Primary Data Center and a fee of $3,000 per month for each physical connection in the Secondary Data Center for connections to its Options platform, as it currently charges for connections to its Equities platform. There is no requirement that any Member maintain a specific number of physical connections and a Member may choose to maintain as many or as few of such connections as each Member deems appropriate. Further, as noted above, existing Equities Members may choose to use their existing physical connection(s) to access the Exchange's Options platform.

The Exchange notes, however, that pursuant to Rule 2.4 (Mandatory Participation in Testing of Backup Systems), the Exchange does require a small number of Members to connect and participate in functional and performance testing as announced by the Exchange, which occurs at least once every 12 months. Specifically, Members that have been determined by the Exchange to contribute a meaningful percentage of the Exchange's overall volume must participate in mandatory testing of the Exchange's backup systems (*i.e.,* such Members must connect to the Secondary Data Center). The Exchange notes that designated Members are still able to use third-party providers of connectivity to access the Exchange at its Secondary Data Center, and that for its Equities platform, one of eight such designated Members does use a third-party provider instead of connecting directly to the Secondary Data Center through connectivity provided by the Exchange. Nonetheless, because some Members are required to connect to the Secondary Data Center pursuant to Rule 2.4 and to encourage Exchange Members to connect to the Secondary Data Center generally, the Exchange has proposed to charge one-half of the fee for a physical connection in the Primary Data Center for its Options platform, as it currently charges for Equities. The Exchange notes that its costs related to operating the Secondary Data Center were not separately calculated for purposes of this proposal, but instead, all costs related to providing physical connections were considered in the aggregate. The Exchange believes this is appropriate because had the Exchange calculated such costs separately and then determined the fee per physical connection that would be necessary for the Exchange to cover its costs for operating the Secondary Data Center, the costs would likely be much higher than those proposed for connectivity at the Primary Data Center because Members maintain significantly fewer connections at the Secondary Data Center. The Exchange believes that charging a higher fee for physical connections at the Secondary Data Center would be inconsistent with its objective of encouraging Members to connect at such data center and is inconsistent with the fees charged by other exchanges, which also provide connectivity for disaster recovery purposes at a discounted rate.[28]

The proposed fee will not apply differently based upon the size or type of the market participant, but rather based upon the number of physical connections a User requests, based upon factors deemed relevant by each User (either a Member, service bureau or extranet). The Exchange believes these factors include the costs to maintain connectivity, business model and choices Members make in how to participate on the Exchange, as further described below.

The proposed fee of $6,000 per month for physical connections at the Primary Data Center is designed to permit the Exchange to cover the costs allocated to providing connectivity services with a modest profit margin (approximately 20%), which would also help fund future expenditures (increased costs, improvements, etc.). The Exchange believes it is appropriate to charge fees that represent a reasonable markup over cost given the other factors discussed above and the need for the Exchange to maintain a highly performant and stable platform to allow Members to transact with determinism.

As noted above, the Exchange proposes a discounted rate of $3,000 per month for physical connections at its Secondary Data Center. The Exchange has proposed this discounted rate for Secondary Data Center connectivity in order to encourage Members to establish and maintain such connections. Also, as noted above, a small number of Members are required pursuant to Rule 2.4 to connect and participate in testing of the Exchange's backup systems, and the Exchange believes it is appropriate to provide a discounted rate for physical connections at the Secondary Data Center given this requirement. The Exchange notes that this rate is well below the cost of providing such services and the Exchange will operate its network and systems at the Secondary Data Center without recouping the full amount of such cost through connectivity services.

The proposed fee for physical connections is effective on filing and will become operative immediately, subject to the proposed waiver described below.

Application Session Fees

Similar to other exchanges, MEMX offers its Members application sessions, also known as logical ports, for order entry and receipt of trade execution reports and order messages. Members can also choose to connect to MEMX indirectly through a session maintained by a third-party service bureau. Service bureau sessions may provide access to one or multiple Members on a single session. Users of MEMX connectivity services (both Members and non-Members [29]) seeking to establish one or more application sessions with the Exchange submit a request to the Exchange via the MEMX User Portal or directly to Exchange personnel. Upon receipt of the completed instructions, MEMX assigns the User the number of sessions requested by the User. The number of sessions assigned to each User as of August 31, 2022, ranges from one (1) to more than 150 depending on the scope and scale of the Member's trading activity on the Exchange (either through a direct connection or through a service bureau) as determined by the Member. For example, by using multiple sessions, Members can segregate order flow from different internal desks, business lines, or customers. The Exchange does not impose any minimum or maximum requirements for how many application sessions a Member or service bureau can maintain, and it is not proposing to impose any minimum or maximum session requirements for its Members or their service bureaus. The same application session cannot be used to access both MEMX Equities and MEMX Options, as such, Users will need to

[27] Of those 12 members, nine (9) have designated certain of their physical ports will be used to connect to MEMX Options.

[28] *See, e.g.,* the BZX options fee schedule, available at: *https://www.cboe.com/us/options/membership/fee_schedule/bzx/*.

[29] *See supra* note 4.

purchase separate application sessions for MEMX Options, which differs from physical connections.

As described above, in order to cover the aggregate costs of providing application sessions to Options Users and to make a modest profit, as described below, the Exchange is proposing to charge a fee of $450 per month for each Order Entry Port and Drop Copy Port in the Primary Data Center for Options application sessions, which is the same fee it currently charges for Equities application sessions. The Exchange notes that it does not propose to charge for: (1) Order Entry Ports or Drop Copy Ports in the Secondary Data Center, or (2) any Test Facility Ports or MEMOIR Gap Fill Ports, again, which it does not charge for Equities Users. The Exchange has proposed to continue to provide Order Entry Ports and Drop Copy Ports in the Secondary Data Center for Options free of charge in order to encourage Members to connect to the Exchange's backup trading systems. Similarly, because the Exchange wishes to encourage Members to conduct appropriate testing of their use of the Exchange, the Exchange has not proposed to charge for Test Facility Ports. With respect to MEMOIR Gap Fill ports, such ports are exclusively used in order to receive information when a market data recipient has temporarily lost its view of MEMX market data. The Exchange has not proposed charging for such ports because the costs of providing and maintaining such ports is more directly related to producing market data.

The proposed fee of $450 per month for each Order Entry Port and Drop Copy Port in the Primary Data Center is designed to permit the Exchange to cover the costs allocated to providing application sessions with a modest profit margin (approximately 6%), which would also help fund future expenditures (increased costs, improvements, etc.).

The proposed fee is also designed to encourage Users to be efficient with their application session usage, thereby resulting in a corresponding increase in the efficiency that the Exchange would be able to realize in managing its aggregate costs for providing connectivity services. There is no requirement that any Member maintain a specific number of application sessions and a Member may choose to maintain as many or as few of such ports as each Member deems appropriate. The Exchange has designed its platform such that Order Entry Ports can handle a significant amount of message traffic (*i.e.,* over 50,000 orders per second), and has no application flow control or order throttling. In contrast, other exchanges maintain certain thresholds that limit the amount of message traffic that a single logical port can handle.[30] As such, while several Members maintain a relatively high number of ports because that is consistent with their usage on other exchanges and is preferable for their own reasons, the Exchange believes that it has designed a system capable of allowing such Members to significantly reduce the number of application sessions maintained.

The proposed fee will not apply differently based upon the size or type of the market participant, but rather based upon the number of application sessions a User requests, based upon factors deemed relevant by each User (either a Member or service bureau on behalf of a Member). The Exchange believes these factors include the costs to maintain connectivity and choices Members make in how to segment or allocate their order flow.[31]

The proposed fee for application sessions is effective on filing and will become operative immediately, subject to the proposed waiver described below.

Proposed Fees—Additional Discussion

As discussed above, the proposed fees for connectivity services do not by design apply differently to different types or sizes of Members. As discussed in more detail in the Statutory Basis section, the Exchange believes that the likelihood of higher fees for certain Members subscribing to connectivity services usage than others is not unfairly discriminatory because it is based on objective differences in usage of connectivity services among different Members. The Exchange's incremental aggregate costs for all connectivity services are disproportionately related to Members with higher message traffic and/or Members with more complicated connections established with the Exchange, as such Members: (1) consume the most bandwidth and resources of the network; (2) transact the vast majority of the volume on the Exchange; and (3) require the high-touch network support services provided by the Exchange and its staff, including network monitoring, reporting and support services, resulting in a much higher cost to the Exchange to provide such connectivity services. For these reasons, MEMX believes it is not unfairly discriminatory for the Members with higher message traffic and/or Members with more complicated connections to pay a higher share of the total connectivity services fees. While Members with a business model that results in higher relative inbound message activity or more complicated connections are projected to pay higher fees, the level of such fees is based solely on the number of physical connections and/or application sessions deemed necessary by the Member and not on the Member's business model or type of Member. The Exchange notes that the correlation between message traffic and usage of connectivity services is not completely aligned because Members individually determine how many physical connections and application sessions to request, and Members may make different decisions on the appropriate ways based on facts unique to their individual businesses. Based on the Exchange's architecture, as described above, the Exchange believes that a Member even with high message traffic would be able to conduct business on the Exchange with a relatively small connectivity services footprint.

Finally, the fees for connectivity services will help to encourage connectivity services usage in a way that aligns with the Exchange's regulatory obligations. As a national securities exchange, the Exchange is subject to Regulation Systems Compliance and Integrity (''Reg SCI'').[32] Reg SCI Rule 1001(a) requires that the Exchange establish, maintain, and enforce written policies and procedures reasonably designed to ensure (among other things) that its Reg SCI systems have levels of capacity adequate to maintain the Exchange's operational capability and promote the maintenance of fair and orderly markets.[33] By encouraging Users to be efficient with their usage of connectivity services, the proposed fee will support the

[30] *See, e.g.,* Cboe US Options BOE Specification, *available at: https://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf* (describing a 5,000 message per second Port Order Rate Threshold on Cboe BOE ports).

[31] The Exchange understands that some Members (or service bureaus) may also request more Order Entry Ports to enable the ability to send a greater number of simultaneous order messages to the Exchange by spreading orders over more Order Entry Ports, thereby increasing throughput (*i.e.,* the potential for more orders to be processed in the same amount of time). The degree to which this usage of Order Entry Ports provides any throughput advantage is based on how a particular Member sends order messages to MEMX, however the Exchange notes that its architecture reduces the impact or necessity of such a strategy. All Order Entry Ports on MEMX provide the same throughput, and as noted above, the throughput is likely adequate even for a Member sending a significant amount of volume at a fast pace, and is not artificially throttled or limited in any way by the Exchange.

[32] 17 CFR 242.1000–1007.

[33] 17 CFR 242.1001(a).

Exchange's Reg SCI obligations in this regard by ensuring that unused application sessions are available to be allocated based on individual User needs and as the Exchange's overall order and trade volumes increase. Additionally, because the Exchange will charge a lower rate for a physical connection to the Secondary Data Center and will not charge any fees for application sessions at the Secondary Data Center or its Test Facility, the proposed fee structure will further support the Exchange's Reg SCI compliance by reducing the potential impact of a disruption should the Exchange be required to switch to its Disaster Recovery Facility and encouraging Members to engage in any necessary system testing with low or no cost imposed by the Exchange.[34]

(ii) Options Connectivity Fee Waiver

To encourage new participants to join the Exchange as Members in order to participate in MEMX Options, the Exchange is proposing to waive all Connectivity Fees used solely for MEMX Options until February 1, 2024. As noted above, physical connections may be used to access both Equities and Options, and as such, the Exchange will internally verify whether new connections are being used solely for Options connections in order to determine whether such connection qualifies for this waiver. Separately, Members specify the Exchange to which their requested application sessions should connect, and as such, any new application sessions for MEMX Options will qualify for this waiver.

(iii) Organizational Fee Schedule Changes

The Exchange is proposing to more clearly separate Connectivity Fees from the Exchange's current fee schedule. Currently, the Exchange has separate transaction fee schedules for Equities and Options, and the current Connectivity Fees appear solely on the Equities fee schedule. The Exchange proposes to remove the Connectivity Fees section from the Equities fee schedule, and add hyperlinks at the bottom of the Equities and Options fee schedules that direct the User to a single Connectivity fee schedule. The Exchange believes this format is appropriate given that the same Connectivity Fees apply to both Equities and Options Users, and separating out the fee schedule for Connectivity Fees will reduce potential confusion (*e.g.,* as to which fees a Member that participates on both MEMX Equities and MEMX Options must pay on a monthly basis to maintain connectivity to the Exchange).

The Exchange also proposes to add three additional bullet points to the new Connectivity Fee Schedule related to MEMX Options. The first will notify Members that a physical connection can be used to access MEMX Equities and/or MEMX Options. The second will clarify that an application session can only be used to access one MEMX platform, *i.e.,* MEMX Equities or MEMX Options. The third will note that Connectivity and application session fees solely related to participation on MEMX Options are waived until February 1, 2024. The Exchange notes that the existing bullet points related to Connectivity and application sessions will be included on the proposed separate Connectivity Fee Schedule, (*i.e.,* detailing the Exchange's billing practices, and making clear that that the Exchange does not charge for: (1) Order Entry Ports or Drop Copy Ports in the Secondary Data Center, or (2) any Test Facility Ports or MEMOIR Gap Fill Ports.

2. Statutory Basis

The Exchange believes that the proposed fees for connectivity services to MEMX Options are reasonable, equitable and not unfairly discriminatory because, as described above, the proposed pricing for connectivity services is directly related to the relative costs to the Exchange to provide those respective services and does not impose a barrier to entry to smaller participants.

The Exchange recognizes that there are various business models and varying sizes of market participants conducting business on the Exchange. The Exchange's incremental aggregate costs for all connectivity services are disproportionately related to Members with higher message traffic and/or Members with more complicated connections established with the Exchange, as such Members: (1) consume the most bandwidth and resources of the network; (2) transact the vast majority of the volume on the Exchange; and (3) require the high-touch network support services provided by the Exchange and its staff, including network monitoring, reporting and support services, resulting in a much higher cost to the Exchange to provide such connectivity services. Accordingly, the Exchange believes the allocation of the proposed fees that increase based on the number of physical connections or application sessions is reasonable based on the resources consumed by the respective type of market participant (*i.e.,* lowest resource consuming Members will pay the least, and highest resource consuming Members will pay the most), particularly since higher resource consumption translates directly to higher costs to the Exchange.

With regard to reasonableness, the Exchange understands that when appropriate given the context of a proposal the Commission has taken a market-based approach to examine whether the SRO making the proposal was subject to significant competitive forces in setting the terms of the proposal. In looking at this question, the Commission considers whether the SRO has demonstrated in its filing that: (i) there are reasonable substitutes for the product or service; (ii) ''platform'' competition constrains the ability to set the fee; and/or (iii) revenue and cost analysis shows the fee would not result in the SRO taking supra-competitive profits. If the SRO demonstrates that the fee is subject to significant competitive forces, the Commission will next consider whether there is any substantial countervailing basis to suggest the fee's terms fail to meet one or more standards under the Exchange Act. If the filing fails to demonstrate that the fee is constrained by competitive forces, the SRO must provide a substantial basis, other than competition, to show that it is consistent with the Exchange Act, which may include production of relevant revenue and cost data pertaining to the product or service.

MEMX believes the proposed fees for connectivity services are fair and reasonable as a form of cost recovery for the Exchange's aggregate costs of offering connectivity services to Members and non-Members. The proposed fees are expected to generate monthly revenue of $1,768,800 providing cost recovery to the Exchange for the aggregate costs of offering connectivity services, based on a methodology that narrowly limits the cost drivers that are allocated cost to those closely and directly related to the particular service. In addition, this revenue will allow the Exchange to continue to offer, to enhance, and to continually refresh its infrastructure as necessary to offer a state-of-the-art trading platform. The Exchange believes

[34] While some Members might directly connect to the Secondary Data Center and incur the proposed $3,000 per month fee, there are other ways to connect to the Exchange, such as through a service bureau or extranet, and because the Exchange is not imposing fees for application sessions in the Secondary Data Center, a Member connecting through another method would not incur any fees charged directly by the Exchange. However, the Exchange notes that a third-party service provider providing connectivity to the Exchange likely would charge a fee for providing such connectivity; such fees are not set by or shared in by the Exchange.

that, consistent with the Act, it is appropriate to charge fees that represent a reasonable markup over cost given the other factors discussed above. The Exchange also believes the proposed fee is a reasonable means of encouraging Users to be efficient in the connectivity services they reserve for use, with the benefits to overall system efficiency to the extent Members and non-Members consolidate their usage of connectivity services or discontinue subscriptions to unused physical connectivity.

The Exchange further believes that the proposed fees, as they pertain to purchasers of each type of connectivity alternative, constitute an equitable allocation of reasonable fees charged to the Exchange's Members and non-Members and are allocated fairly amongst the types of market participants using the facilities of the Exchange.

As described above, the Exchange believes the proposed fees are equitably allocated because the Exchange's incremental aggregate costs for all connectivity services are disproportionately related to Members with higher message traffic and/or Members with more complicated connections established with the Exchange, as such Members: (1) consume the most bandwidth and resources of the network; (2) transact the vast majority of the volume on the Exchange; and (3) require the high-touch network support services provided by the Exchange and its staff, including network monitoring, reporting and support services, resulting in a much higher cost to the Exchange to provide such connectivity services.

Commission staff previously noted that the generation of supra-competitive profits is one of several potential factors in considering whether an exchange's proposed fees are consistent with the Act.[35] As described in the Fee Guidance, the term ''supra-competitive profits'' refers to profits that exceed the profits that can be obtained in a competitive market. The proposed fee structure would not result in excessive pricing or supra-competitive profits for the Exchange. The proposed fee structure is merely designed to permit the Exchange to cover the costs allocated to providing connectivity services with a modest margin (on average, approximately 13%), which would also help fund future expenditures (increased costs, improvements, etc.). While the Fee Guidance did not establish a guideline as to what constitutes supra-competitive pricing through analyzing margin (nor does the Exchange believe it should have), the Exchange does not believe that it would be reasonable to consider margin of 20%, which is the Exchange's estimated margin on physical connections, margin of 6%, which is the Exchange's estimated margin on application sessions, or margin of 13%, which is the Exchange's average estimated margin of overall Connectivity Fees, to constitute supra-competitive pricing. As noted above, the increase in margin for physical connections is primarily driven by certain cost savings that the Exchange has been able to achieve as compared to the 2021 Cost Analysis, and the Exchange does not believe it should be penalized, and instead should be rewarded for identifying and realizing such savings. Of course, should the Exchange find opportunities to dramatically reduce costs or increase revenues such that it believes the cost it is charging for physical connections or applications sessions is inconsistent with the cost of providing such connectivity or resulting in unreasonable margin, the Exchange will seek to lower its fees in order to pass savings on to its constituents. Thus, the Exchange believes that its proposed pricing for Connectivity Fees is fair, reasonable, and equitable. Further, the Exchange notes that certain of its competitors have connectivity fees that were approved without the presentation of a cost-based analysis, but it is reasonable to assume that certain of those competitors with significantly higher fees also operate with significantly higher profit margins. Accordingly, the Exchange believes that its proposal is consistent with Section 6(b)(4)[36] of the Act because the proposed fees will permit recovery of the Exchange's costs and will not result in excessive pricing or supra-competitive profit.

The proposed fees for Options connectivity services will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity services. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by adopting fees for connectivity services. As detailed above, the Exchange has four primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these four primary sources of revenue. The Exchange's Cost Analysis estimates the costs to provide connectivity services at $1,447,000. Based on current connectivity services usage, the Exchange would generate monthly revenues of approximately $1,768,800. This represents a modest profit when compared to the cost of providing connectivity services and that profit represents a modest increase over the profit estimated in the 2021 Cost Analysis (a reasonable goal for a newly formed business, *i.e.,* growing from non-profitable, to break-even to modestly profitable).[37] Even if the Exchange earns that amount or incrementally more, the Exchange believes the proposed fees for connectivity services are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total expense of MEMX associated with providing connectivity services versus the total projected revenue of the Exchange associated with network connectivity services.

As noted above, when incorporating the projected revenue from connectivity services into the Exchange's overall projected revenue, including projections related to recently adopted market data fees, the Exchange anticipates monthly revenue of $5,988,620 from all sources. As such, applying the Exchange's holistic Cost Analysis to a holistic view of anticipated revenues, the Exchange would earn approximately 23% margin on its operations as a whole. The Exchange believes that this amount is reasonable and is again evidence that the Exchange will not earn a supra-competitive profit.

The Exchange notes that other exchanges offer similar connectivity options to market participants and that the Exchange's fees are a discount as compared to the majority of such fees.[38]

[35] *See* Fee Guidance, *supra* note 13.

[36] 15 U.S.C. 78f(b)(4).

[37] Specifically, in the 2021 Cost Analysis, the Exchange estimated the total costs to provide connectivity services at $1,143,715 and estimated monthly revenues of $1,233,750.

[38] One significant differentiation between the Exchanges is that while it offers different types of physical connections, including 10Gb, 25Gb, 40Gb, and 100Gb connections, the Exchange does not propose to charge different prices for such connections. In contrast, most of the Exchange's competitors provide scaled pricing that increases depending on the size of the physical connection.

With respect to physical connections, MIAX Options (''MIAX''), MIAX Pearl, LLC (''MIAX Pearl''), MIAX Emerald, LLC (''MIAX Emerald''), each of the Nasdaq Stock Market LLC (''Nasdaq'') options exchanges,[39] NYSE American Options (''NYSE American''), NYSE Arca Options (''NYSE Arca''), Cboe Exchange, Inc. (''Cboe Options''), Cboe BZX Options (''BZX Options''), and Cboe EDGX Options (''EDGX Options'') charge between $7,000-$22,000 per month for physical connectivity at their primary data centers that is comparable to that offered by the Exchange.[40] Nasdaq, NYSE American and NYSE Arca also charge installation fees, which are not proposed to be charged by the Exchange. With respect to application sessions, BX, PHLX, GEMX, MRX, BOX Options (''BOX''), Cboe Options, BZX Options and EDGX charge between $500-$800 per month for order entry and drop ports.[41] The Exchange further notes that several of these exchanges each charge for other logical ports that the Exchange will continue to provide for free, such as application sessions for testing and disaster recovery purposes.[42] While the Exchange's proposed Options Connectivity Fees are lower than certain of the fees charged by the Nasdaq options exchanges, MIAX Options, MIAX Pearl, MIAX Emerald, NYSE American, NYSE Arca, BOX, Cboe, BZX and EDGX, MEMX believes that it offers significant value to Members over these other exchanges in terms of bandwidth available over such connectivity services, which the Exchange believes is a competitive advantage, and differentiates its connectivity versus connectivity to other exchanges.[43] Additionally, the Exchange's proposed Connectivity Fees to its disaster recovery facility are within the range of the fees charged by other exchanges for similar connectivity alternatives.[44] The Exchange believes that its proposal to offer certain application sessions free of charge is reasonable, equitably allocated and not unfairly discriminatory because such proposal is intended to encourage Member connections and use of backup and testing facilities of the Exchange, and, with respect to MEMOIR Gap Fill ports, such ports are used exclusively in connection with the receipt and processing of market data from the Exchange.

In conclusion, the Exchange submits that its proposed fee structure satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act[45] for the reasons discussed above in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities, does not permit unfair discrimination between customers, issuers, brokers, or dealers, and is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest, particularly as the proposal neither targets nor will it have a disparate impact on any particular category of market participant.

The Exchange believes that the waiver of Connectivity Fees for physical connections and application sessions used solely for Options until February 1, 2024 is reasonable, equitable, and not unfairly discriminatory in that it will apply uniformly to all Options Users. The Exchange is proposing the waiver to provide an incentive for options trading firms to apply for membership to MEMX Options, which has recently launched. The options markets are quote-driven markets and are dependent on liquidity providers for liquidity and price discovery. The proposal will be of particular importance in encouraging liquidity providers to become members of the Exchange, which may result in more trading opportunities, enhanced competition, and improved overall market quality on the Exchange. The Exchange notes that it previously proposed waiving Connectivity Fees for physical connections and application sessions used solely for Options until January 1, 2024, but has determined to extend the time for such waiver to February 1, 2024, due to the fact the Exchange has been rolling out the number of options classes traded on MEMX Options gradually since its initial launch and will not complete such rollout until January of 2024. The Exchange believes it is reasonable to postpone the time at which it will commence charging Connectivity Fees for physical connections and application sessions until after such rollout is complete.

The Exchange believes that the proposed reorganization of its fee schedule to establish a separate fee schedule for Connectivity Fees is reasonable and equitable because it is a non-substantive change and does not involve changing any existing fees or rebates that apply to trading activity on MEMX Equities. Further, the changes are designed to make the fee schedule easier to read and for Members to validate the bills they receive from the Exchange. The Exchange also believes this reorganization is non-discriminatory because it applies uniformly to all Members. The Exchange believes the proposed fee schedule will be clearer and less confusing for Members of the Exchange and will eliminate potential Member confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market, and in general, protecting investors and the public interest.

The Exchange does not believe that its costs increase incrementally based on the size of a physical connection but instead, that individual connections and the number of such separate and disparate connections are the primary drivers of cost for the Exchange.

[39] Including Nasdaq PHLX (''PHLX''), Nasdaq Options Market (''NOM''), Nasdaq BX Options (''BX''), Nasdaq ISE (''ISE''), Nasdaq GEMX (''GEMX''), and Nasdaq MRX (''MRX'').

[40] *See* the MIAX fee schedule, available at: *https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX__Options__Fee__Schedule_10022023.pdf;* the MIAX Pearl fee schedule, available at: *https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Pearl_Options_Fee_Schedule_09122023.pdf;* the MIAX Emerald fee schedule, available at: *https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_10122023_3.pdf;* the Nasdaq Options markets fee schedule, at *http://www.nasdaqtrader.com/trader.aspx?id=pricelisttrading2;* the NYSE Connectivity fee schedule, at: *https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf* ; the Cboe fee schedule, at: *https://www.cboe.com/us/options/membership/fee_schedule/cone/* ; the BZX Options fee schedule, available at: *https://www.cboe.com/us/options/membership/fee_schedule/bzx/;* the EDGX Options fee schedule, available at: *https://www.cboe.com/us/options/membership/fee_schedule/edgx/,* and the BOX Options fee schedule, available at: *https://boxoptions.com/fee-schedule/.* This range is based on a review of the fees charged for 10–40Gb connections at each of these exchanges and relates solely to the physical port fee or connection charge, excluding co-location fees and other fees assessed by these exchanges. The Exchange notes that it does not offer physical connections with lower bandwidth than 10Gb and that Members and non-Members with lower bandwidth requirements typically access the Exchange through third-party extranets or service bureaus.

[41] *See id.*

[42] *See id.*

[43] As noted above, all physical connections offered by MEMX are at least 10Gb capable and physical connections provided with larger bandwidth capabilities will be provided at the same rate as such connections. In contrast to other exchanges, MEMX has not proposed different types of physical connections with higher pricing for those with greater capacity. *See supra* note 39. The Exchange also reiterates that MEMX application sessions are capable of handling significant amount of message traffic (*i.e.,* over 50,000 orders per second), and have no application flow control or order throttling, in contrast to competitors that have imposed message rate thresholds. *See supra* note 31 and accompanying text.

[44] *See supra* note 41.

[45] 15 U.S.C. 78f(b)(4) and (5).

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[46] the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed rule change to apply the same Connectivity Fees to Options Users as it does to Equities Users would place certain market participants at the Exchange at a relative disadvantage compared to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. As noted above, the Exchange has previously justified its pricing with respect to MEMX Equities and believes the most fair approach, absent a significant differentiation between application costs to Equities and Options, is to apply the same pricing to all participants of either platform. The Exchange believes its proposed pricing is reasonable and lower than what other options exchanges charge and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. Therefore, the fees may stimulate intramarket competition by attracting additional firms to become Members of MEMX Options. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed Connectivity Fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

As it relates to the reorganization of the fee schedule and the Options Connectivity Fee Waiver, as discussed above, the Exchange does not believe that the proposed changes would impose any burden on intramarket competition because such changes would encourage new participants to participate on the Exchange, thereby enhancing liquidity and market quality on the Exchange, as well as enhancing the attractiveness of the Exchange as a trading venue. The Exchange believes this would encourage market participants to direct order flow to the Exchange.

The Exchange does not believe that the proposed changes would impose any burden on intramarket competition because such changes will incentivize new participants to join MEMX Options and the majority of the Exchange's current Equities members joined at a time when MEMX Equities did not charge connectivity fees (also to incentivize such participants to join), and thus have already received this benefit. The options markets are quote-driven markets and are dependent on liquidity providers for liquidity and price discovery. The proposal will be of particular importance in encouraging liquidity providers to become members of the Exchange, which may result in more trading opportunities, enhanced competition, and improved overall market quality on the Exchange. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

The Exchange does not believe the proposed fees for Options Connectivity place an undue burden on competition on other SROs that is not necessary or appropriate. Additionally, other exchanges have similar connectivity alternatives for their participants, but with higher rates to connect.[47] The Exchange is also unaware of any assertion that the proposed fees for connectivity services would somehow unduly impair its competition with other exchanges. As a new entrant in an already highly competitive environment for equity options trading, MEMX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Exchange Act. In sum, MEMX's proposed Connectivity Fees for Options Members are comparable to and generally lower than fees charged by other options exchanges for the same or similar services.

Additionally, as described above, the proposed reorganization of the fee schedule and Connectivity Fee Waiver will incentive market participants to join the Exchange during the Fee Waiver period. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other options exchanges.

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 foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[48] and Rule 19b–4(f)(2)[49] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change 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–2023–39 on the subject line.

Paper Comments

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

All submissions should refer to file number SR–MEMX–2023–39. This file number should be included on the subject line if email is used. To help the Commission process and review your

[46] 15 U.S.C. 78f(b)(8).

[47] *See supra* notes 40–45 and accompanying text.

[48] 15 U.S.C. 78s(b)(3)(A)(ii).

[49] 17 CFR 240.19b–4(f)(2).

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–2023–39 and should be submitted on or before January 31, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[50]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00286 Filed 1–9–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99273; File No. SR–CboeEDGX–2023–082]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 21.17

January 4, 2024.

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 21, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III 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

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend Rule 21.17. The text of the proposed rule change is provided below.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe EDGX Exchange, Inc.

* * * * *

Rule 21.17. Additional Price Protection Mechanisms and Risk Controls

The System's acceptance and execution of orders, quotes, and bulk messages, as applicable, are subject to the price protection mechanisms and risk controls in Rule 21.16, this Rule 21.17, and as otherwise set forth in the Rules. Unless otherwise specified the price protections set forth in this Rule, including the numeric values established by the Exchange, may not be disabled or adjusted. The Exchange may share any of a User's risk settings with the Clearing Member that clears transactions on behalf of the User.

(a) *Simple Orders.*

(1)–(3) No change.

(4) *Drill-Through Price Protection.*

(A)–(B) No change.

(C) The System enters a market order with a Time-in Force of Day or limit order with a Time-in-Force of Day, GTC, or GTD (or unexecuted portion) not executed pursuant to subparagraph (A) in the EDGX Options Book with a displayed price equal to the Drill-Through Price, unless the terms of the order instruct otherwise.

(i)–(vii) No change.

([viii]*D*) This protection does not apply to bulk messages *or ISOs.*

* * * * *

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 21.17. Specifically, the Exchange proposes to exclude Intermarket Sweep Orders (''ISOs'') from its drill-through protection. Pursuant to Rule 21.17(a)(4)(A), if a buy (sell) order enters the book at the conclusion of the opening auction process or would execute or post to the book when it enters the book, the Exchange's system executes the order up to an Exchange-determined buffer amount (determined on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar[5] or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price''). The System cancels or rejects any market order with a time-in-force of immediate-or-cancel (''IOC'') (or unexecuted portion or limit order with time-in-force of IOC or fill-or-kill (''FOK'') (or unexecuted portion not executed pursuant to the previous sentence.[6] Rule 21.17(a)(4)(C) establishes an iterative drill-through process, whereby the Exchange permits orders to rest in the book for multiple time periods and at more aggressive displayed prices during each time period. Specifically, for a market order with a time-in-force of day or limit order with a time-in-force of day, good-til-cancelled (''GTC''), or good-til-gate (''GTD'') (or unexecuted portion), the Exchange system enters the order in the book with a displayed price equal to the drill-through price (unless the terms of the order instruct otherwise). The order (or unexecuted portion) will rest in the book at the drill-through price for the

[50] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Rule 21.7(a) for the definition of Opening Collars.

[6] *See* Rule 21.17(a)(4)(B).

duration of consecutive time periods (the Exchange determines on a class-by-class basis the length of the time period in milliseconds, which may not exceed three seconds), which are referred to as ''iterations.'' Following the end of each period, the Exchange system adds (if a buy order) or subtracts (if a sell order) one buffer amount (the Exchange determines the buffer amount on a class-by-class basis) to the drill-through price displayed during the immediately preceding period (each new price becomes the ''drill-through price''). The order (or unexecuted portion) rests in the book at that new drill-through price for the duration of the subsequent period. The Exchange system applies a timestamp to the order (or unexecuted portion) based on the time it enters or is re-priced in the book for priority reasons. The order continues through this iterative process until the earliest of the following to occur: (a) the order fully executes; (b) the user cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the book at its limit price, subject to a user's instructions.

Currently, the drill-through protection applies to ISOs. An ISO is a limit order for an options series that meets the following requirements: (1) when routed to an Eligible Exchange,[7] the order is identified as an ISO; and (2) simultaneously with the routing of the order, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the ISO, with such additional orders also marked as ISOs.[8]

The Exchange proposes to exclude ISOs from the drill-through protection.[9] The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. This is inconsistent with the primary purpose of ISOs, which is to permit orders to trade at prices outside of the market. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[10] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [11] 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 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) [12] 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 proposed rule change will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a national market system, and protect investors and the public interest, because it will increase instances in which ISOs receive executions up to their limit prices, including outside of the market prices when the ISOs were submitted to the Exchange, which the Exchange believes is consistent with the expectations of users that submit those orders. As noted above, the primary purpose of ISOs is to permit orders to trade at prices outside of the market. The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality. Therefore, the Exchange believes the proposed rule change will enhance the Exchange system by aligning its drill-through protection with the intended purpose of ISOs.[13] The Exchange believes the proposed rule change may ultimately result in additional executions consistent with the expectations of users that submit ISOs, which ultimately benefits investors. The Exchange further believes the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as it will apply to ISOs of all users.

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 that the proposed rule change 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 ISOs of all Members. The Exchange does not believe that the 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 relates solely to the application of one of the Exchange's price protection mechanisms to ISOs. The Exchange notes at least one other options exchange excludes ISOs from certain of its price protection measures.[14]

[7] An ''Eligible Exchange'' means a national securities exchange registered with the SEC in accordance with Section 6(a) of the Securities Exchange Act of 1934 (the ''Act'') that: (a) is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to this Plan, is a participant in another plan approved by the Securities and Exchange Commission (the ''Commission'') providing for comparable Trade-Through and Locked and Crossed Market protection. The term ''Trade-Through'' means a transaction in an options series at a price that is lower than a Protected Bid or higher than a Protected Offer. A ''Protected Bid'' or ''Protected Offer'' means a bid or offer in an options series, respectively, that (a) is disseminated pursuant to the OPRA Plan; and (b) is the best bid or best offer, respectively, displayed by an Eligible Exchange. A ''Locked Market'' means a quoted market in which a Protected Bid is equal to a Protected Offer in a series of an options class, and a ''Crossed Market'' means a quoted market in which a Protected bid is higher than a Protected Offer in a series of an options class. *See* Rule 27.1(a)(5), (7), (10), (18), and (22).

[8] *See* Rules 21.1(d)(9) and 27.1(a)(9).

[9] *See* proposed Rule 21.17(a)(4)(D). As set forth in current Rule 21.17(a)(4)(C)(viii), the drill-through protection does not apply to bulk messages. The proposed rule change moves this current exclusion to proposed Rule 21.17(a)(4)(D) so that all orders and quotes that are excluded from the drill-through protection are maintained in the same rule provision, and the Exchange believes proposed subparagraph (D) is a more appropriate place for listing excluded orders and quotes. This nonsubstantive change regarding the exclusion of bulk messages from the drill-through protection has no impact on current behavior and merely moves the exclusion to a different subparagraph.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *Id.*

[13] The Exchange notes ISOs will continue to receive price protection, such as from the limit order fat finger check. *See* Rule 21.17(a)(2).

[14] *See* Miami International Securities Exchange, LLC (''MIAX'') Rule 515(c)(1) (ISOs excluded from MIAX's price protection on non-market maker orders in non-proprietary products, which prevents orders from executing more than a specified

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 foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [15] and Rule 19b–4(f)(2) [16] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change 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–CboeEDGX–2023–082 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–CboeEDGX–2023–082. 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–CboeEDGX–2023–082 and should be submitted on or before January 31, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00284 Filed 1–9–24; 8:45 am]

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number of increments away from the national best bid or offer (''NBBO'') at the time the order is received).

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 240.19b–4(f)(2).

[17] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 12297]

Report to Congress Pursuant to the United States—Northern Triangle Enhanced Engagement Act

ACTION: Notice of report.

SUMMARY: This document provides an update to the Department of State's report to Congress on July 19, 2023, regarding foreign persons who are determined to have knowingly engaged in actions that undermine democratic processes or institutions, significant corruption, or obstruction of investigation into such acts of corruption in El Salvador, Guatemala, and Honduras pursuant to the United States—Northern Triangle Enhanced Engagement Act, as amended.

SUPPLEMENTARY INFORMATION: *Report to Congress on Foreign Persons who have Knowingly Engaged in Actions that Undermine Democratic Processes or Institutions, or in Significant Corruption, or in Obstruction of Investigations into Such Acts of Corruption, in El Salvador, Guatemala, Honduras, and Nicaragua Pursuant to Section 353(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021 (Div. FF, Pub. L. 116–260, as amended) (Section 353)*

Consistent with section 353(b) of the United States—Northern Triangle Enhanced Engagement Act (Div. FF, Pub. L. 116–260) (the Act), as amended, this report is being submitted to the House Foreign Affairs Committee, Senate Foreign Relations Committee, House Committee on the Judiciary, and the Senate Committee on the Judiciary.

This document provides an update to the Department of State's report to Congress on July 19, 2023. Section 353(b) requires the submission of a report that identifies the following persons in El Salvador, Guatemala, Honduras, and Nicaragua: foreign persons who the President has determined have knowingly engaged (1) in actions that undermine democratic processes or institutions; (2) in significant corruption; and (3) in obstruction of investigations into such acts of corruption, including the following: corruption related to government contracts; bribery and extortion; the facilitation or transfer of the proceeds of corruption, including through money laundering; and acts of violence, harassment, or intimidation directed at governmental and nongovernmental corruption investigators. On November 10, 2021, the President signed the Reinforcing Nicaragua's Adherence to Conditions for Electoral Reform (RENACER) Act, adding Nicaragua to the countries within the scope of Section 353. On June 21, 2021, the President delegated his authority under section 353 to the Secretary of State.

Under section 353, foreign persons identified in the report submitted to Congress are generally ineligible for visas and admission to the United States and any current visa shall be revoked and any other valid visa or entry documentation cancelled. Consistent with section 353(g), this report will be published in the **Federal Register**.

This report includes individuals who the Secretary has determined have engaged in the relevant activity based upon credible information. The Department will continue to review the individuals listed in the report and consider all available tools to deter and disrupt corrupt and undemocratic activity in El Salvador, Guatemala, Honduras, and Nicaragua. The Department also continues to actively

review additional credible information and allegations concerning corruption or undemocratic activity and to utilize all applicable authorities, as appropriate, to ensure corrupt or undemocratic officials are denied safe haven in the United States.

El Salvador

Ricardo Gomez, President Commissioner of the Institute for Access to Public Information, undermined democratic processes or institutions by purposefully and wrongfully blocking access to public information through his position as President Commissioner at the Institute for Access to Public Information.

Gerardo Guerrero, commissioner of the Institute for Access to Public Information, undermined democratic processes or institutions by purposefully and wrongfully blocking access to public information through his position as a Commissioner at the Institute for Access to Public Information.

Andrés Grégori Rodríguez, commissioner of the Institute for Access to Public Information, undermined democratic processes or institutions by purposefully and wrongfully blocking access to public information through his position as a Commissioner at the Institute for Access to Public Information.

Honduras

Ricardo Arturo Salgado Bonilla, Current Minister of Strategic Planning, undermined democratic processes or institutions by directing the LIBRE party's coordinated efforts through party loyalist groups (''colectivos'') to suppress dissent by violently intimidating opposition legislators calling for a legislative session on October 31, 2023.

Mohammad Yusuf Amdani Bai, a private businessman, engaged in significant corruption by bribing Honduran Supreme Court officials to rule in favor of his business in a private lawsuit.

Cristian Adolfo Sánchez, engaged in significant corruption by participating in a scheme that defrauded the Honduran government of more than $300,000, and colluded with Ministry of Health officials to improperly award government contracts.

Guatemala

Leonor Eugenia Morales Lazo, current prosecutor, undermined democratic processes or institutions by leading a politically-motivated investigation to cast doubt on certified election results to disrupt the presidential transition.

Noe Nehemías Rivera Vasquez, current prosecutor, undermined democratic processes or institutions by bringing politically motivated charges against justice actors fighting corruption and impunity.

Pedro Otto Hernandez Gonzalez, current prosecutor, undermined democratic processes or institutions by participating in a politically-motivated investigation to cast doubt on certified election results to disrupt the presidential transition.

Silvia Patricia Valdes Quezada, a former Supreme Court of Justice magistrate, undermined democratic processes or institutions by participating in the ''Parallel Commissions'' scheme to stack the Supreme Court and Appellate Courts with corrupt judges.

Nicaragua

Gloria Maria Saavedra Corrales, Judge in the Tenth Criminal District Court of Hearings of Managua, undermined democratic processes or institutions by using her position and authority within the Nicaraguan judicial system to knowingly facilitate a coordinated campaign to suppress dissent by confiscating property from the Jesuit Central American University without a legal basis, in order to install a regime-friendly administration.

Maribel del Socorro Duriez González, President of Nicaragua's National Council for Evaluation and Accreditation (CNEA), undermined democratic processes or institutions by taking part in a coordinated campaign to suppress dissent by confiscating property from the government's political opponents, including the Central American University (UCA) and at least 25 other private Nicaraguan universities, without a legal basis, in order to install a regime-friendly administrations.

Ramona Rodriguez Perez, President of Nicaragua's National Council of Universities (CNU), undermined democratic processes or institutions by taking part in a coordinated campaign to suppress dissent by confiscating property from the government's political opponents, including Central American University (UCA) and at least 25 other private Nicaraguan universities, without a legal basis, in order to install a regime-friendly administrations.

Alejandro Enrique Genet Cruz, Rector of Casimiro Sotelo University (formerly Central American University), undermined democratic processes or institutions by taking part in a coordinated campaign to retaliate against critics of the Ortega-Murillo regime and to suppress dissent by using his position to create policies that punish Casimiro Sotelo University faculty and students who do not take part in political activities for Ortega's Sandinista National Liberation Front (FSLN) political party.

Dated: December 20, 2023.

Richard Verma,

Deputy Secretary of State for Management and Resources.

[FR Doc. 2024–00346 Filed 1–9–24; 8:45 am]

BILLING CODE 4710–29–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1311 (Sub-No. 1X)]

Metro-North Commuter Railroad Company—Abandonment Exemption—in Dutchess and Putnam Counties, N.Y.

Metro-North Commuter Railroad Company (MNR) has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon an approximately 41.1-mile rail line that runs between milepost 0.0 and milepost 71.2, in Dutchess and Putnam Counties, N.Y. (the Line).[1] The Line traverses U.S. Postal Service Zip Codes 12508, 12524, 12533, 12582, 12570, 12531, 12563, 10509, and 12564.

MNR has certified that: (1) no local freight or overhead traffic has moved over the Line during the past two years; (2) no formal complaint filed by a user of rail service on the Line (or by a state or local government on behalf of such user) regarding cessation of service over the Line is pending with either the Surface Transportation Board (Board) or any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (3) the requirements at 49 CFR 1152.50(d)(1) (notice to government agencies) have been met.

As a condition to this exemption, any employee adversely affected by the

[1] When the Interstate Commerce Commission, the Board's predecessor, authorized MNR to acquire the Line in 1995, it exempted MNR from most of the provisions of Subtitle IV of Title 49 of the U.S. Code and authorized MNR to abandon the Line subject to the future discontinuance of trackage rights then held by Danbury Terminal Railroad Company. *Metro-N. Commuter R.R.—Exemption—from 49 U.S.C. Subtitle IV.,* FD 32639 (Sub-No. 1), slip op. at 1 (STB served Nov. 22, 2023). *See also Metro-N. Commuter R.R.—Acquis. Exemption—the Maybrook Line,* FD 32639 et al., slip op. at 3–4 (ICC served Jan. 13, 1995). MNR filed a petition seeking partial revocation of the Subtitle IV exemption to permit MNR to file for abandonment authority and ultimately pursue interim trail use/railbanking of a rail line under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), and 49 CFR 1152.29. *Metro-N. Commuter R.R.,* FD 36239 (Sub-No. 1), slip op. at 1 (STB served Nov. 22, 2023). The Board granted that petition on November 22, 2023. *Id.*

abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received,[2] this exemption will be effective on February 9, 2024, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues [3] must be filed by January 19, 2024. Formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2) and interim trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 22, 2024.[4] Petitions to reopen and requests for public use conditions under 49 CFR 1152.28 must be filed by January 30, 2024.

All pleadings, referring to Docket No. AB 1311 (Sub-No. 1X), must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street, SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on MNR's representative, Charles A. Spitulnik, Kaplan, Kirsch & Rockwell, LLP, 1634 I (Eye) Street NW, Suite 300, Washington, DC 20006.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Public use or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), MNR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by MNR's filing of a notice of consummation by January 10, 2025, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available at *www.stb.gov.*

Decided: January 5, 2024.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2024–00338 Filed 1–9–24; 8:45 am]

BILLING CODE 4915–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Approvals by Rule for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: December 1–31, 2023.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.gov.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22 (e) and (f) for the time period specified above.

Water Source Approval—Issued Under 18 CFR 806.22(e):

1. Plainville Brands, LLC—Plainville Farms, ABR–202312005; New Oxford Borough, Adams County, Pa.; Consumptive Use of Up to 0.380 mgd; Approval Date: December 6, 2023.

2. Penn State Health Hampden Medical Center—Hampden Medical Center; ABR–202312006; Hampden Township, Cumberland County, Pa.; Consumptive Use of Up to 0.1620 mgd; Approval Date: December 7, 2023.

Water Source Approval—Issued Under 18 CFR 806.22(f):

1. Coterra Energy Inc.; Pad ID: DobrosielskiJ P1; ABR–202312003; Auburn & Dimock Townships, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: December 7, 2023.

2. RENEWAL—Chesapeake Appalachia, L.L.C.; Pad ID: Amcor; ABR–201211018.R2; Meshoppen Township, Wyoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: December 8, 2023.

3. RENEWAL—Chesapeake Appalachia, L.L.C.; Pad ID: Joeguswa; ABR–201211019.R2; Cherry Township, Sullivan County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: December 8, 2023.

4. RENEWAL—Chesapeake Appalachia, L.L.C.; Pad ID: Lucarino Drilling Pad #1; ABR–201112010.R2; Wilmot Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: December 8, 2023.

5. RENEWAL—Range Resources—Appalachia, LLC; Pad ID: State Game Lands 075A—East Pad; ABR–201311005.R2; Pine Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 8, 2023.

6. RENEWAL—Seneca Resources Company, LLC; Pad ID: Sherman 492W; ABR–201310001.R2; Sullivan Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 8, 2023.

7. RENEWAL—SWN Production Company, LLC; Pad ID: TNT 1 LIMITED PARTNERSHIP; ABR–201112006.R2; New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 8, 2023.

8. Coterra Energy Inc.; Pad ID: ConboyT P1; ABR–202312002; Middletown Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: December 10, 2023.

9. Greylock Production, LLC; Pad ID: Ron Well Pad; ABR–202312001; Hector Township, Potter County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: December 10, 2023.

10. RENEWAL—Chesapeake Appalachia, L.L.C.; Pad ID: Edger; ABR–201112020.R2; Smithfield Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: December 18, 2023.

11. RENEWAL—Chesapeake Appalachia, L.L.C.; Pad ID: RGB; ABR–201112021.R2; Smithfield Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: December 18, 2023.

[2] Persons interested in submitting an OFA must first file a formal expression of intent to file an offer, indicating the type of financial assistance they wish to provide (*i.e.,* subsidy or purchase) and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(2)(i).

[3] Typically, an abandonment requires environmental review. However, on September 9, 2022, the Board's Office of Environmental Analysis (OEA) issued a Final Environmental Assessment (Final EA) covering the Line in a related proceeding: *Metro-North Commuter Railroad—Adverse Discontinuance of Trackage Rights—Housatonic Railroad,* Docket No. AB 1311. No environmental or historic preservation issues were raised by any party or identified by OEA in that Final EA. MNR states that no significant changes affecting the Line have taken place since the Final EA was issued. Accordingly, because OEA has recently conducted an appropriate environmental review concerning the Line at issue, a finding of no significant impact under 49 CFR 1105.10(g) will be made pursuant to 49 CFR 1011.7(a)(2)(ix). *See Housatonic R.R.—Discontinuance of Serv.—in Dutchess & Putnam Cntys., N.Y.,* AB 733 (Sub-no. 1X) et al., slip op. at 4 n.10 (STB served July 13, 2023).

[4] Filing fees for OFAs and trail use requests can be found at 49 CFR 1002.2(f)(25) and (27), respectively.

12. RENEWAL—Chesapeake Appalachia, L.L.C.; Pad ID: Wildonger; ABR–201112026.R2; Wyalusing Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: December 18, 2023.

13. RENEWAL—Chesapeake Appalachia, L.L.C.; Pad ID: Yost; ABR–201112022.R2; Franklin Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: December 18, 2023.

14. RENEWAL—Coterra Energy Inc.; Pad ID: CareyR P1; ABR–201112023.R2; Harford Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: December 18, 2023.

15. RENEWAL—Seneca Resources Company, LLC; Pad ID: DCNR 007 Pad K; ABR–201112018.R2; Delmar Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 18, 2023.

16. RENEWAL—SWN Production Company, LLC; Pad ID: NR–11–DAYTON–PAD; ABR–201312002.R2; Great Bend Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 18, 2023.

17. RENEWAL—SWN Production Company, LLC; Pad ID: NR–14–BRANT–PAD; ABR–201312001.R2; Great Bend Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 18, 2023.

18. RENEWAL—SWN Production Company, LLC; Pad ID: RU–40–BREESE–PAD; ABR–201312003.R2; New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 18, 2023.

19. RENEWAL—Seneca Resources Company, LLC; Pad ID: Cotton Hanlon 595; ABR–201612001.R1; Sullivan Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 20, 2023.

20. RENEWAL—EQT ARO LLC; Pad ID: Kurt Haufler Pad A; ABR–201312005.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 26, 2023.

21. RENEWAL—Repsol Oil & Gas USA, LLC; Pad ID: STICKNEY (07 087) A; ABR–201312004.R2; Choconut Township, Susquehanna County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: December 26, 2023.

22. RENEWAL—Seneca Resources Company, LLC; Pad ID: Scheible 898; ABR–201112039.R2; Deerfield Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 26, 2023.

23. RENEWAL—SWN Production Company, LLC; Pad ID: LOCH; ABR–201112031.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 26, 2023.

24. Inflection Energy (PA) LLC; Pad ID: Easton Well Site; ABR–202312004; Upper Fairfield Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 29, 2023.

25. RENEWAL—Coterra Energy Inc.; Pad ID: Jeffers Farms P1; ABR–201112003.R2; Harford Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: December 29, 2023.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806 and 808.

Dated: January 5, 2024.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2024–00356 Filed 1–9–24; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Public Hearing

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will hold a public hearing on February 1, 2024. The Commission will hold this hearing in person and telephonically. At this public hearing, the Commission will hear testimony on the projects listed in the Supplementary Information section of this notice and testimony on the General Permit GP–3, Cooperative Fish Nursery. Such projects and actions are intended to be scheduled for Commission action at its next business meeting, tentatively scheduled for March 14, 2024, which will be noticed separately. The public should note that this public hearing will be the only opportunity to offer oral comments to the Commission for the listed projects and actions. The deadline for the submission of written comments is February 12, 2024.

DATES: The public hearing will convene on February 1, 2024, at 6:30 p.m. The public hearing will end at 9 p.m. or at the conclusion of public testimony, whichever is earlier. The deadline for submitting written comments is Monday, February 12, 2024.

ADDRESSES: This public hearing will be conducted in person and virtually. You may attend in person at Susquehanna River Basin Commission, 4423 N. Front St., Harrisburg, Pennsylvania, or join by telephone at Toll-Free Number 1–877–304–9269 and then enter the guest passcode 2619070 followed by #.

FOR FURTHER INFORMATION CONTACT: Jason Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423 or *joyler@srbc.gov.*

The draft General Permit GP–3, Cooperative Fish Nursery, and related Fact Sheet may be viewed on the Commissions website at *https://www.srbc.gov/regulatory/public-participation/.*

Information concerning the project applications is available at the Commission's Water Application and Approval Viewer at *https://www.srbc.net/waav.* Additional supporting documents are available to inspect and copy in accordance with the Commission's Access to Records Policy at *www.srbc.gov/regulatory/policies-guidance/docs/access-to-records-policy-2009–02.pdf.*

SUPPLEMENTARY INFORMATION: In addition to hearing testimony on General Permit GP–3, the public hearing will cover the following projects:

Projects Scheduled for Action:

1. Project Sponsor and Facility: ADLIB Resources, Inc. (Meshoppen Creek), Springville Township, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.499 mgd (peak day) (Docket No. 20190301).

2. Project Sponsor and Facility: Beech Resources, LLC (Lycoming Creek), Lycoming Township, Lycoming County, Pa. Application for surface water withdrawal of up to 1.500 mgd (peak day).

3. Project Sponsor and Facility: Cherokee Pharmaceuticals, LLC (Susquehanna River), Riverside Borough, Northumberland County, Pa. Modification to extend the approval terms of the consumptive use and surface water withdrawal approvals (Docket Nos. 20090310 and 20090311) while the facility begins to decommission operations through 2028, and a phased reduction in the surface water withdrawal from 34.392 mgd to 5.100 mgd (peak day) and consumptive use from 0.999 mgd to 0.200 mgd (peak day).

4. Project Sponsor and Facility: Chesapeake Appalachia, L.L.C. (Susquehanna River), Braintrim Township, Wyoming County, Pa. Application for renewal of surface water withdrawal of up to 3.000 mgd (peak day) (Docket No. 20190303).

5. Project Sponsor and Facility: Chesapeake Appalachia, L.L.C.

(Susquehanna River), Wysox Township, Bradford County, Pa. Modification to increase surface water withdrawal by an additional 2.001 mgd (peak day), for a total withdrawal of up to 3.000 mgd (peak day) (Docket No. 20220603).

6. Project Sponsor and Facility: Conestoga Country Club, Manor Township, Lancaster County, Pa. Application for renewal of groundwater withdrawal of up to 0.281 mgd (30-day average) from Well 1 (Docket No. 20080617).

7. Project Sponsor: Dauphin County General Authority. Project Facility: Highlands Golf Course, Swatara Township, Dauphin County, Pa. Application for renewal of consumptive use of up to 0.249 mgd (30-day average) (Docket No. 19940104).

8. Project Sponsor and Facility: East Cocalico Township Authority, East Cocalico Township, Lancaster County, Pa. Application for renewal of groundwater withdrawal of up to 0.115 mgd (30-day average) from Well 2A (Docket No. 19990901).

9. Project Sponsor: East Hempfield Township. Project Facility: Four Seasons Golf Club, East Hempfield Township, Lancaster County, Pa. Applications for renewal of groundwater withdrawal of up to 0.199 mgd (30-day average) from Well C and consumptive use of up to 0.304 mgd (peak day) (Docket No. 19970504).

10. Project Sponsor: Golf Enterprises, Inc. Project Facility: Valley Green Golf Course, Newberry Township, York County, Pa. Application for renewal of consumptive use of up to 0.099 mgd (30-day average) (Docket No. 20021019).

11. Project Sponsor: Greater Hazleton Community-Area New Development Organization, Inc. Project Facility: CAN DO, Inc.—Corporate Center, Butler Township, Luzerne County, Pa. Application for groundwater withdrawal of up to 0.288 mgd (30-day average) from Well 2.

12. Project Sponsor and Facility: Greylock Production, LLC (Genesee Forks), Hector Township, Potter County, Pa. Application for surface water withdrawal of up to 1.440 mgd (peak day).

13. Project Sponsor and Facility: Greylock Production, LLC (Pine Creek), Ulysses Township, Potter County, Pa. Application for surface water withdrawal of up to 2.592 mgd (peak day).

14. Project Sponsor and Facility: Hegins-Hubley Authority, Hegins Township, Schuylkill County, Pa. Application for renewal of groundwater withdrawal of up to 0.110 mgd (30-day average) from Well 5 (Docket No. 19981204).

15. Project Sponsor and Facility: Keystone Potato Products, LLC, Frailey Township, Schuylkill County, Pa. Applications for groundwater withdrawal of up to 0.140 mgd (30-day average) from Well 2 and consumptive use of up to 0.140 mgd (30-day average).

16. Project Sponsor: New Enterprise Stone & Lime Co., Inc. Project Facility: Laflin Quarry, Plains Township, Luzerne County, Pa. Modification to increase consumptive use by an additional 0.240 mgd (30-day average), for a total consumptive use of up to 0.280 mgd (30-day average) (Docket No. 20230613).

17. Project Sponsor and Facility: New Holland Borough Authority, Earl Township, Lancaster County, Pa. Application for groundwater withdrawal of up to 0.391 mgd (30-day average) from Well 1.

18. Project Sponsor and Facility: Newport Borough Water Authority, Oliver Township, Perry County, Pa. Application for early renewal of groundwater withdrawal at an increased rate of up to 0.096 mgd (30-day average) from Well 1 (Docket No. 20140908).

19. Project Sponsor: Post Consumer Brands, LLC. Project Facility: Bloomsburg Plant, South Centre Township, Columbia County, Pa. Applications for renewal of groundwater withdrawal of up to 0.530 mgd (30-day average) from Well 6 and consumptive use of up to 0.800 mgd (peak day) (Docket No. 19910709).

20. Project Sponsor and Facility: PPG Operations LLC (West Branch Susquehanna River), Goshen Township, Clearfield County, Pa. Modification to review withdrawal and approval for use of AMD-impacted water under Commission Policy No. 2021–04 (Docket No. 20210605).

21. Project Sponsor: Rich Valley Golf, Inc. Project Facility: Rich Valley Golf Course (Conodoguinet Creek), Silver Spring Township, Cumberland County, Pa. Applications for renewal of surface water withdrawal of up to 0.325 mgd (peak day) and consumptive use of up to 0.325 mgd (30-day average) (Docket No. 19990306).

22. Project Sponsor and Facility: Seneca Resources Company, LLC (Cowanesque River), Westfield Township, Tioga County, Pa. Application for renewal of surface water withdrawal of up to 0.375 mgd (peak day) (Docket No. 20190311).

23. Project Sponsor: Shadow Ranch Resort, Inc. Project Facility: Shadowbrook Resort (Tunkhannock Creek), Tunkhannock Township, Wyoming County, Pa. Application for renewal of surface water withdrawal of up to 0.999 mgd (peak day) (Docket No. 20190307).

24. Project Sponsor and Facility: Sugar Hollow Water Services LLC (Martins Creek), Hop Bottom Borough, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.360 mgd (peak day) (Docket No. 20190310).

25. Project Sponsor and Facility: SWN Production Company, LLC (Martins Creek), Brooklyn Township, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.997 mgd (peak day) (Docket No. 20190312).

Opportunity to Appear and Comment:

Interested parties may call into the hearing to offer comments to the Commission on any business listed above required to be the subject of a public hearing. Given the nature of the meeting, the Commission strongly encourages those members of the public wishing to provide oral comments to pre-register with the Commission by emailing Jason Oyler at *joyler@srbc.gov* before the hearing date. The presiding officer reserves the right to limit oral statements in the interest of time and to control the course of the hearing otherwise. Access to the hearing via telephone will begin at 6:15 p.m. Guidelines for the public hearing are posted on the Commission's website, *www.srbc.gov,* before the hearing for review. The presiding officer reserves the right to modify or supplement such guidelines at the hearing. Written comments on any business listed above required to be the subject of a public hearing may also be mailed to Mr. Jason Oyler, Secretary to the Commission, Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, Pa. 17110–1788, or submitted electronically through *https://www.srbc.gov/meeting-comment/default.aspx?type=2&cat=7.* Comments mailed or electronically submitted must be received by the Commission on or before Monday, February 12, 2023, to be considered.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: January 5, 2024.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2024–00357 Filed 1–9–24; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Minor Modifications

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the minor modifications approved for a previously approved project by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: December 1–31, 2023.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists previously approved projects receiving approval of minor modifications, described below, pursuant to 18 CFR 806.18 or Commission Resolution Nos. 2013–11 and 2015–06 for the time period specified above.

1. Global Tungsten & Powders LLC (consumptive use), Docket No. 20231221, North Towanda Township and Towanda Borough, Bradford County, Pa.; modification approval to adjust the term of approval and align term with the term of another Commission docket approval; Approval Date: December 15, 2023.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806 and 808.

Dated: January 5, 2024.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2024–00355 Filed 1–9–24; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2024–0002]

Agency Information Collection Activities: Notice of Request for Reinstatement of a Previously Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for reinstatement of a previously approved information collection.

SUMMARY: The FHWA has forwarded the information collection request described in this notice to the Office of Management and Budget (OMB) for approval of a new (periodic) information collection. We published a **Federal Register** Notice with a 60-day public comment period on this information collection on September 30, 2023. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by February 9, 2024.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0002 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jason Broehm, Office of Safety, 202–366–2201, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, between 7:30 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Safe Streets and Roads for All Grant Program.

OMB Control #: 2125–0675.

Background: Through the Safe Streets and Roads for All discretionary grant program, the Office of the Secretary of Transportation (OST), in close collaboration with the Federal Highway Administration (FHWA), provides financial support for local initiatives to prevent traffic related fatalities and serious injuries on the nation's roads. Section 24112(g)(1) of the Bipartisan Infrastructure Law specifically requires grant recipients to submit certain data, information, and analysis to the Secretary on a regular basis. In addition, grant recipients will submit requests for financial reimbursement for funds expended on eligible projects. The reporting requirements submitted by grant recipients will be completed during the application, grant agreement, project management, and project evaluation phases.

Respondents: MPOs, political subdivisions of a State, federally-recognized Tribal governments, and multijurisdictional groups comprised of these entities.

Estimated Average Burden per Response: Collectively, the respondents electronically submit an estimated total of 18,650 reporting documents under all four phases (application, grant agreement, project management, and project evaluation) per year. Each respondent will spend an estimated average of 157.75 hours to complete all the phases of a grant annually.

Estimated Total Annual Burden Hours: Total estimated average annual burden is 61,400 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, 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.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on: January 4, 2024.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2024–00281 Filed 1–9–24; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–41]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its

implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) summarized below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On October 2, 2023, FRA published a notice providing a 60-day period for public comment on the ICR. FRA received no comments related to the proposed collection of information.

DATES: Interested persons are invited to submit comments on or before February 9, 2024.

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

FOR FURTHER INFORMATION CONTACT: Ms. Arlette Mussington, Information Collection Clearance Officer, at email: *arlette.mussington@dot.gov* or telephone: (571) 609–1285, or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: *joanne.swafford@dot.gov* or telephone: (757) 897–9908.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On October 2, 2023, FRA published a 60-day notice in the **Federal Register** soliciting public comment on the ICR for which it is now seeking OMB approval. *See* 88 FR 67864. FRA received no comments related to the proposed collection of information.

Before OMB decides whether to approve this proposed collection of information, it must provide 30 days' notice for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Safety Appliance Concern Recommendation Report, Safety Appliance Standards Guidance Checklist Forms.

OMB Control Number: 2130–0565.

Abstract: Title 49 Code of Federal Regulations (CFR) part 231, Railroad Safety Appliance Standards, was supplemented and expanded in 2013 to include the industry standard established by the Association of American Railroads (AAR), Standard 2044 or S–2044, which prescribed safety appliance arrangements for 11 new types of cars. As a result of the inclusion, FRA developed Forms FRA F 6180.161(a)–(k) as guidance checklist forms to facilitate railroad, rail car owner, and rail equipment manufacturer compliance with S–2044 and 49 CFR part 231. AAR has since updated S–2044 to include seven new types of cars.

Type of Request: Extension without change of a currently approved collection.

Affected Public: Businesses.

Form(s): 18 forms (FRA F 6180.161(a)–(r)).

Respondent Universe: Car manufacturers/State inspectors.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 142.

Total Estimated Annual Burden: 142 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $13,061.

FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information that does not display a currently valid OMB control number.

(Authority: 44 U.S.C. 3501–3520)

Christopher S. Van Nostrand,

Acting Deputy Chief Counsel.

[FR Doc. 2024–00295 Filed 1–9–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Bureau of the Fiscal Service

Notice of Rate To Be Used for Federal Debt Collection, and Discount and Rebate Evaluation

AGENCY: Bureau of the Fiscal Service, Fiscal Service, Treasury.

ACTION: Notice of rate to be used for Federal debt collection, and discount and rebate evaluation.

SUMMARY: The Secretary of the Treasury is responsible for computing and publishing the percentage rate that is used in assessing interest charges for outstanding debts owed to the Government (The Debt Collection Act of 1982, as amended). This rate is also used by agencies as a comparison point in evaluating the cost-effectiveness of a cash discount. In addition, this rate is used in determining when agencies should pay purchase card invoices when the card issuer offers a rebate. Notice is hereby given that the applicable rate for calendar year 2024 is 4.00 percent.

DATES: January 1, 2024, through December 31, 2024.

FOR FURTHER INFORMATION CONTACT: Department of the Treasury, Bureau of the Fiscal Service, Payment Management, E-Commerce Division (LC–RM 349B), 3201 Pennsy Drive, Building E, Landover, MD 20785 (Telephone: 202–874–9428).

SUPPLEMENTARY INFORMATION: The rate reflects the current value of funds to the Treasury for use in connection with Federal Cash Management systems, and is based on investment rates set for purposes of Public Law 95–147, 91 Stat. 1227 (October 28, 1977), as calculated by the Department of the Treasury's Office of Debt Management. The annual Interest Rate Factors used in determining the Current Value of Funds Rate are based on weekly average Fed funds less 25 basis points for the 12-month period ending every September 30, rounded to the nearest whole percentage, for applicability effective each January 1. Quarterly revisions are made if the annual average, on a moving basis, changes by 2 percentage points. The rate for calendar year 2024 reflects

the average investment rates for the 12-month period that ended September 30, 2023.

Authority: 31 U.S.C. 3717.

Linda Claire Chero,

Assistant Commissioner, Disbursing & Debt Management and Chief Disbursing Officer.

[FR Doc. 2024–00272 Filed 1–9–24; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On December 28, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

Individuals:

1. AL-HADHA, Nabil Ali Ahmed (Arabic: نبيل علي أحمد الحظا) (a.k.a. AL-HAZA', Nabil), Yemen; DOB 02 Feb 1975; nationality Yemen; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Passport 08928715 (Yemen) expires 05 Nov 2025 (individual) [SDGT] (Linked To: NABCO MONEY EXCHANGE AND REMITTANCE CO.).

   Designated pursuant to section 1(a)(iii)(B) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism" (E.O. 13224), 3 CFR, 2019 Comp., p. 356., as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended) for owning or controlling, directly or indirectly, NABCO MONEY EXCHANGE AND REMITTANCE CO., a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Entities:

1. AL AMAN KARGO ITHALAT IHRACAT VE NAKLIYAT LIMITED SIRKETI (a.k.a. AL AMAN CO KARGO), Ikitelli OSB Mah. Milas Cad., No: 29/5 Basaksehir, Istanbul, Turkey; Ordu Cd., Cihan Saray Is Merkezi, No. 71, Kat 6, No. 91, Laleli, Istanbul, Turkey; Cakmak Mah., Zafer Cd., No. 16/D, Sehitkamil, Gaziantep, Turkey; 11 Eylul Cd., No. 32, Yavus Selim, Bursa, Turkey; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 05 May 2014; Chamber of Commerce Number 919198 (Turkey); Business Registration Number 921643-0 (Turkey) [SDGT] (Linked To: ALALAMIYAH EXPRESS COMPANY FOR EXCHANGE AND REMITTANCE).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, ALALAMIYAH EXPRESS COMPANY FOR EXCHANGE AND REMITTANCE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

2. AL RAWDA EXCHANGE AND MONEY TRANSFERS COMPANY (Arabic: شركة الروضة للصرافة والتحويلات المالية) (a.k.a. AL RAWDA EXCHANGE AND TRANSFERS CO.; a.k.a. AL RAWDAH EXCHANGE AND FINANCIAL TRANSACTIONS-MOHAMMAD ALI MOHAMMED AL HAWRI AND YASSER ALI MOHAMMED AL HAWRI COMPANY GENERAL PARTNERSHIP (Arabic: شركة الروضة للصرافة والتحويلات المالية محمد علي محمد الحو ي وياسر علي محمد الحو ي التضامنية)), Airport Line, Al-Jumna Roundabout, Sana'a, Yemen; Sa'adah, Yemen; Al-Hudaydah, Yemen; Amran, Yemen; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by

Executive Order 13886; Organization Type: Other monetary intermediation [SDGT] (Linked To: AL-JAMAL, Sa'id Ahmad Muhammad).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SA'ID AL-JAMAL (AL-JAMAL), a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. NABCO MONEY EXCHANGE AND REMITTANCE CO. (Arabic: شركة نابكو للصرافة والتحويلات المالية) (a.k.a. NABAKO MONEY EXCHANGE AND TRANSFERS; a.k.a. NABCO MONEY EXCHANGE & REMITTANCE CO.; a.k.a. NABICO EXCHANGE; a.k.a. NABIL AL-HAZA' COMPANY; a.k.a. "NABCO COMPANY"), Al-Khamis Street, Lebanese University Neighborhood, Sana'a, Yemen; Website https://nabco-ye.com; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Type: Other monetary intermediation [SDGT] (Linked To: AL-JAMAL, Sa'id Ahmad Muhammad).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, AL-JAMAL, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Dated: December 28, 2023.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024–00273 Filed 1–9–24; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*ofac.treasury.gov*).

Notice of OFAC Action(s)

On November 29, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

Individuals:

1. ALAVI, Seyyed Abdoljavad (Arabic: سید عبدالجواد علوی) (a.k.a. ALAVI, Sayyed Abdoljavad), Iran; DOB 30 Mar 1946; POB Khormoj, Iran; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 3549804814 (Iran) (individual) [SDGT] [IFSR] (Linked To: MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS).

   Designated pursuant to section 1(a)(iii)(C) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism" (E.O. 13224), 3 CFR, 2001 Comp., p. 786, as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended) for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS (MODAFL), a person whose property and interests in property are blocked pursuant to E.O. 13224.

2. A'ZAMI, Majid (Arabic: مجید اعظمی), Iran; DOB 06 Jan 1983; POB Esfahan, Iran; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 1287272045 (Iran) (individual) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(E) of E.O. 13224, as amended, for being a leader of official of, SEPEHR ENERGY JAHAN NAMA PARS COMPANY (SEPEHR ENERGY), a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. NIROOMAND TOOMAJ, Elyas (Arabic: الیاس نیرومند توماج) (a.k.a. NIRUMAND TUMAJ, Elyas; a.k.a. NIRUMANDTUMAJ, Elias), Iran; DOB 31 May 1990; POB Iran; nationality Iran; citizen Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Passport L55195938 (Iran) expires 17 Nov 2026; National ID No. 2230048759 (Iran) (individual) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for acting or purporting to act for or on behalf of, directly or indirectly, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

4. KULIYEVA, Adelina (a.k.a. DAL, Jackline; a.k.a. TURKMEN, Selina), Turkmenistan; United Arab Emirates; DOB 03 Dec 1990; Gender Female; Secondary sanctions risk:

section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: TRANSMART DMCC).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for acting or purporting to act for or on behalf of, directly or indirectly, TRANSMART DMCC, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

5. PALIKANDY, Mehboob Thachankandy, United Arab Emirates; DOB 25 Apr 1966; POB India; nationality India; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Passport U0446178 (India) (individual) [SDGT] (Linked To: CGN TRADE FZE; Linked To: MSE OVERSEAS PTE. LTD.; Linked To: SEALINK OVERSEAS PTE. LTD.; Linked To: SOLISE ENERGY (FZE)).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for acting or purporting to act for or on behalf of, directly or indirectly, TRANSMART DMCC, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

6. VAHAP, Zabi (a.k.a. VAHAP, Zebih Ullah; a.k.a. WAHAB, Zabihullah Abdul), Dubai, United Arab Emirates; DOB 01 Jan 1986; POB Akce, Afghanistan; nationality Turkey; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Passport U24258057 (Turkey) expires 12 Jul 2031; alt. Passport U13652962 expires 02 Dec 2026; National ID No. 25406705762 (Turkey) (individual) [SDGT] [IFSR] (Linked To: KARIMIAN, Mohammad Sadegh; Linked To: TRANSMART DMCC).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, MOHAMMAD SADEGH KARIMIAN, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended, and pursuant to section 1(a)(iii)(B) of E.O. 13224, as amended, for owning, controlling, or directing, directly or indirectly, TRANSMART DMCC, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Entities:

1. SEPEHR ENERGY JAHAN NAMA PARS COMPANY (Arabic: شركت سپهر انرژی جهان نمای پارس), Floor 1, No. 41, Shahid Doctor Beheshti Street, Doctor Ali Shariati Street, Niloofar-Shahid Ghandi, Central District, Tehran, Tehran Province 1559649899, Iran; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 21 Nov 2022; National ID No. 14011674086 (Iran); Business Registration Number 605057 (Iran) [SDGT] [IFSR] (Linked To: MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, MODAFL*, a person whose property and interests in property are blocked pursuant to E.O. 13224.

2. FUTURE ENERGY TRADING L.L.C (Arabic: فيوتشر لتجارة الطاقة ش.ذ.م.م), Bur Dubai, Dubai, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 04 Nov 2021; Business Registration Number 1000007 (United Arab Emirates); Economic Register Number (CBLS) 11776799 (United Arab Emirates) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY JAHAN NAMA PARS COMPANY (SEPEHR ENERGY), a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. HK SIHANG HAOCHEN TRADING LIMITED (Chinese Traditional: 香港思航皓宸貿易有限公司), 12th Floor San Toi Building 137-139, Connaught Road, Central Hong Kong, Hong Kong, China; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 03 Jan 2022; Commercial Registry Number 3117975 (Hong Kong) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

4. JEP PETROCHEMICAL TRADING L.L.C (Arabic: جي إي بي لتجارة البتروكيماويات ش.ذ.م.م), Deira Al Murar, Dubai, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 30 Jun 2022; Business Registration Number 1078042 (United Arab Emirates); Economic Register Number (CBLS) 11899644 (United Arab Emirates) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

5. OPG GLOBAL GENERAL TRADING CO. L.L.C (Arabic: او جي بي جلوبال للتجارة العامة شركة الشخص الواحد ذ.م.م), Bur Dubai Al Fahedy, Dubai, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 13 Dec 2022; Business Registration Number 1127555 (United Arab Emirates); Economic Register Number (CBLS) 11980239 (United Arab Emirates) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

6. PUYUAN TRADE CO., LIMITED (Chinese Traditional: 普緣貿易有限公司), Rm. 517, New City Centre, 2 Lei Yue Mun Road, Kwun Tong, Kowloon, Hong Kong, China; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 06 Jul 2022; Commercial Registry Number 3169192 (Hong Kong) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

7. TETIS GLOBAL FZE (Arabic: تيتيس جلوبال م م ح), P2-ELOB Office No. E2-112G-05, Hamriyah, Sharjah, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 13 Feb 2023; Business Registration Number 25754 (United Arab Emirates); Economic Register Number (CBLS) 12017901 (United Arab Emirates) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

8. UNIQUE PERFORMANCE GENERAL TRADING L.L.C (Arabic: يونيك برفورمانس للتجارة العامة ش.ذ.م.م), PO Box 128617, Dubai, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886, Organization Established Date 13 May 2013; Business Registration Number 688618 (United Arab Emirates); Economic Register Number (CBLS) 10893667 (United Arab Emirates) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

9. A THREE ENERGY FZE (Arabic: ا ثري انيرجي م م ح), Leased Office Bldg Office No. 2F-37, Hamriyah, Sharjah, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 15 Mar 2018; Business Registration Number 16882 (United Arab Emirates); Economic Register Number (CBLS) 11581771 (United Arab Emirates) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224.

10. ROYAL SHELL GOODS WHOLESALERS L.L.C (Arabic: رويال شيل لتجارة السلع بالجملة ش.ذ.م.م), Riggat Al Buteen, Deira, Dubai, United Arab Emirates; Secondary sanctions ; risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 Organization Established Date 29 Jul 2021; Business Registration Number 968335 (United Arab Emirates); Economic Register Number (CBLS) 11710687 (United Arab Emirates) [SDGT] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS). COMPANY

    Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

11. PISHRO TEJARAT SANA COMPANY (Arabic: شركت پيشرو تجارت سانا), Unit 81, Floor 8, Ribbon Building, Number 3, Eastern Brazil Street, Kurdistan Highway, Vanak, Central Section, Tehran, Tehran Province, Iran; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 25 Jul 2011; National ID No. 10320606988 (Iran); Business Registration Number 410131 (Iran) [SDGT] (Linked To: ALAVI, Seyyed Abdoljavad).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, SEYYED ABDOLJAVID ALAVI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

12. MSE OVERSEAS PTE. LTD., Paya Lebar Square, 60 Paya Lehar Road #09-43, 409051, Singapore; Website www.mse-overseas.com; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 03 Nov 2014; Trade License No. 201432806G (Singapore) [SDGT] (Linked To: PALIKANDY, Mehboob Thachankandy).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, MEHBOOB THACHANKANDY PALIKANDY (PALIKANDY), a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

13. SEALINK OVERSEAS PTE. LTD. (a.k.a. UNITED AGRO COMMODITIES PTE. LTD.; f.k.a. UNITED AGRO FERTILIZER PTE. LTD.), Paya Lebar Square, 60 Paya Lehar Road #09-43, 409051, Singapore; 22, RB Capital Building, 03, Malacca Street, Singapore; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 28 Dec 2012; Trade License No. 201231437N (Singapore) [SDGT] (Linked To: PALIKANDY, Mehboob Thachankandy).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, PALIKANDY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

14. SOLISE ENERGY FZE (Arabic: سوليس اينرجي), SAIF Executive Office P8-08-54, Sharjah, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 20 Oct

2019; alt. Organization Established Date 24 Apr 2019; alt. Organization Established Date 13 Jun 2021; Business Registration Number 20920 (United Arab Emirates); alt. Business Registration Number 22474 (United Arab Emirates); Economic Register Number (CBLS) 11615535 (United Arab Emirates); alt. Economic Register Number (CBLS) 11952021 (United Arab Emirates) [SDGT] (Linked To: PALIKANDY, Mehboob Thachankandy).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, PALIKANDY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

15. TRANSMART DMCC (Arabic: ترانسمارت م.د.م.س) (a.k.a. TRANSMART AG; a.k.a. TRANSMART GLOBAL TRADING PRIVATE LIMITED), Unit Number 1606 to 1610, Floor 16, Tower X3, Jumeirah Bay Tower, Dubai, United Arab Emirates; Jumeirah Lakes Tower, Unit Number 1606 to 1610, Jumeirah, Bay Tower X3 Plot No: JLT-PH2-X3A, 126422, Dubai, United Arab Emirates; PO Box 126422, Dubai, United Arab Emirates; Hirsernweg 11 Hergiswil, NW 6052, Switzerland; Information Technology Park 25/517/14, Ananya Tower, MG Road 680001 Trichur, Kerala, India; Website www.transmartdmcc.com; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 03 Apr 2011; alt. Organization Established Date 12 Mar 2019; alt. Organization Established Date 04 May 2022; National ID No. CHE-418.995.816 (Switzerland); Trade License No. CH-150.3.476.957-7 (Switzerland); alt. Trade License No. U52590KL2022FTC075362 (India); Business Registration Number DMCC-31631 (United Arab Emirates); Economic Register Number (CBLS) 11465311 (United Arab Emirates) [SDGT] (Linked To: CGN TRADE FZE; Linked To: VAHAP, Zabi).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, CGN TRADE FZE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Dated: November 29, 2023.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024–00274 Filed 1–9–24; 8:45 am]

BILLING CODE 4810–AL–C

UNITED STATES INSTITUTE OF PEACE

Notice Regarding Board of Directors Meetings

AGENCY: United States Institute of Peace (USIP) and Endowment of the United States Institute of Peace.

ACTION: Announcement of meeting.

SUMMARY: USIP announces the next meeting of the Board of Directors.

DATES: Friday, January 19, 2024 (9 a.m.–12:30 p.m.).

The next meeting of the Board of Directors will be held April 19, 2024.

ADDRESSES: 2301 Constitution Avenue NW, Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Corinne Graff, 202–429–7895, *cgraff@usip.org.*

SUPPLEMENTARY INFORMATION: Open Session—Portions may be closed pursuant to subsection (c) of section 552b of title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

Authority: 22 U.S.C. 4605(h)(3).

Dated: January 4, 2023.

Rebecca Fernandes,

Director of Accounting.

[FR Doc. 2024–00269 Filed 1–9–24; 8:45 am]

BILLING CODE 2810–03–P

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Part II

Department of Labor

Wage and Hour Division

29 CFR Parts 780, 788, and 795
Employee or Independent Contractor Classification Under the Fair Labor Standards Act; Final Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 780, 788, and 795

RIN 1235–AA43

Employee or Independent Contractor Classification Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor (the Department) is modifying Wage and Hour Division regulations to replace its analysis for determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA or Act) with an analysis that is more consistent with judicial precedent and the Act's text and purpose.

DATES: This final rule is effective on March 11, 2024.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or logging onto WHD's website for a nationwide listing of WHD district and area offices at *https://www.dol.gov/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This final rule addresses how to determine whether a worker is properly classified as an employee or independent contractor under the Fair Labor Standards Act (FLSA or Act). Congress enacted the FLSA in 1938 to eliminate ''labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'' [1] To this end, the FLSA generally requires covered employers to pay nonexempt employees at least the Federal minimum wage for all hours worked and at least one and one-half times the employee's regular rate of pay for every hour worked over 40 in a workweek. The Act also requires covered employers to maintain certain records regarding employees and prohibits retaliation against employees who are discharged or discriminated against after, for example, filing a complaint regarding their pay. However, the FLSA's protections do not apply to independent contractors.

As used in this rule, the term ''independent contractor'' refers to workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves. Such workers play an important role in the economy and are commonly referred to by different names, including independent contractor, self-employed, and freelancer. This rule is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.

Determining whether an employment relationship exists under the FLSA begins with the Act's definitions. Although the FLSA does not define the term ''independent contractor,'' it contains expansive definitions of ''employer,'' ''employee,'' and ''employ.'' ''Employer'' is defined to ''include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee,'' ''employee'' is defined as ''any individual employed by an employer,'' and ''employ'' is defined to ''include[ ] to suffer or permit to work.'' [2] As detailed below, courts have developed an analysis that recognizes that independent contractors are not encompassed within these definitions.

Since the 1940s, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA, grounded in the Act's broad understanding of employment. The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor). In assessing economic dependence, courts and the Department have historically conducted a totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor, with no factor or factors having predetermined weight. There is significant and widespread uniformity among federal courts of appeals in the adoption and application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed. These factors generally include the opportunity for profit or loss, investment, permanency, control, whether the work is an integral part of the employer's business, and skill and initiative.

In January 2021, the Department published a rule titled ''Independent Contractor Status Under the Fair Labor Standards Act'' (2021 IC Rule), providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.[3] The 2021 IC Rule marked a departure from the consistent, longstanding adoption and application of the economic reality test by courts and the Department of how to determine whether a worker is an employee or an independent contractor under the FLSA. It identified five economic reality factors to guide the inquiry into a worker's status as an employee or independent contractor.[4] Two of the five identified factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—were designated as ''core factors'' that were the most probative and carried greater weight in the analysis. The 2021 IC Rule stated that if these two core factors pointed towards the same classification, there was a substantial likelihood that it was the worker's accurate classification.[5] The 2021 IC Rule also identified three less probative non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an integrated unit of production.[6] The 2021 IC Rule stated that it was ''highly unlikely'' that these three non-core factors could outweigh the combined probative value of the two core factors.[7] The 2021 IC Rule also

[1] 29 U.S.C. 202.

[2] 29 U.S.C. 203(d), (e)(1), (g).

[3] 86 FR 1168. The Office of the Federal Register did not amend the Code of Federal Regulations (CFR) to include the regulations from the 2021 IC Rule because, as explained elsewhere in this section, the Department first delayed and then withdrew the 2021 IC Rule before it became effective. A district court decision later vacated the Department's rules to delay and withdraw the 2021 IC Rule, and the Department has (since that decision) conducted enforcement in accordance with that decision while the 2021 IC Rule has been in effect.

[4] *Id.* at 1246–47 (§ 795.105(d)).

[5] *Id.* at 1246 (§ 795.105(c)).

[6] *Id.* at 1247 (§ 795.105(d)(2)).

[7] *Id.* at 1246 (§ 795.105(c)).

limited consideration of investment and initiative to the opportunity for profit or loss factor in a way that narrowed, in at least some circumstances, the extent to which investment and initiative are considered. The facts to be considered under other factors (such as control) were also narrowed, and the factor that considers whether the work is integral to the employer's business was limited to whether the work was part of an integrated unit of production.[8] Finally, the 2021 IC Rule provided that the actual practice of the parties involved was more relevant than what may be contractually or theoretically possible.[9]

The effective date of the 2021 IC Rule was March 8, 2021. On March 4, 2021, the Department published a rule delaying the effective date of the 2021 IC Rule (Delay Rule) and on May 6, 2021, it published a rule withdrawing the 2021 IC Rule (Withdrawal Rule). On March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a Federal district court in the Eastern District of Texas issued a decision vacating the Delay and Withdrawal Rules.[10] The district court concluded that the 2021 IC Rule became effective on the original effective date of March 8, 2021.

On October 13, 2022, the Department published a Notice of Proposed Rulemaking (NPRM) regarding employee or independent contractor classification under the FLSA, proposing to rescind and replace the 2021 IC Rule.[11] The Department explained in its proposal that upon further consideration, the Department believed that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by courts and departed from decades of case law applying the economic reality test. The NPRM identified provisions of the 2021 IC Rule that were in tension with this case law—such as designating two ''core factors'' as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. The NPRM stated that these provisions narrowed the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself.

After careful consideration, the Department decided it was appropriate to move forward with a proposed rescission of the 2021 IC Rule and a replacement regulation. As explained in the NPRM, the Department believed that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. Further, because the 2021 IC Rule departed from legal precedent, it was not clear whether courts would adopt its analysis—a question that could take years of appellate litigation in different federal courts of appeals to sort out, resulting in more uncertainty as to the applicable test. The Department also explained in the NPRM that it believed the 2021 IC Rule's departure from the longstanding test applied by the courts could result in greater confusion among employers in applying the new analysis, which could place workers at greater risk of misclassification as independent contractors due to the new analysis being applied improperly, and thus could negatively affect both the workers and competing businesses that correctly classify their employees.

The initial deadline for interested parties to submit comments on the NPRM was November 28, 2022. In response to requests for an extension of the time period for filing written comments, the Department lengthened the comment period an additional 15 days to December 13, 2022, resulting in a total comment period of 61 days.[12] The Department received approximately 55,400 comments on the proposed rule.

As described below, after considering the views expressed by commenters, the Department is finalizing its proposal with some modifications. For the reasons explained in the NPRM and detailed in section III, the Department concludes that it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.

Summary of the Major Provisions of the Final Rule

In addition to rescinding the 2021 IC Rule, the Department is adding part 795. Specifically, this final rule modifies the regulatory text published on January 7, 2021, at 86 FR 1246 through 1248, addressing whether workers are employees or independent contractors under the FLSA. Instead of using the ''core factors'' set forth in the 2021 IC Rule, this final rule returns to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. In addition to this critical reversion to the longstanding analysis that preceded the 2021 IC Rule, this final rule returns to the longstanding framing of investment as its own separate factor, and the integral factor as one that looks to whether the work performed is an integral part of a potential employer's business rather than part of an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor.

While the above modifications from the 2021 IC Rule were all proposed in the NPRM, the Department also made several adjustments to the proposed regulations after consideration of the comments received. Notably, as discussed further below, the portion of the Department's proposal for the control factor stating that control implemented for purposes of complying with legal obligations may be indicative of control generated many comments. The Department is modifying the proposed language to address confusion and concern regarding potential unintended consequences.

Additionally, the Department received many comments regarding the investment factor. In response to a number of comments concerning the Department's proposal to consider the relative investments of the worker and the potential employer, the Department is clarifying in the final rule that consideration of the relative investments of the worker and the potential employer should be compared not only in terms of dollar value or size of the investments, but should focus on whether the worker is making similar types of investments as the employer (albeit on a smaller scale) that would suggest that the worker is operating independently. Further, in response to

[8] *Id.* at 1246–47 (§ 795.105(d)(1) and (d)(2)(iii)).

[9] *Id.* at 1247–48 (§ 795.110).

[10] *See Coal. for Workforce Innovation* v. *Walsh,* No. 1:21–CV–130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022), *appeal filed,* No. 22–40316 (5th Cir. May 13, 2022) (''*CWI* v. *Walsh*'').

[11] 87 FR 62218.

[12] 87 FR 64749.

comments regarding the unilateral nature of some costs imposed by potential employers on workers, which could appear to be capital or entrepreneurial in nature, the Department is including language recognizing that costs that are unilaterally imposed are not indicative of a worker's capital or entrepreneurial investment.

Further clarifications and adjustments to the regulatory text that reflect a range of comments made by employers; workers; those who view themselves as independent contractors, self-employed, or freelancers; labor unions; legal services providers; policy and research organizations; and counsel for both businesses and employees have been made as well and are discussed under the section-by-section analysis that follows.

The final rule reiterates that part 795 contains the Department's general interpretations for determining whether workers are employees or independent contractors under the FLSA. Further, it reiterates that economic dependence is the ultimate inquiry, meaning that a worker is an independent contractor as opposed to an employee under the Act if the worker is, as a matter of economic reality, in business for themself. The final rule explains that the economic reality test is comprised of multiple factors that are tools or guides to conduct the totality-of-the-circumstances analysis to determine economic dependence. The six factors described in the regulatory text should guide an assessment of the economic realities of the working relationship, but no one factor or subset of factors is necessarily dispositive. The final rule provides guidance on how six economic reality factors should be considered—opportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and skill and initiative. Just as under the 2021 IC Rule, and in accordance with longstanding precedent and guidance, additional factors may also be considered if they are relevant to the overall question of economic dependence.

The Department recognizes that this return to a totality-of-the-circumstances analysis in which the economic reality factors are not assigned a predetermined weight and each factor is given full consideration represents a change from the 2021 IC Rule. However, the Department believes that this approach is the most beneficial because it is aligned with the Department's decades-long approach (prior to the 2021 IC Rule) as well as with federal appellate case law, and is more consistent with the Act's text and purpose as interpreted by the courts. The Department believes that this final rule will provide more consistent guidance to employers as they determine whether workers are economically dependent on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. Accordingly, the Department believes that the guidance provided in this final rule will help protect employees from misclassification. Moreover, this final rule recognizes that independent contractors serve an important role in our economy and provides a consistent approach for those businesses that engage (or wish to engage) independent contractors as well as for those who wish to work as independent contractors.

II. Background

A. Relevant FLSA Definitions

Enacted in 1938, the FLSA generally requires that covered employers pay nonexempt employees at least the Federal minimum wage (presently $7.25 per hour) for every hour worked, and at least one and one-half times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.[13] Among other protections, the FLSA also regulates the employment of children,[14] prohibits employers from keeping employee tips,[15] and requires employers to provide reasonable break time and a place for covered nursing employees to express breast milk at work.[16] Finally, the FLSA requires covered employers to ''make, keep, and preserve'' certain records regarding employees, and prohibits retaliation against employees who engaged in protected activity, such as filing a complaint regarding their pay.[17]

The FLSA's wage-and-hour protections apply to employees. In relevant part, section 3(e) of the Act defines the term ''employee'' as ''any individual employed by an employer.'' [18] Section 3(d) defines the term ''employer'' to ''includ[e] any person acting directly or indirectly in the interest of an employer in relation to an employee.'' [19] Finally, section 3(g) provides that the term '' '[e]mploy' includes to suffer or permit to work.'' [20]

Interpreting these provisions, the U.S. Supreme Court has stated that ''[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame,'' and that ''the term 'employee' under the FLSA had been given 'the broadest definition that has ever been included in any one act.' '' [21] In particular, the Court has noted the ''striking breadth'' of section 3(g)'s ''suffer or permit'' language, observing that it ''stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'' [22] Thus, the Court has repeatedly observed that the FLSA's scope of employment is broader than the common law standard often applied to determine employment status under other Federal laws.[23]

At the same time, the Supreme Court has recognized that the Act was ''not intended to stamp all persons as employees.'' [24] Among other categories of workers excluded from FLSA coverage, the Court has recognized that ''independent contractors'' fall outside the Act's broad understanding of employment.[25] Accordingly, the FLSA does not require covered employers to pay an independent contractor the minimum wage or overtime pay under sections 6(a) and 7(a) of the Act, or to keep records regarding an independent contractor's work under section 11(c). However, merely ''putting on an 'independent contractor' label does not take [a] worker from the protection of the [FLSA].'' [26] Courts have thus recognized a need to delineate between

[13] 29 U.S.C. 206(a), 207(a).

[14] 29 U.S.C. 212.

[15] 29 U.S.C. 203(m)(2)(B).

[16] *See* 29 U.S.C. 218d (added by the PUMP for Nursing Mothers Act, Public Law 117–328, 136 Stat. 4459 (Dec. 29, 2022)).

[17] 29 U.S.C. 211(c), 215(a)(3).

[18] 29 U.S.C. 203(e)(1).

[19] 29 U.S.C. 203(d).

[20] 29 U.S.C. 203(g).

[21] *United States* v. *Rosenwasser,* 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Hugo Black)).

[22] *Nationwide Mut. Ins.* v. *Darden,* 503 U.S. 318, 326 (1992).

[23] *Id.; see also, e.g., Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 150–51 (1947) (''[I]n determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'') (citation omitted).

[24] *Portland Terminal,* 330 U.S. at 152.

[25] *See, e.g., Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 729 (1947) (noting that ''[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees'').

[26] *Id.*

employees, who fall under the protections of the FLSA, and independent contractors, who do not.

The FLSA does not define the term ''independent contractor.'' While it is clear that section 3(g)'s ''suffer or permit'' language contemplates a broader coverage of workers compared to what exists under the common law, ''there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act.'' [27] Therefore, in articulating the distinction between FLSA-covered employees and independent contractors, courts rely on a broad, multifactor ''economic reality'' analysis derived from judicial precedent.[28] Unlike the control-focused analysis for independent contractors applied under the common law,[29] the economic reality test focuses more broadly on a worker's economic dependence on an employer, considering the totality of the circumstances.

B. Development of the Economic Reality Test

1. Supreme Court Development of the Economic Reality Test

In a series of cases from 1944 to 1947, the U.S. Supreme Court considered employee or independent contractor status under three different Federal statutes that were enacted during the 1930s New Deal Era—the FLSA, the National Labor Relations Act (NLRA), and the Social Security Act (SSA)—and applied an economic reality test under all three laws.

In the first of these cases, *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111 (1944), the Court considered the meaning of ''employee'' under the NLRA, which defined the term to ''include any employee.'' [30] In relevant part, the *Hearst* Court rejected application of the common law standard, noting that ''the broad language of the [NLRA's] definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.'' [31]

On June 16, 1947, the Supreme Court decided *United States* v. *Silk,* 331 U.S. 704 (1947), addressing the distinction between employees and independent contractors under the SSA. The Court favorably summarized *Hearst* as setting forth ''economic reality,'' as opposed to ''technical concepts'' of the common law standard alone, as the framework for determining workers' classification, but acknowledged that not ''all who render service to an industry are employees.'' [32] Although the Court found it to be ''quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employe[e] relationship,'' the Court identified five factors as ''important for decision'': ''degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation.'' [33] The Court added that ''[n]o one [factor] is controlling nor is the list complete.'' [34] The Court went on to note that the workers in that case were ''from one standpoint an integral part of the businesses'' of the employer, supporting a conclusion that some of the workers in that case were employees.[35]

The same day that the Supreme Court issued its decision in *Silk,* it also issued *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1947), in which it affirmed a federal court of appeals decision that analyzed an FLSA employment relationship based on its economic realities.[36] Describing the FLSA as ''a part of the social legislation of the 1930s of the same general character as the [NLRA] and the [SSA],'' the Court opined that ''[d]ecisions that define the coverage of the employer-Employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the [FLSA].'' [37] Accordingly, the Court rejected an approach based on ''isolated factors'' and again considered ''the circumstances of the whole activity.'' [38] The Court considered several of the factors that it listed in *Silk* as they related to meat boners on a slaughterhouse's production line, ultimately determining that the boners were employees.[39] The Court noted, among other things, that the boners did a specialty job on the production line, had no business organization that could shift to a different slaughter-house, and were best characterized as ''part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment.'' [40]

On June 23, 1947, one week after the *Silk* and *Rutherford* decisions, the Court decided *Bartels* v. *Birmingham,* 332 U.S. 126 (1947), another case involving employee or independent contractor status under the SSA. Here again, the Court rejected application of the common law control test, explaining that, under the SSA, employee status ''was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker.'' [41] Rather, employees under ''social legislation'' such as the SSA are ''those who as a matter of economic reality are dependent upon the business to which they render service.'' [42] Thus, in addition to control, ''permanency of the relation, the skill required, the investment [in] the facilities for work and opportunities for profit or loss from the activities were also factors'' to consider.[43] Although the Court identified these specific factors as relevant to the analysis, it explained that ''[i]t is the total situation that controls'' the worker's classification under the SSA.[44]

Following these Supreme Court decisions, Congress responded with separate legislation to amend the NLRA and SSA's employment definitions. First, in 1947, Congress amended the NLRA's definition of ''employee'' to clarify that the term ''shall not include any individual having the status of an independent contractor.'' [45] The

[27] *Id.* at 728.

[28] Courts invoke the concept of ''economic reality'' in FLSA employment contexts beyond independent contractor status. However, as in prior rulemakings, this final rule refers to the ''economic reality'' analysis or test for independent contractors as a shorthand reference to the independent contractor analysis used by courts for FLSA purposes.

[29] In distinguishing between employees and independent contractors under the common law, courts evaluate ''the hiring party's right to control the manner and means by which the product is accomplished.'' *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989). ''Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.'' *Id.* (footnotes omitted).

[30] 322 U.S. at 118–20; 29 U.S.C. 152(3).

[31] *Id.* at 123–25, 129.

[32] 331 U.S. at 712–14.

[33] *Id.* at 716.

[34] *Id.*

[35] *Id.*

[36] 331 U.S. at 727.

[37] *Id.* at 723–24.

[38] *Id.* at 730.

[39] *See id.*

[40] *Id.* at 729–30.

[41] 332 U.S. at 130.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Labor Management Relations (Taft-Hartley) Act, 1947, Public Law 80–101, sec. 101, 61 Stat.

Continued

following year, Congress similarly amended the SSA to exclude from employment ''any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor.'' [46] The Supreme Court interpreted the amendments to the NLRA as having the same effect as the explicit definition included in the SSA, which was to ensure that employment status would be determined by common law agency principles, rather than an economic reality test.[47]

Despite its amendments to the NLRA and SSA in response to *Hearst* and *Silk,* Congress did not similarly amend the FLSA following the *Rutherford* decision. Thus, when the Supreme Court revisited independent contractor status under the FLSA several years later in *Goldberg* v. *Whitaker House Co-op., Inc.,* 366 U.S. 28 (1961), the Court affirmed that '' 'economic reality' rather than 'technical concepts' '' remained ''the test of employment'' under the FLSA,[48] quoting from its earlier decisions in *Silk* and *Rutherford.* The Court in *Whitaker House* found that certain homeworkers were ''not self-employed . . . [or] independent, selling their products on the market for whatever price they can command,'' but instead were ''regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.'' [49] Such facts, among others, established that the homeworkers at issue were FLSA-covered employees.

Subsequently, in *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318 (1992), the Court again endorsed application of the economic reality test to evaluate independent contractor status under the FLSA, citing to *Rutherford* and emphasizing the broad ''suffer or permit'' language codified in section 3(g) of the Act.[50]

2. Application of the Economic Reality Test by Federal Courts of Appeals

Since *Rutherford,* federal courts of appeals have applied the economic reality test to distinguish independent contractors from employees who are entitled to the FLSA's protections. Recognizing that the ''suffer or permit'' language in section 3(g) of the FLSA provides a more expansive scope of employment than that which exists at common law, courts of appeals have followed the Supreme Court's instruction that '' 'employees are those who as a matter of economic realities are dependent upon the business to which they render service.' '' [51]

When determining whether a worker is an employee under the FLSA or an independent contractor, federal courts of appeals apply an economic reality test using the factors identified in *Silk.*[52] No court of appeals considers any one factor or combination of factors to invariably predominate over the others.[53] For example, the Eleventh Circuit has explained that some of the factors ''which many courts have used as guides in applying the economic reality test'' are: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the worker's opportunity for profit or loss depending upon their managerial skill; (3) the worker's investment in equipment or materials required for their task, or their employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) the extent to which the service rendered is an integral part of the alleged employer's business.[54] Like other federal courts of appeals, the Eleventh Circuit repeats the Supreme Court's explanation from *Silk* that no one factor is controlling, nor is the list exhaustive.[55]

Some courts of appeals have applied the factors with some variations. For example, the Fifth Circuit typically does not list the ''integral part'' factor as one of the considerations that guides its analysis.[56] However, recognizing that its list of enumerated factors is not exhaustive, the Fifth Circuit has considered the extent to which a worker's function is integral to a business as part of its economic realities analysis.[57] Similarly, the Second and D.C. Circuits vary in that they describe the employee's opportunity for profit or loss and the employee's investment as a single factor, but they still use the same considerations as the other circuits to inform their economic realities analysis.[58]

In sum, since the 1940s, federal courts have analyzed the question of employee or independent contractor status under the FLSA using a multifactor, totality-of-the-circumstances economic reality test, with no factor or factors being dispositive. The courts have examined the economic realities of the employment relationship to determine whether the worker is economically dependent on the employer for work or is in business for themself, even if they have varied slightly in their articulations of the factors. Despite such variation, all courts have looked to the factors first articulated in *Silk* as useful guideposts while acknowledging that those factors are not exhaustive and should not be applied mechanically.

3. The Department's Application of the Economic Reality Test

The Department has applied a multifactor economic reality test since the Supreme Court's opinions in *Rutherford* and *Silk.* For example, on June 23, 1949, the Wage and Hour Division (WHD) issued an opinion letter

136, 137–38 (1947) (codified as amended at 29 U.S.C. 152(3)).

[46] SSA of 1948, Public Law 80–642, sec. 2(a), 62 Stat. 438 (1948) (codified as amended at 26 U.S.C. 3121(d)).

[47] *See NLRB* v. *United Ins. Co. of Am.,* 390 U.S. 254, 256 (1968) (noting that ''[t]he obvious purpose of'' the amendment to the definition of employee under the NLRA ''was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act'').

[48] 366 U.S. at 33 (quoting from *Silk,* 331 U.S. at 713, and *Rutherford,* 331 U.S. at 729).

[49] *Id.* at 32.

[50] *Darden,* 503 U.S. at 325–26.

[51] *Usery* v. *Pilgrim Equip. Co.,* 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels,* 332 U.S. at 130).

[52] *See Brock* v. *Superior Care, Inc.,* 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Donovan* v. *DialAmerica Mktg., Inc.,* 757 F.2d 1376, 1382–83 (3d Cir. 1985); *McFeeley* v. *Jackson Street Ent., LLC,* 825 F.3d 235, 241 (4th Cir. 2016); *Pilgrim Equip.,* 527 F.2d at 1311; *Acosta* v. *Off Duty Police Servs., Inc.,* 915 F.3d 1050, 1055 (6th Cir. 2019); *Sec'y of Labor, U.S. Dep't of Labor* v. *Lauritzen,* 835 F.2d 1529, 1534–35 (7th Cir. 1987); *Walsh* v. *Alpha & Omega USA, Inc.,* 39 F.4th 1078, 1082 (8th Cir. 2022); *Real* v. *Driscoll Strawberry Assocs., Inc.,* 603 F.2d 748, 754 (9th Cir. 1979); *Acosta* v. *Paragon Contractors Corp.,* 884 F.3d 1225, 1235 (10th Cir. 2018); *Scantland* v. *Jeffry Knight, Inc.,* 721 F.3d 1308, 1311–12 (11th Cir. 2013); *Morrison* v. *Int'l Programs Consortium, Inc.,* 253 F.3d 5, 11 (D.C. Cir. 2001).

[53] *See, e.g., Parrish* v. *Premier Directional Drilling, L.P.,* 917 F.3d 369, 380 (5th Cir. 2019) (stating that it ''is impossible to assign to each of these factors a specific and invariably applied weight'') (quoting *Hickey* v. *Arkla Indus., Inc.,* 699 F.2d 748, 752 (5th Cir. 1983)); *Scantland,* 721 F.3d at 1312 n.2 (the relative weight of each factor ''depends on the facts of the case'') (quoting *Santelices* v. *Cable Wiring,* 147 F. Supp. 2d 1313, 1319 (S.D. Fla. 2001)); *Martin* v. *Selker Bros.,* 949 F.2d 1286, 1293 (3d Cir. 1991) (''It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.'').

[54] *Scantland,* 721 F.3d at 1311–12.

[55] *Id.* at 1312 n.2.

[56] *See Pilgrim Equip.,* 527 F.2d at 1311.

[57] *See Hobbs* v. *Petroplex Pipe & Constr., Inc.,* 946 F.3d 824, 836 (5th Cir. 2020) (considering ''the extent to which the pipe welders' work was 'an integral part' of Petroplex's business''). Every other federal court of appeals that has decided an FLSA case involving alleged independent contractors includes the ''integral part'' factor among the list of enumerated economic reality factors. *See* the cases cited *supra* at n.52 other than *Pilgrim Equipment.*

[58] *See, e.g., Franze* v. *Bimbo Bakeries USA, Inc.,* 826 F. App'x 74, 76 (2d Cir. 2020); *Superior Care,* 840 F.2d at 1058–59. The D.C. Circuit has adopted the Second Circuit's articulation of the factors, including treating opportunity for profit or loss and investment as one factor. *See Morrison,* 253 F.3d at 11 (citing *Superior Care,* 840 F.2d at 1058–59).

distilling six ''primary factors which the Court considered significant'' in *Rutherford* and *Silk:* ''(1) the extent to which the services in question are an integral part of the 'employer[']s' business; (2) the amount of the so-called 'contractor's' investment in facilities and equipment; (3) the nature and degree of control by the principal; (4) opportunities for profit and loss; . . . (5) the amount of initiative judgment or foresight required for the success of the claimed independent enterprise[;] and [(6)] permanency of the relation.'' [59] The guidance cautioned that no single factor is controlling, and ''[o]rdinarily a definite decision as to whether one is an employee or an independent contractor under the [FLSA] cannot be made in the absence of evidence as to [the worker's] actual day-to-day working relationship with [their] principal. Clearly a written contract does not always reflect the true situation.'' [60]

Subsequent WHD opinion letters addressing employee or independent contractor status under the FLSA have provided similar recitations of the *Silk* factors, sometimes omitting one or more of the six factors described in the 1949 opinion letter, and sometimes adding (or substituting) a seventh factor: the worker's ''degree of independent business organization and operation.'' [61] Numerous opinion letters have emphasized that employment status is ''not determined by the common law standards relating to master and servant,'' and that ''[t]he degree of control retained by the principal has been rejected as the sole criterion to be applied.'' [62]

In 1962, the Department revised the regulations in 29 CFR part 788, which generally provides interpretive guidance on the FLSA's exemption for employees in small forestry or lumbering operations, and added a provision addressing the distinction between employees and independent contractors.[63] Citing to *Silk, Rutherford,* and *Bartels,* the regulation advised that ''an employee, as distinguished from a person who is engaged in a business of his own, is one who 'follows the usual path of an employee' and is dependent on the business which he serves.'' [64] To ''aid in assessing the total situation,'' the regulation then identified a partial list of ''characteristics of the two classifications which should be considered,'' including ''the extent to which the services rendered are an integral part of the principal's business; the permanency of the relationship; the opportunities for profit or loss; the initiative, judgment or foresight exercised by the one who performs the services; the amount of investment; and the degree of control which the principal has in the situation.'' [65] Implicitly referring to the *Bartels* decision, the regulation advised that ''[t]he Court specifically rejected the degree of control retained by the principal as the sole criterion to be applied.'' [66]

In 1972, the Department added similar guidance on independent contractor status at 29 CFR 780.330(b), in a provision addressing the employment status of sharecroppers and tenant farmers.[67] This regulation was nearly identical to the independent contractor guidance for the logging and forestry industry previously codified at 29 CFR 788.16(a), including an identical description of the same six economic reality factors.[68] Both provisions—29 CFR 780.330(b) and 788.16(a)—remained unchanged until 2021.

In 1997, the Department promulgated a regulation applying a multifactor economic reality analysis for distinguishing between employees and independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which notably incorporates the FLSA's ''suffer or permit'' definition of employment by reference.[69] The regulation (which has not since been amended) advises that in determining if the farm labor contractor or worker is an employee or an independent contractor, the ultimate question is the economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or farm labor contractor, as appropriate. The regulation elaborates that ''[t]his determination is based upon an evaluation of all of the circumstances, including the following: (i) The nature and degree of the putative employer's control as to the manner in which the work is performed; (ii) The putative employee's opportunity for profit or loss depending upon his/her managerial skill; (iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers; (iv) Whether the services rendered by the putative employee require special skill; (v) The degree of permanency and duration of the working relationship; (vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business.'' [70] This description of six economic reality factors was very similar to the earlier description of six economic reality factors provided in 29 CFR 780.330(b) and 788.16(a).

Also in 1997, WHD issued Fact Sheet #13, ''Employment Relationship Under the Fair Labor Standards Act (FLSA).'' [71] Like WHD opinion letters, Fact Sheet #13 advises that an employee, as distinguished from a person who is engaged in a business of their own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which they serve. The fact sheet identifies the six familiar economic realities factors, as well as consideration of the worker's degree of independent business organization and operation.

On July 15, 2015, WHD issued additional subregulatory guidance, Administrator's Interpretation No. 2015–1, ''The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors'' (AI 2015–1).[72] AI 2015–1 reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for themself. It identified six economic realities factors that followed the six factors used by most federal courts of

[59] WHD Op. Ltr. (June 23, 1949).

[60] *Id.*

[61] *See, e.g.,* WHD Op. Ltr. (Oct. 12, 1965) (discussing degree of independent business organization); WHD Op. Ltr. (Feb. 18, 1969) (same); WHD Op. Ltr. FLSA–314 (Dec. 21, 1982) (discussing three of the *Silk* factors); WHD Op. Ltr. FLSA–164 (Jan. 18, 1990) (discussing four of the *Silk* factors).

[62] *See, e.g.,* WHD Op. Ltr. FLSA–106 (Feb. 8, 1956); WHD Op. Ltr. (July 20, 1965); WHD Op. Ltr. (Sept. 1, 1967); WHD Op. Ltr. (Feb. 18, 1969); WHD Op. Ltr. FLSA–31 (Aug. 10, 1981); WHD Op. Ltr. (June 5, 1995).

[63] *See* 27 FR 8032; 29 U.S.C. 213(b)(28) (previously codified at 29 U.S.C. 213(a)(15)).

[64] 27 FR 8033 (29 CFR 788.16(a)).

[65] *Id.*

[66] 27 FR 8033–34 (29 CFR 788.16(a)).

[67] *See* 37 FR 12084, 12102 (introducing 29 CFR 780.330(b)).

[68] *Id.*

[69] *See* 62 FR 11734 (amending 29 CFR 500.20(h)(4)); *see also* 29 U.S.C. 1802(5) (''The term 'employ' has the meaning given such term under section 3(g) of the [FLSA]'').

[70] 29 CFR 500.20(h)(4).

[71] *See* WHD Fact Sheet #13 (1997) *https:/web.archive.org/web/19970112162517/http:/www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs13.htm*). WHD made minor revisions to Fact Sheet #13 in 2002 and 2008, before a more substantial revision in 2014. In 2018, WHD reverted back to the 2008 version of Fact Sheet #13, which—apart from the addition of an advisory note referring to the 2021 IC Rule—is identical to the current March 2022 version (available at *https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship*).

[72] AI 2015–1 is available at 2015 WL 4449086 (withdrawn June 7, 2017).

appeals: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on their managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. AI 2015–1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative. AI 2015–1 was withdrawn on June 7, 2017.[73]

In 2019, WHD issued an opinion letter, FLSA2019–6, regarding whether workers who worked for companies operating self-described ''virtual marketplaces'' were employees covered under the FLSA or independent contractors.[74] Like the Department's prior guidance, the letter stated that the determination depended on the economic realities of the relationship and that the ultimate inquiry was whether the workers depend on someone else's business or are in business for themselves. The letter identified six economic realities factors that differed slightly from the factors typically articulated by the Department previously: (1) the nature and degree of the employer's control; (2) the permanency of the worker's relationship with the employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of the integration of the worker's services into the employer's business.[75] The Department later withdrew Opinion Letter FLSA2019–6 on February 19, 2021.[76]

C. The Department's 2021 Independent Contractor Rule

1. Overview

On January 7, 2021, the Department published the 2021 IC Rule, with an effective date of March 8, 2021.[77] The 2021 IC Rule set forth regulations to be added to a new part (part 795) in title 29 of the Code of Federal Regulations titled ''Employee or Independent Contractor Classification under the Fair Labor Standards Act,'' providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.[78] The 2021 IC Rule also addressed the Department's prior interpretations of independent contractor status in 29 CFR 780.330(b) and 788.16(a)—both of which applied to specific industries—by cross-referencing part 795.[79]

The Department explained that the purpose of the 2021 IC Rule was to establish a ''streamlined'' economic reality test that improved on prior articulations described as ''unclear and unwieldy.'' [80] It stated that the existing economic reality test applied by the Department and courts suffered from confusion regarding the meaning of ''economic dependence,'' a lack of focus in the multifactor balancing test, and confusion and inefficiency caused by overlap between the factors.[81] The 2021 IC Rule asserted that shortcomings and misconceptions associated with the economic reality test were more apparent in the modern economy and that additional clarity would promote innovation in work arrangements.

The 2021 IC Rule explained that independent contractors are not employees under the FLSA and are therefore not subject to the Act's minimum wage, overtime pay, or recordkeeping requirements. It adopted an economic reality test under which a worker is an employee of an employer if that worker is economically dependent on the employer for work and is an independent contractor if the worker is in business for themself.[82]

The 2021 IC Rule identified five economic realities factors to guide the inquiry into a worker's status as an employee or independent contractor, while acknowledging that the factors were not exhaustive, no one factor was dispositive, and additional factors could be considered if they ''in some way indicate whether the [worker] is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.'' [83] In contrast to prior guidance and contrary to case law, the 2021 IC Rule designated two of the five factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—as ''core factors'' that should carry greater weight in the analysis. Citing the goal of providing greater certainty and predictability in the economic reality test, the 2021 IC Rule determined that these two factors were more probative of economic dependence than other economic realities factors. If both of those core factors indicate the same classification, as either an employee or an independent contractor, the 2021 IC Rule stated that there was a ''substantial likelihood'' that the indicated classification was the worker's correct classification.[84]

The 2021 IC Rule's first core factor was the nature and degree of control over the work, which indicated independent contractor status to the extent that the worker exercised substantial control over key aspects of the performance of the work, such as by setting their own schedule, by selecting their projects, and/or through the ability to work for others, which might include the potential employer's competitors.[85] The 2021 IC Rule provided that requiring the worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) did not constitute control for purposes of determining employee or independent contractor classification.[86]

The 2021 IC Rule's second core factor was the worker's opportunity for profit or loss.[87] The Rule stated that this factor indicates independent contractor status to the extent the worker has an opportunity to earn profits or incur losses based on either (1) their exercise of initiative (such as managerial skill or business acumen or judgment) or (2) their management of investment in or capital expenditure on, for example, helpers or equipment or material to further the work. While the effects of the worker's exercise of initiative and management of investment were both considered under this factor, the worker did not need to have an opportunity for profit or loss based on both initiative

[73] *See* News Release 17–0807–NAT, ''US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance'' (June 7, 2017), *https://www.dol.gov/newsroom/releases/opa/opa20170607* (last visited November 20, 2023).

[74] *See* WHD Op. Ltr. FLSA2019–6, 2019 WL 1977301 (Apr. 29, 2019) (withdrawn Feb. 19, 2021).

[75] *See id.* at *4. Opinion Letter FLSA2019–6's ''extent of the integration'' factor was a notable recharacterization of the factor traditionally considered by courts and the Department regarding the extent to which work is ''an integral part'' of an employer's business.

[76] *See note at https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA* (last visited November 20, 2023).

[77] *See* 86 FR 1168. The Department initially published a NPRM soliciting public comment on September 25, 2020. *See* 85 FR 60600. The final rule adopted ''the interpretive guidance set forth in the [NPRM] largely as proposed.'' 86 FR 1168.

[78] 86 FR 1246–48.

[79] *Id.* at 1246.

[80] *Id.* at 1172, 1240.

[81] *Id.* at 1172–75.

[82] *Id.* at 1246 (§ 795.105(a)–(b)).

[83] *Id.* at 1246–47 (§ 795.105(c) and (d)(2)(iv)).

[84] *Id.* at 1246 (§ 795.105(c)).

[85] *Id.* at 1246–47 (§ 795.105(d)(1)(i)).

[86] *Id.*

[87] *Id.* (§ 795.105(d)(1)(ii)).

and management of investment for this factor to weigh towards the worker being an independent contractor. This factor indicated employee status to the extent that the worker was unable to affect their earnings or was only able to do so by working more hours or faster.

The 2021 IC Rule also identified three other non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production (which it cautioned is ''different from the concept of the importance or centrality of the individual's work to the potential employer's business'').[88] The 2021 IC Rule provided that these other factors were ''less probative and, in some cases, may not be probative at all'' of economic dependence and were ''highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.'' [89]

The 2021 IC Rule also stated that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible, and provided five ''illustrative examples'' demonstrating how the analysis would apply in particular factual circumstances.[90] Finally, the 2021 IC Rule rescinded any ''prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the FLSA'' to the extent that such items ''are inconsistent or in conflict with the interpretations stated in this part,'' and explained that the 2021 IC Rule would guide WHD's enforcement of the FLSA.[91]

On January 19, 2021, WHD issued Opinion Letters FLSA2021–8 and FLSA2021–9 applying the Rule's analysis to specific factual scenarios. WHD subsequently withdrew those opinion letters on January 26, 2021, explaining that the letters were issued prematurely because they were based on a rule that had yet to take effect.[92]

2. Delay and Withdrawal

On February 5, 2021, the Department published a proposal to delay the 2021 IC Rule's effective date until May 7, 2021—60 days after the Rule's original March 8, 2001, effective date.[93] On March 4, 2021, after considering the approximately 1,500 comments received in response to that proposal, the Department published a final rule delaying the effective date of the 2021 IC Rule as proposed.[94]

On March 12, 2021, the Department published a NPRM proposing to withdraw the 2021 IC Rule.[95] On May 5, 2021, after reviewing approximately 1,000 comments submitted in response to the NPRM, the Department announced a final rule withdrawing the 2021 IC Rule.[96] In explaining its decision to withdraw the 2021 IC Rule, the Department stated that the Rule was inconsistent with the FLSA's text and purpose and would have had a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent. The Withdrawal Rule stated that it took effect immediately upon its publication in the **Federal Register** on May 6, 2021.[97]

3. Litigation

On March 14, 2022, in a lawsuit challenging the Department's Delay and Withdrawal Rules under the Administrative Procedure Act (APA), a district court in the Eastern District of Texas issued a decision vacating the Department's Delay and Withdrawal Rules.[98] While acknowledging that the Department engaged in separate notice-and-comment rulemakings in promulgating both of these rules, the district court concluded that the Department ''failed to provide a meaningful opportunity for comment in promulgating the Delay Rule,'' [99] failed to show ''good cause for making the [Delay Rule] effective immediately upon publication,'' [100] and acted in an arbitrary and capricious manner in its Withdrawal Rule by ''fail[ing] to consider potential alternatives to rescinding the Independent Contractor Rule.'' [101] Accordingly, the district court vacated the Delay and Withdrawal Rules and concluded that the 2021 IC Rule ''became effective as of March 8, 2021, the rule's original effective date, and remains in effect.'' [102] The district court's ruling did not address the validity of the 2021 IC Rule; rather, the case was focused solely on the validity of the Delay and Withdrawal Rules.

The Department filed a notice of appeal of the district court's decision.[103] In response to requests by the Department informing the court of this rulemaking, the Fifth Circuit Court of Appeals has entered successive orders staying the appeal. The Fifth Circuit's most recent order was dated October 9, 2023 and stayed the appeal for an additional 120 days.

D. The Department's Proposal

Following a series of stakeholder forums on the classification of workers as employees or independent contractors under the FLSA, the Department published an NPRM on October 13, 2022 proposing to rescind the 2021 IC Rule and replace it with new part 795 regulations.[104] In the NPRM, the Department proposed to add a new part 795 to Title 29 of the Code of Federal Regulations providing guidance regarding whether workers are employees or independent contractors, which would be different in notable respects from the regulatory text in the 2021 IC Rule, published at 86 FR 1246 through 1248. In contrast to the 2021 IC Rule's creation of elevated ''core factors,'' the Department proposed returning to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Additional proposed differences from the 2021 IC Rule included restoring consideration of investment as a separate factor, providing additional analysis of the control factor (including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered), and returning to the longstanding interpretation of the integral factor, which considers whether the work performed is integral to the employer's business.

E. Comments

The initial deadline for interested parties to submit comments on the NPRM was November 28, 2022. In response to requests for an extension of the time period for filing written comments, the Department lengthened the comment period an additional 15

[88] *Id.* (§ 795.105(d)(2)).

[89] *Id.* at 1246 (§ 795.105(c)).

[90] *Id. at* 1247–48 (§§ 795.110–.115).

[91] *Id.* at 1246 (§ 795.100).

[92] *See https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA* (last visited November 20, 2023), noting the withdrawal of Opinion Letters FLSA2021–8 and FLSA2021–9.

[93] 86 FR 8326.

[94] 86 FR 12535.

[95] 86 FR 14027.

[96] 86 FR 24303.

[97] *Id.* at 24320.

[98] *CWI* v. *Walsh,* 2022 WL 1073346.

[99] *Id.* at *9. The court specifically faulted the Department's use of a shortened 19-day comment period in its proposal to delay of the 2021 IC Rule's original effective date (instead of 30 days), and for failing to consider comments beyond its proposal to delay the 2021 IC Rule's effective date. *Id.* at *7–10.

[100] *Id.* at *11.

[101] *Id.* at *13.

[102] *Id.* at *20.

[103] *See* Fifth Circuit No. 22–40316 (appeal filed, May 13, 2022).

[104] *See* 87 FR 62218.

days to December 13, 2022, resulting in a total comment period of 61 days.[105]

The Department received approximately 55,400 comments on the NPRM. Comments were submitted by a diverse array of stakeholders, including employees, self-identified independent contractors, businesses, trade associations, labor unions, advocacy groups, law firms, members of Congress, state and local government officials, and other interested members of the public. This section provides a high-level summary of commenter views. Significant issues raised in the comments received are discussed in subsequent sections of this preamble, along with the Department's response to those comments and a discussion of resulting changes that have been made in the final rule's regulatory text. All comments received may be viewed on the *http://www.regulations.gov* website, docket ID WHD–2022–0003.

Many of the comments the Department received can be characterized in the following ways: (1) very general statements of support or opposition; (2) personal anecdotes that did not address a specific aspect of the proposal; or (3) identical or nearly identical ''campaign'' comments sent in response to comment initiatives sponsored by various groups.[106] Other comments provided specific data, views, and arguments, which are described throughout this preamble. Commenters expressed a wide variety of views on the merits of the Department's proposal. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered the comments submitted.

As a general matter, most employees, labor unions, worker advocacy groups, and other affiliated stakeholders generally expressed support for the NPRM, asserting that its proposed guidance was more consistent with judicial precedent and would better protect employees from misclassification than the 2021 IC Rule. By contrast, most commenters who identified as independent contractors, business entities, and commenters affiliated with those constituencies generally expressed opposition to the NPRM, criticizing the Department's proposed economic reality test as ambiguous and biased against independent contracting.

The Department received several comments addressing topics that are beyond the scope of this rulemaking. For example, numerous individuals submitted comments expressing support or opposition to the ''Protecting the Right to Organize Act'', H.R. 842, 117th Cong. (2021), proposed legislation that would amend the NLRA. Other commenters expressed views on possible legislative reforms to extend wage-and-hour protections and other employment benefits to workers classified as independent contractors. *See, e.g.,* Center for Cultural Innovation (''CCI'') (discussing collective bargaining rights and sector wage standards as ''two promising approaches to guaranteeing [wage-and-hour] protections to independent workers''); DoorDash (''[L]aws should be updated to preserve the independence workers like Dashers value, while clearing the way for new protections and benefits that independent contractors have historically lacked.''); Uber (''We look forward to working with the Department to address the shortcomings of existing laws, including unlocking access to benefits for independent contractors such as app-based workers.''). Such legislative efforts are beyond the scope of this rulemaking as they would require congressional action; the scope of this regulation is limited to providing guidance regarding employee or independent contractor classification under the FLSA as currently enacted.

Some commenters addressed the rulemaking's potential effect on workers other than those classified as independent contractors. For example, the Labor Relations and Employment Law Society at St. John's University School of Law requested the Department to apply the NPRM's proposed economic reality test to evaluate the employment status of unpaid student interns. Similarly, Boulette Golden & Marin L.L.P. asserted that the NPRM's proposed guidance creates a ''false dichotomy'' where ''every worker in the United States is either an employee or an 'independent business.' '' To clarify, this rulemaking specifically addresses the legal distinction between FLSA-covered employees and independent contractors; it does not replace or supplant the analyses that courts and the Department apply when evaluating FLSA coverage of other kinds of workers, such as unpaid interns, students, trainees, or volunteers.[107] Coverage for these types of workers is not addressed in this rule.

Finally, some commenters opined on potential compliance or enforcement measures. For example, the Sheet Metal and Air Conditioning Contractors' National Association (''SMACNA'') requested that the Department introduce a mandatory ''Notice of Independent Contractor Status'' form for businesses and independent contractors in the construction industry, to notify ''true independent contractors'' of their tax obligations and help enforcement against misclassification. This suggestion, however, is outside the scope of this rulemaking, which has not proposed any mandatory notice and focuses specifically on the legal distinction between FLSA-covered employees and independent contractors. Further, some commenters raised compliance with employment verification requirements under the Immigration Reform and Control Act (IRCA), both to note that some employers are incentivized to misclassify immigrant workers as independent contractors in part because they do not have to verify the work authorization of independent contractors, *see, e.g.,* Equal Justice Center; SMACNA, and to note that being able to operate as an independent contractor or in business for oneself provides economic opportunity for people who lack work authorization, *see* TheDream.US. Because this rulemaking pertains only to the question of employee classification under the FLSA, it does not address employers' compliance obligations with respect to employees as determined under other laws, such as IRCA. The FLSA's various worker protections apply to FLSA-covered employees regardless of their citizenship or immigration or work authorization status.

III. Need for Rulemaking

The Department recognizes that independent contractors and small businesses play an important role in our economy. It is also fundamental to the Department's obligation to administer and enforce the FLSA that workers who should be covered under the Act are able to receive its protections. In the FLSA context, employees misclassified as independent contractors are denied

[105] 87 FR 64749. Although several commenters requested a longer extension or otherwise objected that the comment period was inadequately short, the resulting 61-day comment period was more than twice as long as the 30-day comment period for the NPRM for the 2021 IC Rule, when the Department initially proposed regulatory guidance on employee and independent contractor status under the FLSA. *See* 85 FR 60600. The Department declined several requests to extend the comment period for the 2020 NPRM. *See https://www.regulations.gov/document/WHD-2020-0007-0193.*

[106] Campaign comments, both in favor and opposed to the proposal, were received from a variety of groups, including, for example, court reporters, construction industry employers, DoorDash workers, professional translators, truckers, financial advisors, and healthcare professionals.

[107] *See, e.g.,* WHD Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (describing the analysis applied by courts and the Department to evaluate the FLSA employment status of students and interns).

basic workplace protections, including the rights to minimum wage and overtime pay.[108] Meanwhile, employers that comply with the law are placed at a competitive disadvantage compared to other businesses that misclassify employees, contravening the FLSA's goal of eliminating ''unfair method[s] of competition in commerce.'' [109]

As explained in the NPRM, the Department believes that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by the courts. The Department further believes that leaving the 2021 IC Rule in place would have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. While the Department agrees that the 2021 IC Rule identified a need to further develop and center the concept of economic dependence, the 2021 IC Rule included provisions that are in tension with longstanding case law, such as designating two ''core factors'' as most probative and predetermining that they carry greater weight in the analysis; considering investment and initiative only as part of the opportunity for profit or loss factor; and excluding consideration of whether the work performed is central or important to the potential employer's business. These and other provisions in the 2021 IC Rule narrowed the economic reality test by limiting the facts that may be considered as part of the test—facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or is in business for themself. As the NPRM explained, this novel narrowing of the test under which certain factors are always elevated and other facts are essentially precluded from consideration may result in misapplication of the economic reality test and an increased risk of FLSA-covered employees being misclassified as independent contractors. Moreover, the 2021 IC Rule did not address the potential risks to workers of such misclassification.[110]

The Department previously explained these concerns about the 2021 IC Rule at length in the Withdrawal Rule,[111] which was vacated by a district court (the Department's appeal of the district court's order is pending). The Department now believes it is appropriate to rescind the 2021 IC Rule and replace it with an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. While prior to the 2021 IC Rule the Department primarily issued subregulatory guidance in this area, the NPRM explained that rescinding the 2021 IC Rule and replacing it with detailed regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—would be helpful for workers and businesses alike. Specifically, the Department explained that its proposed guidance would protect workers from misclassification while at the same time provide a consistent approach for those businesses that engage (or wish to engage) with properly classified independent contractors.

In the NPRM, the Department acknowledged that its proposal departed from the approach taken in the 2021 IC Rule, and further discussed the rationale used in the 2021 IC Rule and why the Department had carefully reconsidered that reasoning and determined that modifications were necessary.[112] As the NPRM noted, the Department had identified four reasons underlying the need to promulgate the 2021 IC Rule: (1) confusion regarding the meaning of ''economic dependence'' because the concept is ''underdeveloped''; (2) lack of focus in the multifactor balancing test; (3) confusion and inefficiency due to overlapping factors; and (4) the shortcomings of the economic reality test that are more apparent in the modern economy.[113] The 2021 IC Rule had also suggested as a fifth reason that the economic reality test hindered innovation in work arrangements.[114] As discussed further below, the Department explained in the NPRM that it believed that the proposed rule's approach offers a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themself is analyzed within each of the six economic realities factors. Further, the Department believed that the proposal's discussion of how courts and the Department's previous guidance apply the factors brings the multifactor test into focus, reduces confusion as to the overlapping factors, and provides a better basis for understanding how the test has the flexibility to be applied to changes in the modern economy, such that the Department no longer viewed the concerns articulated in the 2021 IC Rule as impediments to using the economic reality test formulated by the courts and the Department's longstanding guidance.

Thousands of commenters opined on this rulemaking. Most commenters that expressed support for the NPRM—including labor unions, worker advocacy organizations, and workers—were highly critical of the 2021 IC Rule, often referencing or attaching earlier comments filed in opposition to that rule when it was proposed. *See, e.g.,* American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO''); National Women's Law Center (''NWLC''); Northwest Worker Justice Project; United Brotherhood of Carpenters and Joiners of America (''UBC''). Using common template language, several dozen advocacy organizations and local unions affiliated with the United Food and Commercial Workers (''UFCW'') characterized the 2021 IC Rule as an ''anti-worker rule'' which ''narrowed the scope of who is considered an employee under the FLSA.'' Many of these commenters also asserted that the 2021 IC Rule ''contravenes the [FLSA's] statutory definitions and Supreme Court precedent.'' Additionally, numerous commenters supportive of the Department's rulemaking asserted that replacing the 2021 IC Rule with the NPRM's proposed economic reality test would reduce the misclassification of employees as independent contractors, given the proposed test's fuller consideration of facts that were minimized or excluded under the 2021 IC Rule. *See, e.g.,* AARP; Joint Comment of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers (''NECA & IBEW''); REAL Women in Trucking.

A number of commenters supportive of the NPRM also stated that the economic reality test applied by courts is not only compatible with the modern

[108] Workers who are employees under the FLSA but are misclassified as independent contractors remain legally entitled to the Act's wage-and-hour protections and are protected from retaliation for attempting to assert their rights under the Act. *See* 29 U.S.C. 215(a)(3). However, many misclassified employees may not be aware that such rights and protections apply to them or face obstacles when asserting those rights.

[109] 29 U.S.C. 202; *see also Tony & Susan Alamo Found.* v. *Sec'y of Labor,* 471 U.S. 290, 302 (1985) (noting that allowing workers who are employees under the Act to work as non-employees ''would affect many more people than those workers directly at issue . . . and would be likely to exert a general downward pressure on wages in competing businesses'').

[110] 86 FR 1225; *see also id.* at 1206–07.

[111] *See* 86 FR 24307–18.

[112] *See* 87 FR 62226 (citing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

[113] *Id.* (citing 86 FR 1172–75).

[114] *Id.* (citing 86 FR 1175).

economy, but preferable to the 2021 IC Rule's elevation of certain factors as controlling. *See, e.g.,* AARP (''It is precisely because work arrangements are more varied and complex in today's economy that no one factor should be controlling or exclusive to others.''); Coalition of State Attorneys General and State Labor Departments (''State AGs'') (''As State AGs who enforce and defend state wage and hour laws, we know that a flexible standard that considers the totality of the circumstances is required to address changing work arrangements.''). Some business stakeholders expressed support for the NPRM, but for different reasons. For example, some employers—including Alto Experience, Inc., Gale Healthcare Solutions, IntelyCare, Inc., and various union-affiliated contractor associations—expressed support for the NPRM on the grounds that its guidance would better prevent rival businesses from obtaining an unfair competitive advantage through the misclassification of employees as independent contractors, consistent with the FLSA's goal of eliminating unfair methods of competition in commerce. Additionally, some business stakeholders stated that they preferred the economic reality test applied by courts to the 2021 IC Rule. *See, e.g.,* Ho-Chunk Inc. (supporting the proposed analysis because the 2021 IC Rule ''deviat[ed] from established case law''); Small Business Legislative Council (''SBLC'') (''While the SBLC has not taken a position on whether the economic realities test strikes the right balance, applying a test like the economic realities test that has been fleshed out over years through case law and administrative guidance certainly makes this complex issue easier to navigate.''); *see also* Opera America (''The 'totality-of-the-circumstances' approach allows for the nuance necessary to truly evaluate the nature of an employment or contractor relationship''); Texas Association for Home Care and Hospice (''We support the reiteration in the [NPRM] that the enumerated factors should each be equally relevant, including any additional relevant factors that indicate economic dependence or independence.'').

Other commenters, including most business-affiliated stakeholders and many self-identified independent contractors, disagreed with the Department's proposal to rescind and replace the 2021 IC Rule. Many of these commenters argued that the 2021 IC Rule was based on judicial precedent. *See e.g.,* Coalition for Workforce Innovation (''CWI''); Independent Bakers Association (''IBA''); Pacific Legal Foundation. Commenters opposed to this rulemaking further stated that the 2021 IC Rule's analysis is clearer than the NPRM's proposed economic reality test, asserting that returning to a totality-of-the-circumstances analysis would increase litigation and deter businesses from engaging with independent contractors. *See, e.g.,* American Society of Travel Advisors (''ASTA''); Financial Services Institute (''FSI''); U.S. Chamber of Commerce (''U.S. Chamber''). While many commenters opposed to the NPRM acknowledged that the misclassification of employees as independent contractors might be a problem in some industries, several commenters disputed the need for generally applicable guidance that (in their view) could be disruptive to businesses and legitimate independent contractors in their particular industries. *See, e.g.,* American Translators Association; IMC Companies, LLC; *see also* HR Policy Association. Finally, many self-identified independent contractors and advocacy groups asserted that the Department's proposal would ''misclassify'' independent contractors as employees. *See, e.g.,* American Society of Journalists and Authors; Cambridge Investment Research, Inc.; Fight for Freelancers; Transportation Intermediaries Association (''TIA'').

Commenters opposed to this rulemaking agreed with the 2021 IC Rule's assessment that the economic reality test traditionally applied by courts is incompatible with the modern economy. *See, e.g.,* Institute for the American Worker (''I4AW''); Society for Human Resources Management (''SHRM''); TIA. Several commenters pointed to differences in the economy today compared to the 1930s and 1940s, when the FLSA was enacted and the Supreme Court first endorsed the economic reality test. *See, e.g.,* Flex Association (''Flex'') (''It is no longer 1938, when Congress enacted the FLSA. Today, independent contractors can leverage app-based technology to build their own businesses in ways we could not have conceived even 20, let alone 84, years ago.''); National Association of Professional Insurance Agents (''[I]n many ways, the 1938 Congress could not have conceived of the present-day global economy or the variations among worker statuses that have emerged and continue to evolve therefrom.'').

Several commenters stated that the Department's proposal would deter businesses from engaging with independent contractors, which in turn would have disruptive economic consequences. In a joint comment, 33 business advocacy organizations and over 100 local Chambers of Commerce (''Coalition of Business Stakeholders'') asserted that, under the NPRM, ''the only scenario in which a hiring entity can be sure it is safe from an enforcement action by the DOL is when it classifies, or misclassifies, its workers as employees'' and concluded that the NPRM would ''upend millions of legitimate, productive independent contractor relationships.'' *See also, e.g.,* California Association of Realtors (C.A.R.) (''This proposal as is would seriously disrupt the current and historical choices of the real estate industry that have been in place for at least fifty years.''); FSI (''Changes in laws or regulations that substantially limited or prohibited the use of independent contracting in financial services would harm those who currently work as independent contractors, harm consumers by reducing their financial literacy and thus their ability to accumulate wealth and save for retirement, and harm the economy overall.'').

Upon consideration of the comments and as described throughout this preamble, the Department continues to believe that this final rule's approach offers a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themself is analyzed within each of the six economic reality factors. This rule's discussion of how courts and the Department's previous guidance apply the factors brings the multifactor test into focus, reduces confusion as to the overlapping factors, and provides a more consistent basis for understanding how the test has the flexibility to be applied to changes in the modern economy. Accordingly, the Department no longer views the concerns articulated in the 2021 IC Rule as impediments to using the economic reality test formulated by the courts and the Department's longstanding guidance.

The Department is, however, retaining its longstanding interpretation, as it did in the 2021 IC Rule, that economic dependence is the ultimate inquiry, and that an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income.[115]

[115] *See* 86 FR 1246 (§ 795.105(b) (''An employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work.''); *see also infra* section V.B.; 29 CFR 795.105(b) (''An 'employee' under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. . . . [This is] meant

Consistent with the 2021 IC Rule and as explained in the NPRM, the Department continues to believe that, as compared to the economic realities analysis generally, the particular concept of economic dependence is underdeveloped in the case law. As noted in the 2021 IC Rule, the Department and most courts have historically applied a ''dependence-for-work'' approach which considers whether the worker is dependent on the employer for work or depends on the worker's own business for work. However, a minority of courts have applied a ''dependence-for-income'' approach that considers whether the worker has other sources of income or wealth or is financially dependent on the employer.[116] Further, rather than giving primacy to only two factors as indicators of economic dependence, the Department believes that developing the concept of economic dependence is better accomplished by, in addition to elaborating on the general meaning of economic dependence, explaining how each of the six factors can illuminate the distinction between economic dependence on the employer for work and being in business for oneself. By focusing on that distinction in its discussion of each factor, the Department expects that this rule will provide clarity on the concept of economic dependence that the 2021 IC Rule indicated would be welcomed by workers and businesses, but will do so in a way that is consistent with case law and the Department's prior guidance.

Regarding commenters that stated that the 2021 IC Rule provided more clarity in distinguishing between factors, the Department believes, upon further consideration, that any purported confusion and inefficiency due to overlapping factors was overstated in the 2021 IC Rule. Moreover, when each factor is viewed under the framework of whether the worker is economically dependent or in business for themself, the rationale for considering facts under more than one factor is clearer. The Department explains in more detail in section V why considering certain facts under more than one factor is consistent with the totality-of-the-circumstances approach of the economic realities analysis used by courts. And the Department provides guidance regarding how to consider certain facts, such as the ability to work for others and whether the working relationship is exclusive, under more than one factor. The Department believes that this flexible approach is supported by the case law and preferable to rigidly and artificially limiting facts to only one factor, as the 2021 IC Rule did.

Concerning comments that the 2021 IC Rule was better suited to the modern economy, the Department believes that this final rule is well-equipped to address a wide array of traditional and emerging work relationships, as discussed throughout section V of this preamble. In the 2021 IC Rule, the Department stated that ''technological and social changes have made shortcomings of the economic realities test more apparent in the modern economy,'' thus justifying the 2021 IC Rule's characterization of the integral, investment, and permanence factors as less important in determining a worker's classification.[117] Upon further consideration, however, the Department believes that the multifactor economic reality test relied on by courts where no one factor or set of factors is presumed to carry more weight is the most helpful tool for evaluating modern work arrangements. The test's vitality is confirmed by its application over seven decades that have seen monumental shifts in the economy. Modern work arrangements utilizing applications or other technology are best addressed using the underlying economic reality test, which considers the totality of the circumstances in each working arrangement and offers a flexible, comprehensive, and appropriately nuanced approach which can be adapted to disparate industries and occupations. It can also encompass continued social changes because it does not presume which aspects of the work relationship are most probative or relevant and leaves open the possibility that changed circumstances may make certain factors more important in certain cases or future scenarios.

The Department's response to commenter feedback on the potential economic consequences of this rulemaking is discussed in the regulatory impact analysis provided in section VII. However, the Department continues to believe that proper application of the FLSA in the modern economy requires the flexibility of an economic reality test that does not predetermine the probative value of particular factors and which is adaptable to different industries and workers. As further explained in sections III.C and VII, commenter assertions of economic disruption related to this rulemaking are belied by the fact that this rulemaking merely aligns the Department's interpretive guidance with the same legal standard courts have been applying for decades—and are continuing to apply today.

The discussion that follows sets forth the Department's explanation of the need for this rulemaking and responds to relevant commenter feedback.

A. The 2021 IC Rule's Test Is Not Supported by Judicial Precedent or the Department's Historical Position and Is Not Fully Aligned With the Act's Text as Interpreted by the Courts

In the NPRM, the Department explained that it was proposing to rescind and replace the 2021 IC Rule in part because that rule was not fully aligned with the FLSA's text as interpreted by the courts or the Department's longstanding analysis, as well as decades of case law describing and applying the multifactor economic reality test. In relevant part, the NPRM explained that the Department had three primary and overlapping legal concerns with the 2021 IC Rule: (1) its creation of two ''core factors'' as the ''most probative'' in the economic reality analysis; (2) the oversized role of the control factor in its analysis; and (3) its altering of several economic reality factors to minimize or exclude key facts commonly analyzed by courts.[118]

After considering the comments, the Department continues to believe that the 2021 IC Rule marked a departure from the way in which courts and the Department adopted and applied the multifactor, totality-of-the-circumstances economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department also continues to believe that the 2021 IC Rule's departure from longstanding precedent unduly narrowed the economic reality test by limiting facts that may be considered as part of the test that are relevant in determining whether a worker is economically dependent on the employer for work or is in business for themself. By doing so, the 2021 IC Rule artificially restricted the Act's expansive definitions of ''employer,'' ''employee,'' and ''employ,'' undermining the Act's text and purposes, as interpreted by courts and the Department's longstanding interpretation of the economic reality test.

to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work. . . . Economic dependence does not focus on the amount of income earned, or whether the worker has other sources of income.'').

[116] *See* 86 FR 1172–73.

[117] 86 FR 1175.

[118] *See* 87 FR 62227–29. The Department had previously identified and discussed these three concerns in its 2021 Withdrawal Rule. *See* 86 FR 24307–15.

1. The 2021 IC Rule's Elevation of Control and Opportunity for Profit or Loss as the ''Most Probative'' Factors in Determining Employee Status Under the FLSA

As the NPRM explained, the 2021 IC Rule set forth a new articulation of the economic reality test, elevating two factors (control and opportunity for profit or loss) as ''core'' factors above other factors, asserting that the two core factors have ''greater probative value'' in determining a worker's economic dependence.[119] Notably, the 2021 IC Rule further provided that if both core factors point toward the same classification—either employee or independent contractor—then there is a ''substantial likelihood'' that this is the worker's correct classification.[120] Although it identified three other factors as additional guideposts and acknowledged that additional factors may be considered, it made clear that non-core factors ''are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.'' [121] The NPRM explained that the Department believes that the 2021 IC Rule's elevation of the control and opportunity for profit or loss factors was in tension with the language of the Act as well as the longstanding judicial precedent, expressed by the Supreme Court and in appellate cases from across the circuits, that no single factor is determinative in the analysis of whether a worker is an employee or an independent contractor, nor is any factor or set of factors necessarily more probative of whether the worker is in fact economically dependent on the employer for work as opposed to being in business for themself.

Many commenters expressed concerns about the 2021 IC Rule's elevation of two ''core factors'' and supported the Department's proposal to restore a totality-of-the-circumstances analysis where no factor (or set of factors) is given a predetermined weight. Several commenters asserted that the use of core factors was contrary to Supreme Court precedent. *See, e.g.,* International Association of Machinists and Aerospace Workers, AFL–CIO; Laborers' International Union of North America (''LIUNA''); National Employment Law Project (''NELP'). The AFL–CIO and the North America's Building Trades Unions (''NABTU'') further commented that the 2021 IC Rule's elevation of control and opportunity for profit or loss effectively (and impermissibly) adopted a common law test for independent contractor status. The Signatory Wall and Ceiling Contractors Alliance (''SWACCA'') stated that ''[b]y giving greater emphasis to these two factors . . . the [2021 IC Rule] improperly narrows the analysis of the facts and circumstances surrounding the business-worker relationship, thereby reducing the scope of the FLSA's protections.'' *See also* State AGs (commenting that the 2021 IC Rule's ''emphasis on two 'core' factors . . . negated the need to fully consider the remaining factors''). Farmworker Justice commented that the 2021 IC Rule's use of core factors could facilitate the misclassification of farmworkers, whose employment status is particularly dependent on the economic reality factors examining the skill and integrality of the work being performed. *See also* Joint Comment from the Center for Law and Social Policy & Governing for Impact (''CLASP & GFI'') (same).

Other commenters supported the 2021 IC Rule's use of core factors and did not agree with the Department's proposal to change the 2021 IC Rule's analysis. Pointing to the Department's review of appellate case law described in the 2021 IC Rule preamble,[122] several commenters stated that the elevation of the control and opportunity for profit or loss factors was fully consistent with the outcome of FLSA court decisions, if not their explicit reasoning. *See, e.g.,* Associated Builders and Contractors (''ABC''); Coalition to Promote Independent Entrepreneurs (''CPIE''); Flex; FSI. Several commenters, like the Club for Growth, Flex, and Modern Economy Project (''MEP'') agreed with the 2021 IC Rule's determination that the control and the opportunity for profit or loss factors ''drive at the heart'' of economic dependence.[123] CWI asserted that ''it is simply inaccurate that *no* court has determined, as a general rule, that any core factor should be afforded greater weight in determining whether an individual is an [employee].'' *See also* CPIE.

Having considered the comments, the Department continues to believe that the 2021 IC Rule was in tension with the Act, judicial precedent, and congressional intent. As the Department explained in the NPRM, there is no statutory basis for such a predetermined weighting of the factors and the Department is concerned that prioritizing two core factors over other factors may not fully account for the Act's broad definition of ''employ,'' as interpreted by the courts. The Department agrees with those commenters that noted that the elevation of two core factors improperly narrowed the analysis of the relevant facts, thereby reducing the scope of the FLSA's protections. For example, if facts relevant to the control and opportunity for profit or loss factors both point to independent contractor status for a particular worker but weakly so, those factors should not be presumed to carry more weight than stronger factual findings under other factors (*e.g.,* the existence of a lengthy working relationship under the ''permanence'' factor and the performance of work that does not require specialized skills and is an integral part of the business), which would indicate that the worker is an employee.

Moreover, the Department is not aware of any court that has, as a general rule, elevated any one economic reality factor or subset of factors above others, despite receiving several comments suggesting that there was such case law. The 2021 IC Rule did not cite or rely on any particular decision where a court announced such a general rule predetermining the weight of some of the economic reality factors. Further, the Department has examined cases raised by commenters in support of the core factor analysis and none stand for the proposition that a predetermined elevation of any factor or set of factors is appropriate under the economic reality analysis for worker classification under the FLSA. Rather, the cases cited by commenters are either relevant to a different statute such as the Americans with Disabilities Act (''ADA'') or Title VII, reference a joint employment analysis rather than an employee classification analysis, or have had excerpts taken out of context.[124] While

[119] 87 FR 62227 (citing 86 FR 1246 (§ 795.105(c) and (d))).

[120] 86 FR 1246 (§ 795.105(c)); *see also id.* at 1201 (advising that other factors would only outweigh the two core factors ''in rare cases'').

[121] *Id.* at 1246 (§ 795.105(c)).

[122] *See* 86 FR 1196–98.

[123] *Id.* at 1196.

[124] For example, although some commenters cited *Walsh* v. *Medical Staffing of America,* that case explicitly stated that ''[n]o single factor in the six-factor test is dispositive as 'the test is designed to capture the economic realities of the relationship between the worker and the putative employer.'" 580 F. Supp. 3d 216, 229 (E.D. Va. 2022) (quoting *McFeeley,* 825 F.3d at 241). The *Medical Staffing* court's reference to *Smith* v. *CSRA,* 12 F.4th 396, 413 (4th Cir. 2021), is unpersuasive since that case addressed employment status under the Americans with Disabilities Act, not the FLSA. *See CSRA,* 12 F.4th at 412–13. Other cases cited by commenters in support of core factors are inapposite. *See Brown* v. *BCG Attorney Search,* No. 12 C 9596, 2013 WL 6096932, at *1 (N.D. Ill. Nov. 20, 2013) (citing *Knight* v. *United Farm Bureau Mut. Ins. Co.,* 950 F.2d 377, 378 (7th Cir. 1991), which concerned Title VII not the FLSA); *Meyer* v. *U.S. Tennis Ass'n,* No. 1:11–cv–06268 (ALC)(MHD), 2014 WL 4495185, at *6 (S.D.N.Y. Sept. 11, 2014) (citing *Wadler* v. *Eastern Coll. Athletic Conference,* No. 00–civ–5671,

courts and the Department may focus on some relevant factors more than others when analyzing a particular set of facts and circumstances, this does not mean that it is possible or permissible to derive from these fact-driven decisions universal rules regarding which factors deserve more weight than the others when the courts themselves have not set forth any such universal rules despite decades of opportunity.

The Supreme Court has emphasized that employment status under the economic reality test turns upon ''the circumstances of the whole activity,'' rather than ''isolated factors.'' [125] Federal appellate courts have repeatedly cautioned against a mechanical or formulaic application of the economic reality test,[126] and specifically warn that it '' 'is impossible to assign to each of these factors a specific and invariably applied weight.' '' [127] The 2021 IC Rule's elevation of two ''core factors'' was also in tension with judicial precedent, expressed by the Supreme Court and federal courts of appeals, that no single factor in the analysis is dispositive.[128] Thus, the 2021 IC Rule's predetermined and mechanical weighting of factors was not consistent with how courts have, for decades, applied the economic reality analysis.[129]

Regarding comments relying on the 2021 IC Rule's reference to an appellate case law analysis to support the elevation of core factors, the Department has carefully reconsidered the cases cited in the 2020 NPRM and 2021 IC Rule in support.[130] The appellate cases relied on in the 2020 NPRM [131] and 2021 IC Rule to support the 2021 IC Rule's creation of ''core factors'' do not, themselves, elevate these two factors—rather, the 2021 IC Rule made assumptions about the reasoning behind the courts' decisions that are not clear from the decisions themselves and in some cases are contrary to the decisions' instructions that the test should not be applied in a mechanical fashion.[132] In fact, most of the decisions cited as supporting a ''core factor'' analysis based on the case law review explicitly deny assigning any predetermined weight to these factors, and instead state that they considered the factors as part of an analysis of the whole activity, with no determinative single factor.[133] Particularly when viewed in the context of repeated statements from the courts that no one factor in the economic reality test is dispositive, divining from the cases a conclusion that is the exact opposite from what the courts say that they are doing is not persuasive. The Department now believes that the 2020 NPRM and 2021 IC Rule's discussion of the case law in support of the core factors improperly simplified the courts' analysis in an attempt to quantify the probative value of certain factors in a manner that is facially inconsistent with the decisions themselves.

Additionally, while there are certainly many cases in which the classification decision made by the court aligns with the classification indicated by the control and opportunity for profit or loss factors, the 2021 IC Rule did not identify any cases stating that those two factors are ''more probative'' of a worker's classification than other factors. Rather, the 2021 IC Rule acknowledged that there are cases in which the classification suggested by the control factor did not align with the worker's classification as determined by the courts.[134] The Department has also identified appellate cases in which the classification suggested by the profit or loss factor, for example, did not align with the worker's classification as determined by the courts or in which that factor was simply not addressed due to the fact-specific nature of the analysis. *See, e.g., Nieman* v. *Nat'l Claims Adjusters, Inc.,* 775 F. App'x 622, 625 (11th Cir. 2019) (concluding that worker was an independent contractor without considering profit or loss or integral factors because facts were not presented on those issues); *Simpkins* v. *DuPage Hous. Auth.,* 893 F.3d 962, 967 (7th Cir. 2018) (reversing the district court's summary judgment decision and remanding case for determination of employee status without addressing opportunity for profit or loss); *Thomas* v. *TXX Servs., Inc.,* 663 F. App'x 86, 90 (2d Cir. 2016) (reversing summary judgment on the issue of plaintiffs' status as employees

2003 WL 21961119, at *2 (S.D.N.Y. Aug. 14, 2003), a Title VII case not an FLSA case); *see also Herman* v. *RSR Sec. Servs. Ltd.,* 172 F.3d 132, 135 (2d Cir. 1999) (joint employment not worker classification); *Zheng* v. *Liberty Apparel Co. Inc.,* 355 F.3d 61 (2d Cir. 2003) (joint employment not worker classification); *Razak* v. *Uber Technologies, Inc.,* 951 F.3d 137, 145 (3d Cir. 2020) (making the uncontroversial statement that the control factor ''is highly relevant to the FLSA analysis'' while also reaffirming the Third Circuit's statement that ''neither the presence nor absence of any particular factor is dispositive'' and that ''courts should examine the circumstances of the whole activity'' (quoting *DialAmerica,* 757 F.2d at 1382)).

[125] *Rutherford,* 331 U.S. at 730; *see also Silk,* 331 U.S. at 716, 719 (denying the existence of ''a rule of thumb to define the limits of the employer-employee relationship'' and determining employment status based on ''the total situation'').

[126] *See, e.g., Parrish,* 917 F.3d at 380 (''And, obviously, the factors should not 'be applied mechanically.' '') (quoting *Brock* v. *Mr. W Fireworks, Inc.,* 814 F.2d 1042, 1043–44 (5th Cir. 1987)); *Superior Care,* 840 F.2d at 1059 (''Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.'').

[127] *Parrish,* 917 F.3d at 380 (quoting *Hickey,* 699 F.2d at 752); *see also Scantland,* 721 F.3d at 1312 n.2 (''The weight of each factor depends on the light it sheds on the putative employee's dependence on the alleged employer, which in turn depends on the facts of the case.'') (quoting *Santelices,* 147 F. Supp. 2d at 1319)).

[128] *See, e.g., Silk,* 331 U.S. at 716 (explaining that ''[n]o one [factor] is controlling'' in the economic realities test); *Morrison,* 253 F.3d at 11 (''No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence.''); *Dole* v. *Snell,* 875 F.2d 802, 805 (10th Cir. 1989) (''It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances.''); *Lauritzen,* 835 F.2d at 1534 (''Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.''); *Selker Bros.,* 949 F.2d at 1293 (''It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.'').

[129] *See McFeeley,* 825 F.3d at 241 (''While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy. In other words, the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case.'').

[130] The 2021 IC Rule referenced on several occasions a review of appellate case law since 1975 to justify its elevation of two ''core'' factors. *See* 86 FR at 1194, 1196–97, 1198, 1202, 1240.

[131] 85 FR 60619.

[132] Federal courts of appeals have repeatedly cautioned against the ''mechanical application'' of the economic reality factors, including in the cases cited in support of the predetermined elevation of core factions. *See, e.g., Saleem* v. *Corp. Transp. Grp., Ltd.,* 854 F.3d 131, 139 (2d Cir. 2017) (''Relevant FLSA precedent, despite endorsing the *Silk* factors, cautions against their 'mechanical application.' '') (quoting *Superior Care,* 840 F.2d at 1059). And as explained herein, courts of appeals make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself.

[133] *See, e.g., Hobbs,* 946 F.3d at 829 (''No single factor is determinative. Rather, each factor is a tool used to gauge the *economic dependence* of the alleged employee, and each must be applied with this ultimate concept in mind.'') (quotation marks omitted) (citing *Hopkins* v. *Cornerstone Am.,* 545 F.3d 338, 343 (5th Cir. 2008)); *Parrish,* 917 F.3d at 380 (noting that no one factor is determinative and ''obviously, the factors should not 'be applied mechanically' '') (quoting *Mr. W Fireworks,* 814 F.2d at 1043); *Saleem,* 854 F.3d at 139–40 (explaining that employment relationships are determined by the circumstances of the whole activity); *McFeeley,* 825 F.3d at 241 (''No single factor is dispositive,—all six are part of the totality of circumstances presented.'') (citing *Baystate Alternative Staffing, Inc.* v. *Herman,* 163 F.3d 668, 675 (1st Cir. 1998)) (internal citation and quotation marks omitted); *Barlow* v. *C.R. England, Inc.,* 703 F.3d 497, 506 (10th Cir. 2012) (' 'None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.' '') (citing *Baker* v. *Flint Eng'g & Const. Co.,* 137 F.3d 1436, 1440 (10th Cir. 1998)); *Schultz* v. *Capital Int'l Sec., Inc.,* 466 F.3d 298, 305 (4th Cir. 2006) (''No single factor is dispositive; again, the test is designed to capture the economic realities of the relationship between the worker and the putative employer.'').

[134] *See* 86 FR 1196–97.

under the FLSA but not discussing opportunity for profit or loss); *Meyer* v. *U.S. Tennis Ass'n,* 607 F. App'x 121, 123 (2d Cir. 2015) (affirming summary judgment decision and concluding that district court did not err in determining that plaintiffs were independent contractors where district court found that the profit or loss factor ''cuts both ways'') (quoting *Meyer,* 2014 WL 4495185, at *7); *Johnson* v. *Unified Gov't of Wyandotte Cnty./Kansas City, Kansas,* 371 F.3d 723, 730 (10th Cir. 2004) (affirming jury verdict that workers were independent contractors despite concluding that ''[t]he jury could have viewed [the profit or loss] factor as not favoring either side''); *Donovan* v. *Tehco, Inc.,* 642 F.2d 141, 143 (5th Cir. 1981) (noting that the worker ''could elect to be paid by the hour or by the job and thus profit from foresight'' but that this and other facts were not sufficient ''to counterbalance the strong indicia of employee status''). As such, it is clear that mechanically deconstructing certain court decisions and considering what those courts have said about only two factors—even when the courts did not present their analyses in this manner—ignores the broader approach that most courts have taken in determining worker classification.

Moreover, it is necessarily the case when applying a multifactor balancing test that when any two factors of that test both point toward the same outcome, the probability of that indicated outcome aligning with the ultimate outcome increases. The 2021 IC Rule did not address whether a different combination of two factors would yield similar results. Yet, an in-depth review of the case law indicates that it would yield similar results, as most of the cases cited in the 2020 NPRM and 2021 IC Rule in support of its core factor analysis had multiple factors pointing in the same direction.[135] This further underscores the unduly narrow focus on two ''core factors'' in the 2021 IC Rule.

In any event, the 2021 IC Rule significantly altered the ''control'' and ''opportunity for profit or loss'' factors, changing what facts may be considered for each, as discussed more fully in section V. For example, contrary to the approach taken by most courts, the 2021 IC Rule placed a significant focus on the worker's control rather than the potential employer's control and recast the opportunity for profit or loss factor as indicating independent contractor status based on the worker's initiative or investment. Thus, irrespective of whether control and opportunity for profit or loss were more frequently aligned with the ultimate result in prior appellate cases, the new framing of these factors, as redefined in the 2021 IC Rule, set forth a new standard for analysis that is unsupported by precedent.

2. The Role of Control in the 2021 IC Rule's Analysis

The 2021 IC Rule identified ''the nature and degree of control over the work'' as one of two core factors given ''greater weight'' in the independent contractor analysis.[136] In the NPRM, the Department expressed concern that elevating the importance of control in every FLSA employee or independent contractor analysis brings the 2021 IC Rule closer to the common law control test that courts have rejected when interpreting the Act. Accordingly, the NPRM proposed restoring control to one of six factors to be considered, with no single factor being determinative.

Commenter views on the 2021 IC Rule's emphasis on control overlapped with those responding to its creation of ''core factors.'' For example, several commenters in support of the NPRM asserted that elevating the role of control makes the 2021 IC Rule's analysis too similar to a common law control test. *See, e.g.,* AFL–CIO; LIUNA; NABTU; State AGs. Lawyers' Committee for Civil Rights Under Law & the Washington Lawyers' Committee for Civil Rights and Urban Affairs (''LCCRUL & WLC'') discussed court decisions where workers were found to be misclassified employees under the economic reality test despite a lack of ''actual control'' exercised by the employer, implying that the outcomes might have been different if courts had applied the 2021 IC Rule. NELP requested that the Department further deemphasize the relevance of control, asserting that ''the 'control' factor is furthest removed from the statutory 'suffer or permit' language, and that an absence of control is not particularly telling given that language.'' Finally, several commenters asserted that the 2021 IC Rule's elevation of control is doubly problematic in view of alterations to the control factor which, in commenters' views, make the factor less likely to indicate employee status. *See* NWLC (''[T]he 2021 Rule not only gave the 'control' factor outsized importance, but impermissibly narrowed the concept of control itself by focusing on control over work exercised by the individual worker, as opposed to the right to control by an employer, and defining control primarily with reference to considerations that are often disregarded as irrelevant by courts.''); *see also* AFL–CIO; International Brotherhood of Teamsters (''IBT'').

As discussed earlier, commenters opposed to the NPRM stated that the control factor should be given added weight in the economic reality test (along with the opportunity for profit or loss factor), due to its purported strong correlation with the ultimate outcomes of prior FLSA court decisions. *See, e.g.,* ABC; CPIE; Flex; FSI. CWI commented that the 2021 IC Rule's elevation of control served a ''definitional purpose,'' identifying control as a foundational aspect of the ''dependence'' in ''economic dependence.'' *See also* Club for Growth (''[Because control is] virtually synonymous with what it means to be an independent businessperson . . . it makes sense that [it] typically matter[s] more than, for instance, the duration of a business relationship or a worker's level of skill.''). The U.S. Chamber commented that the 2021 IC Rule ''rightly elevated the importance of control'' because ''courts and scholars have found . . . no functional difference between'' the economic reality and common law control tests. *See also* Club for Growth (''It would be odd to say that control, which underpins the concept of employment and agency law generally, should have no more weight than, say, whether the worker bought his own boots.'').

As noted in the NPRM, although the 2021 IC Rule's analysis regarding who is an employee and who is an independent contractor was not the same as the common law control analysis, elevating the importance of control in every FLSA employee or independent contractor analysis brought the 2021 Rule closer to

[135] Unsurprisingly, most of the cases cited in support of the core factor analysis had multiple factors pointing in the same direction, not only control and opportunity for profit or loss. *See, e.g., Hobbs,* 946 F.3d at 830–36 (all factors pointing in same direction); *Verma* v. *3001 Castor, Inc.,* 937 F.3d 221, 230–32 (3d Cir. 2019) (control, profit or loss, integral, skill, and investment all pointing in same direction); *Gayle* v. *Harry's Nurses Registry, Inc.,* 594 F. App'x 714, 717–18 (2d Cir. 2014) (control, profit or loss, and integral all pointing in same direction); *Schultz,* 466 F.3d at 307–09 (control, profit or loss, investment, permanence, integral all pointing in same direction); *Parrish,* 917 F.3d at 379–388 (control, profit or loss, skill, permanence all pointing same direction); *Saleem,* 854 F.3d at 140–48 (control, profit or loss, investment, permanence all pointing same direction); *Mid-Atl. Installation Servs.,* 16 F. App'x at 106–08 (control, profit or loss, investment, skill all pointing same direction); *Off Duty Police,* 915 F.3d at 1059–1062 (profit or loss, investment, permanence, skill, and integral all pointing in same direction); *McFeeley,* 825 F.3d at 243–44 (control, profit or loss, investment, skill, and integral all pointing in same direction); *Eberline* v. *Media Net, L.L.C.,* 636 F. App'x 225, 228–29 (5th Cir. 2016) (control, profit or loss, investment, and skill all pointing in same direction).

[136] *Id.* at 1246–47 (§ 795.105(c), (d)).

the common law control test that courts have rejected when interpreting the Act.[137] The Supreme Court has repeatedly stated that the Act establishes a broader scope of employment for FLSA purposes than under a common law analysis focused on control.[138] The Department remains concerned that the outsized role of control under the 2021 IC Rule's analysis was contrary to the Act's text and case law interpreting the Act's definitions of employment and as such disagrees with commenters who suggested that control is essentially synonymous with economic dependence and should be given more weight. The Department, however, also disagrees with NELP that the FLSA's ''suffer or permit'' standard suggests that control should be afforded less weight than other economic reality factors, as courts have similarly not adopted such an approach.

3. The 2021 IC Rule Improperly Altered Several Factors by Precluding the Consideration of Relevant Facts

The NPRM stated that the Department remained concerned that the 2021 IC Rule's preclusion of certain facts from being considered under the factors improperly narrowed the economic reality test and did not allow for a full consideration of all facts which might be relevant to determining whether a worker is economically dependent upon an employer for work or in business for themself. Examples of such narrowing from the 2021 IC Rule include: (1) stating that ''control'' indicative of an employment relationship must involve an employer's ''substantial control over key aspects of the performance of the work,'' excluding requirements ''to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms;'' [139] (2) making the ''opportunity for profit or loss'' factor indicate independent contractor status based on either the worker's initiative or investment (even if either a lack of initiative or lack of investment suggests that the worker is an employee); [140] (3) disregarding the employer's investments; [141] (4) disregarding the importance or centrality of a worker's work to the employer's business; [142] and (5) downplaying the employer's reserved right or authority to control the worker.[143] In each of these ways, the 2021 IC Rule limited the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor.

Numerous commenters opined on the 2021 IC Rule's general narrowing of the economic reality test and the extent to which it justifies this rulemaking. For example, IBT stated that ''[t]he current rule conflicts with the intended broad definition and coverage of the [FLSA] and adopts an impermissibly narrow test for determining employee status.'' *See also, e.g.,* AFL–CIO (''Overall, the 2021 IC Rule contracted the coverage of the FLSA, strongly contrary to congressional intent and Supreme Court precedent.''); Outten & Golden LLP (''The January 2021 rule restricts FLSA coverage to a smaller subset of workers than those whose work is 'suffer[ed] or permit[ted]' under the statute's expansive coverage.''). While some commenters focused on the 2021 IC Rule's elevation of ''control'' as a core factor, other commenters additionally addressed the rule's alteration of individual economic factors. *See, e.g.,* LCCRUL & WLC (describing the 2021 IC Rule as ''elevating facts tending to show independent contractor status, while reducing the probative weight of other factors and downplaying facts tending to show employee status''); NECA & IBEW (''The 2021 IC Rule also narrowed the facts to be considered under the 'non-core' factors.''). The AFL–CIO and LCCRUL & WLC both identified two changes to the factors from the 2021 IC Rule as particularly problematic: the diminution of an employer's reserved right to control, and the alteration of the ''integral part'' factor (excluding any consideration of the importance or centrality of the work to the employer).

Other commenters defended the merit of the 2021 IC Rule's five economic reality factors, as discussed in greater detail in section V. As a general matter, these commenters praised the 2021 IC Rule's description of the economic reality factors for reducing overlap and redundancy compared to the approach taken by courts, stating that such changes brought greater clarity to the regulated community. *See, e.g.,* American Hotel & Lodging Association; Center for Workplace Compliance (''CWC''); FSI; MEP; National Retail Federation and the National Council of Chain Restaurants (''NRF & NCCR''). Discussing examples such as the ''integrated unit'' factor's exclusion of the importance or centrality of the individual's work to the potential employer's business,[144] CWI asserted that the 2021 IC Rule ''ensures that each factor is properly tailored to address the ultimate determinant of employee or independent contractor status—economic dependence.''

Having considered the comments on this issue, the Department believes that the 2021 IC Rule altered various economic reality factors in ways that improperly narrowed the economic reality test, because such alterations minimized or excluded facts which in many cases are relevant for determining whether a worker is economically dependent upon an employer for work or in business for themself. The Department remains of the view that the 2021 IC Rule's alteration of several economic reality factors provides another important justification for this rulemaking. Commenter feedback on the proper articulation of each factor in the economic reality test is described in greater detail in section V.

B. Confusion and Uncertainty Introduced by the 2021 IC Rule

The 2021 IC Rule stated that it sought to ''significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act.'' [145] However, as previously discussed,[146] the 2021 IC Rule introduced a new analysis regarding employee or independent contractor classification that was materially different from the longstanding analysis applied by courts and that included

[137] The Department previously identified this concern as one of the primary reasons for the Withdrawal Rule. *See* 86 FR 24311.

[138] *See Darden,* 503 U.S. at 324–26; *Portland Terminal,* 330 U.S. at 150–51; and *Rutherford,* 331 U.S. at 728.

[139] 86 FR 1246–47 (§ 795.105(d)(1)(i)).

[140] *Id.* at 1247 (§ 795.105(d)(1)(ii)) (''While the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor.'').

[141] *Id.; see also id.* at 1188 (''[T]he Department reaffirms its position that comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment.'').

[142] *Id.* at 1247 (§ 795.105(d)(2)(iii)); *see also id.* at 1248 (noting through an example in § 795.115(b)(6)(ii) that ''[i]t is not relevant . . . that the writing of articles is an important part of producing newspapers''); *accord id.* at 1195 (responding to commenters regarding the Department's decision to shift to an ''integrated unit of production'' analysis).

[143] *See id.* at 1246–47 (advising, in § 795.105(d)(1)(i), that the control factor indicates employment status if a potential employer ''*exercises* substantial control over key aspects of the performance of the work'') (emphasis added); *id.* at 1247 (advising, in § 795.110, that ''a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority''); *see also id.* at 1203–04 (same in response to commenters).

[144] *See* 86 FR 1247 (§ 795.105(d)(2)(iii)).

[145] *Id.* at 1168.

[146] *See supra* section III.A.

several new concepts that neither courts nor the Department had previously applied. This final rule (and particularly rescission of the 2021 IC Rule) is needed in part because of the concern that the 2021 IC Rule's new analysis and concepts did not provide the intended clarity.

First, as the Department explained in the NPRM, because the 2021 IC Rule departed from courts' longstanding precedent, it is not clear whether courts would have at some point adopted the Rule's analysis were it not being rescinded as part of this rulemaking. The Department further explained that this question could have taken years of appellate litigation in different federal courts of appeals to sort out, resulting in more uncertainty as to the applicable economic reality test. Businesses operating nationwide would have had to familiarize themselves with multiple standards for determining who is an employee under the FLSA. This litigation and these multiple standards would have likely caused confusion and uncertainty.[147]

Second, as the Department noted in the NPRM, the 2021 IC Rule would have introduced several ambiguous terms and concepts into the analysis for determining whether a worker is an employee under the FLSA or an independent contractor. For example, those following the guidance provided in the 2021 IC Rule had to grapple with what it means in practice for two factors to be ''core'' factors and entitled to greater weight. In addition, they had to determine, in cases where the two core factors point to the same classification, how ''substantial'' the likelihood is that they point toward the correct classification if the additional factors point toward the other classification. Additionally, as explained in the NPRM, the 2021 IC Rule did not specify whether the ''additional factors'' that could be considered under that rule had less probative value (or weight) than the three non-''core'' factors. Assuming that they did, the 2021 IC Rule would have essentially resulted in a three-tiered multifactor balancing test, with the ''core'' factors given more weight than enumerated non-''core'' factors, and the enumerated non-''core'' factors given more weight than the ''additional'' factors. The 2021 IC Rule would have also improperly collapsed some factors into each other, so that, for example, investment and initiative would have been considered only as a part of the opportunity for profit or loss factor, requiring courts and the regulated community to reconsider how they have long applied those factors. These new concepts, this new weighing of the factors, and this new treatment of the factors would have likely caused confusion and uncertainty.[148]

In sum, the NPRM explained that the 2021 IC Rule would have complicated rather than simplified the analysis for determining whether a worker is an employee or independent contractor under the FLSA, which is further justification for this final rule to rescind and replace the 2021 IC Rule.

As a threshold matter, commenters disagreed over whether courts would adopt and apply the 2021 IC Rule's analysis if it were left in place. Multiple commenters agreed with the Department's concern, as described in the NPRM, that courts might not adopt or apply the 2021 IC Rule, which they criticized as an unlawfully narrow interpretation of the FLSA. *See, e.g.,* LIUNA (discussing ''the clear illegality of the 2021 Rule''); NELP (describing the 2021 IC Rule as ''a legally incorrect standard'' that ''merits neither adherence, agency deference, nor smallest persuasive effect''); UBC (''The 2021 Rule is so abundantly flawed that it is ripe for challenge under the Administrative Procedure Act.''). The State AGs commented that ''it could take years of litigation to determine if and how courts will adopt'' the 2021 IC Rule's analysis. *See also* SWACCA (''Judicial disregard of the January 2021 Rule's interpretation of the FLSA would create considerable confusion.''). UBC elaborated that uncertainty over judicial adoption of the 2021 IC Rule poses a significant legal risk to businesses, as ''any employer relying on the 2021 Rule faces the very real possibility that their presumed compliance with the FLSA would in fact be the opposite.'' *See also* NECA & IBEW (asserting that the 2021 IC Rule does not provide ''certainty and clarity'' for businesses because courts will continue applying a broader economic reality test). Notwithstanding their concerns with some aspects of the NPRM's proposed guidance, some independent contractors and business stakeholders shared the Department's concerns over whether courts would actually apply the 2021 IC Rule and the attendant risks that they would not. *See, e.g.,* Ho-Chunk, Inc. (''Ho-Chunk supports the Department's revision of the 2021 IC Rule as we agree that [it] would have a confusing and disruptive effect due to its deviation from established case law.'').

Commenters opposed to the NPRM, however, expressed confidence that, if left in place, the 2021 IC Rule would be adopted by courts over time and promote greater uniformity in the law. *See, e.g.,* IMC Companies (''After decades of uncertainty and imprecise applications of the law, the [2021 IC Rule] was on the cusp of ushering in a new era of streamlined analysis and consistent court decisions across all jurisdictions.''); NRF & NCCR (''If left in place, [the 2021 IC Rule] would undoubtedly increase consistency.''). Several of these commenters asserted that the Department's concerns about the 2021 IC Rule's reception by courts were speculative, unsupported by evidence, and premature. *See, e.g.,* American Bakers Association; CPIE; Freedom Foundation. A comment from two fellows at the Heritage Foundation asserted that courts would adopt the 2021 IC Rule given the deferential standard of review afforded to agency rules that fill statutory gaps under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 468 U.S. 837 (1984).[149] Other commenters disputed the relevance of the Department's concern over the 2021 IC Rule's adoption by courts, asserting that courts were already applying different versions of the economic reality test and arriving at different outcomes prior to the 2021 IC Rule. *See, e.g.,* ASTA; Independent Women's Forum (''IWF''); *see also* Club for Growth (''Without supporting experience, the critique is no more than the same argument that could be leveled against virtually any regulation.''). Finally, many commenters questioned the likelihood that courts would adopt the NPRM's proposed guidance, which they viewed as less consistent with the FLSA and judicial precedent than the 2021 IC Rule. *See, e.g.,* CPIE; FSI; National Association of Manufacturers (''NAM''); Workplace Policy Institute of Littler Mendelson, P.C. (''WPI'').

Having considered the comments, the Department continues to have serious concerns about the extent to which federal courts would have adopted the 2021 IC Rule, were it not being rescinded by this rulemaking. The Department is unaware of a single federal court that has applied the 2021 IC Rule's analysis. To the contrary, to the Department's knowledge, only a few court decisions have even considered the 2021 IC Rule and all expressly

[147] *See generally* 87 FR 62229.

[148] *See generally id.*

[149] A far larger number of commenters—including those both supportive and critical of the NPRM—asserted that any regulatory guidance issued by the Department addressing employee or independent contractor status under the FLSA would be a non-binding ''interpretive rule,'' given the Department's lack of explicit rulemaking authority on the topic. *See, e.g.,* Club for Growth; CWC; NELP; Winebrake & Santillo, LLC; WPI.

declined to apply its analysis.[150] Other courts that have considered employee or independent contractor classification under the FLSA have continued applying a broader economic reality test consistent with their own longstanding precedent.[151]

The Department disagrees with commenter assertions that the 2021 IC Rule's analysis was more likely to be adopted by courts than the analysis proposed in the NPRM. The Department's analysis in this rulemaking is grounded in longstanding case law, while the new standard and new concepts introduced by the 2021 IC Rule were a very significant departure from that longstanding case law. For example, as previously discussed, the 2021 IC Rule created ''core'' factors that were automatically given greater weight in the analysis, contrary to how every appellate court has described the economic reality test.[152] In line with the case law, this final rule has no ''core'' factors. Similarly, while every federal court of appeals that has applied the integral factor in an FLSA independent contractor case has examined whether the worker's work is an ''integral part'' of the potential employer's business,[153] no circuit applies the 2021 IC Rule's narrower inquiry into ''whether the work is part of an integrated unit of production'' as the standard under this factor.[154] And unlike the 2021 IC Rule, all but two circuits share the approach of listing ''investment'' and ''opportunity for profit and loss'' as separate economic reality factors, consistent with the Supreme Court's original listing of these factors in *Silk*.[155]

Some commenters alleged that certain aspects of the NPRM's proposed guidance were departures from judicial precedent, such as its proposal that ''control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control,'' [156] and its proposed consideration of investments made by the potential employer as well as the worker.[157] However, as the discussions of the control and investments factors in section V explain, this final rule's guidance on both issues is well-supported by the case law. Moreover, the Department has made meaningful changes in this final rule to aspects of its proposed guidance in response to comments, including the treatment of control exercised to comply with legal obligations and the consideration of investments made by the potential employer.[158] The Department believes that such changes further align this final rule's guidance with the analysis presently applied by courts, providing greater certainty for interested parties.

Apart from the 2021 IC Rule's reception by courts, commenters also disagreed over whether the 2021 IC Rule's guidance brought clarity or confusion as a standalone matter. Some commenters asserted that the novelty of the 2021 IC Rule's analysis, for example, would have created confusion as compared to the longstanding analysis applied by courts. *See, e.g.,* NELP (''By departing from decades of federal case law on the scope of the Act's protections, and by downplaying relevant facts of an employment relationship in the analysis, the 2021 IC Rule . . . creates more confusion for employers and workers alike.''); SWACCA (asserting that the ability to ''draw[] on 70 years of existing interpretations from the courts and Department of Labor guidance'' under the NPRM's guidance will ''save time and resources for all stakeholders compared to the January 2021 Rule's novel, untested weighted framework.'').

In contrast, other commenters asserted that rescission and replacement of the 2021 IC Rule would reduce certainty and clarity. *See, e.g.,* Americans for Prosperity Foundation (''AFPF''); Coalition of Business Stakeholders; NAM; Republican Members of Congress; SHRM; U.S. Chamber. Numerous commenters that preferred the 2021 IC Rule identified its establishment of core factors as that rule's most clarifying feature. *See, e.g.,* Competitive Enterprise Institute (''CEI''); CWC; IWF; Landmark Legal Foundation; National Association of Women Business Owners (''NAWBO''); Raymond James Financial, Inc. (''Raymond James''). Some commenters additionally supported the 2021 IC Rule's elimination of purported redundant or overlapping considerations in various economic reality factors. *See, e.g.,* FSI (criticizing the NPRM's proposed separation of the ''investment'' and ''opportunity for profit or loss'' factors as ''yet another way in which the [NPRM] . . . undo[es] the 2021 Rule's clarifying efforts to articulate an appropriately weighted test with less overlapping redundancy''); MEP.

Having reviewed the comments, the Department continues to believe that the 2021 IC Rule introduced uncertainty regarding the applicable legal standard for determining whether a worker is an employee or an independent contractor under the FLSA, contrary to its stated intent. Prior to the 2021 IC Rule, there was certainty as to the applicable legal standard for determining whether a worker was an employee or independent contractor under the FLSA because federal courts of appeals applied a totality-of-the-circumstances, economic reality test that did not elevate any factors above the others. Despite slight variation in the exact number and phrasing of specific economic reality factors, courts and the Department generally examined the same economic reality factors. The 2021 IC Rule, however, injected uncertainty into this area of the law by putting forth new guidance that was at odds (for all of the reasons discussed herein) with

[150] *See Wallen* v. *TendoNova Corp.,* No. 20-cv-790–SE, 2022 WL 17128983, at *4 (D.N.H. Nov. 22, 2022) (noting that the 2021 IC Rule ''is not controlling . . . and may not be valid''); *Harris* v. *Diamond Dolls of Nevada, LLC,* No. 3:19-cv-00598–RCJ–CBC, 2022 WL 4125474, at *2 (D. Nev. July 26, 2022) (denying defendants' motion to reconsider the court's earlier ruling that plaintiffs were FLSA-covered employees in part because the 2021 IC Rule is ''not binding''); *Badillo-Rubio* v. *RF Constr., LLC,* No. 18–CV–1092, 2022 WL 821421, at *13 (M.D. La. Mar. 17, 2022) (rejecting plaintiff's argument that the court should apply the 2021 IC Rule's ''integrated production'' factor as ''unnecessary'' in determining that plaintiff was an employee). The *Wallen* decision is notable because, as the court explained, the First Circuit has neither adopted nor rejected a particular test, and thus the court was not bound by any prior circuit-level precedent. Still, the *Wallen* court declined to apply the 2021 IC Rule and applied ''the standard six-factor test.'' 2022 WL 17128983, at *3–4.

[151] *See, e.g., Acevedo* v. *McCalla,* No. MJM–22–1157, 2023 WL 1070436, at *3–5 (D. Md. Jan. 27, 2023) (relying on the Fourth Circuit's economic reality test to find that the worker failed to state a claim for relief under the FLSA without reference to 2021 IC Rule); *Brunet* v. *GB Premium OCTG Servs. LLC,* No. 4:21–CV–1600, 2022 WL 17730576, at *5–10 (S.D. Tex. Dec. 1, 2022) (applying the Fifth Circuit's economic reality test without reference to 2021 IC Rule), *report and recommendation adopted,* 2023 WL 2186441 (Feb. 23, 2023); *Ajquiixtos* v. *Rice & Noodles, Inc.,* No. 4:21–CV–01546, 2022 WL 7055396, at *2–4 (S.D. Tex. Oct. 12, 2022) (relying on the Fifth Circuit's economic reality test and not referencing the 2021 IC Rule to conclude that a worker was an employee and not an independent contractor); *Black* v. *7714 Ent., Corp.,* No. 21–CV–4829, 2022 WL 4229260, at *6–8 (E.D.N.Y. July 29, 2022), *report and recommendation adopted,* 2022 WL 3643969 (E.D.N.Y. Aug. 24, 2022) (relying on the Second Circuit's economic reality test to conclude that a worker is an employee and not an independent contractor without reference to the 2021 IC Rule); *Hill* v. *Pepperidge Farm, Inc.,* No. 3:22–CV–97–HEH, 2022 WL 3371321, at *2–5 (E.D. Va. Aug. 16, 2022) (relying on the Fourth Circuit's economic reality test to find that the worker has stated a claim for relief under the FLSA without reference to 2021 IC Rule).

[152] *See supra* section III.A.1.

[153] *See supra* n.52.

[154] *See infra,* section V.C.5.

[155] 331 U.S. at 716. As discussed earlier, the Second and D.C. Circuit Courts of Appeals describe ''investment'' and ''opportunity for profit or loss'' as a single factor in the economic reality test. *See supra* n.58.

[156] 87 FR 62275 (proposed § 795.110(b)(4)).

[157] 87 FR 62275 (proposed § 795.110(b)(2)).

[158] *See infra,* section V.C.

the substantive standard applied by courts. As a result of the 2021 IC Rule, the regulated community was confronted with inconsistent standards for interested parties to apply to determine a worker's status—the test from the 2021 IC Rule and the totality-of-the-circumstances test in federal appellate case law.[159] Leaving the 2021 IC Rule in place would have risked greater confusion regarding its relation to well-settled circuit precedent. Thus, the 2021 IC Rule's new standard introduced uncertainty that did not exist before.[160]

Additionally, the Department continues to believe that the aspects of the 2021 IC Rule's analysis introduced confusion, making that rule's guidance vulnerable to misapplication. Confusion about how to apply the 2021 IC Rule was evident in many of the comments submitted in opposition to the Department's proposal to rescind and replace that rule. For example, several commenters inaccurately described the 2021 IC Rule as establishing a ''two-factor test,'' *see, e.g.,* CEI; National Demolition Association (''NDA''), while others mistakenly assumed that non-core factors were only considered when the two core factors pointed to opposite classification outcomes. *See, e.g.,* Information Technology & Innovation Foundation; News/Media Alliance (''N/MA''); Professional Golfers' Association of America (''PGA'').[161] Some commenters appeared to conflate the reduced importance of non-core factors under the 2021 IC Rule's analysis with a reduced need to consider such factors at all. *See, e.g.,* National Federation of Independent Businesses (''NFIB''); SHRM.[162] Additionally, some commenters viewed the 2021 IC Rule's economic reality test, in its totality, as essentially the same as a common law control test.[163] *See* The National Council of Agricultural Employers (asserting that common law definitions of independent contractor status ''are consistent with the 2021 IC Rule''); U.S. Chamber (asserting that ''despite the ostensible variances between the economic realities and common law control tests, 'there is no functional difference between' these tests'').

Commenter confusion about the 2021 IC Rule is unsurprising because that rule set forth a novel analysis which has not been applied by any court. The confusion evident in the comments received reinforces the Department's assessment, as explained in the NPRM, that the 2021 IC Rule could have resulted in misapplication of the economic reality test and may have conveyed to employers that more workers could be classified as independent contractors than prior to the 2021 IC Rule.

C. Risks to Workers From the 2021 IC Rule

In the NPRM, the Department explained that to the extent the 2021 IC Rule's guidance resulted in the misclassification of employees as independent contractors, the resulting denial of FLSA protections could harm the affected workers. These protections include being paid at least the federal minimum wage for all hours worked, overtime compensation for hours worked over 40 in a workweek, and protection against retaliation for complaining about, for example, a violation of the FLSA. The Department further explained in the NPRM that the 2021 IC Rule did not fully consider these potential consequences for workers. The NPRM noted that this result could have a disproportionate impact on women and people of color, to the extent such workers are overrepresented in low-wage positions where misclassification is more likely.[164] The NPRM further noted that women and people of color experience multiple types of economic inequities in the labor force, including gender and racial wage gaps and occupational segregation, and that the misclassification of these workers as independent contractors deprives them of wage and hour protections that could help alleviate some of this inequality.[165]

Many commenters, including worker advocacy groups, labor unions, and other stakeholders, shared views about the 2021 IC Rule's effect on employees vulnerable to misclassification. The Department also received significant feedback regarding the potential effects of this rulemaking on independent contractors, as well as from commenters who did not agree that the 2021 IC Rule would or could increase the prevalence of misclassification.

Many commenters agreed with the Department's assessment that the misclassification of employees as independent contractors remains a serious problem for workers, businesses, and the broader economy. Several commenters referenced studies or data estimating a high prevalence of misclassification in the economy, in addition to those mentioned in the NPRM's regulatory impact analysis.[166] *See, e.g.,* NABTU (citing multiple studies estimating the misclassification of construction workers in various states); State AGs (discussing a June 2022 report estimating that ''at least 10 percent of New York State's workers are misclassified as independent contractors'' and a December 2022 report estimating that ''approximately 259,000 workers in Pennsylvania are wrongly classified as independent contractors''). CLASP & GFI asserted that the misclassification of employees as independent contractors is ''occurring with increased frequency as workplaces 'fissure,' '' and ''firms . . . outsource bigger and bigger portions of their workforces to other entities and to workers themselves.'' Similarly, the UFCW asserted that misclassification is a ''pervasive and growing problem,'' citing one report showing that in Washington state, misclassification increased from 5 percent of employers misclassifying workers in 2008 to 14 percent of employers misclassifying workers in 2017, with construction workers, clerical workers, and hotel and restaurant workers the most likely to be misclassified.'' Several commenters emphasized the prevalence of misclassification in specific industries. *See, e.g.,* American Federation of State,

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[159] To the extent that there was any uncertainty around outcomes when applying federal appellate case law beyond what would be expected from any fact-specific test, the standard that courts and the Department would apply prior to the 2021 IC Rule was known. And with this rulemaking, the Department hopes to decrease any uncertainty around outcomes by providing detailed guidance about the application of each factor that is consistent with the case law, as opposed to the new concepts that the 2021 IC Rule introduced.

[160] The Department acknowledges that the 2021 IC Rule includes several important principles from the case law, such as: economic dependence is the ultimate inquiry, the list of economic reality factors is not exhaustive, and no single factor is determinative. However, as explained herein, the 2021 IC Rule was, on balance, a departure from the case law to an extent that it introduced uncertainty.

[161] The 2021 IC Rule explained that it rejected commenter requests to ''state that if the two core factors point towards the same classification, there is no need to consider any other factors'' because ''in some circumstances, the core factors could be outweighed by particularly probative facts related to other factors.'' 86 FR 1202.

[162] The 2021 IC Rule explained that ''there may be circumstances where one or more of the non-core factors, *upon consideration,* has little or no probative value.'' 86 FR 1202 (emphasis added).

[163] *Cf.* 86 FR 1201 (''[T]he rule's standard for employment remains broader than the common law.''); *see also id.* at 1239 (rejecting the adoption of a common law control test in the analysis of regulatory alternatives).

[164] *See* 87 FR 62230 (describing commenter feedback from the Withdrawal Rule asserting that ''misclassification is rampant in low-wage, labor-intensive industries where women and people of color, including Black, Latinx, and AAPI workers, as overrepresented'').

[165] *Id.*

[166] *See* 87 FR 62266 (citing a 2020 study from NELP estimating that ''10 to 30 percent of employers (or more) misclassify their employees as independent contractors).

County and Municipal Employees (custodial work); Farmworker Justice (agriculture); IntelyCare Inc. (nursing); National Domestic Workers Alliance (''NDWA'') (domestic and home care); REAL Women in Trucking (trucking); Service Employees International Union (janitorial and gig work); SMACNA (construction).

Many commenters discussed how the misclassification of employees as independent contractors deprives workers of wages. SWACCA, for example, commented that ''the estimated 20 percent of construction workers who should be treated as employees (but are not) lose close to $1 billion in wages annually.'' Commenters pointed out that misclassification undercuts employers that comply with the law and causes a ''race to the bottom'' in labor standards. *See, e.g.,* AARP; Indiana, Illinois, Iowa Foundation for Fair Contracting; SWACCA (estimating that ''construction companies that treat their workforce as independent contractors save at least 20 to 30 percent on labor costs''). Gale Healthcare Solutions stated that ''[t]emporary staffing platform companies that hire nursing staff as W2 employees lose talent to companies that use a 1099 model, as 1099 agencies promote wages that appear higher because they do not provide traditional protections of employment or account for withholding taxes and additional expenses required by the W–2 model.'' Alto Experience Inc., a ridesharing company that classifies its drivers as employees, asserted that the misclassification of employees as independent contractors constitutes an ''unfair method of competition in commerce'' that the FLSA was passed to prevent.

Beyond wage effects, commenters identified and discussed many other consequences of worker misclassification. For example, the NWLC asserted ''by strengthening the employment test to reduce misclassification, the Department can ensure that more nursing mothers will be able to hold their employers accountable for providing appropriate facilities and adequate break time.'' *See also* A Better Balance (''[W]e are pleased that this rule will help to ensure that workers are able to access their rights under the Family and Medical Leave Act and the Break Time for Nursing Mothers law.''). As discussed more fully in section VII, commenters also raised other negative consequences of misclassification for workers beyond those directly related to the FLSA, such as: decreased access to employment benefits such as health insurance or retirement benefits, inability to access paid sick leave, unemployment insurance, and worker's compensation, a lack of ability to take collective action to improve workplace conditions, and a lack of anti-discrimination protections under various civil rights laws. *See, e.g.,* Smith Summerset & Associates LLC; UFCW.

Several commenters emphasized the uniquely harmful risks and consequences of misclassification for workers in certain demographic groups. *See, e.g.,* AARP (senior workers); California Immigrant Policy Center (immigrant workers); Equal Justice Center (low-income workers); LCCRUL & WLC (workers of color); NWLC (women workers). In a joint comment, the Action Center on Race and the Economy, Color of Change, Liberation in a Generation, Unemployed Workers United, MediaJustice, the National Black Worker Center, Muslims for Just Futures, Raise Up South Florida, Human Impact Partners, ROC United, Interfaith Center on Corporate Responsibility, HEAL Food Alliance, and the Public Accountability Initiative/LittleSis.org (''ACRE et al.'') pointed to the overrepresentation of workers of color in low-wage, labor-intensive industries where misclassification is pervasive and asserted that they ''view misclassification as a critical racial justice issue that the DOL must help address.''

Many commenters agreed with the Department's assessment that the 2021 IC Rule has increased the risk of misclassification. For example, SWACCA asserted that challenges in enforcing misclassification in the construction industry ''would be compounded if enforcement officials had to pursue bad actors under the January 2021 Rule's novel interpretation of the law that could require protracted litigation to clarify and would permit more contractors to argue that their classification of workers as independent contractors is permissible, or at least defensible, under the FLSA.'' The International Association of Machinists and Aerospace Workers asserted that the 2021 IC Rule ''creates perverse incentives for companies to misclassify workers,'' because ''[t]he more easily a company can misclassify its workforce, the more incentive for other companies to do the same, creating a 'race to the bottom' in employment practices and social standards to the detriment of workers.'' CLASP & GFI and Farmworker Justice both commented that the 2021 IC Rule's elevation of the ''control'' and ''opportunity for profit or loss'' factors might exacerbate misclassification among farmworkers, whose employment status is particularly dependent on the consideration of factors other than the 2021 IC Rule's ''core'' factors.

Commenters opposed to this rulemaking generally did not dispute the occurrence or importance of employee misclassification, at least in certain industries. For example, a lawyer representing employers acknowledged that ''independent contractor status can be abused.'' *See also, e.g.,* HR Policy Association (''The Association does not question the fact that worker misclassification does occur and that individuals may be deprived of rights and benefits crucial for their livelihood.''); U.S. Black Chambers, Inc. (''[W]e agree that worker misclassification is a pressing issue to be solved at the Federal level[.]''). Some commenters, however, alleged that rescinding and replacing the 2021 IC Rule would be an overbroad solution for a problem that could be addressed with industry-specific measures. *See* H.R. Policy Association; IMC Companies, LLC (trucking company) (''What we do ask is that the WHD and legislators across our country recognize that targeted regulation of these [app-based technology] companies is the answer to this issue.''). Other commenters asserted that, in the NPRM, the Department failed to explain how the 2021 IC Rule has increased the risk of worker misclassification or otherwise hampered efforts to reduce misclassification. *See, e.g.,* IWF (''The Department has provided no evidence that these drastic changes are necessary to prevent misclassification, or even that widespread misclassification actually occurred under the 2021 Rule.''); NAWBO. Some commenters referenced Departmental press releases published after the March 2022 *CWI* v. *Walsh* decision (which ruled that the 2021 IC Rule had taken effect in March 2021) as evidence that the Department is successfully using the 2021 IC Rule to combat misclassification. *See, e.g.,* Coalition of Business Stakeholders (''DOL has repeatedly boasted about the cases it has brought showing improper classification of independent contractors and the amounts of back pay remedies it has secured.''); *see also* Flex; U.S. Chamber.

Having considered the comments, the Department remains of the view that the misclassification of employees as independent contractors is a serious problem affecting workers who do not receive proper wages and businesses that have to compete in the economy against businesses that unlawfully misclassify their workers. As explained more fully in section III.B., the 2021 IC

Rule increased the risk of worker misclassification by adding considerable confusion and uncertainty over the proper analysis for distinguishing between FLSA-covered employees and independent contractors. By elevating certain factors, devaluing other factors, and precluding the consideration of certain relevant facts, the novel—and unprecedented—analysis in the 2021 IC Rule has improperly narrowed the focus of the inquiry in a way that may have led employers to believe the test no longer includes as many considerations; the comments received evidenced such misunderstanding. If widespread misperceptions about the 2021 IC Rule articulated by some of its supporters in the comments are any indication, such confusion and misapplication of that rule could deprive many workers of protections they are entitled to under the FLSA.

The Department's 2022 press releases addressing misclassification enforcement referenced by some commenters primarily involved investigations by the Department that were initiated before the 2021 IC Rule was published and/or covered a period of investigation prior to March 8, 2021. In any event, the Department's ability to pursue some enforcement actions involving misclassification while applying the 2021 IC Rule's guidance is not a persuasive reason to retain the 2021 IC Rule. The Department is not promulgating this rule because the 2021 IC Rule renders the Department powerless to enforce misclassification. Rather, the 2021 IC Rule's guidance injected a new framework for analyzing whether workers are employees or independent contractors under the FLSA that is inconsistent with decades of case law interpreting the Act. As explained earlier, the Department is further concerned that widespread stakeholder confusion over the 2021 IC Rule and its guidance regarding how its factors should be applied (as discussed in section II.B.) may be causing some misclassification that would not occur in the absence of the rule. For these reasons, the Department believes that rescinding the 2021 IC Rule will likely both reduce misclassification and restore the Department's ability to consider all relevant facts under a totality-of-the-circumstances economic reality test that does not predetermine the weight of certain factors, consistent with the text of the FLSA and decades of judicial precedent.

Other commenters expressed concern that rescinding the 2021 IC Rule will result in the widespread reclassification of workers who should be considered independent contractors. *See* Cambridge Investment Research, Inc. (''[T]he practical result of the [NPRM] . . . will be that many workers—including workers who want to be independent contractors—will be reclassified as employees under the FLSA.''); SBA Office of Advocacy (''Small businesses and independent contractors have told Advocacy that this rule may be disruptive and detrimental to the millions of businesses in industries that rely upon the independent contractor model.''). This concern was also expressed by numerous self-identified independent contractors, who feared reclassification or lost work opportunities as an unintended consequence of the rulemaking.

Some commenters contended that the NPRM's guidance was inappropriately broad and would encompass as employees individuals who they assert are appropriately classified as independent contractors. *See, e.g.,* IBA (asserting that the NPRM would improperly ''broaden the test and thereby expand the meaning of 'employee' to encompass individuals who under current law would qualify independent contractors''); National Association of Insurance and Financial Advisors (''NAIFA'') (''NAIFA believes that [the NPRM] wrongly construes the scope of FLSA coverage and would thus misclassify many independent insurance agents and brokers as employees.''). Other commenters asserted that ambiguity inherent in reverting to a ''totality-of-the-circumstances'' analysis would deter businesses from engaging with independent contractors. *See, e.g.,* Beacon Center of Tennessee (asserting that the NPRM would ''rob[ ] businesses of the regulatory certainty needed to effectively operate and make personnel decisions, which is likely to have a chilling effect on hiring new employees or contractors''); NFIB (''Companies . . . will be less likely to engage a contractor or consultant if there's uncertainty over a worker's status since a finding of misclassification can result in ruinous penalties''); Opportunity Solutions Project (''If implemented, the proposal would make it more difficult for entrepreneurs and independent workers to find companies willing to take on the risk of becoming their client.'').

Other commenters disagreed that the Department's proposal would result in the reclassification of appropriately classified independent contractors. For example, an individual commenter wrote that ''[i]mproving classification rules and returning to a back-to-basics approach used for over fifty years does not mean independent contractors will automatically be classified as employees.'' Noting that ''[t]he Proposed Rule is a restatement of decades of court precedents and WHD guidance,'' UBC remarked that ''[a]ny employer who has been correctly classifying its independent contractors has no worry that the Proposed Rule will result in liability under the FLSA.'' Multiple business stakeholders and self-identified independent contractors commented that they did not expect such reclassification for workers in their industry. For example, LPL Financial stated that it believes that the Department's proposal ''will not result in the reclassification of independent financial professionals as employees'' and it ''commend[ed] the DOL for undertaking the rulemaking process and proposing a rule that recognizes that entrepreneurs who establish and build small businesses utilizing their managerial skills and professional expertise can operate in an independent contractor model to create multigenerational financial advising practices.'' Over 1,000 financial advisors affiliated with Ameriprise and LPL Financial submitted separate campaign comments in support of the NPRM, asserting that ''[the] proposal will allow me to continue to choose to be an independent contractor.'' *See also* International Dale Carnegie Franchise Association (''The IDCFA is confident that independent instructors would not be reclassified as employees under the Proposed IC Rule.'').

Having considered the comments, the Department continues to believe that this rulemaking will not jeopardize legitimate independent contracting arrangements. Fears to the contrary are not realistic given that the Department is adopting guidance derived from the same analysis that courts have applied for decades and have been continuing to apply since the 2021 IC Rule took effect. There is no evidence that the status quo prior to the 2021 IC Rule was hindering the use of independent contractors.[167]

Because the FLSA's economic reality test is broad and fact-specific, the Department cannot categorically declare that individual workers in particular occupations or industries will always qualify as independent contractors applying the guidance provided in this rule. However, keeping in mind that the Department is adopting guidance in this

[167] The 2021 IC Rule asserted that ''legal uncertainty arising from . . . shortcomings of the multifactor economic reality test may deter innovative, flexible work arrangements,'' but declined to provide any evidence in response to comments questioning that claim, explaining it was ''unclear what empirical data could measure innovation that is not occurring due to legal uncertainty.'' 86 FR 1175.

rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule, the Department agrees with those commenters who stated that workers properly classified as independent contractors prior to the 2021 IC Rule will likely continue to be properly classified as independent contractors under this rule and disagrees with other commenter assertions that this rule will ''cause workers who have long been properly classified as independent contractors . . . to improperly lose their independent status.'' ABC; *see also, e.g.,* Finseca (expressing concern that the NPRM ''could materially disrupt long-standing, well-understood, and properly classified independent contractor relationships''); National Association of Chemical Distributors (asserting that the NPRM would ''disrupt longstanding business models''). Rather, because this final rule is aligned with longstanding case law, the Department does not anticipate that independent contractors (who sometimes also self-identify as freelancers or small/micro business owners) who are correctly classified as independent contractors under current circuit case law would be reclassified applying the guidance provided in this rule.

In sum, the Department's rulemaking to rescind and replace the 2021 IC Rule is motivated, in part, by an assessment that the guidance provided here will likely benefit workers as a whole, including those workers at risk of being misclassified as independent contractors as well as those who are appropriately classified as independent contractors.

D. The Benefits of Replacing the Part 795 Regulations on Employee or Independent Contractor Status

Until the 2021 IC Rule, the Department had not previously promulgated generally applicable regulations on independent contractor classification in the FLSA's 83 years of existence. In light of the consistency of the economic reality test as adopted by the circuits, the Department had instead relied on subregulatory documents to provide generally applicable guidance for the Department and the regulated community on determining employee or independent contractor status under the FLSA. In the NPRM, the Department explained that, although it believes that its earlier subregulatory guidance provided appropriate guidance to the regulated community, the Department upon further consideration recognized that publishing regulatory guidance would be beneficial for stakeholders, particularly because the Department had published a regulation in 2021. The NPRM elaborated that detailed federal regulations would be easier to locate and read for interested stakeholders than applicable circuit case law, potentially helping workers and businesses better understand the Department's interpretation of their rights and responsibilities under the law. Additionally, the NPRM explained that adopting detailed regulations that are aligned with existing precedent could better protect workers, who were placed at a greater risk of misclassification as a consequence of the 2021 IC Rule.[168]

Several commenters agreed with the Department's reasons for replacing the 2021 IC Rule with alternative regulatory guidance. These commenters generally asserted that detailed regulatory guidance brings added clarity to interested parties. *See, e.g.,* NELP (''[T]o address confusion that can stem from a multifactor balancing test, the commentary to the proposed rule clarifies how each of the factors (described in more detail below) informs the economic dependence analysis, *i.e., how and why* each factor helps to answer the question of whether a worker is truly in business for themself.''); State AGs (''Subregulatory guidance is not as robust as promulgating a new rule.''); Winebrake & Santillo, LLC (supporting the NPRM for ''clarifying topics which had not been fully explored by all courts''). LIUNA asserted that the regulatory guidance's ''expert synthesis of complicated precedents will . . . clarify the FLSA and promote its uniform application.''

Other commenters commended the accessibility of generally applicable regulatory guidance. *See* UBC (''In one place, without searching through WHD guidance and court cases, employers and workers can go to the rule for information that will assist in correct classification. This need for rulemaking, albeit for slightly different reasons, is where the interest of the proponents of the 2021 Rule and drafters of the NPRM are aligned.''). Some business stakeholders also agreed with the potential benefits of regulatory guidance. *See, e.g.,* Consumer Brands Association (''The CPG industry believes strongly in the potential opportunities afforded through clear rulemaking''); CWC (''We . . . concur with DOL's assessment that a clear explanation of the test in easily accessible regulatory text is valuable.'').

Some labor unions and worker advocacy organizations opined that the Department needs to promulgate regulatory guidance to counteract confusion introduced by the 2021 IC Rule. *See* State AGs (asserting that ''a new rule is necessary because the 2021 Rule was such a drastic departure from the status quo''); UBC (''The 2021 Rule's confusion and encouragement of misclassification . . . creates the necessity for the Proposed Rule with its adherence to the intent of Congress and judicial precedents.''); *see also* NECA & IBEW.

Several commenters, however, disagreed that the Department should issue regulations addressing independent contractor status under the FLSA. Some of these commenters asserted that the Department has no legal authority or expertise to do so. *See, e.g.,* ArcBest (''Congress has not delegated authority to DOL to define 'independent contractor'—a definition with far-reaching economic and political consequences.''); Boulette Golden & Marin L.L.P. (''[W]hile the DOL may have authority to issue guidance on its view of the term 'employee,' the DOL does not have any authority to offer guidance on the meaning of the term 'independent contractor.' ''); IBA (''The DOL has no special expertise in interpreting Supreme Court precedent.''). Insight Association and several individual commenters asserted that Congress should address the distinction between FLSA-covered employees and independent contractors rather than the Department. Finally, CPIE asserted that ''this area of the law is one that is not appropriate for general regulatory guidance,'' urging the Department to ''continue its policy of issuing subregulatory guidance on the application of the economic reality test to specific facts'' if it rescinded the 2021 IC Rule.

Having considered the comments, the Department continues to believe not only in the benefits of adopting alternative guidance on the distinction between FLSA-covered employees and independent contractors, but also in the value of providing such guidance in easily-accessible regulatory text. Although the Department previously issued regulatory guidance on this issue specific to the sharecropping and lumber industries in parts 780 and 788,[169] the Department believes that regulatory text that can be applied to workers in any industry is beneficial to the regulated community.

Further, as noted in the 2021 IC Rule, the Department ''without question has relevant expertise in the area of what

[168] *See generally* 87 FR 62230.

[169] *See supra,* nn.63 and accompanying text.

constitutes an employment relationship under the FLSA, given its responsibility for administering and enforcing the Act and its decades of experience doing so.'' [170] As also noted in the 2021 IC Rule, the Department's ''authority to interpret the Act comes with its authority to administer and enforce the Act.'' [171] The Department issues interpretations on a range of issues under the Act, and addressing which workers are employees protected by the Act or independent contractors not subject to the Act is one such issue. The Department's attention to relevant judicial precedent interpreting the Act is key to providing such guidance.

The Department acknowledges that some commenters would prefer Congress to address this issue through legislation and to adopt one uniform standard that would apply across federal laws. *See, e.g.,* ASTA; CPIE. However, in the absence of congressional legislation to amend the FLSA, the Department believes that this final rule will provide detailed guidance on employee or independent contractor status that is not only consistent with the FLSA and the decades of case law interpreting it, but clearer and more robust than the Department's earlier subregulatory guidance on the topic.

E. Timing of the Rulemaking

Many of the commenters opposed to this rulemaking asserted that the Department's rulemaking to rescind and replace the 2021 IC Rule is premature or otherwise ill-timed. *See, e.g.,* CPIE (''[CPIE] urges DOL to defer action until courts have had an opportunity to apply the 2021 IC Rule.''); CWI (''The most obvious alternative action 'within the ambit of the existing policy' is simply to allow the 2021 IC Rule to go into effect and study its results, rather than assume unproven consequences.''); MEP (''MEP strongly believes WHD should allow the courts to weigh in on the current rule before determining the analysis does not work and replacing it with a standard that will clearly create substantial confusion and uncertainty for the regulated community.'').

Some commenters noted the added costs and uncertainty attributable to the Department promulgating the 2021 IC Rule and subsequently proposing to rescind and replace it. *See* American Association of Advertising Agencies (''4A's'') (''The regulatory whiplash here is real, and costly, and should not be taken so lightly by DOL.''); *see also* App Association; N/MA; Vegas Chamber.

Other commenters cited to various economic conditions that caution (in their view) against any rulemaking that would deter independent contracting. *See, e.g.,* NRF & NCCR (''As the American economy and the modern workplace continue to evolve in the wake of the COVID–19 pandemic, it is imperative that policymakers account for the wide range of innovative and imaginative methods by which individuals engage in the marketplace and feed their families.''); Scopelitis, Garvin, Light, Hanson & Feary (''Scopelitis'') (''The Proposed Rule would add pressure to already stressed supply chains.'').

The Department disagrees with the various timing arguments advanced by commenters urging the Department to delay or withdraw this rulemaking, though it is mindful of the impact that changes in the Department's guidance may end up having on the regulated community. As the Department has explained, there are compelling reasons to rescind and replace the 2021 IC Rule, including its significant departure from judicial precedent, the confusion it has introduced for affected stakeholders, and the consequences for workers and competing businesses attributable to an increased risk of misclassification. Allowing the 2021 IC Rule to stay in effect for a longer period would not ameliorate any of those concerns. To the contrary, as NELP pointed out, ''over time . . . negative consequences . . . will be exacerbated.'' The fact that no court has applied the 2021 IC Rule in the year since the district court's decision in *CWI* v. *Walsh* is not a justification for its retention.

The Department further finds arguments about stakeholder reliance on the 2021 IC Rule to be unpersuasive. Before the 2021 IC Rule's effective date, the Department issued rules intending to delay the effective date of and then withdraw the 2021 IC Rule, while also identifying concerns with the 2021 IC Rule. The Department then announced on June 3, 2022 that it was initiating a new rulemaking on employee and independent contractor classification under the FLSA.[172] Thus, the regulated community has been on notice since very soon after the 2021 IC Rule's publication as to the Department's concerns regarding the 2021 IC Rule, including the way in which it upset decades of precedent the regulated community and workers had previously been relying on to distinguish between employees and independent contractors.

Finally, the Department disagrees with commenters that it is obligated to wait for more time to gather data before rescinding the 2021 IC Rule and promulgating a new rule.[173] As discussed in the NPRM, the Department considered waiting for a longer period to monitor the effects of the 2021 IC Rule but believed that the potential confusion and disruption from the 2021 IC Rule outweighed any potential benefit from this monitoring.[174] In making the decision to proceed with this final rule, the Department drew upon its extensive experience in interpreting and enforcing the FLSA and its consideration of the comments received.[175] The Department believes that this rule, which provides guidance that is consistent with longstanding precedent, provides more consistency for stakeholders than the 2021 IC Rule.

IV. Alternatives Considered

In the NPRM, the Department noted that it had considered four alternatives to what it proposed.[176] The Department further noted that it had previously considered and rejected two of those alternatives—issuing guidance adopting either the common law test or the ABC test for determining FLSA employee or independent contractor status—in the 2021 IC Rule.[177]

Regarding adoption of the common law test, as the Department explained in the NPRM, that test is contrary to the ''suffer or permit'' language in section 3(g) of the FLSA, which the Supreme Court has interpreted as requiring a broader definition of employment than under the common law. Accordingly, the Department stated that the common law test is inconsistent with the FLSA because that test ''is not sufficiently protective in assessing worker classification under the FLSA.'' Regarding adoption of an ABC test, as the Department explained, the Supreme Court has held that the economic reality test is the applicable standard for determining workers' classification

[170] 86 FR 1176.

[171] *Id.*

[172] *See* Jessica Looman, ''Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act,'' U.S. Department of Labor Blog (June 3, 2022), *https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act.*

[173] ''[A]n agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be entitled to conduct . . . a general analysis based on informed conjecture.'' *Chamber of Com. of U.S.* v. *SEC,* 412 F.3d 133, 142 (D.C. Cir. 2005) (internal quotation and citation omitted).

[174] *See* 87 FR 62219.

[175] An agency's reliance on ''its own and its staff's experience, the many comments received, and other evidence, in addition to [ ] limited and conflicting empirical evidence'' meets APA requirements. *Chamber of Com.,* 412 F.3d at 142.

[176] 87 FR 62230.

[177] *Id.* (citing 86 FR 1238).

under the FLSA as an employee or independent contractor, and ''the existence of employment relationships under the FLSA 'does not depend on such isolated factors' as the three independently determinative factors in the ABC test, 'but rather upon the circumstances of the whole activity.' '' Because an ABC test is, in the Department's view, inconsistent with Supreme Court precedent interpreting the FLSA, the Department explained that ''it could only implement an ABC test if the Supreme Court revisits its precedent or if Congress passes legislation that alters the applicable analysis under the FLSA.'' [178]

As a third alternative, the Department considered proposing to only partially rescind the 2021 IC Rule and instead retain some aspects of it. In discussing this alternative, the Department listed numerous instances in which its NPRM was consistent or in agreement with the 2021 IC Rule. The Department explained that it considered ''simply removing the problematic 'core factors' analysis from the 2021 IC Rule and retaining the five factors as described in th[at] rule.'' However, the Department rejected this approach because numerous ways in which that rule described the factors were in tension with judicial precedent and longstanding Department guidance and ''narrow[ed] the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself.'' For those reasons, the Department ''concluded that in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete rescission and replacement of the 2021 IC Rule is needed'' as opposed to a partial rescission.[179]

As a fourth alternative, the Department considered rescinding the 2021 IC Rule and, instead of promulgating new regulations, providing guidance on employee or independent contractor classification through subregulatory guidance. In discussing this alternative, the Department reiterated the reasons why it believed that rescission of the 2021 IC Rule was necessary. The Department acknowledged that prior to the 2021 IC Rule, it did not have general guidance published in the Code of Federal Regulations on the classification of workers as employees or independent contractors. The Department explained that issuing a new rule rather than subregulatory guidance would allow the Department to provide in-depth guidance that is more closely aligned with circuit case law, allows the Department to formally collect and consider a wide range of views by using the notice-and-comment process, and may further improve consistency among courts regarding the classification of workers because courts are accustomed to considering relevant agency regulations. For these reasons, the Department decided not to propose rescinding the 2021 IC Rule and providing only subregulatory guidance, and to instead propose the regulations set forth in the NPRM.[180]

A few commenters expressly addressed the first alternative—adopting a common law control test.[181] For example, State AGs agreed with the Department's reasoning that the common law control test is inconsistent with the FLSA. State AGs stated that ''[t]he common law test, which focuses on control rather than economic dependence, provides a narrower definition of employment than the broad 'suffer or permit' language of the FLSA'' and that the common law test therefore ''conflicts with the broad statutory definition of 'employ' in the FLSA.'' UFCW added: ''Correctly, the DOL's proposed rule does not incorporate the narrower common law independent contractor standard because Congress sought for the FLSA to guard against labor exploitation by intentionally covering employment relationships that may not have constituted employer and employees under common law'' (emphasis omitted). ASTA disagreed. Noting the various tests under federal law for determining employment, it advocated for ''the adoption of a single standard to evaluate worker status for all federal purposes.'' The commenter acknowledged the Department's view that it lacks the authority to do so, but asserted that ''the simplest means to that end would be amendment of the FLSA to replace the economic reality test with the right of control test.''

Having considered the comments, the Department reaffirms its position that the FLSA's definitions, as interpreted by courts, reflect Congress' rejection of the common law test as determining employee status under the Act. The Department continues to believe that adopting the common law test would be contrary to FLSA section 3(g)'s ''suffer or permit'' language, which under Supreme Court and federal appellate precedent requires a broader definition of employment than the common law test.[182]

A number of commenters addressed the second alternative—adopting an ABC test. Most commenters agreed with the Department's proposed rejection of an ABC test as inconsistent with current precedent and/or expressed opposition to an ABC test. For example, CCI stated that, ''[w]hile the ABC test may be appropriate in some circumstances (for example collective bargaining rights), we believe the Department is correct to return to a broader 'totality-of-the-circumstances' analysis for wage and overtime protections under the Fair Labor Standards Act.'' UBC described the rejection of an ABC test as an ''adherence to precedent.'' State AGs stated that, although ''the ABC test arguably protects against employee misclassification better than other tests in use'' and ''several of the undersigned State AGs apply the ABC test,'' they ''understand the Department believes it is constrained under current law from implementing the ABC test under the FLSA[.]''

SBLC ''applaud[ed] the DOL for declining calls to adopt an ABC test, like what is currently used in California, or a similar test that would apply a stringent requisite factor test rather than a balancing test.'' The International Franchise Association (''IFA'') ''support[ed] the DOL's explicit statement in its 2022 NPRM that the ABC test, which is used in states like California and Massachusetts, is 'inconsistent' with controlling Supreme Court authority under the FLSA.'' The App Association expressed concerns with the ABC test and ''discourage[d] alignment in federal regulation with California's approach.'' The Coalition of Trucking Stakeholders stated that the Department ''properly acknowledge[d] that the adoption of any ABC-like test, which is not based upon an economic-realities assessment, would be contrary to precedent'' (citation omitted). And noting that the ABC test ''assumes all workers are employees unless they can demonstrate that they meet specific criteria,'' The Owner-Operator Independent Drivers Association (''OOIDA'') stated that ''the Department is correct in its assessment that the ABC

[178] *See generally id.* at 62231.

[179] *See generally id.* at 62231–32.

[180] *See generally id.* at 62232.

[181] A number of commenters discussed the common law test in their comments, but not in the context of consideration of the common law test as an alternative. Instead, these commenters, for example, compared the analysis in the 2021 IC Rule to the common law test or compared the economic realities test generally to the common law test.

[182] *See, e.g., Darden,* 503 U.S. at 326; *Portland Terminal,* 330 U.S. at 150–51.

Test is not consistent with the history of the FLSA because it establishes independently determinative factors.'' *See also* C.A.R. (supporting the decision not to adopt the ABC test).

Some commenters advocated for adoption of an ABC test. For example, the Los Angeles County Federation of Labor, AFL–CIO & Locals 396 and 848 of the International Brotherhood of Teamsters (''LA Fed & Teamsters Locals'') acknowledged that ''the Department is correct in its conclusion that the lower federal courts have developed a fairly consistent version of what is referred to as the economic realities test by identifying a list of six non-exclusive factors to frame their analysis,'' but asserted that ''there is nothing in the FLSA's legislative history nor in the Supreme Court's precedent that compels this exact six-factor framing.'' Discussing *Rutherford* and *Silk,* the commenter argued that Supreme Court precedent does not require a six-factor economic realities test, prohibit adoption of an ABC test, or prevent adoption of a test that includes dispositive factors or presumes employee status unless the employer proves otherwise. *See also* Blitman & King LLP; National Employment Lawyers Association (''NELA''); Nichols Kaster.

Having considered the comments, the Department is not adopting an ABC test. The Department continues to believe that an ABC test would be inconsistent with Supreme Court and federal appellate precedent interpreting and applying the FLSA, and therefore, this final rule declines to adopt an ABC test. The Supreme Court has repeatedly explained that ''economic reality'' is the applicable standard for determining whether a worker is an employee or not under the FLSA.[183] The Supreme Court has further explained that the existence of employment relationships under the FLSA does not depend on ''isolated factors but rather upon the circumstances of the whole activity,'' [184] and that ''[n]o one [factor] is controlling nor is the list complete.'' [185] As explained in section II, federal courts of appeals have consistently interpreted this Supreme Court precedent to apply a nonexhaustive multifactor economic realities analysis in which there is no presumption of employee status that must be rebutted, no one factor is determinative, and all of the factors must be considered and weighed.[186] The Department is grounding the economic realities analysis set forth in this final rule in the decades of federal appellate case law applying such analyses and is rescinding the 2021 IC Rule because of its deviations from that case law. An ABC test, on the other hand, has a presumption of employee status, considers only three factors—each of which can be determinative on its own—and does not result in all of the factors being weighed or even necessarily considered. Adopting the ABC test would be a similarly unsupported deviation from that case law, would have no moorings in the case law applying the FLSA or the Department's prior guidance, and could undermine the Department's well-founded reasons for rescinding and replacing the 2021 IC Rule.[187] For all of these reasons, this final rule does not adopt an ABC test.

NABTU stated that, although it ''believes that the 'ABC test' is the better test for determining worker classification, NABTU understands that absent congressional action, DOL must operate within the parameters of the statute as defined by controlling Supreme Court precedent'' (footnote omitted). NABTU nonetheless recommended that, ''for purposes of applying the economic reality test to the construction industry, DOL adopt a rebuttable presumption that all construction workers are employees.'' [188] The Department declines this recommendation for two reasons. First, the Department's intent in promulgating this final rule is to provide as much as possible a general analysis for determining employee or independent contractor status. NABTU's recommendation, on the other hand, is specific to one industry. Second, regardless of its scope, this recommendation implicates the same concerns as discussed in the above paragraph. Specifically, this approach would not be consistent with Supreme Court precedent and federal appellate case law interpreting and applying that precedent in part because that precedent and case law have not adopted a rebuttable presumption of employee status when determining employee or independent contractor status under the FLSA. Thus, the Department believes that it is not an option to adopt a rebuttable presumption of employee status in this context for the same reasons that the Department also declines to adopt an ABC test.

A number of commenters objected that the Department's proposed test (in particular the integral factor) might have the same effect—either unintendedly or not—as an ABC test. *See, e.g.,* CWI; FMI—The Food Industry Association (''FMI''); Customized Logistics and Delivery Association (''CLDA''); Erik Sherman; Western States Trucking Association (''WSTA''). However, as discussed in section V.C.5, the suggestion that this final rule's economic realities analysis essentially implements an ABC test is baseless. As explained above, the economic realities analysis considers multiple factors (no one of which is dispositive) and weighs them as part of a totality-of-the-circumstances analysis to determine if the worker is economically dependent on the employer for work or in business for themself. An ABC test, on the other hand, presumes that a worker is an employee unless the employer can show that each of the three factors is satisfied. (In other words, each factor is dispositive on its own and the other factors need not be considered if one points to employee status.) In sum, this final rule's economic realities test is not an ABC test, and any concern that its economic realities analysis is or will become an ABC test is thus unfounded.[189]

A few commenters addressed generally the NPRM's discussion of the alternatives considered by the Department. State AGs, in addition to commenting on the first and second alternatives, commented that ''retaining portions of the 2021 Rule that are consistent with the Proposed Rule would not provide needed clarity because the governing principle of the 2021 Rule was a marked departure from

[183] *See Tony & Susan Alamo,* 471 U.S. at 301 (''The test of employment under the Act is one of 'economic reality.' ''); *Whitaker House,* 366 U.S. at 33 (' 'economic reality' rather than 'technical concepts' is . . . the test of employment'' under the FLSA) (citing *Silk,* 331 U.S. at 713; *Rutherford,* 331 U.S. at 729).

[184] *Rutherford,* 331 U.S. at 730.

[185] *Silk,* 331 U.S. at 716.

[186] *See supra* section II.B.

[187] The assertions of LA Fed & Teamsters Locals that Supreme Court precedent could have been interpreted differently and that the six traditional economic realities factors could be ''fit within the three elements of the ABC Test'' are unavailing considering how Supreme Court precedent has actually been interpreted and applied for decades.

[188] LIUNA endorsed NABTU's recommendation. SMACNA similarly recommended that ''[i]n the construction industry, the DOL should create a rebuttable presumption that 'laborers and mechanics' are 'employees' of the engaging business.''

[189] In any event, there are arguably some similarities between an ABC test and most alternative analyses under the FLSA. For example, the 2021 IC Rule provided that two factors were ''core'' factors and gave them near-dispositive weight if they both indicated the same status, which was a step away from a multifactor totality-of-the-circumstances analysis and a step closer to a test (like an ABC test) where each factor is dispositive. And the 2021 IC Rule considered control like an ABC test and considered control to be a ''core'' factor, giving it more weight and making it closer to the dispositive factor that it is under the ABC test.

the Department's longstanding position.'' In their view, the 2021 IC Rule's ''emphasis on two 'core' factors . . . negated the need to fully consider the remaining factors,'' and therefore ''a full rescission of the 2021 Rule is needed to provide clarity to workers, employers, and the public.'' Regarding the fourth alternative, State AGs stated that ''merely rescinding the 2021 Rule and issuing subregulatory guidance will not provide the direction necessary to achieve consistent application of the economic reality test.'' In their view, ''a new rule is necessary because the 2021 Rule was such a drastic departure from the status quo'' and would ''provide needed regulatory guidance for the consistent application of the economic reality test by courts and employers.'' State AGs agreed with the Department's assessment of the four alternatives and that ''a full rescission of the 2021 Rule and replacement with the Proposed Rule is most appropriate for clarity and consistency with the FLSA.''

WPI commented that it ''is well settled that agencies are required to consider alternatives within the ambit of the regulation being considered,'' including ''less restrictive rules than those proposed'' (citations omitted). WPI further commented that the district court in *CWI* v. *Walsh* ''held that DOL failed to consider any alternatives in the withdrawal of the 2021 IC Rule'' and asserted that ''[t]he Department repeats this error and only pays lip service to these requirements by 'considering' four alternatives, two of which are not even legally viable options.'' The commenter faulted the Department for ''conclud[ing] in identical fashion to the 2021 rule that codifying a common law or ABC test would not be legally permissible, yet . . . nevertheless continu[ing] to 'analyze' these two alternatives despite the knowledge that neither can be adopted.'' The commenter concluded that the NPRM's ''consideration of only two viable alternatives falls short of the requirements under the APA and is thus arbitrary and capricious'' (citing the district court's decision in *CWI* v. *Walsh*).

As an initial matter, although the Department believes that the common law control test and an ABC test are not feasible options in this rulemaking, as discussed above, several commenters advocated for the adoption of one or the other of those tests.[190] In any event, the district court's decision in *CWI* v. *Walsh* (which is on appeal to the Fifth Circuit) does not support WPI's assertion that a rule's consideration of ''only two viable alternatives'' makes a rule arbitrary and capricious under the APA.[191] The district court ruled that ''agency action is arbitrary and capricious when the agency considers only the binary choice of whether to retain or rescind a policy, without also considering less disruptive alternatives.'' [192] In this rulemaking, the Department considered less disruptive alternatives than fully rescinding and replacing the 2021 IC Rule, including a partial rescission of the 2021 IC Rule.[193] In the Department's judgment, however, only removing the 2021 IC Rule's designation of two factors as the ''core'' factors would not undo the numerous ways in which that rule's discussion of the factors were ''in tension with judicial precedent and longstanding Department guidance'' and unjustifiably narrowed the facts that may be considered when applying the factors.[194] Thus, the Department concluded that, ''in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete rescission and replacement of the 2021 IC Rule is needed'' as opposed to a partial rescission.[195] As further detailed above, the Department also specifically considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new regulations. The Department reiterated the reasons why it believed that rescission of the 2021 IC Rule was necessary and identified numerous benefits in favor of issuing a new rule rather than relying on subregulatory guidance.[196] Having considered the comment, the Department continues to believe that, in addition to rescinding the 2021 IC Rule, promulgating new regulations is preferable to providing only subregulatory guidance. Although WPI disagrees with the judgments that the Department is making, the Department plainly considered less disruptive alternatives and made reasonable judgments in not adopting those alternatives.[197]

Finally, WPI claimed that the NPRM did not consider ''simply reverting to interpretive guidance already in place prior to the 2021 IC Rule'' and ''ignore[d] this option in a purported quest for clarity.'' In the commenter's view, there is already clarity in the economic reality test because of the case law explaining and interpreting it, and the commenter added that the NPRM went ''beyond any position the Department has taken historically'' and was not ''faithful to settled caselaw and analysis by courts upon which it claims to base its proposed rule.'' As an initial matter, the Department considered (as the fourth alternative) ''rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new regulations.'' [198] As discussed in the NPRM and this final rule, the Department concludes that issuing new regulations is the preferable alternative to subregulatory guidance.[199] Moreover, as explained generally throughout the NPRM and this final rule and specifically in their discussions of each economic reality factor, the Department's regulatory text and accompanying guidance seek consistency with, and are grounded in, existing case law. The 2021 IC Rule departed from case law in numerous ways, and contrary to WPI's comment,

[190] In addition, discussing alternatives that an agency may be legally constrained from adopting is permissible and encouraged under OMB guidance. OMB Circular A–4 advises that agencies ''should discuss the statutory requirements that affect the selection of regulatory approaches. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.''

[191] The 2021 IC Rule, which WPI urged be permitted by the Department ''to remain in effect,'' considered only one viable alternative if the commenter's logic applied. *See* 86 FR 1238 (considering three alternatives: ''[c]odification of the common law control test,'' codification of a ''six-factor 'economic reality' balancing test,'' and ''[c]odification of the 'ABC' test'').

[192] 2022 WL 1073346, at *18 (internal quotation marks and citation omitted).

[193] As a general matter, agency action must be upheld in the face of an arbitrary and capricious challenge if the agency ''articulate[s] a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made.'' *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2383 (2020) (citation omitted); *see also City of Abilene* v. *EPA,* 325 F.3d 657, 664 (5th Cir. 2003) (''If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld.'') (citation omitted).

[194] 87 FR 62232.

[195] *Id.*

[196] *Id.*

[197] *See City of Abilene,* 325 F.3d at 664; *see also California* v. *Azar,* 950 F.3d 1067, 1096 (9th Cir. 2020) (When reviewing agency action under the arbitrary and capricious standard, a court ''cannot 'ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives' '' and is ''prohibited from 'second-guessing the [agency]'s weighing of risks and benefits and penalizing [it] for departing from the . . . inferences and assumptions' of others.'') (citations omitted).

[198] 87 FR at 62232.

[199] The Department in its 2021 IC Rule also reached the same conclusion that the Department is reaching here: relying solely on subregulatory guidance is not the preferable alternative.

the Department's stated goal in promulgating this final rule is to realign the Department's guidance with that case law. Moreover, to the extent that commenters argued that the NPRM's proposed analysis was not supported by applicable case law, the Department considered those comments and, where appropriate, made changes in this final rule in response.

As explained in section III, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy is helpful for workers and employers in understanding how to apply the law in this area. These regulations and the explanatory preamble provide in-depth guidance, and because courts are accustomed to considering relevant agency regulations, issuing these regulations may further improve consistency among courts regarding this issue. The Department is therefore rescinding the 2021 IC Rule and issuing this final rule to replace part 795; the provisions of the regulation are discussed below.

V. Final Regulatory Provisions

Having reviewed commenter feedback submitted in response to the proposed rule, the Department is finalizing the following regulations to provide guidance regarding whether workers are employees or independent contractors under the FLSA. The regulations include a new part 795 and cross-references in 29 CFR 780.330(b) and 788.16(a) to part 795. Of particular note, the regulations set forth in this final rule do not use ''core factors'' and instead return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Regarding the economic reality factors, this final rule returns to the longstanding framing of investment as a separate factor, and integral as an integral part of the potential employer's business rather than an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor. The Department also made several adjustments to the proposed regulations after consideration of the comments received, including revisions to the regulations regarding the investment factor and the control factor (specifically addressing compliance with legal obligations).

Additionally, in the 2021 IC Rule, the Department proposed not to revise its regulation addressing employee or independent contractor status under MSPA in 29 CFR 500.20(h)(4), stating, in part, that the MSPA regulation and the 2021 IC Rule both applied an economic reality test in which the ultimate inquiry was economic dependence. In the NPRM, the Department similarly did not propose to make any revisions to the MSPA regulation, which adopts by reference the FLSA's definition of ''employ,'' and considers ''whether or not an independent contractor or employment relationship exists under the Fair Labor Standards Act'' to interpret employee or independent contractor status under MSPA.[200] The test contained in the MSPA regulation is substantially similar to the proposed test here, and the comments received in this rulemaking did not address MSPA. Accordingly, the Department is not revising the MSPA regulation at this time.

Finally, the Department also proposed to formally rescind the 2021 IC Rule.[201] In the Department's view, the operative effects of rescinding the 2021 IC Rule are as follows. With this final rule, the 2021 IC Rule is formally rescinded. This rescission operates independently of the new content in this final rule, as the Department intends the rescission to be severable from the substantive regulatory text added as part 795. For the reasons set forth in this final rule, the Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new regulations in this final rule. Thus, even if the entirety of the part 795 regulations promulgated by this final rule or any part thereof were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule remain in effect, and the Department would rely on federal appellate case law and provide subregulatory guidance for stakeholders as appropriate unless or until it decided to engage in additional rulemaking.

The Department responds to commenters' feedback on the proposed rule below.

[200] 29 CFR 500.20(h)(1), (4).

[201] Comments regarding this aspect of the NPRM are discussed in section V.F. below.

A. Introductory Statement (§ 795.100)

Proposed § 795.100 explained that the interpretations in part 795 will guide WHD's enforcement of the FLSA and are intended to be used by employers, employees, workers, and courts to assess employment status under the Act.[202] Commenters did not generally address this section, which is very similar to the 2021 IC Rule introductory statement, except to note that these regulations would be interpretive guidance. *See, e.g.,* NELP; WPI. The Department is adopting this section without change.

B. Economic Dependence (§ 795.105)

In the NPRM, the Department proposed to simplify § 795.105(a) of the 2021 IC Rule and make additional clarifying edits to § 795.105(b).[203] Proposed § 795.105(a) would continue to make clear, as the 2021 IC Rule did, that independent contractors are not ''employees'' under the Act. The Department did not receive significant comments regarding this and is adopting it without change.

The Department proposed that paragraph § 795.105(b) would affirm that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee; this paragraph also makes clear that the plain language of the statute is relevant to the analysis.[204] The Department explained that this proposed section would focus the analysis on whether the worker is in business for themself and clarified that economic dependence does not focus on the amount the worker earns or whether the worker has other sources of income.

As a preliminary matter, Cetera Financial Group urged the Department to ''recognize that economic dependence often does not exist and certainly should not be presumed'' and that it ''should be the subject of a threshold inquiry prior to applying the other factors in the economic realities test, or, at a minimum, added as an additional factor.'' As the Department explained in the NPRM, the question of economic dependence is the ultimate inquiry, and the factors are tools or guideposts for answering that inquiry, so it would not be appropriate to make ''economic dependence'' an additional factor or a threshold inquiry. The Department agrees, however, that economic dependence should never be presumed and that when it does not exist, that worker is not an employee.

[202] 87 FR 62233 (proposed § 795.100).

[203] 87 FR 62233 (proposed § 795.105(a), (b)).

[204] 87 FR 62233 (proposed § 795.105(b)).

Commenters generally agreed that economic dependence was the right lens for evaluating whether an employment relationship exists under the FLSA. *See, e.g.,* CPIE; IBA; NELP; Outten & Golden. The AFL–CIO and others, for example, noted that ''[c]ourts have interpreted the FLSA's broad suffer or permit to work language as seeking to answer one foundational question regarding the relationship between a worker and the entity to whom that worker provides their labor—whether as a matter of economic reality that worker is dependent upon the business to which they render service.'' At least one commenter, however, stated that using the idea of economic dependence as a ''litmus test'' is ''exceptionally challenging to prove or meet in today's complex world of business operations for both large and small business.'' *See* Vegas Chamber. Additionally, some self-identified freelancers questioned how the definition of ''economic dependence'' would apply to a freelance worker who may, for example, be a writer for multiple publications. One freelancer explained that ''self-employed independent contractors do not see it as having that many employers [but rather] view those publications as customers.''

Some commenters stated that the Department's proposed language broadened the definition of ''economic dependence'' and objected to this perceived broadening. *See, e.g.,* Goldwater Institute, Job Creators Network Foundation. The Antonin Scalia Law School's Administrative Law Clinic (''Scalia Law Clinic''), for instance, commented that the Department's proposed definition of economic dependence ''wrongly states that a worker can be an employee merely because she is dependent in some way on a business, and it incorrectly says that a worker's income is entirely irrelevant to whether a worker is dependent on a business.'' Similarly, the Goldwater Institute stated that the proposal ''creates a broad new definition of 'economic dependence' that does not focus on the amount of income earned or whether the independent contractor has other income streams.'' Several commenters further stated that the Department had put forward a new definition of economic dependence ''that a worker is an employee if they are merely 'economically dependent' on a business in a small or inconsequential way.'' *See, e.g.,* NAIFA. Smith Summerset and Associates did not disagree with the content of § 795.105(b) but suggested that the provision be edited for clarity, noting that the regulatory language referring to ''other income streams'' is ''unnecessarily abstract and confusing'' and suggested incorporating alternative language from the preamble that the Department will be adopting.

The Department notes that this concept of economic dependence—one which does not focus on the amount of income earned or whether the worker has other income streams—has been the Department's consistent position. Although some commenters believed the Department was proposing a different approach, the concept of economic dependence in the NPRM and this final rule is identical to the 2021 IC Rule, which stated that, ''other forms of dependence, such as dependence on income or subsistence, do not count'' and that ''dependence of income or subsistence, is not a relevant consideration in the economic reality test.'' [205] The Department continues to believe that this position is correct and most consistent with the concept of economic dependence for work. As noted in the 2021 IC Rule and raised again in comments received in response to the NPRM, a minority of courts have applied a ''dependence-for-income'' approach that considers whether the worker has other sources of income or wealth or is financially dependent on the employer. Most courts, however, as well as the Department, believe a ''dependence-for-work'' approach that considers whether the worker is dependent on the employer for work or depends on the worker's own business for work is the better interpretation. This approach focuses the analysis on whether the worker is in business for themself (and thus dependent upon themself for work), or whether the worker is dependent upon the potential employer for work.[206] This approach is also consistent with the majority of case law. As the Eleventh Circuit has explained, ''in considering economic dependence, the court focuses on whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.' '' [207] Economic dependence, however, ''does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life . . . . Rather, it examines whether the workers are dependent on a particular business or organization for their continued employment.'' [208] Additionally, consistent with the 2021 IC Rule, economic dependence does not mean that a worker who works for other employers, earns a very limited income from a particular employer, or is independently wealthy cannot nevertheless be economically dependent on any particular employer for purposes of the FLSA.[209] As the Fifth Circuit has explained, ''it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment.'' [210]

Lastly, as a global matter, some commenters objected to the Department's use of the word ''employer'' throughout the proposed regulatory provisions and recommended that the Department use an alternate term such as ''potential employer'' instead because it made it seem as if the result of the analysis was predetermined in favor of employee status. *See, e.g.,* National Association of Convenience Stores (''NACS''); National Home Delivery Association (''NHDA''); Scopelitis.

Having considered the comments, the Department is adopting § 795.105(a) and (b) largely as proposed, explaining that economic dependence is the ultimate inquiry, and that an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income. The Department is also making three clarifying edits. First, in response to comments, the Department uses the phrase ''worker's potential employer'' or ''potential employer'' instead of the word ''employer'' in § 795.105(a). The Department did not intend for its use of the word ''employer'' to predetermine any result and makes the change throughout the regulatory text. The Department is using the terms

[205] 86 FR 1178.

[206] *See id.* at 1172–73; *see also Cornerstone Am.,* 545 F.3d at 343 (''To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.''); *Flint Eng'g,* 137 F.3d at 1440 (noting that ''the economic realities of the relationship govern, and the focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself''); *Superior Care,* 840 F.2d at 1059 (''The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business . . . or are in business for themselves.'').

[207] *Scantland,* 721 F.3d at 1312 (quoting *Mednick* v. *Albert Enters., Inc.,* 508 F.2d 297, 301–02 (5th Cir. 1975)).

[208] *DialAmerica,* 757 F.2d at 1385.

[209] *See* 86 FR 1173; *see also McLaughlin* v. *Seafood, Inc.,* 861 F.2d 450, 452 (5th Cir. 1988), *modified on reh'g,* 867 F.2d 875 (5th Cir. 1989) (reasoning that ''[l]aborers who work for two different employers on alternate days are no less economically dependent than laborers who work for a single employer''); *Halferty* v. *Pulse Drug Co., Inc.,* 821 F.2d 261, 267–68 (5th Cir. 1987) (rejecting the employer's argument that the worker's wages were too little to constitute dependence).

[210] *See Halferty,* 821 F.2d at 268.

''employer,'' ''potential employer,'' and ''the worker's potential employer'' throughout the preamble discussion, and the terms are not intended to predetermine any result. Second, the Department is adding the statutory definition of ''employer'' to § 795.105(a) for completeness. And third, consistent with the 2021 IC Rule and the proposed regulatory text, the Department is finalizing language that makes clear that other sources of income or amount of pay are not relevant to economic dependence, although, in response to comments, the Department is making some minor edits for additional clarity.

The Department also proposed to delete § 795.105(c) and (d) of the 2021 IC Rule because it believed that the factors of the economic reality test should not be given a predetermined weight and designated as ''core'' or ''additional guideposts.'' As discussed in section III (Need for Rulemaking) as well as in section V.C., the Department is proceeding with the removal of these paragraphs, and discussion of the economic reality test and the individual factors is being moved to § 795.110. The comments regarding the discontinuation of ''core factors'' and the Department's return to the economic reality test's longstanding totality-of-the-circumstances analysis are discussed in section V.C.

C. Economic Reality Test and Economic Reality Test Factors (§ 795.110)

In the NPRM, the Department proposed to replace § 795.110 (Primacy of actual practice) from the 2021 IC Rule with a provision discussing the economic reality test and the economic reality factors. Proposed § 795.110(a) introduced the economic reality test, emphasizing that the economic reality factors are guides to be used to conduct a totality-of-the-circumstances analysis. It also explained that the factors are not exhaustive, and no single factor is dispositive.[211] The Department then proposed to address the economic reality factors in § 795.110(b).[212]

Many commenters supported the Department's return to the longstanding totality-of-the-circumstances economic reality analysis, stating that it would provide clarity and align with the statutory text and relevant case law. *See, e.g.,* IBT; Leadership Conference on Civil and Human Rights (''Leadership Conference''); NELP; REAL Women in Trucking; State AGs; William E. Morris Institute for Justice. Outten & Golden, for instance, commented that the NPRM ''properly establishes that the purpose of the 'economic reality' factors is to inform and illuminate the 'economic dependence' inquiry, while no one factor independently drives the analysis.'' NECA and IBEW commented that they ''support returning to the long-standing six-factor balancing test, which will ensure certainty and clarity for construction employers and employees, provide protection to law-abiding responsible contractors and workers in the construction industry, and reduce burdensome and costly litigation.'' Securities Industry Financial Markets Association (''SIFMA'') agreed that ''[t]he Department of Labor is correct to note that it is the totality of the circumstances that one must look at to properly determine status'' and observed that ''courts have found that there is no 'rule of thumb', but that they must instead look at 'the total situation.' '' Similarly, the Shriver Center on Poverty Law commented that the ''proposed rule's six-factor 'economy reality' analysis is a sensible, totality-of-the circumstances approach that takes into account all relevant aspects of the worker's relationship with the hiring entity, is not easily manipulated by employers, and is well-supported by Supreme Court and circuit court precedent.'' Regarding the Department's explanations accompanying each factor, NELP commented that ''[b]y sharpening the focus of each factor, the proposed rule provides greater clarity, which will encourage employer compliance and reduce misclassification while still enabling true independent contractors to run their businesses as they see fit.'' The Transport Workers Union of America commented that the Department's proposal ''will ensure that the legal line between those realities matches the facts on the ground. The six-factor test envisioned in this rule accurately reflects the everyday relationship between workers and their employers. None of our members would risk becoming independent contractors under this rule (as they would have under the previous administration's proposal).'' Likewise, SWACCA stated that the Department's proposal ''will achieve more certainty than the January 2021 Rule because it reflects a standard that the courts have clarified and explained in numerous specific contexts through decades of judicial rulings. It is a well understood body of law that employers, workers, enforcement officials, private attorneys, and the federal courts all have considerable experience applying.''

Several commenters emphasized that the Act's definitions should guide the analysis. The LA Fed & Teamsters Locals, for example, observed that ''[c]ourts have interpreted the FLSA's broad suffer or permit to work language as seeking to answer one foundational question regarding the relationship between a worker and the entity to whom that worker provides their labor.'' They added that the 2021 IC Rule ''improperly elevates certain factors and prevents consideration of certain facts, would invite employers to find ways to cloak a worker's dependence in a veneer of independence and would fail to account for changes in working structures that come with societal progress.''

In contrast, other commenters stated that the Department's proposal to replace the ''core factor'' analysis and return to the totality-of-the-circumstances analysis undermined the clarity of the 2021 IC Rule, creating more uncertainty and confusion. *See, e.g.,* Consumer Brands Association; CWI; Forest Resources Association; I4AW; NYS Movers and Warehousemen's Association; WSTA. For example, the 4A's stated that the Department's proposal to return to a ''totality-of-the-circumstances analysis, in which the economic reality factors are no longer weighted more heavily based on importance, represents a change from the 2021 Independent Contractor Rule that will inevitably bring uncertainty and confusion for advertising agencies and the U.S. business community at large.'' FSI commented that ''[b]y expanding the range of relevant factors and expressly refusing to give guidance on how to weigh them against each other, DOL actively undermines the clarifying improvements of the 2021 Rule and works against its own stated objectives.'' Several commenters objected to the Department's framing of the proposal as a return to a longstanding analysis, instead opining that the NPRM set forth a novel test. *See, e.g.,* Mackinac Center for Public Policy; WPI. Many of these commenters expressed concern that the proposed rule would have detrimental effects on their industries, work opportunities, and earnings. *See, e.g.,* American Council of Life Insurers (''ACLI'') (identifying aspects of the proposal that ''would be enormously economically disruptive to the local businesses and preferred livelihoods of these individuals''); Buckeye Institute (''[B]y making it more expensive and more difficult to undertake independent work, this rule will shrink the available labor pool for employers.''); PGA (commenting that the proposal could ''[t]hreaten the source of income of thousands of workers across the country

[211] 87 FR 62234–37 (proposed § 795.110).

[212] *Id.*

in a time of economic uncertainty''); National Pork Producers Council (''As a result, pork producers and other business owners could be subject to increased legal and tax issues.'').

Other commenters stated that the 2021 IC Rule's core factor analysis was better suited to the issues of the current economy than the Department's proposal. For instance, the Job Creators Network Foundation commented that the Department's proposal ''conflicts with the way America's economy works today'' and that the new economy would be ''significantly diminished'' if the proposal were to move forward. In contrast, other commenters stated that the NPRM ''accurately analyzes modern workplace trends and provides detailed guidance on how these changes to the nature of work itself must be integrated and considered within those six identified factors (and within the additional factors that may arise in particular factual scenarios).'' LA Fed & Teamsters Locals; *see also* LCCRUL & WLC (commenting that the NPRM ''closely aligns with long-standing judicial precedent and that has proven well-suited to adapt to the myriad forms of working arrangements that have existed in the over 80 years since the FLSA's passage, as well as to unforeseeable work structures that will appear in the future'').

Some commenters stated that the Department's proposed factors were too broad and not tethered to economic dependence. IBA and CPIE, for example, commented that the proposed regulations ''are not faithful to answering the question of economic dependence'' and instead ''consistently resolve alternative interpretations of a specific factor in the direction of broadening the scope of the factor.'' Similarly, some commenters stated that the Department's proposal expanded the range of relevant factors and ''hold[s] a thumb on the analytical scale towards employment.'' *See* SHRM. The U.S. Chamber stated that the proposed rule ''would not only lead to significant reclassification of independent contractors but would also lead to a considerable increase in litigation. The bias in favor of employee status, which appears throughout the Proposed Rule, makes the risk that independent contractors would be misclassified as employees especially acute, with potentially dramatic consequences for entire industries.'' *See also* Boulette Golden & Marin LLP (commenting that the Department has attempted ''to narrow the scope of the economic reality test and suggests an individual is *not* an employee *only if* the employee has a free-standing business'').

Relatedly, other commenters requested that ''[i]f it is the Department's intent that this rule should uphold practices that were in place for years before the 2021 Independent Contractor Rule, then we believe any final rule should confidently state that most workers would not see a change.'' *See* OOIDA.

Several commenters requested that the Department provide additional guidance regarding how to weigh the factors in various scenarios. *See, e.g.,* Grantmakers in the Arts; National Small Business Association. NRF & NCCR, for example, commented that ''[t]his approach provides little guidance as to how individuals and businesses should apply those factors when they do not all point in the same direction.'' Commenters also stated that, in contrast to the 2021 IC Rule, potential overlap among factors made this test more challenging to understand. For example, the Club Management Association of America and the National Club Association (''CMAA & NCA'') commented that ''[e]ach factor includes multiple subjective elements for consideration that are not distinct from other factors'' and the Alabama Trucking Association stated that the proposal ''also create[ed] subtests that overlap at least conceptually or completely with aspects of other parts of the test.'' *See also* MEP (''Overlap makes it more difficult for the regulated community to understand how to analyze the different elements of the contractual relationship.'').

Various commenters requested that the Department state that workers in their particular industry or occupation were bona fide independent contractors. *See, e.g.,* Insights Association (strongly urging ''the addition of a clarification that market research participants receiving incentives are independent contractors''); American Securities Association (stating its belief ''that, consistent with this precedent, there is wisdom in including in the Proposed Rule an exemption for the financial services and insurance industries''); C.A.R. (''C.A.R. asks the DOL to not apply any new rule to established industries whose businesses have already addressed this long-standing issue.''); National Alliance of Forest Owners (''NAFO'') (requesting ''a safe harbor provision to provide forestry businesses a clear standard for classifying workers as independent contractors'').

After considering all comments and as discussed in detail below, the Department is adopting § 795.110(a) as proposed.

Regarding comments that the Department's proposal is generally biased in favor of employee status, or that its analysis of each factor places a ''thumb on the scale'' toward employment, the Department reiterates that its proposal is consistent with longstanding judicial precedent and, critically, the plain language of the Act. The Department agrees with those commenters who emphasized the Act's relevant statutory definitions. As it has stated previously, the Department believes that determining whether an employment relationship exists under the FLSA begins with the Act's definitions.[213] The Act's text is expansive, defining ''employer'' to ''include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee,'' ''employee'' as ''any individual employed by an employer,'' and ''employ'' to ''include[ ] to suffer or permit to work.'' [214] Prior to the FLSA's enactment, the phrasing ''suffer or permit'' was commonly used in state laws regulating child labor. As the Eleventh Circuit explained in *Antenor* v. *D & S Farms,* ''[t]he 'suffer or permit to work' standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children.'' [215] In other words, the standard was designed to ensure that an employer could be covered under the labor law even if they did not directly control a worker or used an agent to supervise the worker. The Supreme Court has explicitly and repeatedly recognized that this ''suffer or permit'' language demonstrates Congress's intent for the FLSA to apply broadly and more inclusively than the common law standard.[216] This textual breadth reflects Congress's stated intent. Section 2 of the Act, Congress's ''declaration of policy,'' states that the Act is intended to eliminate ''labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'' [217] Particularly relevant to misclassification, section 2 identifies ''unfair method[s] of competition in commerce'' as an additional condition ''to correct and as

[213] 87 FR 62234.

[214] 29 U.S.C. 203(d), (e)(1), (g).

[215] 88 F.3d 925, 929 n.5 (11th Cir. 1996).

[216] *See, e.g., Darden,* 503 U.S. at 326 (noting that ''employ'' is defined with ''striking breadth'' (citing *Rutherford,* 331 U.S. at 728)); *Rosenwasser,* 323 U.S. at 362 (''A broader or more comprehensive coverage of employees . . . would be difficult to frame.''); *Robicheaux* v. *Radcliff Material, Inc.,* 697 F.2d 662, 665 (5th Cir. 1983) (''The term 'employee' is thus used 'in the broadest sense 'ever . . . included in any act.'' '' (quoting *Donovan* v. *Am. Airlines, Inc.,* 686 F.2d 267, 271 (5th Cir. 1982))).

[217] 29 U.S.C. 202.

rapidly as practicable . . . eliminate.'' [218]

In its 1947 brief before the Supreme Court in *Rutherford,* the Department explained that the Act ''contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'' [219] The Department continued, stating that ''[t]he purposes of this Act require a practical, realistic construction of the employment relationship . . . and the broad language of the statutory definitions is more than adequate to support such a construction.'' [220] The determination of whether a worker is covered under the FLSA must be made in the context of the Act's own definitions and the courts' expansive reading of its scope.[221] The FLSA's ''particularly broad'' definition of ''employee'' encompasses all workers who are, ''as a matter of economic reality, . . . economically dependent upon the alleged employer.'' [222] The Supreme Court agreed, reiterating the breadth and reach of the Act's definitions to work relationships that were not previously considered to constitute employment relationships and emphasizing that the determination of an employment relationship under the FLSA depends not on ''isolated factors but rather upon the circumstances of the whole activity.'' [223]

Thus, the Department's analysis does not place a ''thumb on the scale'' for employment. Rather, it was Congress's clear intent in fashioning the Act (which has been repeated by courts for decades) that the statutory language sweep broader than the common law and encompass all workers who are ''suffered or permitted'' to work, and the test for employment must reflect that plain language and clear intent. The Department emphasizes again, however, that there is a wide assortment of bona fide independent contractors across industries and occupations, and it believes that the regulations as finalized in this rule allow for this range of work relationships—from employees to independent contractors—to be appropriately classified.

The Department has also considered the comments opining that the Department's totality-of-the-circumstances economic reality test will cause confusion or uncertainty and that the 2021 IC Rule's core factors analysis was clearer. The Department believes, however, that an analysis that has been applied for decades and is aligned with the breadth of the relevant statutory definitions and binding judicial precedent is not only more faithful to the Act but also more familiar to the regulated community, workers, and those enforcing the Act.

The economic reality test was developed by the Supreme Court in interpreting and applying the social legislation of the 1930s, including the FLSA.[224] In 1947, the Supreme Court issued two decisions, *Silk* and *Rutherford,* that used an economic reality test to determine employment status.[225] As explained in *Rutherford,* the ''economic reality'' test is designed to bring within such legislation ''persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.'' [226] Only a worker who ''is instead in business for himself'' is an independent contractor not covered by the Act.[227] The ''focus'' and ''ultimate concept'' of the determination of whether a worker is an employee or an independent contractor, then, is ''the *economic dependence* of the alleged employee.'' [228] The statutory language thus frames the central question that the economic reality test asks—whether the worker is economically dependent on an employer who suffers or permits the work or whether the worker is in business for themself.

To aid in answering this ultimate inquiry of economic dependence, several factors have been considered by courts and the Department as particularly probative when conducting a totality-of-the-circumstances analysis of whether a worker is an employee or an independent contractor under the FLSA.[229] In *Silk,* the Supreme Court suggested that ''degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are

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[218] *Id.; see also Rosenwasser,* 323 U.S. at 361–62; *Pilgrim Equip.,* 527 F.2d at 1311 (''Given the remedial purposes of the legislation, an expansive definition of 'employee' has been adopted by the courts.'').

[219] Brief for the Administrator at 10, *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1947) (No. 562), 1947 WL 43939, at *10 (quoting *Portland Terminal,* 330 U.S. at 150–51).

[220] *Id.* at *10–11.

[221] Some commenters contended that the Department's discussion in this section of cases where the Supreme Court repeatedly recognized that the definitions of ''employ,'' ''employee,'' and ''employer'' that establish who is entitled to the FLSA's protections were written broadly and have been appropriately interpreted broadly, failed to properly account for the Court's more recent decision in *Encino Motorcars* v. *Navarro,* 138 S. Ct. 1134 (2018), which overturned a rule of interpretation that applied to exemptions. *See* U.S. Chamber; FSI. In *Encino,* the Supreme Court addressed an exemption from the FLSA's overtime pay requirements and ruled that the ''narrow construction'' principle—that FLSA exemptions should be narrowly construed—should no longer be used. The Court explained that instead, such exemptions should be given a fair reading, stating ''[b]ecause the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give [them] anything other than a fair (rather than a narrow) interpretation.'' *Encino,* 138 S. Ct. at 1142 (internal quotations and citation omitted). Though this decision did not apply to the Act's definitions (which have not been interpreted under the ''narrow construction'' principle), the Department recognizes that some courts have gone beyond *Encino* and extended the ''fair reading'' principle to other parts of the Act or to the Act generally. *See, e.g., McKay* v. *Miami-Dade Cnty.,* 36 F.4th 1128, 1133 (11th Cir. 2022). There is no need to rely on the ''fair reading'' principle here because there is a clear textual indication in the Act's definitions, by the inclusion of the ''suffer or permit'' language, that broad coverage under the Act was intended. *See* 29 U.S.C. 203(g). Thus, even if it were applied, such broad coverage would be a ''fair'' interpretation under *Encino* because the broad scope of who is an employee under the FLSA comes from the definitions themselves and not any ''narrow-construction'' principle. *See id.* Moreover, *Encino* did not hold that the FLSA's remedial purpose may never be considered, it simply noted that it is a ''flawed premise that the FLSA 'pursues' its remedial purpose '*at all costs.*'' *Id.* at 1142 (quoting *Am. Express Co.* v. *Italian Colors Rest.,* 570 U.S. 228, 234 (2013)) (emphasis added). Indeed, other courts have appropriately continued to consider the purpose of the Act. *See, e.g., Uronis* v. *Cabot Oil & Gas Corp.,* 49 F.4th 263, 269 (3d Cir. 2022) (''As a remedial statute, the FLSA . . . is broadly construed, and 'must not be interpreted or applied in a narrow, grudging manner.' '') (quoting *Brock* v. *Richardson,* 812 F.2d 121, 124 (3d Cir. 1987)). The Department does not agree with the commenters' views that any pre-*Encino* case law discussing the remedial purpose of the Act has been abrogated, and it notes that courts have not changed their application of the economic reality test to determine employee status based on *Encino.* Finally, the Department reiterates that, to the extent that the language in the 2021 IC Rule preamble implied that the Act's remedial purpose can never be considered, including when determining whether an individual is an employee or an independent contractor under the FLSA, the Department clarifies that it believes that this would be an unwarranted extension of the Supreme Court's decision. *See, e.g.,* 86 FR 1207–08 (discussing *Encino*'s application in response to commenters' concerns that the 2021 IC Rule conflicted with the FLSA's remedial purpose).

[222] *Cornerstone Am.,* 545 F.3d at 343 (citing *Darden,* 503 U.S. at 326; *Herman* v. *Express Sixty-Minutes Delivery Serv., Inc.,* 161 F.3d 299, 303 (5th Cir. 1998)).

[223] *Rutherford,* 331 U.S. at 728–30.

[224] *Rosenwasser,* 323 U.S. at 362.

[225] *See Silk,* 331 U.S. at 716–18 (applying the test under the SSA); *Rutherford,* 331 U.S. at 730 (same under the FLSA).

[226] *Rutherford,* 331 U.S. at 729; *see also Whitaker House,* 366 U.S. at 31–32 (describing the same as it relates to homeworkers).

[227] *Cornerstone Am.,* 545 F.3d at 343 (citing *Express Sixty-Minutes,* 161 F.3d at 303).

[228] *Id.; see also Pilgrim Equip.,* 527 F.2d at 1311–12 (''[T]he final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of [the] FLSA or are sufficiently independent to lie outside its ambit.'').

[229] *See, e.g., Flint Eng'g,* 137 F.3d at 1441 (explaining that ''[n]one of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach'').

important for decision.'' [230] The Court also drew a distinction between workers who are an integral part of the business but are not the directors of their business, and workers who ''depend upon their own initiative, judgment, and energy for a large part of their success.'' [231] The Court cautioned that no single factor is controlling and that the list is not exhaustive.[232] In *Rutherford,* the Court used a similar analysis when concluding that the workers in that case were employees, considering ''the circumstances of the whole activity,'' and relied on the fact that the workers' work was ''a part of the integrated unit of production.'' [233]

These considerations identified by the Supreme Court are the same factors that the Department set forth in its NPRM. Courts, employers, workers, and enforcement personnel have been considering these factors for over 75 years. As such, the Department does not see a credible basis for comments that predict sharply increased litigation, dramatic curtailment of opportunities, or massive reclassification of workers. This is the analysis that the Department (except for the 2021 IC Rule) and courts have applied for more than 7 decades to classify workers under the Act, and the predictions raised in the comments as concerns have not been evident. Moreover, this final rule represents the Department's most comprehensive guidance regarding the economic reality test used by courts to determine employee or independent contractor status. As such, to the extent there was litigation around this issue due to a lack of clarity, that should be further alleviated by this rulemaking. As explained further in the economic analysis in section VII, because of this alignment with a longstanding analysis, the Department does not expect widespread reclassification as a result of this rule.

Rather, the economic reality test, the case law, and the Department's position have remained remarkably consistent since the 1940s, and throughout this time the test has demonstrated its ability to address evolving workplace trends. The test's focus has remained on whether the worker is in business for themself, with the inquiry directed toward the question of economic dependence. This consistency is, at least in part, due to the fact that the analysis works for a broad swath of work arrangements, both longstanding and emerging, and its overarching rationale based on economic dependence makes common sense. It is not surprising that some courts and the Department may have used somewhat different iterations of the factors over the last several decades, as the factors ''are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected.'' [234] These factors are only guideposts, and ''[i]t is dependence that indicates employee status. Each [factor] must be applied with that ultimate notion in mind.'' [235] This is why most courts, and the Department, have long made clear that additional factors may be relevant when applying the test to a particular case. It is also expected that outcomes may vary somewhat among workers even in the same profession, for example, because the test demands a fact-specific analysis. Facts like job titles or whether a worker receives a 1099 form are not probative of the economic realities of the relationship. Rather, in undertaking this analysis, each factor is examined and analyzed in relation to one another and to the Act's definitions. Importantly, ''[n]one of these factors is determinative on its own, and each must be considered with an eye toward the ultimate question—the worker's economic dependence on or independence from the alleged employer.'' [236]

While the Department appreciates, as some commenters noted, that two factors (like any test with fewer factors) are simpler in some ways than six factors, the Department believes that it would be a disservice to stakeholders to present an analysis that is contrary to how courts view the totality-of-the-circumstances analysis. Courts have repeatedly admonished against a mechanical application of the factors and have required a full analysis of all relevant factors, which is why the Department believes that any clarity created by shrinking the test to two core factors and artificially weighting them is illusory. As addressed in the NPRM, since *Silk* and *Rutherford,* federal courts of appeals have applied the economic reality test to distinguish independent contractors from employees who are entitled to the FLSA's protections. Federal appellate courts considering employee or independent contractor status under the FLSA generally analyze the economic realities of the work relationship using the factors identified in *Silk* and *Rutherford.*[237] There is significant and widespread uniformity among the federal courts of appeals in the application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed (for example, whether relative investment is considered within the investment factor, or whether skill must be used with business-like initiative).[238] As the 2021 IC Rule explained, ''[m]ost courts of appeals articulate a similar test,'' and these courts consistently caution against the ''mechanical application'' of the economic reality factors, view the factors as tools to ''gauge . . . economic dependence,'' and ''make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself.'' [239] All of the federal courts of appeals that have addressed employee or independent contractor status under the FLSA consider five of the same factors.[240] Briefly, these factors include the degree of control exercised by the employer over the worker, skill, permanency, opportunity for profit or loss, and investment, although the Second Circuit and the D.C. Circuit treat the worker's opportunity for profit or loss and the worker's investment as a single factor.[241] Nearly all federal courts of appeals expressly consider a sixth factor, whether the work is an integral part of the employer's business. The Fifth Circuit has not adopted the integral factor as an enumerated factor but has at times assessed integrality as an additional relevant factor.[242] As such, courts can and do accord weight to different factors depending upon the particular facts of a case. And because courts are the ultimate arbiter of disputes regarding worker classification, an analysis that is aligned with how courts view the issue is the most beneficial guidance that the Department can provide to stakeholders.

Regarding comments that the Department should provide additional guidance regarding how to weigh the

[230] 331 U.S. at 716.

[231] *Id.*

[232] *See id.*

[233] *Rutherford,* 331 U.S. at 729–30.

[234] *Pilgrim Equip.,* 527 F.2d at 1311.

[235] *Id.*

[236] *Off Duty Police,* 915 F.3d at 1055 (alterations and internal quotations omitted).

[237] *See generally supra* n.52.

[238] *See, e.g., Cornerstone Am.,* 545 F.3d at 344 (discussing relative investments); *Superior Care,* 840 F.2d at 1060 (discussing the use of skill as it relates to business-like initiative).

[239] 86 FR 1170; *see also Saleem,* 854 F.3d at 139–40; *Cornerstone Am.,* 545 F.3d at 343; *Keller* v. *Miri Microsystems LLC,* 781 F.3d 799, 807 (6th Cir. 2015); *Flint Eng'g,* 137 F.3d at 1440–41.

[240] *Superior Care,* 840 F.2d at 1058–59; *DialAmerica,* 757 F.2d at 1382–83; *McFeeley,* 825 F.3d at 241; *Off Duty Police,* 915 F.3d at 1055; *Lauritzen,* 835 F.2d at 1534–35; *Alpha & Omega,* 39 F.4th at 1082; *Driscoll,* 603 F.2d at 754–55; *Paragon,* 884 F.3d at 1235; *Scantland,* 721 F.3d at 1311–12; *Morrison,* 253 F.3d at 11.

[241] *See, e.g., Superior Care,* 840 F.2d at 1058–59; *Morrison,* 253 F.3d at 11 (citing *Superior Care,* 840 F.2d at 1058–59).

[242] *See, e.g., Hobbs,* 946 F.3d at 836.

factors, the Department believes that adding mechanistic rules for analyzing the factors would be contrary to judicial precedent and would limit the test's intended flexibility. As explained in the NPRM, this totality-of-the-circumstances analysis considers all factors that may be relevant and, in accordance with the case law, does not assign any of the factors a predetermined weight. Limiting and weighting the factors in a predetermined manner undermines the very purpose of the test, which is to consider—based on the economic realities—whether a worker is economically dependent on the employer for work or is in business for themself.[243] Importantly, each factor, considered in isolation, does not determine whether a worker is economically dependent on an employer for work or in business for themself. Rather, the factors are tools or indicators and must be analyzed together in order to answer this ultimate inquiry. This is the guidance that the Department has tried to provide for each factor, as discussed in this section below.[244] Depending on the facts and circumstances of a case, it is to be expected that one or more factors may be more probative than the other factors. The analysis, however, cannot be conducted like a scorecard or a checklist. For example, two factors that strongly indicate independent contractor status in a particular case could possibly outweigh other factors that indicate employee status, and vice versa. But to assign a predetermined and immutable weight to certain factors ignores the totality-of-the-circumstances, fact-specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time. Similarly, it is possible that not every factor will be particularly relevant in each case and that is also to be expected.[245] Accordingly, the Department believes that the nuanced analysis that accompanies each factor below is more appropriate guidance than rote instructions for weighing the factors.

Regarding comments that certain relevant facts may overlap among the factors, as explained in the NPRM, the Department believes that emphasizing the discrete nature of each particular factor and evaluating each factor in a vacuum fails to analyze the entire range of potential employment relationships in the manner demanded by the Act's text and accompanying case law. Additionally, the test must be able to identify the vast variety of legitimate independent contractor relationships.[246] As such, the Department does not wish to be overly prescriptive regarding overlap among factors, because doing so encourages a more formulaic application of the factors as a checklist, when instead the factors are guides to determining, by looking at all relevant facts, the economic reality of the situation. Applying a formulaic or rote analysis that isolates each factor is contrary to decades of case law, decreases the utility of the economic reality test, and makes it harder to analyze the ultimate inquiry of economic dependence. Rather, the analysis needs to be flexible enough to apply to all kinds of work, and all kinds of workers, from traditional economy jobs to jobs in emerging business models. As the Supreme Court stated in *Silk,* ''[p]robably it is quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employe[e] relationship'' but the Court identified factors as ''important'': ''degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation'' and added that ''[n]o one is controlling, nor is the list complete.'' [247] With this rule, the Department is providing its most detailed guidance to date regarding the application of each of the considerations identified by the Supreme Court as being important to the determination of whether a worker is an employee under the Act.

As to those comments stating that the proposed rule was not well-suited to the modern economy, the Department disagrees. The Department notes that the cases addressing employee vs. independent contractor status discussed in this rule and using the economic reality test apply to a wide range of today's workers, from cable installers to exotic dancers to health care workers, and the Department's enforcement experience applying the economic reality test is similarly varied. With this rulemaking, the Department describes the economic reality factors that reflect the totality-of-the-circumstances approach that courts have taken for decades and are still applying to today's workplaces, and provides an analysis as to how the Department considers each factor in today's workplaces, based on case law and the Department's enforcement expertise in this area. For example, the investment factor is returned to being a separate factor, considers facts such as whether the investment is capital or entrepreneurial in nature, and considers the worker's investments relative to the employer's investments. Significant additional guidance is provided for the control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the degree of control exerted over a worker. And the integral factor is returned to its longstanding Departmental and judicial interpretation, rather than the ''integrated unit of production'' approach that was included in the 2021 IC Rule.

The Department declines commenter requests to provide any industry-specific or occupation-wide exemptions or carve-outs to this rule. As explained elsewhere, the Department intends these regulations to apply to a broad range of work relationships and will continue to assess the need for more specific subregulatory guidance.

Finally, multiple commenters seemed to refer to worker classification as a preference or suggested that the Department's proposal would infringe upon workers' or businesses' choices. *See, e.g.,* Cambridge Investment Research (commenting that the result of the NPRM ''will be that many workers—including workers who want to be independent contractors—will be reclassified as employees under the FLSA''); Transcend Software and Technology Solutions (commenting that the proposal would create an environment ''where the freedom for entrepreneurs to operate as independent contractors is significantly diminished''). For instance, the NDA stated that it ''believes employers and workers should have the freedom and flexibility to engage in labor arrangements that meet the specific needs and preferences of both parties involved,'' and Cetera Financial Group commented that the ''Department could

[243] *See, e.g., Scantland,* 721 F.3d at 1312 (quoting *Mednick,* 508 F.2d at 301–02); *see also Saleem,* 854 F.3d at 139–140; *Mr. W Fireworks,* 814 F.2d at 1054–55.

[244] *See, e.g., Scantland,* 721 F.3d at 1312 (the economic reality factors ''serve as guides, [and] the overarching focus of the inquiry is economic dependence''); *Pilgrim Equip.,* 527 F.2d at 1311 (The economic reality factors ''are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.'').

[245] *See, e.g., Lauritzen,* 835 F.2d at 1534 (referring to the economic reality factors and stating that ''[c]ertain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.'').

[246] Independent contractors are not ''employees'' for purposes of the FLSA. *See generally Portland Terminal,* 330 U.S. at 152 (stating that the ''definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees'').

[247] *Silk,* 331 U.S. at 716.

take a huge step toward . . . certainty [for stakeholders] by including the expressed intention of the parties as a threshold criteria for the existence of economic dependence.'' While businesses are certainly and unequivocally able to organize their businesses as they prefer consistent with applicable laws, and workers are free to choose which work opportunities are most attractive to them, if a worker is an employee under the FLSA, then those FLSA-protected rights cannot be waived by either party.

The Supreme Court's ''decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right[s] . . . under the Act'' and ''have held that FLSA rights cannot be abridged by contract or otherwise waived.'' [248] The Supreme Court has identified at least three reasons for this nonwaiver rule. First, the Court has determined, based on the legislative history of the FLSA, that the Act constituted ''a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency.'' [249] According to the Court, the protective purposes of the Act thus ''require that it be applied even to those who would decline its protections''; otherwise, ''employers might be able to use superior bargaining power to coerce employees to . . . waive their protections under the Act.'' [250] Second, in enacting the FLSA, Congress sought to establish a ''uniform national policy of guaranteeing compensation for all work'' performed by covered employees.[251] Consequently, ''[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage . . . cannot be utilized to deprive employees of their statutory rights.'' [252] Third, the Court has held that permitting employees to waive their FLSA rights is inconsistent with the explicit purpose of the Act to protect employers against unfair methods of competition.[253] Accordingly, FLSA rights cannot be waived by either party under the law.

The Department is finalizing § 795.110(a) as proposed. In the sections that follow, the Department is providing a detailed analysis about the application of each factor based on case law and the Department's enforcement experience as a guide for employers and workers in determining whether a worker is an employee or an independent contractor, with each factor discussed through the lens of economic dependence.

1. Opportunity for Profit or Loss Depending on Managerial Skill (§ 795.110(b)(1))

Regarding the opportunity for profit or loss depending on managerial skill factor, the Department proposed that this factor consider ''whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work.'' The Department identified a nonexclusive list of facts that may be relevant when considering this factor: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. The Department added that, if a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. The Department said further that some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.[254]

The Department explained that the proposed regulatory text for this factor focused the opportunity for profit or loss factor on whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The Department noted that the 2021 IC Rule similarly considered managerial skill, but explained that the proposed regulatory text more accurately reflects the consideration of the profit or loss factor in the case law and reflects the ultimate inquiry into the worker's economic dependence or independence. The Department further explained that many federal courts of appeals ''apply this factor with an eye to whether the worker is using managerial skill to affect the worker's opportunity for profit or loss'' and discussed that case law. The Department also noted that its proposal would consider investment as a separate factor, unlike the 2021 IC Rule's consideration of investment within its opportunity for profit or loss factor. Additionally, the Department explained that the proposed regulatory text stating that the fact that a worker has no opportunity for a loss indicates employee status is consistent with the overall inquiry into economic dependence and is supported by the case law. Finally, the Department discussed the case law and its prior guidance supporting its view that a worker's decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.[255]

In addition to the numerous comments generally supporting the Department's six-factor analysis, a number of commenters expressed support for the NPRM's discussion of the opportunity for profit or loss depending on managerial skill factor. For example, Smith Summerset & Associates LLC ''highly applaud[ed] inclusion of 'managerial skill' in the title line and in the first sentence of the proposed'' regulatory text and stated that ''the exercise of managerial skill is a sine qua non of independent contractor status.'' LA Fed & Teamsters Locals agreed ''that it is managerial skill that matters when analyzing whether a worker's earning ability is relevant to the employee status analysis'' (emphasis omitted). Several commenters (including Farmworker Justice, NWLC, and the Shriver Center) stated that ''a worker who has the power to make key business decisions that affect their opportunity for profit or loss is more likely to be an independent contractor than a worker who does not have power over these decisions.'' Similarly, NELP expressed agreement with the proposal ''to explicitly tie the opportunity for profit or loss to a worker's managerial skill, not their ability to work longer'' (emphasis omitted). *See also* Gale HealthCare Solutions. OOIDA agreed with the Department's rejection of how the 2021 IC Rule discussed this factor, commenting: ''We believe that the 2021 Rule may have opened additional opportunities for truckers to fall prey to lease-purchase schemes by stipulating that an individual only needed to exhibit exercise of initiative or

[248] *Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981) (listing cases).

[249] *Brooklyn Sav. Bank* v. *O'Neil,* 324 U.S. 697, 706 (1945).

[250] *Tony & Susan Alamo,* 471 U.S. at 302 (citing *Barrentine,* 450 U.S. 728 and *Brooklyn Sav.,* 324 U.S. 697).

[251] *Jewell Ridge Coal Corp.* v. *UMWA Local 6167,* 325 U.S. 161, 167 (1945).

[252] *Id.* (internal quotation marks omitted).

[253] 29 U.S.C. 202(a); *Brooklyn Sav.,* 324 U.S. at 710.

[254] *See generally* 87 FR 62274–75 (proposed § 795.110(b)(1)).

[255] *See generally id.* at 62237–39.

management of investment for the factor to weigh towards the individual being an independent contractor. The formulation of the factor may have dismissed predatory leasing arrangements because an owner-operator otherwise exercised some initiative in the management of their work.''

Regarding the Department's proposal that decisions to work more hours or take more jobs ''generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor,'' [256] NDWA agreed, stating that ''a worker's ability to impact their pay by working more hours or taking more jobs does not show the exercise of managerial skill indicating independent contractor status.'' IBT also agreed with the NPRM's ''rejection of the proposition that a worker['s] decision to take additional hours or tasks indicates 'managerial skill.' '' *See also* Leadership Conference, ROC United, UFCW.

Several commenters found the NPRM's listing of potentially relevant facts when applying this factor to be helpful. Real Women in Trucking noted that this factor can appropriately indicate employee or independent contractor status for truck drivers and that the NPRM's ''addition of relevant facts to consider under this factor . . . provides helpful context to differentiate between these scenarios.'' Smith Summerset & Associates LLC ''applaud[ed] the specific examples of managerial skill listed in the [proposal].'' And UFCW stated that, ''[c]orrectly, the proposed rule highlights whether the worker can meaningfully negotiate, accept or decline jobs, and engage in efforts to expand their independent business.''

Some other commenters that generally supported the Department's six-factor analysis requested changes to or clarifications of the opportunity for profit or loss depending on managerial skill factor. For example, UFCW cited agreements that it says are imposed by companies like Instacart, Uber, and Lyft that prohibit workers from connecting with or soliciting their customers and stated that ''actively prohibit[ing] workers from developing an independent business is evidence of a lack of opportunity to profit or loss based managerial skill.'' UFCW also stated that, ''when black-box algorithms solely dictate their available work, pay, and other economic conditions,'' ''[w]orkers are powerless to negotiate or make any managerial decisions.'' The Department agrees that such facts would be probative of whether a worker has an opportunity for profit or loss depending on managerial skill but also reiterates that no one fact is dispositive under this factor.

Real Women in Trucking requested that the Department address ''free market'' load boards (load boards are matching systems where shippers post freights that they need carried and carriers post their availability), which, in the commenter's view, ''offer an opportunity to control profit or loss (unlike internal load boards).'' Similarly, OOIDA explained its view that ''the mere fact that an individual purchases equipment or services from a business they work with *does not* necessarily indicate an employee relationship.'' OOIDA further explained that ''[t]here are many owner-operators who choose to make purchases from the business they are leased to because it is a profitable deal'' and provided an example involving a group discount on tires. OOIDA ''believe[s] that the NPRM's totality-of-the-circumstances approach should be able to distinguish between these types of situations.'' The Department appreciates these concerns and agrees that the test put forth is flexible enough to account for a wide variety of situations, but its intent in promulgating this final rule is to provide as much as possible a general standard for determining employee or independent contractor status. The requested guidance is technical and industry-specific and is better addressed outside of rulemaking after this final rule takes effect.

Smith & Summerset recommended adding ''depending on managerial skill'' to the third sentence of the regulatory text so that it reads: ''If a worker has no opportunity for profit or loss depending on managerial skill, then this factor suggests that the worker is an employee.'' The commenter stated that, ''[w]ithout the managerial skill qualifier, the reader is invited to quickly think of working more or fewer hours as an opportunity for profit or loss.'' However, the subsequent sentence in the regulatory text addresses working more hours. Moreover, the intent of the third sentence is to explain that, where a worker who has no opportunity for profit or loss, this factor indicates employee status. Qualifying that explanation with a reference to managerial skill is unnecessary, because regardless of managerial skill, the worker's lack of an opportunity for profit or loss points this factor toward employee status.

NELA recommended a number of changes to this factor. It stated that a ''worker who can experience 'profit' with no attached risk of business loss is not truly in business for themselves,'' and suggested that the following language from the NPRM preamble be added to the regulatory text: ''The fact that a worker has no opportunity for a loss indicates employee status. Workers who incur little or no costs or expenses, simply provide their labor, and/or are paid hourly, piece rate, or flat rate are unlikely to experience a loss. This factor suggests employee status in those circumstances.'' However, the third sentence of the regulatory text already explains that this factor indicates employee status where a worker has no opportunity for a loss. NELA further suggested that the Department should ''incorporate the flip side'' of its above suggestion and state that ''the chance for a 'loss' with no corresponding opportunity for profit is a sign of dependence on the employer, which points toward employee status.'' Again, the third sentence of the regulatory text already covers circumstances where the worker has ''no opportunity for a profit or loss.'' NELA also suggested that the following language be added to the regulatory text: ''The fact that an employer may impose fines, penalties, or chargebacks on a worker for faulty performance does not mean that the worker may experience a loss. These kinds of costs are likely to make workers more dependent on their employers, and therefore more like employees.'' (The first sentence is from the NPRM preamble, and the second sentence is new language suggested by NELA.) The Department declines to add this language to the regulatory text. The Department notes that although fines, penalties, and chargebacks can indicate a worker's economic dependence on the employer, whether they indicate dependence may depend on the circumstances.

NELA additionally suggested changing the regulatory text identifying accepting or declining jobs as a relevant factor so that it would read: ''whether the worker exercises managerial skill in accepting or declining jobs without employer input or chooses the order and/or time in which the jobs are performed independent from employer control.'' In the Department's view, however, adding a reference to ''managerial skill'' is unhelpful because accepting or declining jobs is an underlying fact that is relevant to determining whether the worker exercises managerial skill. And adding references to ''employer input'' and ''employer control'' are unnecessary because the focus of this factor is whether the worker has an opportunity

[256] *Id.* at 62274–75 (proposed § 795.110(b)(1)).

for profit or loss through managerial skill, and there are many aspects of accepting/declining jobs and choosing the order/time to perform jobs—not only ''employer input'' and ''employer control''—which may shed light on whether those decisions and choices exemplify managerial skills. Finally, NELA suggested adding two sentences to the regulatory text. The first sentence would read: ''A worker's technical proficiency in completing each job is not the type of managerial skill that would indicate independent contractor status.'' This suggested sentence is, in the Department's view, correct in the abstract. As the Department explained in the NPRM, ''where a worker is paid by the job, the worker's decision to work more jobs and the worker's technical proficiency in completing each job are not the type of managerial skill that would indicate independent contractor status under this factor.'' [257] However, the Department also identifies in the regulatory text instances of managerial skill, such as efforts to expand a business or secure more work, hiring others, and purchasing materials and equipment, that can affect a worker's opportunity for profit or loss by, at least in part, increasing the worker's technical proficiency. The focus of this factor should be the degree of managerial skill, and the Department does not believe that adding a blanket statement regarding technical proficiency to the regulatory text would be helpful because doing so could distract from evaluating managerial skill. Technical proficiency in completing a job, even if it affects a worker's earnings, is alone insufficient for this factor to indicate independent contractor status, but, ultimately, whether that technical proficiency is the product of managerial skill is probative of employee or independent contractor status. NELA's second suggested sentence would read: ''Managerial skill will typically affect opportunity for profit or loss beyond a given job, and will relate to the worker's business as a whole.'' The Department believes that the second suggested sentence is not necessarily probative of this factor and is not a point emphasized in the case law.

Numerous commenters opposed, disagreed with, and/or requested changes to or clarifications of the proposed opportunity for profit or loss depending on managerial skill factor. For example, several commenters raised concerns that certain of the facts in the nonexclusive list of facts identified by the Department as relevant to this factor cannot be satisfied in their particular industries. Texas Association for Home Care & Hospice stated that, ''[i]n home care, independent contractor clinicians cannot hire other workers for the purposes of completing the contracted jobs (*i.e.,* patient visits) they have accepted from the home care agency'' because of ''stringent human resources and patient care regulations from both state and federal regulatory agencies.'' It added that workers ''purchase and maintain their own equipment,'' but if the worker ''accepts a specialized patient job, for instance a wound care patient, then the home care agency must purchase and provide to the independent contractor clinician the appropriate wound care supplies . . . as ordered by the physician.'' The ACLI stated that, ''[w]ithout question, [insurance agents'] profit or loss depends upon their own managerial skill,'' but ''insurance regulations, including New York Insurance Law § 4228, set strict limits on the commissions that insurers can pay to agents, who are ''unable to negotiate or change their commission structure.'' And although it ''generally supports the Department's proposed application'' of this factor, the American Securities Association expressed concern that this factor ''globally suggests, without any exceptions, that 'whether the worker determines or can meaningfully negotiate the charge or pay for the work provided' is a relevant factor.'' Because ''insurance and financial services regulations . . . set strict limits on the premiums that can be charged to customers and on the commissions that can be paid to agents and advisors,'' it asserted that financial professionals would not be seen as independent under this factor. The American Securities Association suggested that the Department ''eliminate from consideration whether the worker can meaningfully negotiate his or her pay from the list of potentially relevant facts under this factor,'' include a carveout, or ''clarify that a brokerage firm establishing prices to meet regulatory supervision obligations or considerations of its registered representatives does not create an employee relationship and is at most a neutral factor.'' ABC suggested that the NPRM ''improperly presumes that independent contractors must have a staff and a marketed 'business' to 'manage.' '' It stated that ''many independent contractors deliberately offer their services to employers of their choosing for the express purpose of avoiding negotiating costs'' and ''do not want to run a business that requires overhead for services, advertising and hiring support staff.'' It added that ''[i]t should be made clear that a worker who does solicit work from multiple clients remains an independent contractor.'' Finally, although it ''generally agree[d] with the description of this factor,'' the California Chamber of Commerce (''CA Chamber'') expressed concern ''that this factor would weigh against a gig worker being an independent contractor simply because the company for which they perform work sets pricing.''

Having considered these comments, the Department adopts its proposed list of facts that may be relevant when applying this factor. The list is plainly nonexclusive, and neither any fact listed nor this factor will be dispositive of a worker's status. As the regulatory text provides, ''no one factor or subset of factors is necessarily dispositive,'' and the ''outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity.'' [258] The status of the workers identified by these comments will be determined by multiple facts bearing on their work relationships, and accordingly, these commenters' concerns do not reflect how the Department's analysis will be applied. Consistent with a totality-of-the-circumstances analysis, not hiring others and not advertising, for example, do not make the worker an employee or even conclusively determine that this factor indicates employee status. (And as discussed below, certain decisions to ''not'' take business actions such as those listed in the regulatory text may be as indicative of managerial skill as decisions to take those business actions.) In that same vein, soliciting work from multiple clients, for example and while of course relevant, does not guarantee that a worker is an independent contractor or even that this factor points to independent contractor status. In addition, the Department believes that the nonexclusive list of facts that are potentially relevant to this factor provides helpful guidance, as other commenters have stated. And even if a particular fact is not probative or always points in one direction for a particular worker in a particular industry, that does not mean that the fact is not probative on a general level. The Department is striving to provide a generally applicable regulation in this rulemaking and will provide additional

[257] *Id.* at 62238; *see also Scantland,* 721 F.3d at 1316–17.

[258] 29 CFR 795.110(a)(1)–(2).

guidance after this final rule takes effect.[259]

Although the U.S. Chamber agreed that the facts listed in the regulatory text are ''relevant to whether workers are independent contractors or employees,'' it stated that the NPRM was ''wrong to require a worker to 'exercise' these decisions to exemplify independent contractor status.'' Analogizing to the NPRM's discussion of how reserved rights can be relevant in addition to actual practice, the U.S. Chamber asserted that ''the more important question is whether the worker has the *opportunity* to impact their profits and losses by engaging in various activities such as working for other companies, regardless of whether the worker actually acts on that opportunity.'' CWI criticized the NPRM for, in its view, ''requir[ing] consideration of whether the worker *actually exercises* his skill to impact economic success.'' CWI asserted that the NPRM ''consistently references 'opportunity,' not actual exercise of that opportunity, as the relevant touchstone'' and added that: ''Whether a worker chooses to exercise the opportunities for profit and loss available to him is fundamentally his own business decision. It is the ability to follow that business judgment—even to his detriment—that is the hallmark of the independence he is afforded.'' *See also* N/MA; NRF & NCCR.

Having considered the comments on this point, the Department is revising the final regulatory text to emphasize the worker's ''opportunities'' for profit or loss based on managerial skill and to delete the reference to whether the worker ''exercises'' managerial skill. The Department concurs that the term ''opportunities,'' which encompasses opportunity more broadly than ''whether the worker exercises managerial skill,'' is more consistent conceptually with the case law analyzing this factor and with the remainder of the regulatory text. Although the Department did not intend for the ''exercises managerial skill'' language to be limiting, focusing on ''opportunities'' should capture the facts relevant to a worker's profit or loss and managerial skill, as explained further in the discussion of comments in the following paragraph.

The Coalition of Business Stakeholders stated that ''[m]any independent contractors offer their services to select employers for the express purpose of avoiding negotiating costs for services, advertising, and hiring support staff,'' and that the NPRM ''utterly fails to account for workers' preference for having an independent contractor relationship that avoids these costs.'' The commenter asserted that this ''framework would virtually always weigh in favor of employment status.'' NRF & NCCR stated that ''the fact that someone might not engage in certain practices or take on certain risks that would further impact the level of profit or loss should not result in a finding that the individual is not an independent contractor, unless that person is prevented from doing so by the entity with whom the individual contracts.'' According to the commenter, for example, ''[a] carpenter or plumber who chooses to market through word of mouth and to complete one job at a time, and not hire helpers and make the investments necessary to work on multiple job[s] simultaneously, is no less an independent contractor than a carpenter or plumber who has made different choices about how to operate his or her business.'' The Department believes that the opportunity, for example, to hire others or purchase materials and equipment, and a decision to not take such action based on a consideration of possible costs and rewards, can indicate managerial skill. For this to be the case, the worker must have a real opportunity to take the action and make an independent business decision indicating managerial skill to not take the action. In other circumstances, not taking an action may not indicate managerial skill. For example, if the action requires approval from the employer (for example, the employer must approve any person hired by the worker as a helper) or the action is not feasible financially (for example, the worker is lower-paid and cannot hire others or make purchases), then there is likely no opportunity for the worker to make an independent business decision indicating managerial skill. Regardless, no one action or lack of action should determine whether this factor indicates employee or independent contractor status; the Department identifies in the regulatory text a number of possibly relevant facts, and other relevant facts may be considered too.

Several commenters expressed concern that the mention of ''managerial skill'' in the proposed regulatory text did not include references to ''initiative,'' ''business acumen,'' and ''judgment.'' For example, CWI stated that the proposed regulatory text ''narrows the inquiry'' as compared to the 2021 IC Rule, which referenced ''business acumen or judgment'' in its discussion of this factor. CWI further stated that the NPRM's preamble ''acknowledge[d] that 'initiative,' 'business acumen,' and 'judgment' are informative of the opportunity-for-profit-or-loss factor'' (citing 87 FR 62238). CWI requested that the Department ''retain the 2021 IC Rule's formulation of the standard.'' *See also* N/MA. The U.S. Chamber added that the proposed regulatory text ''wrongly narrows the inquiry to 'whether the worker exercises managerial skill,' as opposed to 'managerial skill or business acumen or judgment,' as stated in the 2021 IC Rule.'' The Department did not intend to exclude initiative, judgment, or business acumen from the inquiry under this factor. The NPRM's preamble explained that considering initiative and judgment is very similar to considering managerial skill.[260] Accordingly, in light of the comments and the discussion of managerial skill in the NPRM's preamble and the cases cited therein, the Department is modifying the regulatory text to clarify that managerial skill includes ''initiative or business acumen or judgment.'' Thus, with this change and the change discussed above, the first sentence of the regulatory text for this factor reads: ''This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work.''

CPIE commented that, although earlier court decisions ''properly considered an individual's opportunity for loss in evaluating the individual's economic dependence,'' the U.S. economy has changed, and ''[t]here are countless numbers of individuals today who operate thriving businesses with their laptop computers and incur no risk of loss whatsoever.'' The commenter asserted that ''[t]he fact that these individuals operate a type of business that does not require a substantial financial investment should not deny them their right to offer their services as

[259] Fight for Freelancers commented that the Department does ''not define what constitutes marketing and advertising'' (one of the listed facts) and asked: ''What, specifically, must we do to satisfy your definition of marketing and advertising?'' The Department believes that the terms ''marketing'' and ''advertising'' are well understood, and engaging in marketing or advertising are just examples of types of managerial skill that may be relevant when applying this factor. No worker needs to ''satisfy'' any of these facts; all facts relevant to the worker's opportunity for profit or loss depending on managerial skill should be considered.

[260] 87 FR 62238 (citing, *inter alia, Franze,* 826 F. App'x at 76–78; *Flint Eng'g,* 137 F.3d at 1441; *Superior Care,* 840 F.2d at 1058–59; *Snell,* 875 F.2d at 810).

independent contractors.'' Having considered this comment, the Department stands by its position that ''the fact that a worker has no opportunity for a loss indicates employee status.'' [261] The Department believes that the risk of a loss as a possible result of the worker's managerial decisions indicates that the worker is in business for themself. Although a worker need not experience a loss or even likely experience a loss for this factor to indicate independent contractor status, the scenario presented by the commenter—''no risk of loss whatsoever''—does not suggest that the worker is an independent contractor because at least some risk of a loss is inherent in operating an independent business. Moreover, the Department's position is grounded in the case law, which has recognized that the lack of possibility of a loss indicates employee status.[262] The Department notes, however, that whether the worker in the scenario presented by the commenter is an employee or independent contractor depends on application of all of the factors and a consideration of the totality of the circumstances because neither this factor nor any other factor is necessarily dispositive. Thus, workers ''who operate thriving businesses with their laptop computers and incur no risk of loss whatsoever'' (the scenario presented by the commenter) may be employees or independent contractors depending on all of the factors.

A number of commenters expressed concerns with and/or sought changes to the last sentence of the regulatory text: ''Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.'' For example, NHDA stated that each decision by a ''driver to accept or reject an opportunity (in this case, a load) is a business decision that affects his/her economic success'' and ''involves the weighing of an opportunity cost'' (*i.e.,* ''the cost of accepting that load versus the revenue to be earned and also against the foregone opportunity to transport a different load''). NHDA further stated that, for these reasons, this sentence ''is misleading and susceptible to short-circuiting a proper analysis.'' *See also* Scopelitis (same). Flex described this sentence as ''misleading'' and ''likely lead[ing] to the discounting of evidence that is, in fact, highly relevant to a worker's 'opportunity for profit or loss depending on managerial skill.' '' It stated that, ''[i]f a cashier at a fast-food restaurant voluntarily chooses to work overtime or pick up an additional shift, that decision would not support independent contractor status[,]'' but if a driver ''who was planning to drive clients five days one week is solicited by a new client for a lucrative opportunity on Saturday, the decision to accept that new client and work an extra day is plainly an entrepreneurial decision that reflects managerial decision making.'' Flex explained that ''technological advances . . . have facilitated independent contractors' ability to quickly determine what earnings opportunities and hours worked will yield *for them* the biggest return on the investment of *their* time.'' SHRM added that ''[t]he economic reality is that a worker who can profit by taking other jobs is more independent—and therefore less economically dependent on the employer—than an employee who cannot,'' and that ''[t]he ability to make that choice should point to an independent relationship.'' CWI stated that ''[t]he Department's commentary even cites authority noting that choosing among 'which jobs were most profitable' is evidence of independent contractor status, but the Proposed Rule contains no similar nuance.'' *See also* U.S. Chamber; MEP.

Having considered these comments, the Department believes that the last sentence of the proposed regulatory text for this factor can be more precise. In the NPRM, the Department explained this concept as follows: ''a worker's decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.'' [263] The proposed regulatory text, however, did not account for payment for the hours and jobs at a fixed rate or the employer's control over the flow of work. The NPRM recognized that courts have held that a worker's ability to freely choose among jobs based on the worker's assessment of the comparable profitability of those jobs can indicate independent contractor status when applying the opportunity for profit or loss factor.[264] Other cases relied on by the Department in the NPRM involved workers who were paid at set or fixed rates and/or situations where more work was dictated by the employer's needs as opposed to the worker's initiative.[265] Based on the comments, the discussion in the NPRM, and the case law, the Department is revising the last sentence of the opportunity for profit or loss factor. In the NPRM, that sentence read: ''Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.'' As revised, that sentence reads (with the new language in italics): ''Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs *when paid a fixed rate per hour or per job,* generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.'' The Department also considered adding to the regulatory text a reference to the employer's control of assignment of the hours or jobs. Although such control may be relevant in this context, the Department believes that the fact that the hours or jobs are paid at a fixed rate is more indicative that the worker is not exercising managerial skill by taking more such hours or jobs.

Fight for Freelancers asserted that there was a conflict between this provision regarding working more hours or jobs and the provision stating that accepting or declining jobs can be a relevant fact when applying this factor. The Coalition of Business Stakeholders commented that the NPRM is ''unclear on whether, when assessing the opportunity for profit or loss factor, a worker's ability to accept or decline work weighs in favor of independent contractor status.'' The Department believes these comments overlook the totality-of-the-circumstances nature of the analysis; there is no particular factor to satisfy. In addition, the text addresses two concepts that are not in conflict. The last sentence of the regulatory text (as revised) addresses a worker who can earn more by working more hours or taking more jobs. That worker is working more to earn more but not exercising managerial skill (at least in that regard). On the other hand, a worker may be able to accept and

[261] *Id.*

[262] *Id.* at 62239 (citing *Off Duty Police,* 915 F.3d at 1059; *Flint Eng'g,* 137 F.3d at 1441; *Selker Bros.,* 949 F.2d at 1294; *Snell,* 875 F.2d at 810; *Lauritzen,* 835 F.2d at 1536; *DialAmerica,* 757 F.2d at 1386).

[263] 87 FR 62239.

[264] *Id.* (citing *Karlson* v. *Action Process Serv. & Private Investigations, LLC,* 860 F.3d 1089, 1095 (8th Cir. 2017)); *Express Sixty-Minutes,* 161 F.3d at 304).

[265] *Id.* (citing *Off Duty Police,* 915 F.3d at 1059; *Scantland,* 721 F.3d at 1316–17; *Capital Int'l,* 466 F.3d at 308; *Snell,* 875 F.2d at 810).

decline jobs where the jobs have varying degrees of potential profitability and the worker must determine which jobs to pursue and how much of the worker's time and resources should be devoted to the various jobs. That worker is exercising managerial skill (at least in that regard), which weighs in favor of independent contractor status.

MEP commented that ''managerial skill should be broadly defined'' and that ''managerial skill should include an individual's ability to complete the work more efficiently or effectively.'' World Floor Covering Association (''WFCA'') commented that, although it ''recognizes that merely working longer hours or more efficiently does not distinguish an independent contractor from an employee,'' ''[a]n individual who uses initiation or judgment to perform a job more efficiently can generate greater profits, even if compensated by the hour or by piecework rates.'' WFCA suggested that ''depending on managerial skill'' be stricken from the title of this factor and that the first sentence of the regulatory text be revised to state: ''This factor considers whether the worker exercises managerial skills, implements innovations, or uses other entrepreneurial concepts that affects the worker's economic success or failure in performing the work.'' For the reasons explained in the NPRM and in this section, managerial skill is properly the focus of the opportunity for profit or loss factor because it helps to distinguish between decisions that affect a worker's earnings and the use of initiative, judgment, or business acumen that may create opportunities for profit or loss. As further explained in the NPRM, whether the worker's opportunity for profit or loss depends on managerial skill (or initiative or judgment as discussed above) is ingrained in the case law.[266] Accordingly, striking ''depending on managerial skill'' would not be supported. And although being innovative and acting entrepreneurially are synonymous with managerial skill, implementing innovations and using entrepreneurial concepts are not necessarily synonymous with the worker's managerial skill if those innovations and concepts are developed and perfected by others. WFCA's suggested language would detract the focus from, and not necessarily be consistent with, managerial skill.

In addition, WFCA provided examples of workers who can ''install complex wood or tile patterns'' and requested that implementing ''new techniques or innovations'' and developing ''specialized or unique skills'' be added to the nonexclusive list of facts that may be relevant when applying this factor. However, as discussed in this section, implementing techniques or innovations is not necessarily indicative of managerial skill and may instead relate more to how the worker performs the work. The same may be said about developing skills; especially considering the examples provided by WFCA, these skills seem more about performing particular work. As discussed above in response to NELA's comment that technical proficiency in completing each job is not managerial skill indicative of independent contractor status, the focus of this factor is the worker's managerial skill and not the worker's performance of particular jobs. Accordingly, the Department declines to make the changes requested by WFCA.[267]

The Department is finalizing the opportunity for profit or loss depending on managerial skill factor (§ 795.110(b)(1)) with the modifications discussed herein.

Example: Opportunity for Profit or Loss Depending on Managerial Skill

A worker for a landscaping company performs assignments only as determined by the company for its corporate clients. The worker does not independently choose assignments, solicit additional work from other clients, advertise the landscaping services, or endeavor to reduce costs. The worker regularly agrees to work additional hours in order to earn more. In this scenario, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may fluctuate based on the work available and their willingness to work more. Because of this lack of managerial skill affecting opportunity for profit or loss, these facts indicate employee status under the opportunity for profit or loss factor.

In contrast, a worker provides landscaping services directly to corporate clients. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss. Thus, these facts indicate independent contractor status under the opportunity for profit or loss factor.

2. Investments by the Worker and the Potential Employer (§ 795.110(b)(2))

Regarding the investments factor, the Department proposed that this factor consider ''whether any investments by a worker are capital or entrepreneurial in nature.'' The provision stated that ''[c]osts borne by a worker to perform their job,'' such as ''tools and equipment to perform specific jobs and the worker's labor,'' ''are not evidence of capital or entrepreneurial investment and indicate employee status.'' The provision further stated that investments that are capital or entrepreneurial in nature and thus indicative of independent contractor status are those that ''generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.'' The Department also proposed that ''the worker's investments should be considered on a relative basis with the employer's investments in its overall business.'' The provision further said that ''[t]he worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.'' [268]

The Department explained that its proposal to treat investments as its own separate factor in the economic reality analysis is consistent with its approach prior to the 2021 IC Rule and with the approach of most courts. The Department further explained that considering investments as part of the opportunity for profit or loss factor, as the 2021 IC Rule did, is flawed because, among other reasons, it ''may incorrectly tilt the analysis in favor of independent contractor outcomes'' and ''have the effect in some cases of

[266] 87 FR 62237–38 (citing, *inter alia, Franze,* 826 F. App'x at 76–78; *Razak,* 951 F.3d at 146; *Verma,* 937 F.3d at 229 (citing *Selker Bros.,* 949 F.2d at 1293); *Off Duty Police,* 915 F.3d at 1059; *Iontchev* v. *AAA Cab Serv., Inc.,* 685 F. App'x 548, 550 (9th Cir. 2017); *McFeeley,* 825 F.3d at 241 (citing *Capital Int'l,* 466 F.3d at 304–05); *Keller,* 781 F.3d at 812; *Scantland,* 721 F.3d at 1312; *Flint Eng'g,* 137 F.3d at 1441; *Snell,* 875 F.2d at 810; *Superior Care,* 840 F.2d at 1058–59; *Lauritzen,* 835 F.2d at 1535; *Driscoll,* 603 F.2d at 754–55).

[267] CPIE discussed technical proficiency and commented: ''An individual's ability to maximize the profitability attributable to the individual's technical proficiency will depend on the individual's managerial skill and ability to persuasively communicate to a potential client the value of such proficiency.'' The Department generally agrees with this statement to the extent that it focuses the inquiry on the worker's managerial skill.

[268] *See generally* 87 FR 62275 (proposed § 795.110(b)(2)).

preventing investment from affecting the analysis.'' The Department set forth its reasons (and the supporting case law) for focusing on the nature and reason for the worker's investment and why the worker's investment must be capital in nature for it to indicate independent contractor status. Consistent with that focus, the Department further explained (with a discussion of supporting case law) that ''the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.'' [269]

Finally, the Department explained that its proposal to evaluate the worker's investment in relation to the employer's investment in its business ''is not only consistent with the totality-of-the-circumstances analysis that is at the heart of the economic reality test, but it would also provide factfinders with an additional tool to differentiate between a worker's economic dependence and independence based on the particular facts of the case.'' The Department discussed the federal appellate case law supporting its proposal and addressed any contrary federal appellate case law.[270]

In addition to the numerous comments generally supporting the Department's six-factor analysis, a number of commenters expressed support for the NPRM's treatment of investments as a separate factor in the economic realities analysis. NWLC explained that, ''[c]onsistent with the Department's guidance from its earliest applications of the economic reality test until the 2021 Rule, the proposed rule considers investments by the worker and the employer as a factor distinct from opportunity for profit or loss.'' LA Fed & Teamsters Locals stated that the 2021 IC Rule had ''improperly combine[d]'' the investments factor with the opportunity for profit or loss factor and that the NPRM's treatment of the investments factor as a separate factor ''more faithfully adheres to the long history of jurisprudence defining how to determine the economic reality.'' The State AGs agreed that treating investments as a separate factor is ''consistent with the case law.'' Gale Healthcare Solutions expressed ''support [for] the proposal to treat worker investment as a standalone factor in the economic reality analysis rather than as part of [the] opportunity for profit or loss analysis.'' Others, including NELP, Real Women in Trucking, IBT, and AFL–CIO, expressed similar support.

A number of commenters also supported the substance of the NPRM's discussion of the investments factor. For example, Leadership Conference appreciated the clarification that the NPRM's investments factor would provide, stating that ''[a] true independent contractor should make significant capital or entrepreneurial investments in their business, especially relative to the entity that hired them.'' The Shriver Center agreed that the investments of ''a true independent contractor . . . must be capital or entrepreneurial, as opposed to tools that a worker is required by a business to have in order to perform a job.'' Others, including Farmworker Justice, Real Women in Trucking, and LIUNA, commented similarly. *See also* NELP, Winebrake & Santillo, LLC, Gale Healthcare Solutions.

ROC United described as crucial the NPRM's clarification ''that 'the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.' '' AFL–CIO ''strongly encourage[d] [the Department] to include in the Final Rule its observation'' regarding a worker's use of a personal vehicle. LA Fed & Teamsters Locals agreed that the NPRM's approach to a worker's use of a personal vehicle was right and added that evaluating the worker's investment relative to the employer's ''is critical because even when employers push the cost of tools and supplies onto the workers doing the work at the core of the employer's business, the employers often have even larger investments.''

Some commenters that generally supported the Department's six-factor analysis requested changes to or clarifications of the investments factor. In particular, a number of commenters addressed costs and expenses that employers require workers to bear or that they otherwise impose on workers and argued that such costs and expenses are not of a capital or entrepreneurial nature indicating independent contractor status. For example, Intelycare asserted that when a nursing agency shifts fees for malpractice insurance onto workers, those fees are not an investment by the workers. Intelycare added: ''We urge the Department to close such loopholes and instruct that companies cannot shift or attempt to disguise their own investments in an effort to avoid employee classification.'' Gale Healthcare Solutions likewise requested that the Department ''clarify that when a company shifts its 'investment' cost or a typical cost of doing business to workers (*e.g.,* . . . purchasing group malpractice insurance and deducting the cost from workers' pay), this transferred cost does not constitute worker investment.'' LA Fed & Teamsters Locals requested that the Department make ''clear in its final rule that *any* investments that an employer *requires* fall into th[e] category of non-probative investments, and provide additional guidance to ensure that employers cannot find additional ways to manipulate these factors.'' NELP similarly requested that the Department ''clarify that investments made by a worker that reflect *a contractual demand by the hiring entity, rather than an independent business investment decision or meaningful negotiation between business parties,* should not weigh towards independent contractor status.'' NELP added: ''Without this clarification, hiring entities may misclassify workers as independent contractors and require or pressure them, as a condition of receiving work, to make expenditures that appear large in comparison to an undercapitalized hiring entity—such as a fly-by-night subcontractor or labor broker—to avoid accountability.''

Having considered these comments, the Department agrees that costs unilaterally imposed by an employer on a worker are not capital or entrepreneurial in nature. Where the worker has no meaningful say either in the fact that the cost will be imposed or the amount, the cost cannot be an investment indicating that the worker is in business for themself. Using malpractice insurance for nurses as an example, if such insurance is required by law or regulation and a nursing staffing agency purchases and maintains the insurance for the nurses and passes that cost on to, or imposes a charge for insurance on, the nurses, that cost does not indicate independent contractor status. But, if insurance is required by law or regulation, and the nurse can choose among policies based on their prices and coverages and does independently procure a policy, then the cost of the insurance could be capital or entrepreneurial in nature and indicative of independent contractor status. For these reasons, the Department is modifying the relevant sentence from the regulatory text regarding the investments factor to add the following text: ''and costs that the

[269] *See generally id.* at 62240–41.

[270] *See generally id.* at 62241–43.

potential employer imposes unilaterally on the worker.'' [271]

Relatedly, Real Women in Trucking stated that truck drivers who wholly own or independently finance a truck are true owner-operators because ''[t]his type of investment gives [them] the ability to keep their truck if they decide to stop working for any particular company, and accordingly some measure of economic independence.'' The commenter further stated that, in contrast, ''employer-sponsored leases for work equipment, including for trucks, are not investments of the kind that weigh in favor of independent contractor classification.'' The Department generally agrees with this distinction, although it is hesitant to state that the existence of an employer-sponsored lease can never indicate independent contractor status. Consistent with the discussion of malpractice insurance in the previous paragraph, if a driver is not required to lease a truck from the employer, is able to consider independent financing options, is able to meaningfully negotiate the terms of the lease with the employer, is not required by the employer to work for it for a minimum period of time nor prohibited by it from using the leased truck to work for others, and then decides to lease from the employer, the cost of the truck leased from the employer could be capital or entrepreneurial in nature, especially if the lease could ultimately result in the driver's wholly owning the truck.[272]

Regarding the proposed regulatory text's statement that the costs to workers of tools to perform specific jobs are not capital or entrepreneurial investments, LIUNA suggested the following addition: ''The mere utility of a worker's tools to perform similar work for other employers does not render the worker's purchase of those tools an entrepreneurial investment, especially where the pertinent employer invests far more in facilitating or purchasing the employees' work.'' In support, LIUNA stated that ''[t]he weight of authority . . . overwhelmingly suggests that the potential utility of a workers' tools for other projects does not render those workers[] independent contractors.'' This statement, however, overlooks that the economic realities analysis considers the totality of the circumstances. A worker's use of tools alone does not determine whether the worker is an employee or independent contractor. Moreover, the Department believes that a worker's purchase of tools and equipment for use performing multiple jobs for multiple employers can be a capital or entrepreneurial investment. The regulatory text already explains that the nature of such purchases of tools and equipment needs to be determined and that such costs to a worker and the worker's other investments should be considered on a relative basis with the employer's investments in its overall business. Accordingly, the Department declines LIUNA's suggestion.

NELA stated that the NPRM ''correctly focuses on whether investments are capital or entrepreneurial in nature'' but expressed concerns that the ''Department's decision to separate the 'investment' prong from the 'opportunities for profit and loss' prong . . . goes too far, and detracts from . . . needed clarity.'' According to NELA, ''[a]n expenditure is only an 'investment' when it may impact profit and loss,'' and ''[i]f an employee has spent money for work but has no opportunity for profit and loss as a result, then the conclusion should be that they are not 'investing' in anything.'' NELA requested that the NPRM ''be edited to clarify that 'investment' inherently implies the possibility of profit and is only 'capital or entrepreneurial in nature' . . . when it has a nexus with profit and loss.'' The Department agrees that whether the worker's expenditures may result in profits or losses to the worker is highly relevant to whether those expenditures are capital or entrepreneurial in nature. However, because, as explained further below, the investment factor is not synonymous with the opportunity for profit or loss factor and because adding a ''nexus with profit or loss'' requirement is not supported by the weight of the case law that has historically viewed the two factors as analytically distinct under the economic reality test, the Department declines to promulgate an absolute requirement that expenditures have ''a nexus with profit and loss'' to be capital or entrepreneurial in nature. Moreover, such a requirement could be viewed as similar to the 2021 IC Rule's approach of combining the consideration of investments with opportunity for profit or loss—an approach that the Department is rejecting as discussed below. For all the reasons stated herein, the Department is restoring investments as its own separate factor. Although some overlaps between factors are understandable, tying investments to profits and losses in the absolute manner suggested by NELA would be contrary to the Department's goal of rectifying the 2021 IC Rule's treatment of investments as part of the opportunity for profit or loss factor.

NELA further stated that the NPRM was ''correct to incorporate a relative-investment analysis'' in this factor, but that ''the Department should explain that the relative-investment analysis is qualitative, not quantitative, to better align this prong with the overarching dependence/independence inquiry.'' According to NELA, ''[a] qualitative review of relative investments helps determine whether the investment is entrepreneurial in nature,'' but ''[a]n analysis that instead focuses on a quantitative comparison of investments is rarely conclusive, because not all industries are equally capital-intensive.'' NELA added that ''the threshold question of which expenditures are entrepreneurial 'investments' versus 'tools' makes quantitative comparison confusing and inconclusive.'' *See also* NELP (The Department should ''clarify[] that the comparison of investments must be qualitative.''); Real Women in Trucking (''While a single tractor trailer is a relatively small investment compared to the fleets of trucks owned by some firms, when wholly owned or independently financed, it is sufficient to support a personal trucking business, and thereby meets the standard discussed in the Proposed Rule.'').

Having considered these comments, the Department agrees that focusing the comparison of the worker's and the employer's investments on their qualitative natures is helpful. As NELA points out, different industries may be more or less ''capital-intensive.'' Thus, focusing only on the quantitative measures (*e.g.,* dollar values or size) of the investments may not achieve the full probative value of comparing the investments. On the other hand, comparing the investments in a qualitative manner (*i.e.,* the types of investments) is a better indicator of whether the worker is economically

[271] NELP additionally commented that ''[c]larifying the relationship between [the investments and opportunity for profit or loss] factors will help identify situations (like the personal vehicle example . . .) where a corporation may be transferring the cost of doing business to its workers, who are required to make expenditures that are not independent decisions impacting their businesses' profits or losses.'' The Department believes that its discussion in this paragraph and the following paragraph, as well as its discussion below regarding the investments factor as it relates to the opportunity for profit or loss factor, provide additional clarity.

[272] On the other hand, where a driver has ''the means to engage in the freight-hauling business only because [the employer] advanced a truck, equipment, and many other resources up front on [the employer's] own credit'' and is charged for those costs, the investment factor indicates employee status. *Brant* v. *Schneider Nat'l,* 43 F.4th 656, 671 (7th Cir. 2022).

dependent on the employer for work or is in business for themself. That is because regardless of the amount or size of their investments, if the worker is making similar types of investments as the employer or investments of the type that allow the worker to operate independently in the worker's industry or field, then that fact suggests that the worker is in business for themself. The comment from Real Women in Trucking captures this point well. Although the driver who wholly owns or is independently financing a single truck is making a quantitatively smaller investment (in dollars and size) than the employer that has a fleet of trucks, the driver is making a similar type of investment as the employer and a sufficient investment so that the driver can operate independently in that industry—suggesting independent contractor status. Another example is an individual photographer who has cameras and related equipment, has software to edit photos, and works out of their home. Although the individual may not have the extent of equipment, software with every capability, or a leased office space like a larger firm, the type of investments that the individual has made are sufficient in this case for the individual to operate independently in the photography field—suggesting independent contractor status. Accordingly, the Department is revising the last sentence of the proposed regulatory text for the investments factor to be two sentences and to read: ''The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.'' [273]

Numerous commenters opposed, disagreed with, and/or requested changes to or clarifications of the proposed investments factor. For example, several commenters opposed the NPRM's proposed treatment of investments as its own separate factor. NRF & NCCR stated that ''investments are so interrelated with profits and losses that analyzing them separately is duplicative and unnecessary,'' and that the 2021 IC Rule, ''following Second Circuit precedent,'' ''brings clarity and helps reduce overlap to this analysis.'' N/MA stated that ''[i]nvestment by a worker in their own business creates an expense, which by definition creates an equation whether the worker may experience loss or profit depending on the worker's net profits.'' CWI stated that, ''because the investment factor is already sufficiently addressed in the opportunity-for-profit-or-loss factor, there is no need for it to be addressed again as a standalone factor.'' CWI disagreed with the Department's characterization of the 2021 IC Rule on this point, stating that the 2021 IC Rule ''provides that both initiative and investment must be considered, though both are not required'' and thus ''provides that the satisfaction of either is a *necessary* condition for the opportunity-for-profit-or-loss factor, but not that either is per se *sufficient*'' (emphases added). *See also* Coalition of Business Stakeholders. FSI stated that the NPRM ''introduces redundancy and double-counting by assessing a worker's 'investment' in the business as a 'standalone factor.' '' The commenter further stated that although the Supreme Court in *Silk* articulated investment as a separate factor than opportunity for profit or loss, the Court ''analyzed them together,'' which the commenter asserted that the Department ''fail[ed] to address.'' Other commenters, such as ABC, North American Meat Institute, and the U.S. Chamber, also disagreed with the NPRM's treatment of investments as its own separate factor.

Having considered the comments, the Department agrees with the comments discussed above from commenters including AFL–CIO, IBT, LA Fed & Teamsters Locals, NELP, and NWLC, and is retaining investments as a separate factor in the economic realities analysis. The Department's approach is consistent with the overwhelming majority of federal appellate case law and the Department's practice prior to the 2021 IC Rule. Almost all of the federal courts of appeals consider investments as a separate factor.[274] In addition, the Department consistently identified investments as a separate factor in the analysis prior to the 2021 IC Rule.[275] The Department understands that the Second and D.C. Circuits consider investments and opportunity for profit or loss as one factor.[276] However, treating investments as a separate factor is consistent with the approach taken by most federal appellate courts, the Department's intent for this final rule to be as grounded as possible in the case law, and the Department's prior guidance. And as explained below, treating investments as a separate factor rather than including it in the opportunity for profit or loss factor as the 2021 IC Rule ensures that investments are considered in each case and may result in a fuller consideration of relevant facts.

The Department recognizes that the consideration of investments may be related to the consideration of the opportunity for profit or loss. As explained above in response to a comment from NELA, whether the worker's expenditures may result in profits or losses to the worker is highly relevant to whether those expenditures are capital or entrepreneurial in nature. The U.S. Chamber, for example, cited the Fourth Circuit's decision in *McFeeley* to support its argument that ''[i]nvesting in one's business necessarily entails creating an opportunity for profit or risking a loss on that investment.'' In *McFeeley,* the court noted that the two factors ''relate logically to one other'' [277] but nonetheless articulated them

[273] IBT commented that, ''[a]s it is currently written, this proposed factor could be misinterpreted as it unintentionally excludes from consideration, many of the conditions workers who work for platform-based companies are subject to.'' IBT added: ''By overemphasizing workers' ability to increase earnings through minimal investment or personal initiative, the proposed rule risks inviting employers to engage in further tactics to exclude more of their workers from the FLSA's protections.'' The Department disagrees with this characterization, especially considering the modifications that it has made to the investments factor. For all of the reasons explained herein, the Department believes that it has struck the right balance by focusing on the nature of the worker's investment (it should be capital or entrepreneurial to indicate independent contractor status) and by qualitatively comparing the worker's investments to the employer's investments to determine if the worker is making similar types of investments as the employer to suggest that the worker is in business for themself.

[274] *See, e.g., DialAmerica,* 757 F.2d at 1382; *McFeeley,* 825 F.3d at 241; *Hobbs,* 946 F.3d at 829; *Off Duty Police,* 915 F.3d at 1055; *Brant,* 43 F.4th at 665; *Alpha & Omega,* 39 F.4th at 1082; *Driscoll,* 603 F.2d at 754; *Paragon,* 884 F.3d at 1235; *Scantland,* 721 F.3d at 1311.

[275] *See, e.g.,* WHD Op. Ltr. (Aug. 13, 1954); WHD Op. Ltr. FLSA–795 (Sept. 30, 1964); WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Sept. 12, 1969); WHD Op. Ltr. WH–476, 1978 WL 51437, at *1 (Oct. 19, 1978); WHD Op. Ltr., 1986 WL 1171083, at *1 (Jan. 14, 1986); WHD Op. Ltr., 1986 WL 740454, at *1 (June 23, 1986); WHD Op. Ltr., 1995 WL 1032469, at *1 (Mar. 2, 1995); WHD Op. Ltr., 1995 WL 1032489, at *1 (June 5, 1995); WHD Op. Ltr., 1999 WL 1788137, at *1 (July 12, 1999); WHD Op. Ltr., 2000 WL 34444352, at *1 (July 5, 2000); WHD Op. Ltr., 2000 WL 34444342, at *3 (Dec. 7, 2000); WHD Op. Ltr., 2002 WL 32406602, at *2 (Sept. 5, 2002); WHD Fact Sheet #13, ''Employment Relationship Under the Fair Labor Standards Act (FLSA)'' (July 2008); AI 2015–1,available at 2015 WL 4449086 (withdrawn June 7, 2017).

[276] *See, e.g., Franze,* 826 F. App'x at 76; *Superior Care,* 840 F.2d at 1058–59; *Morrison,* 253 F.3d at 11 (citing *Superior Care,* 840 F.2d at 1058–59).

[277] 825 F.3d at 243.

separately [278] and ultimately made determinations on each factor as it related to the workers' status as employees or independent contractors.[279] And even assuming that the Supreme Court in *Silk* ''analyzed them together'' as FSI argued, the Court did articulate the two factors separately.[280]

Moreover, as decisions from the Fifth Circuit and other Circuits demonstrate, investments may be relevant to whether the worker is economically dependent on the employer separate and apart from the worker's opportunity for profit or loss. For example, the Fifth Circuit found in *Parrish* that the investment factor favored employee status (although it merited ''little weight'' in that case given the nature of the work) and that the opportunity for profit or loss factor favored independent contractor status.[281] In *Cromwell,* the Fifth Circuit conversely found that the investment factor indicated independent contractor status because the workers ''invested a relatively substantial amount in their trucks, equipment, and tools'' but that their opportunity for profit or loss was ''severely limit[ed].'' [282] In *Nieman,* the Eleventh Circuit found that the investment factor weighed in favor of independent contractor status while the opportunity for profit or loss factor did ''not weigh in favor of either'' independent contractor or employee status.[283] And in *Scantland,* the Eleventh Circuit found that the opportunity for profit or loss factor ''point[ed] strongly toward employee status'' although the investment factor weighed slightly in favor of independent contractor status.[284]

The 2021 IC Rule's treatment of investments as part of its opportunity for profit or loss factor further reinforces the Department's decision to treat investments as a separate factor. The 2021 IC Rule stated that its opportunity for profit or loss factor indicates independent contractor status if the worker exercises initiative or if the worker manages their investment in the business.[285] Although ''the effects of the [worker's] exercise of initiative and management of investment are both considered'' under its opportunity for profit or loss factor, the 2021 IC Rule clearly stated that a worker ''does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor.'' [286] Thus, contrary to, for example, the argument of CWI that there would be a ''balancing test,'' the 2021 IC Rule provided that, if either initiative or investment suggested independent contractor status, the other could not change that outcome even if it suggested employee status. The 2021 IC Rule's approach to investments was accordingly flawed because it, in some cases, eliminated the role of investments in helping to determine a worker's status, particularly when the investments or the lack thereof indicated that the worker was an employee.

In sum, nothing in this final rule forecloses consideration, in an appropriate case, of investments as they relate to the worker's opportunity for profit or loss. However, for all of the reasons set forth above and consistent with this final rule's totality-of-the-circumstances approach, treating investments as a separate factor in the analysis ensures that investments are accorded, at least at the outset of the analysis, the same considerations as the other factors and that the probative value of the investments toward the worker's dependence or independence will affect the ultimate outcome of the analysis.

A few commenters objected to the proposed regulatory text's statement that the investments factor ''considers whether any investments by a worker are capital or entrepreneurial in nature.'' [287] CWI commented that ''[n]othing in *Silk* or *Rutherford* construed the factor so narrowly,'' and that ''limiting investments to those that are 'capital or entrepreneurial' would disproportionately impact underserved communities'' because ''the standard imposes significant barriers for individuals without the financial resources needed for capital and entrepreneurial investments—*i.e.,* it penalizes, and removes freedom in choosing work arrangements, from those without pre-existing financial resources.'' Flex made a similar point, stating that ''tools need not be 'capital or entrepreneurial in nature' to have the effect of helping the worker achieve economic independence.''

Having considered these comments, the Department adopts the proposal that whether the worker's investments are capital or entrepreneurial in nature is probative of whether they indicate employee or independent contractor status. Considering the worker's investment in this manner is consistent with the overall inquiry of determining whether the worker is economically dependent on the employer for work or is in business for themself because a capital or entrepreneurial investment indicates that the worker is operating as an independent business. More specifically, capital or entrepreneurial investments tend to help a worker work for multiple companies—a characteristic of an independent business. Accordingly, the examples in the regulatory text (''increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach'') generally involve efforts to work independently for multiple companies. Focusing on whether the worker's investments are capital or entrepreneurial in nature does not construe the factor ''narrowly,'' as CWI asserted. As explained below in response to specific comments asserting that this factor is limiting, there are no minimum-dollar thresholds or other requirements for investments to be capital or entrepreneurial and thus indicate independent contractor status. Instead, focusing on the nature of the worker's investments ties this factor to the worker's economic dependence or independence.

Many federal appellate court decisions have emphasized how the worker's investment must be capital in nature for it to indicate independent contractor status. For example, the Seventh Circuit determined in *Lauritzen* that migrant farm workers were not independent contractors, but employees, due in part to the lack of capital investments made by the workers.[288] The court explained that investments that establish a worker's status as an independent contractor should be ''risk capital [or] capital investments, and not negligible items or labor itself. . . . The workers here are responsible only for providing their own gloves [which] do not constitute a

[278] *Id.* at 241.

[279] *Id.* at 243 (''These two factors thus fail to tip the scales in favor of classifying the dancers as independent contractors.'').

[280] 331 U.S. at 716. Whether the Court in *Silk* actually analyzed the two factors together is questionable, particularly with respect to the ''driver-owners.'' The Court concluded that ''[i]t is the total situation, including the risk undertaken [a reference to the facts that they ''own their own trucks'' and ''hire their own helpers''], the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.'' *Id.* at 718.

[281] 917 F.3d at 382–85.

[282] *Cromwell* v. *Driftwood Elec. Contractors, Inc.,* 348 F. App'x 57, 60–61 (5th Cir. 2009).

[283] 775 F. App'x at 624–25.

[284] 721 F.3d at 1316–18.

[285] 86 FR 1247 (''This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work.'').

[286] *Id.*

[287] 87 FR 62275 (proposed § 795.110(b)(2)).

[288] *See* 835 F.2d at 1537.

capital investment.'' [289] In *Paragon,* the Tenth Circuit explained that ''the relevant 'investment' is 'the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.' '' [290] The Fifth Circuit has focused on whether the worker has any ''risk capital'' in the work and has found this factor to indicate employee status when all or an overwhelming majority of the risk capital is provided by the employer.[291] And the Sixth Circuit has described this factor as the ''capital investment factor.'' [292]

Moreover, CWI's efforts to use *Silk* and *Rutherford* to undercut the Department's approach are unpersuasive. In *Silk,* the unloaders ''provided only picks and shovels,'' and there was nothing to suggest that their ''simple tools'' were capital or entrepreneurial in nature.[293] On the other hand, the ''driver-owners'' at issue in *Silk* ''own[ed] their own trucks'' and ''hire[d] their own helpers,'' and at least some worked ''for any customer.'' [294] The circumstances of the driver-owners, and particularly the indication that their owned trucks and hired helpers allowed them to manage their businesses, operate independently, and work for multiple customers, suggest that their investments were capital or entrepreneurial in nature. And *Rutherford* is not instructive because the workers merely owned some tools specific to their boning work—nothing that suggested any type of investment to the Court indicating that they were independent contractors.[295] Focusing on whether the worker's investments are capital or entrepreneurial nature is thus consistent with *Silk* and *Rutherford* and is not a narrowing of those decisions.

Appraisal Institute and Real Estate Evaluation Advocacy Association asked whether ''an appraiser seeking out specialized education, training, and certification'' is making a capital or entrepreneurial investment ''even when those trainings or certifications are industry requirements for certain categories of work.'' As a general matter and as opposed to costs that a potential employer unilaterally imposes on a worker, a worker's efforts to obtain specialized education, training, and certification that are required by an industry can be capital or entrepreneurial in nature if (for example and as explained in the regulatory text) they increase the worker's ability to do different types of or more work or extend market reach.

CLDA asserted that the ''rule commentary also states the investment must be large, must be a capital expenditure, and must be entrepreneurial in nature.'' It added: ''This ignores the practical realities of starting a business. Few entrepreneurs can start a business with multi-million-dollar investments in equipment, technology, and real estate.'' Direct Selling Association (''DSA'') similarly commented that focusing on whether the investment is capital or entrepreneurial in nature ''would disproportionately impact underserved communities that direct selling serves such as Hispanics.'' Stating that ''practically any individual can start [a direct selling business] for an average of $82.50,'' it added that the Department proposed ''a rule that would penalize this low-cost business by requiring a large investment to point towards being an independent contractor.'' TheDream.US commented that ''Dreamers certainly have skills and initiative, but not the resources to make the level of capital investment that the DOL seems to be proposing.'' Although the NPRM cited cases discussing ''large'' expenditures,[296] the NPRM focused on the nature of the investments, did not propose any minimum-dollar threshold, and absolutely did not suggest that ''multi-million-dollar'' or even ''large'' investments are required for this factor to indicate independent contractor status. As explained above, focusing on the nature of the investments and whether they are capital or entrepreneurial in nature is most probative of whether the worker is economically dependent on the employer for work or in business for themself. Consistent with that focus, there is no minimum-dollar threshold or requirement that the investment be ''large'' or of a certain level for a worker's investment to be capital or entrepreneurial in nature.

MEP stated that the examples of capital or entrepreneurial investments in the proposed regulatory text ''unnecessarily limit the personal investments that should be considered in the analysis and seem to suggest that independent contractors can only be those individuals who want to expand their business, increase their workload, or extend the business' market reach.'' These examples, however, are preceded in the regulatory text by the words ''such as'' and are plainly a nonexhaustive set of examples—none of which have to be satisfied.[297] A worker's investments are most likely to be capital or entrepreneurial in nature if they create or further the worker's ability to work for multiple employers (as these examples suggest), but the examples are not limiting as MEP asserted. Likewise, in response to comments discussed below about particular types of investments, such as computers, phones, and specialized software, the Department is not suggesting that certain types of investments are always or can never be capital or entrepreneurial. Instead, the focus should be on the nature of the investment in the circumstances.

Numerous commenters raised concerns with the statement in the proposed regulatory text that: ''Costs borne by a worker to perform their job (*e.g.,* tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status.'' [298] For example, Coalition of Business Stakeholders stated that the proposed provision ''is far too broad of a directive to be of any use in conducting an independent contractor analysis'' and that it would require factfinders to ''ignore any amount of investment a worker made in his or her tools and equipment, even if those tools and equipment were—as in the case of a software security auditor who provides his own specially designed laptop—highly specialized and expensive.'' CWI stated that, contrary to the proposed regulatory text, ''such investments are plainly a function of the business-like decisions that contractors must make in choosing between the projects available to them'' because ''[t]hey may purchase equipment that allows them to complete a particular job more quickly—and thus more profitably—or may bypass projects requiring discrete expenditures that would lower profitability.'' ABC added ''independent contractors in the construction industry who invest in their own tools and equipment are in fact acting as entrepreneurs, and such investment should continue to be recognized as indicative of independent contractor status.'' The U.S. Chamber

[289] *Id.*

[290] 884 F.3d at 1236 (quoting *Snell,* 875 F.2d at 810).

[291] *See Mr. W Fireworks,* 814 F.2d at 1052; *Pilgrim Equip.,* 527 F.2d at 1314.

[292] *See Off Duty Police,* 915 F.3d at 1056 (quoting *Donovan* v. *Brandel,* 736 F.2d 1114, 1118–19 (6th Cir. 1984)).

[293] 331 U.S. at 717–18.

[294] *Id.* at 719.

[295] 331 U.S. at 725.

[296] 87 FR at 62241 (citing *Paragon,* 884 F.3d at 1236 (quoting *Snell,* 875 F.2d at 810); *Lauritzen,* 835 F.2d at 1537).

[297] *Id.* at 62275 (proposed § 795.110(b)(2)).

[298] *Id.* As explained above, the Department is modifying this provision in response to comments to add ''and costs that are unilaterally imposed by the potential employer on the worker.''

stated this provision ''contradicts the weight of case law, which has held that a worker's investment in the equipment necessary to perform a discrete job is evidence of independent contractor status'' and that ''[e]ven the Fifth Circuit, which utilizes a 'relative investment' inquiry, has found this to be true''). The U.S. Chamber added that ''workers can be in business for themselves without having to expend huge sums of money,'' and that ''[a] 'knowledge-based' worker, such as an IT worker, may be able to perform independent work with only a laptop or tablet, which are seemingly ubiquitous and relatively inexpensive.'' Relatedly, Fight for Freelancers asked whether ''the investment in a computer, a cell phone and some specialized software constitute a meaningful enough investment to indicate independent contractor status under [the investments factor]?'' Moreover, although WFCA agreed with evaluating the worker's ''capital expenditures,'' it expressed concern that the NPRM ''eliminates one of the major capital expenses of many independent contractors—tools and equipment.'' WFCA identified ''specialty tools'' such as a ''floor scrapper'' and ''power stretchers,'' and stated that '[t]hese tools and equipment are major investments and should be recognized in evaluating whether the installer is an independent contractor or an employee.'' WFCA suggested modifying this provision in the regulatory text so that it provides that ''investment in tools and equipment to perform specific jobs (other than common household tools or equipment) are evidence of capital or entrepreneurial investment and indicate independent contractor status.'' Flex commented: ''When a worker's investment in tools and equipment allows the worker to move from client to client, the worker's investment in those tools and equipment makes the worker less economically reliant on any one client.'' CPIE, noting that ''the Tenth Circuit reasoned that '[t]he mere fact that workers supply their own tools or equipment does not establish status as independent contractors' '' (citing *Paragon,* 884 F.3d at 1236), commented that ''*not establishing status* as independent contractors is vastly different from *establishing status* as employees,'' and that ''[a]t most, a finding that an individual bears that costs of performing a service would be neutral.'' OOIDA expressed concern that this provision ''might be construed as saying that the purchase or financing of equipment like a truck or trailer does not weigh in favor of independent contractor status since this equipment is used to complete a job.'' It asked the Department to ''better clarify between the 'tools and equipment' that are used by a worker to perform specific jobs and may not indicate independent contractor status with the 'capital and entrepreneurial' investments that do.'' NHDA expressed concern that a ''medium duty Class 6 box truck, which costs between $50,000—$90,000 on average . . . may not indicate independence under the Proposed Rule, because . . . a medium duty truck is arguably expedient to perform the business of home delivery transportation.''

Having considered these comments, the Department continues to believe that it is helpful to provide guidance regarding workers who provide tools and equipment to perform a specific job, but acknowledges that the ''to perform their job'' language in the proposed regulatory text can be made more precise. Applying the general principle from the regulatory text that the focus should be on whether the investment is capital or entrepreneurial in nature and that capital or entrepreneurial investments tend to increase the worker's ability to do different types of or more work, reduce costs, or extend market reach, investment in tools or equipment to perform a specific job would not qualify as capital or entrepreneurial. As the Department explained in the NPRM, ''an investment that is expedient to perform a particular job (such as tools or equipment purchased to perform the job and that have no broader use for the worker) does not indicate independence.'' [299] On the other hand, a worker may invest in tools and equipment for reasons beyond performing a particular job, such as to increase the worker's ability to do different types of or more work, reduce costs, or extend market reach. Such investments can be capital or entrepreneurial in nature. To the extent that the ''to perform their job'' language in the proposed regulatory text suggested otherwise, the Department is removing that language. Accordingly, the Department is further modifying the regulatory text so that this provision reads: ''Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status.'' A worker may have expenses to perform a specific job and also make investments that generally support, expand, or extend the work performed which may be of a capital or entrepreneurial nature. Thus, the existence of expenses to perform a specific job will not prevent this factor from indicating independent contractor status so long as there are also investments that are capital or entrepreneurial in nature.

A number of commenters expressed concerns with the statement in the NPRM's preamble that ''the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.'' [300] Several of those commenters, however, gave examples of vehicles that are plainly not the type of vehicles identified in this statement. *See, e.g.,* NHDA (purchasing or leasing ''personal vehicles for the primary purpose of starting a transportation business, whether full-time or part-time''); U.S. Chamber (purchasing ''a car to use as a driver for a ride-sharing application''); WFCA (purchasing ''a vehicle that is capable of carrying the weight of flooring materials and tools''). The NPRM's statement does not cover vehicles of the types in these examples that a worker purchased for a business purpose—vehicles which can be investments of a capital or entrepreneurial nature.[301]

CLDA commented that ''most entrepreneurs start their businesses with what they already have,'' stating that ''[t]hey start with using . . . their car as their delivery vehicle.'' CLDA added that ''[t]hose items may have started as personal items, but they become critical business tools and critical business investments when the entrepreneur starts using them to build a business.'' The U.S. Chamber commented that the NPRM's ''absolutist statement ignores the fact that contractors may utilize their personal vehicles in a way that shows entrepreneurial activity. For example, if workers forgo selling their personal vehicle and, instead, choose to use their vehicle to drive for a ridesharing platform, that is quintessentially entrepreneurial activity. The fact that they had already owned their vehicle is immaterial.'' Uber commented that ''[w]hile it is true that drivers on platforms like Uber's

[299] *Id.* at 62241.

[300] *Id.*

[301] N/MA, while commenting on this statement regarding personal vehicles, gave as an example a ''photographer who purchases more sophisticated special camera equipment expecting that he or she will use it in their work.'' Again, purchasing specialized equipment for use in work can be an investment that is capital or entrepreneurial in nature.

may be using vehicles they owned before they started driving, drivers can, and some do, choose to invest in, for example, a luxury vehicle in order to earn more by way of higher-end engagements . . . [or] a hybrid or electric vehicle specifically to increase their fuel economy.'' MEP stated that ''[i]ndividuals may not make . . . investments [in things such as personal vehicles] for the purpose of performing work, but individuals can choose to monetize those investments through independent work arrangements, such as via the gig economy.'' It added that ''[u]sing these pre-owned investments to engage in independent work should reflect economic independence, which is the ultimate inquiry in the worker classification analysis.'' CWI suggested that the NPRM's ''discussion of vehicle investments should be withdrawn, and that the weight that each investment is afforded should instead be evaluated under the totality of the circumstances in which each such investment occurred.''

Having considered the comments, the Department agrees with the comments discussed above from commenters that supported the NPRM's statement regarding personal vehicles, including AFL–CIO, LA Fed & Teamsters Locals, and ROC United, and reaffirms this statement. Whether a vehicle owned or leased by a worker and used to perform work is a capital or entrepreneurial investment does depend on the totality of the circumstances. In the scenario where a worker already owns a vehicle and happens to then use it to perform work, the acquisition of that vehicle was not for a business purpose and generally cannot be a capital or entrepreneurial investment. As the Eleventh Circuit explained in *Scantland,* the ''fact that most technicians will already own a vehicle suitable for the work'' suggests that there is ''little need for significant independent capital.'' [302] If a worker already owns a vehicle for personal use and then modifies, upgrades, or customizes the vehicle to perform work, the worker's investment in modifying, upgrading, or customizing the vehicle could be a capital or entrepreneurial investment. In other scenarios, whether the vehicle is a capital or entrepreneurial investment often depends on whether the vehicle was purchased for a personal or business purpose. Where any vehicle is suitable to perform the work, purchase of the vehicle is generally not a capital or entrepreneurial investment. When the worker owns a vehicle with certain specifications (such as a van or truck) to perform the work and the worker also uses the vehicle for personal reasons, that personal use is relevant, but the vehicle may still be a capital or entrepreneurial investment. For example, the Sixth Circuit has found that, where the workers' vehicles ''could be used for any purpose, not just on the job,'' they did not indicate independent contractor status.[303] The Fifth Circuit has considered the purpose of the vehicle and how the worker uses it, and in *Mr. W Fireworks,* it noted that most of the workers in that case purchased vehicles for personal and family reasons, not business reasons, in concluding that the investment factor indicated employee status.[304] The Fifth Circuit has also noted that, ''[a]lthough the driver's investment of a vehicle is no small matter, that investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes.'' [305] In sum, focusing on the purpose of the vehicle and how it is used is consistent with the overarching inquiry of examining the economic realities of the worker's relationship with the employer. And the reality for a worker who already owns a vehicle for personal use and then uses it (without any modifications) to perform work is that the vehicle was not purchased for a business purpose and generally is not a capital or entrepreneurial investment.[306] Even where a personal vehicle is not a capital investment indicating independent contractor status, there may be other facts relevant to the investment factor, and the worker's ultimate status will be determined by application of all of the factors, consistent with the totality-of-the-circumstances analysis.

Finally, numerous commenters opposed the NPRM's proposal to consider the worker's investments ''on a relative basis with the employer's investments in its overall business.'' [307] That proposed regulatory text further provided that ''[t]he worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.'' [308]

For example, CWI expressed ''grave concerns'' with comparing investments, stating that this approach ''is inconsistent with law, uninformative to the economic realities test, and ultimately injects nothing but further uncertainty into the analysis.'' CWI added that the Supreme Court in *Silk* addressed only the workers' investments and not the employer's investments, and that an ''employer investing in its *own* business provides absolutely no insight into whether the worker is economically dependent on that business.'' CWI further stated that ''[i]t is hardly surprising that virtually all workers—employees and independent contractors alike—have fewer resources than businesses,'' but ''[t]hat fact, however, does not influence the question of economic dependence for either group.'' NRF & NCCR requested that any consideration of relative investments ''be stricken entirely,'' raising similar concerns to CWI. NRF & NCCR added that consideration of relative investments would create barriers to entry in businesses because workers ''would effectively be excluded from contracting with any but the smallest of companies.'' The IFA requested clarification in the franchise context, noting that franchise opportunities require varying upfront investments, but ''[t]his does not mean that someone who invests in a lower-cost franchise opportunity is any less an independent business person than someone with the means to invest a million dollars in a franchise.'' N/MA argued that considering relative investments is inconsistent with *Silk* because the Supreme Court in that case ''addressed the investment of the worker as part of the economic realities test only by reference to the worker's investment.'' The commenter added: ''A putative employer's level of investment in its own business provides no insight into

[302] 781 F.2d at 1318.

[303] *Off Duty Police,* 915 F.3d at 1056.

[304] 814 F.2d at 1052.

[305] *Express Sixty-Minutes,* 161 F.3d at 304; *see also Keller,* 781 F.3d at 810–11 (fact that equipment could be used ''for both personal and professional tasks'' weakens the indication of independent contractor status).

[306] WPI stated that ''the NPRM posits that a worker buying a car is an immaterial investment for purposes of independent contractor classification if they also use the car for personal reasons.'' The commenter, however, mischaracterized the NPRM's statement, which addressed a personal vehicle that the worker already owns (and thus invested in for reasons other than a business purpose) and then uses to perform work. In the different scenario posited by the commenter, a car purchased by a worker may be an investment of a capital or entrepreneurial nature if purchased for a business purpose even if the worker also uses the car for personal reasons. Coalition of Business Stakeholders similarly mischaracterized the NPRM's statement, saying that the NPRM ''presumptively declares that a vehicle, should be considered 'generally not an investment that is capital or entrepreneurial in nature' '' (quoting the NPRM). The NPRM's statement, however, addressed only a vehicle already owned by a worker that the worker then uses to perform work.

[307] 87 FR 62275 (proposed § 795.110(b)(2)).

[308] *Id.*

whether the worker is economically dependent on that business, as the work and investment made by the worker may be in an entirely different area of services than that even performed by the putative employer.'' FSI stated that the Department ''offers no reasoned explanation *why* that relative inquiry is probative of independent contractor status, contrary to the 2021 Rule's conclusion that it measures an irrelevant comparison of respective organizational size.''

Club for Growth Foundation commented that the 2021 IC Rule was correct to reject a relative investments analysis. It added: ''The size of the hiring business has no relevance to whether the worker is a contractor or an employee. Consider a talented translator who translates a book, on the same terms and for the same fee, into French for a local college press and into Spanish for a major commercial publishing house. Why should she be considered more likely to be an employee when doing the Spanish work?'' OOIDA similarly commented that ''it doesn't make sense that an owner-operator would be an independent contractor if they are working with a three-truck carrier but then be judged differently if they go to work for a carrier with hundreds or thousands of trucks.'' The CA Chamber, CLDA, Flex, NACS, NHDA, and Scopelitis, made similar points. *See also* ABC; CPIE; WFCA.

Having considered these comments, the Department continues to believe that comparing the worker's investments to the employer's investment is well-grounded in the case law and the Department's prior guidance. The Department further believes that comparing types of investments is indicative of whether a worker is economically dependent on the employer for work or is in business for themself.

Although the Supreme Court in *Silk* did not make such a comparison, federal courts of appeals applying the factors from *Silk* routinely make that comparison. For example, the Fifth Circuit ''consider[s] the relative investments'' and has explained that, ''[i]n considering this factor, 'we compare each worker's individual investment to that of the alleged employer.' '' [309] The Sixth Circuit has explained that ''[t]his factor requires comparison of the worker's total investment to the 'company's total investment, including office rental space, advertising, software, phone systems, or insurance.' '' [310] The Fourth Circuit has similarly compared the employers' payment of rent, bills, insurance, and advertising expenses to the workers' ''limited'' investment in their work.[311] In addition, the Third,[312] Ninth,[313] and Tenth [314] Circuits have compared the worker's investments to the employer's investments. Moreover, the Department has previously provided guidance that the worker's investments and the employer's investments should be compared. In AI 2015–1, the Department explained that a worker's investment ''should not be considered in isolation'' because ''it is the relative investments that matter.'' [315] AI 2015–1 further explained that, in addition to ''the nature of the investment,'' ''comparing the worker's investment to the employer's investment helps determine whether the worker is an independent business.'' [316] The Department has also compared the worker's and the employer's relative investments in opinion letters issued by WHD.[317] In sum, the relative investments approach is firmly supported by the case law and the Department's precedent.[318]

That said, the Department understands the concerns raised by many commenters with merely comparing the size of and dollar expenditures by the worker to those of the employer, especially for workers who are sole proprietors. Accordingly, as explained above in response to comments from NELA and others that suggested that the comparison of the worker's and the employer's investments should focus on the ''qualitative'' nature of their respective investments, the Department is modifying the last sentence of the proposed regulatory text for the investments factor to be two sentences and to read: ''The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.'' This modification should address commenters' concerns that the size of and/or dollar investments of the employer will determine the outcome when comparing the investments. As explained above, comparing the qualitative (rather than primarily the quantitative) value of the investments is a better indicator of whether the worker is economically dependent on the employer for work or is in business for themself. That is because, regardless of the amount or size of their investments, if the worker is making similar types of investments as the employer or investments of the type that allow the worker to operate independently in the worker's industry or field, then that fact suggests that the worker is in business for themself.[319]

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[309] *Hobbs,* 946 F.3d at 831–32 (quoting *Cornerstone Am.,* 545 F.3d at 344). In *Parrish,* the Fifth Circuit compared the relative investments as part of its analysis but accorded the relative investment factor ''little weight in the light of the other summary-judgment-record evidence supporting IC-status.'' 917 F.3d at 382–83. This does not support the conclusion that this factor is not useful; instead, it simply reflects the Fifth Circuit's faithful application in that case of a totality-of-the-circumstances approach considering many factors, no one of which was dispositive.

[310] *Off Duty Police,* 915 F.3d at 1056 (quoting *Keller,* 781 F.3d at 810).

[311] *McFeeley,* 825 F.3d at 243.

[312] *Verma,* 937 F.3d at 231 (summarizing how courts have viewed this factor in cases examining the employment status of exotic dancers: ''all concluded that 'a dancer's investment is minor when compared to the club's investment' '') (quoting the district court's decision).

[313] *Driscoll,* 603 F.2d at 755 (strawberry growers' investment in light equipment, including hoes, shovels, and picking carts was ''minimal in comparison'' with employer's total investment in land and heavy machinery).

[314] *Paragon,* 884 F.3d at 1236 (''To analyze this factor, we compare the investments of the worker and the alleged employer.''); *Flint Eng'g,* 137 F.3d at 1442 (''In making a finding on this factor, it is appropriate to compare the worker's individual investment to the employer's investment in the overall operation.'').

[315] 2015 WL 4449086, at *8 (withdrawn June 7, 2017).

[316] *Id.*

[317] *See* WHD Op. Ltr., 2002 WL 32406602, at *1–2 (Sept. 5, 2002) (workers' ''hand tools, which can cost between $5,000 and $10,000,'' were ''small in comparison to [the employer's] investment,'' but the ''amount is none the less substantial'' and ''thus indicative of an independent contractor relationship''); WHD Op. Ltr., 2000 WL 34444342, at *4 (Dec. 7, 2000) (comparing ''the relative investments'' of the worker and the employer is the correct approach).

[318] Flex stated that the Department's proposal to compare the worker's and the employer's relative investments ''directly contradicts the Department's subregulatory guidance in Fact Sheet #13, which for decades has advised that 'the amount of the alleged contractor's investment in facilities and equipment' is not only relevant to a worker's status but tends to support classification as an independent contractor.'' Fact Sheet #13 has been revised several times over the past years and will be revised to reflect this final rule. Regardless, there is no basis for Flex's characterization that the version of Fact Sheet #13 available at the time of the NPRM advised that this factor ''tends to support classification as an independent contractor'' as that language is not in the Fact Sheet.

[319] Comparing the investments qualitatively also addresses the Eighth Circuit's ruling in *Karlson* that the district court was correct to allow evidence of the worker's and the employer's relative investments, but also correct to not allow the worker to ask the employer about the dollar amount

Applying this qualitative approach to, for example, the hypothetical truck driver described by OOIDA is instructive. The hypothetical suggests that a driver ''would be an independent contractor if [the driver is] working with a three-truck carrier,'' but the same driver would be an employee if the driver goes ''to work for a carrier with hundreds or thousands of trucks.'' [320] Comparing the driver's investment qualitatively with each carrier, however, should produce the same indicator of employee or independent contractor status. With respect to either carrier, the focus should be on whether the driver is making similar types of investments as the carrier (even if on a smaller scale) so that the driver (like the carrier) can operate independently in the industry. As the application of a qualitative comparison to this hypothetical shows, this focus better aligns the relative investment analysis with the ultimate inquiry of whether the worker is dependent on the employer for work or in business for themself.[321]

ACLI commented that the proposed ''Relative Investment factor conflicts with . . . the Ability to Profit or Loss Based On Managerial Skill factor'' because the Department is ''saying that a worker's effectiveness in managing their overhead and expenses to maximize profit suggests independent contractor status, but that a worker's failure to invest sizeable sums to offset the company's investment suggests employment status.'' It added that the opportunity for profit or loss factor ''should be given greater weight than the relative investment factor so that workers who are skilled in managing their own overhead expenses are not penalized and deemed employees simply because they are better businesspeople and need to invest less and less over time as their businesses mature.'' American Securities Association made a similar point. As an initial matter, the Department is not giving any factor any greater predetermined weight than any of the other factors for all of the reasons explained in this final rule. And as reiterated in this final rule, workers will not be ''deemed employees'' when applying the economic realities analysis based on one fact or factor because the analysis considers the totality of the circumstances. The Department's modifications to the investments factor, and particularly the emphasis on comparing the worker's investments and the employer's investments qualitatively more than quantitatively, should address any concern that ''a worker's failure to invest sizeable sums to offset the company's investment suggests employment status.''

The Department is finalizing the investments factor (§ 795.110(b)(2)) with the revisions discussed herein.

Example Investments by the Worker and the Potential Employer

A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing specific jobs. Thus, these facts indicate employee status under the investment factor.

A graphic designer occasionally completes specialty design projects for the same commercial design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents an office in a shared workspace. The graphic designer also spends money to market their services. These types of investments support an independent business and are capital in nature (*e.g.,* they allow the worker to do more work and extend their market reach). Thus, these facts indicate independent contractor status under the investment factor.

3. Degree of Permanence of the Work Relationship (§ 795.110(b)(3))

For this factor, the Department proposed that the degree of permanence of the work relationship would ''weigh[ ] in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships,'' and that this factor would ''weigh[ ] in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities.'' The Department noted that independent contractors may have ''regularly occurring fixed periods of work,'' but that ''the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification.'' To further clarify, the Department proposed that ''[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative,'' this would not indicate that the workers are independent contractors.[322]

As the Department noted in the NPRM and in the 2021 IC Rule, courts and the Department routinely consider the permanence of the work relationship as part of the economic reality analysis under the FLSA to determine employee

of its investment in order to simply compare the dollar value of the employer's investment to the worker's investment. *See* 860 F.3d at 1096.

[320] This hypothetical and the hypotheticals offered by Club for Growth Foundation, Flex, and other commenters overlook the totality-of-the-circumstances nature of the economic realities analysis. No one fact or factor (including comparing the worker's investments to the employer's investments) will necessarily determine a worker's status as an employee or independent contractor.

[321] ACLI commented that ''[n]othing in the Proposed Rule explains whether the [relative investments] analysis is focused on investments that the company made in the specific worker's business (*i.e.,* paying for the worker's staff, rent, tools or equipment) or whether the analysis focuses on the overall investment of the company in the entirety of its separate business operations (*i.e.,* advertisements, branding, overhead for headquarters, etc.).'' *See also* American Securities Association (''It is unclear whether the analysis is focused on investments that the company made in the specific worker's business (*i.e.,* purchasing tools or equipment for the individual worker) or whether the analysis focuses on the overall investment of the company in its business operations (*i.e.,* branding, marketing campaigns, etc.).''). The proposed and final regulatory text, however, clearly indicate that the worker's investments should be considered on a relative basis with ''the employer's investments in its overall business.'' 29 CFR 795.110(b)(2). The ACLI also requested that the Department ''clarify how the relative investments of the worker and the employer would be measured.'' *See also* CPIE (''The NPRM offers no guidance on how to distinguish between those arrangements for which its proposed comparison of an individual's investment with a company's investment in its *overall* businesses would be relevant and those arrangements for which its proposed comparison should be disregarded.''). The Department has provided additional guidance in the discussion above and by modifying the regulatory text to convey that ''the focus should be on comparing the investments qualitatively'' more than by ''comparing dollar values of investments or the sizes of the worker and the employer.'' 29 CFR 795.110(b)(2). CPIE and IBA suggested modifying the relative investments analysis to ''measure an individual's investment in the specific items the individual requires to perform the individual's services, or compare the relative investment in those specific items by an individual and the company.'' These commenters state that such a modification would avoid the need to address the relative size and magnitude of the worker and the employer and would be consistent with the ultimate inquiry of economic dependence. For all of the reasons explained above, however, the Department believes that those goals are better accomplished by focusing relative investments on a qualitative comparison.

[322] *See generally* 87 FR 62243–45, 62275 (proposed § 795.110(b)(3)).

or independent contractor status.[323] Courts typically describe this factor's relevance as follows: '' 'Independent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration.'' [324] For example, a typical employee often has an at-will work relationship with the employer and works indefinitely until either party decides to end that work relationship. Conversely, an independent contractor does not usually seek such a permanent or indefinite engagement with one entity. Because of these general characteristics of work relationships, the length of time or duration of the work relationship has long been considered under the ''permanence'' factor as an indicator of employee or independent contractor status.[325]

Consistent with case law analyzing this factor, the Department proposed to provide further specificity by noting that an indefinite or continuous relationship is often consistent with an employment relationship, but that a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative.[326] The Department also proposed to continue to recognize that a lack of permanence may be inherent in certain jobs—such as temporary and seasonal work—and that this lack of permanence does not necessarily mean that the worker is in business for themself instead of being economically dependent on the employer for work. For example, courts have also recognized that the temporary or seasonal nature of some jobs may result in a ''lack of permanence . . . due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative.'' [327] In such instances, a lack of permanence alone is not an indicator of independent contractor status.

Many commenters agreed with the Department's overall proposal for this factor. *See, e.g.,* AFL–CIO; IBT, LA Fed & Teamsters Locals; NDWA; NELP; NWLC; REAL Women in Trucking; UFCW. The LA Fed & Teamsters Locals noted in particular that by relegating the permanence factor to ''secondary status,'' the 2021 IC Rule had negated the significance of ''effectively indefinite working relationships'' and that the Department's proposal ''corrects this issue'' by returning the factor to ''an equal basis with all other factors.'' NELP concurred that ''[a] worker whose work relationship is indefinite or continuous or who is performing a job that is regularly required by the business is more likely to be an employee than a worker who performs work that is definite in duration, project-based, or sporadic.''

Many commenters also agreed with the portion of the Department's proposal that addressed situations in which a lack of permanency is inherent in the work, such as temporary or seasonal positions, which the Department had proposed as not necessarily indicating independent contractor status if it is not the result of the worker's own business initiative. *See, e.g.,* Gale Healthcare Solutions; LA Fed & Teamsters Locals; LIUNA; NABTU; NELP. Gale Healthcare Solutions agreed that a lack of permanence may be due to operational characteristics intrinsic to the industry rather than the workers' own business initiative, and it provided the example of temporary or seasonal forces such as ''flu season'' that can drive temporary nursing demand in the healthcare industry. It analogized this to the Second Circuit's decision in *Superior Care,* where temporary nurses' lack of permanence did not preclude them from being employees because ''this reflected 'the nature of their profession and not their success in marketing their skills independently.' '' And commenters such as Farmworker Justice and the New Mexico Center on Law and Poverty affirmed the importance of recognizing that farmwork can be seasonal and/or temporary, but that this does not weigh against employee status for farmworkers, as many courts have recognized.[328]

The primary concern commenters raised about the Department's proposal to consider the degree of permanence of the work relationship as an indicator of employee or independent contractor status is that a long-term pattern of interaction is valued in business relationships, and that it can indicate the vitality and stability of a business where, for example, satisfied long-term clients or customers continue to use their services or contract for particular work. *See, e.g.,* CPIE; Fight for Freelancers; N/MA; NRF & NCCR; OOIDA; SIFMA; SHRM; U.S. Chamber. Similarly, commenters such as CWI and the U.S. Chamber noted that independent contractors may have mutually beneficial business relationships for a long or indefinite time period, which brings into question whether an ''indefinite'' work relationship is probative of employee status.[329] Commenters raising such

[323] *See* 87 FR 62243; 86 FR 1192 (citing a variety of federal appellate case law: *Razak,* 951 F.3d at 142; *Hobbs,* 946 F.3d at 829; *Karlson,* 860 F.3d at 1092–93; *McFeeley,* 825 F.3d at 241; *Keller,* 781 F.3d at 807; *Scantland,* 721 F.3d at 1312); *see also* WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000) ; WHD Fact Sheet #13.

[324] *Snell,* 875 F.2d at 811 (citing *Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1372 (9th Cir. 1981)); *see also Keller,* 781 F.3d at 807 (same); WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (same).

[325] *See, e.g., Parrish,* 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is the total length of the working relationship between the parties); *Capital Int'l,* 466 F.3d at 308–09 (in analyzing the degree of permanency of the working relationship, the ''more permanent the relationship, the more likely the worker is to be an employee''); *DialAmerica,* 757 F.2d at 1385 (finding that ''the permanence-of-working-relationship factor indicates that the home researchers were 'employees' '' because they ''worked continuously for the defendant, and many did so for long periods of time''); *Pilgrim Equip.,* 527 F.2d at 1314 (''the permanent nature of the relations between [the employer] and these operators indicates dependence''); *see also Reyes* v. *Remington Hybrid Seed Co.,* 495 F.3d 403, 408 (7th Cir. 2007) (describing an independent contractor as an individual who ''appears, does a discrete job, and leaves again''); *Reich* v. *Circle C. Invs., Inc.,* 998 F.2d 324, 328 (5th Cir. 1993) (''[a]lthough not determinative, the impermanent relationship between the dancers and the [employer] indicates non-employee status'').

[326] *See, e.g., Superior Care,* 840 F.2d at 1060–61; *see also* AI 2015–1, 2015 WL 4449086, at *10 (withdrawn June 7, 2017).

[327] *Superior Care,* 840 F.2d at 1060–61 (citing *Mr. W Fireworks,* 814 F.2d at 1053–54); *see also Flint Eng'g,* 137 F.3d at 1442 (finding short duration of work relationships in oil and gas pipeline construction work to be intrinsic to the industry rather than a ''choice or decision'' on the part of the workers).

[328] As noted in the NPRM, agriculture is an industry where courts often view permanency as working continuously for the duration of a harvest season or returning in multiple years. *See, e.g., Paragon,* 884 F.3d at 1237 (permanence factor favored employee status because the worker was hired temporarily for the harvest season ''[b]ut his employment was permanent for the duration of each harvest season''); *Lauritzen,* 835 F.2d at 1537 (agricultural harvesters' relationship with employer was ''permanent and exclusive for the duration of that harvest season'' and permanency was also indicated by the fact that many of the same migrant workers returned for the harvest each year; the court noted that ''[m]any seasonal businesses necessarily hire only seasonal employees, but that fact alone does not convert seasonal employees into seasonal independent contractors'').

[329] One of the cases relied on by these commenters is *Donovan* v. *Brandel,* 736 F.2d 1114, 1117 (6th Cir. 1984), where the court determined that migrant farmworker families who sometimes returned annually to harvest pickles during a 30–40 day harvest season and ''considered their jobs as migrant farm laborers to be opportunities for supplementing their income if their family situation allowed'' were engaged in a ''mutually satisfactory arrangement'' that was ''no more indicative of the employment relationship than when a businessman repeatedly uses the same subcontractors due to satisfaction with past performance.'' The Department is careful to note that *Brandel* is not necessarily representative of the way courts have viewed the permanence factor or employment status of agricultural workers who perform seasonal work, nor were these commenters specifically criticizing the regulatory language proposed by the

concerns did not want the fact that an independent contractor had fostered successful, long-term business relationships to indicate that these economically-independent businesses were actually employees of the entities that continued to use their services. They contended that the analysis should be more nuanced, including CWI's comment that ''as is the case with most aspects of the economic realities analysis, '[t]he inferences gained from the length of time of the relationship depend on the surrounding circumstances.' ''

The Department agrees that the permanence factor, like other factors in the economic reality test, is best understood in the overall context of the relationship between the parties where all relevant aspects are considered. The Department also clearly recognizes and appreciates that people who are in business for themselves often rely on repeat business and long-term clients or customers in order for their business to remain economically viable or successful. Thus, the Department notes that the proposed regulatory text does not reduce the permanence analysis to a simple long-term/short-term question. Instead, it looks to the general characteristics historically identified by courts and the Department regarding the permanency factor, which indicate employee status where there is a longer-term, continuous, or indefinite work relationship, and independent contractor status where the work is definite in duration, nonexclusive, project-based, or sporadic due to the worker being in business for themself. It explicitly recognizes that an independent contractor may have ''regularly-occurring fixed periods of work.'' As shown in the example, a 3-year relationship between a cook who provides specialty meals and an entertainment venue does not automatically result in the cook being an employee of the venue, particularly where the cook acts as a ''freelancer'' by providing meals intermittently to the venue while marketing their meal preparation services to multiple customers and the cook can determine whether to provide meals for specific events at the venue based on any reason, including because the cook is too busy with other work.

Several commenters expressed a mistaken belief that having a degree of permanence in a work relationship would automatically make workers employees, s*ee, e.g.,* N/MA; SBA Office of Advocacy, or that the Department was creating a ''per se'' rule that work of continuous or indefinite duration equates to employee status, *see, e.g.,* CWI; NRF & NCCR. Commenters who raised this concern generally asked the Department to either modify the regulatory text or eliminate this factor from consideration. However, as the Department has repeatedly explained, the economic reality test is a totality-of-the-circumstances test where no one factor is dispositive. Even if the degree of permanence in a work relationship indicates employee status, this is just one factor that would be considered along with other factors such as control, opportunity for profit or loss, investment, integral, and skill and initiative. The Department does not believe there is a scenario in which, for example, a worker who controls conditions of employment, sets their own fees, hires helpers, and markets their business is converted from an independent contractor to an employee solely because they have long-lasting relationships with some clients.

Some commenters suggested clarifications to better capture the permanency factor, in their view. For example, IBT and NELP suggested that the Department focus on whether the worker's role or position in a business is long-term, regular, or indefinite, rather than focusing on the individual's tenure, because high turnover of individuals in a particular position does not mean that the position or role within a business is not long-term, but that the job may be economically unsustainable or too dangerous for the worker. The Department agrees that a short-term duration of work may not be indicative of independent contractor status for these and other reasons. However, the Department notes that while this factor is known as the ''permanency'' factor, which could be observed literally by the length of an individual worker's tenure, the regulatory text also provides guidance regarding whether the work was on an indefinite or continuous basis. The Department believes that this captures situations where a position began as an indefinite or continuous one but was cut short—without the need to focus on the nature of the position or role within a business. Further, the commenters' suggestion is not, to the Department's knowledge, an analysis that has been adopted for this factor by the courts.

NELP also suggested that the Department note that an employer may manipulate the permanence of a work relationship by firing or terminating a worker, and that if a worker lacks the power to influence their own permanence, this should weigh in favor of employee status. The Department notes that consideration of whether this type of manipulation to evade the obligations of the FLSA has occurred would seem to be more appropriate in an enforcement situation than in the regulatory text.

One commenter, CWI, objected to the Department's inclusion of ''[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own business initiative, this factor is not indicative of independent contractor status'' because it felt this language fails to account for the fact that ''many types of independent contractor work are often limited or sporadic in duration precisely because such work is only needed for a discrete period of time'' and that ''the critical question is whether the worker acted like a business.'' The U.S. Chamber also contended that it ''makes no difference whether . . . project-to-project work occurs as a result of 'operational characteristics,' '' urging the Department to more clearly identify that whether a worker is acting independently is better viewed through the lens of whether the worker chooses ''how, when, and the volume of services to provide.'' The Department agrees with these commenters that the critical question is whether the worker is in business for themself, which is why the proposed regulatory language would require consideration of whether a lack of permanence is due to the workers' own business initiative. Commenters such as NABTU and the NDWA supported the Department's proposal in this respect, noting that in industries like construction and home care, employment can be temporary and sporadic, and that consideration of whether the worker exercised independent business initiative was important.

The Department continues to believe that it is consistent with the case law and relevant to the overall question of economic reality to consider whether short periods of work are due to workers acting independently to obtain business opportunities or to the operational characteristics of particular industries

Department that was almost identical to the language in the 2021 IC Rule recognizing that the short duration of seasonal work such as in agriculture would not necessarily indicate independent contractor classification. *See* 86 FR 1247 (§ 795.105(d)(2)(ii)); *see also, e.g., Lauritzen,* 835 F.2d at 1536–37 (noting that *Brandel* has been ''narrowed and distinguished''); *Cavazos* v. *Foster,* 822 F. Supp. 438, 441–42 (W.D. Mich. 1993) (collecting decisions issued after *Brandel* holding that migrant farmworkers are employees).

and the workers they employ.[330] However, after considering the comments received, the Department finds that a clearer articulation of the final sentence in the proposed regulatory text would be beneficial to employees, employers, independent contractors, and the Department's enforcement staff. Therefore, the last sentence of § 795.110(b)(3) has been rephrased to emphasize whether the worker is exercising their own business initiative: ''Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status *unless the worker is exercising their own independent business initiative.*'' (Emphasis added.) The Department believes this formulation makes it clearer that the proper analysis is not categorically based on operational characteristics of particular industries, as some commenters seemed to have read into the proposal, and that it is important to consider whether the worker is exercising independent business initiative with respect to these periods of work.

Many commenters suggested industry-specific analyses for the permanence factor. *See, e.g.,* ACLI (insurance agents); AFL–CIO (platform-based companies); American Securities Association and LPL Financial (financial advisors); MEP (applications on smart phones); NABTU (construction); NAFO (forestry); National Association of Realtors (''NAR'') (real estate brokers). Because the Department is promulgating a general rule, it believes that this type of industry-specific guidance would be better suited to potential subregulatory guidance. The Department agrees that these types of factual analyses would, however, be highly relevant when applying the factors to particular situations and should certainly be considered by parties and factfinders. As some commenters noted, however, *see, e.g.,* CWI and U.S. Chamber, the operational characteristics of a particular business or industry would not take precedence over the overall inquiry as to whether, as a matter of economic reality, the worker is in business for themself.

A smaller number of commenters addressed the Department's proposal to recognize that the exclusivity of a work relationship is appropriately considered under the permanency factor and to reject the 2021 IC Rule's approach of considering exclusivity just under the control factor based on whether the worker has the ability to work for others.[331] IBT strongly supported the inclusion of this consideration ''because working exclusively for a particular employer clearly speaks to the permanence of the work relationship.'' Farmworker Justice, LIUNA, and NABTU highlighted the case law discussed in the NPRM where courts found that working exclusively for a particular employer for the duration of a seasonal or temporary job was indicative of employee status, agreeing that this was the appropriate analysis.[332]

The Coalition of Business Stakeholders, NHDA, and NRF & NCCR commented that they preferred to have exclusivity considered only under the control factor, as in the 2021 IC Rule. Similarly, the American Trucking Association contended that the permanence factor was redundant with the control factor because the only relevant aspect of the tenure of the parties' relationship is whether the entity contracting with the worker exercised coercion to prevent them from pursuing other business. Another commenter, FSI, objected that the Department had proposed to include exclusivity under the permanence factor based in part on the weight of the federal appellate case law rather than applying its own independent reasoning.

The Department continues to believe, as discussed in the NPRM, that when analyzing worker classification under the FLSA, all facts that may be relevant to a particular factor should be considered, consistent with the totality-of-the-circumstances approach taken by courts.[333] The case law clearly indicates that facts regarding the exclusivity of a work relationship are salient under both the permanence and control factors. In many cases courts considered this under permanence,[334] and in many cases courts consider this under both permanence and control,[335] while a smaller number of cases considered this only as part of a control analysis.[336] Because the weight of federal appellate authority does not confine consideration of exclusivity to the control factor, and because the Department has historically viewed exclusivity as relevant to permanence,[337] the Department does not believe it is appropriate to silo these facts under the control factor.[338] For

[330] *See, e.g., Flint Eng'g,* 137 F.3d at 1442 (temporary rig welders exhibited sufficient permanency because such temporary work was intrinsic in the industry rather than a ''choice or decision'' by the workers); *Superior Care,* 840 F.2d at 1061 (lack of permanence did not preclude temporary nurses from being employees because this reflected ''the nature of their profession and not their success in marketing their skills independently''), *Mr. W Fireworks,* 814 F.2d at 1054 (''in applying the *Silk* factors courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ'').

[331] *See* 87 FR 62244–45; *see, e.g., Parrish,* 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is whether any plaintiff worked exclusively for the potential employer); *Keller,* 781 F.3d at 807 (noting that ''even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship''); *Scantland,* 721 F.3d at 1319 (noting that ''[e]xclusivity is relevant'' to the permanency of the work relationship); *see also* WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (considering exclusivity under permanence factor); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000) (same).

[332] *See, e.g., Lauritzen,* 835 F.2d at 1537 (agricultural harvesters' relationship with employer was ''permanent and exclusive for the duration of that harvest season''); *Mr. W Fireworks,* 814 F.2d at 1054 (the ''proper test for determining the permanency of the relationship'' in a seasonal industry is ''whether the alleged employees worked for the entire operative period of a particular season''); *see also Flint Eng'g,* 137 F.3d at 1442 (temporary rig welders' relationship with employer was '' 'permanent and exclusive for the duration of' the particular job for which they [were] hired'') (quoting *Lauritzen,* 835 F.2d at 1537).

[333] *See* 87 FR 62244–45.

[334] *See, e.g., Hobbs,* 946 F.3d at 835; *Henderson* v. *Inter-Chem Coal Co., Inc.,* 41 F.3d 567, 570 (10th Cir. 1994); *Carrell* v. *Sunland Constr., Inc.,* 998 F.2d 330, 332, 334 (5th Cir. 1993); *Superior Care,* 840 F.2d at 1060–61; *Lauritzen,* 835 F.2d at 1537; *DialAmerica,* 757 F.2d at 1384.

[335] *See, e.g., Parrish,* 917 F.3d at 382, 386–87; *Keller,* 781 F.3d at 807–09, 814; *Scantland,* 721 F.3d at 1314, 1319; *Cornerstone Am.,* 545 F.3d at 344, 346.

[336] *See, e.g., Razak,* 951 F.3d at 145–46; *Saleem,* 854 F.3d at 141.

[337] *See, e.g.,* WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000).

[338] The 2021 IC Rule also recognized that some courts analyze the exclusivity of the work relationship as part of the permanence factor, 86 FR 1192, and the Department considered in its NPRM for that rule whether to include exclusivity under the permanence factor and change the articulation to ''permanence and exclusivity of the working relationship'' in order ''to be more accurate,'' 85 FR 60616, ultimately rejecting an approach that would ''blur[ ] the lines'' between the factors, 86 FR 1193. As explained, upon further consideration of the importance of a totality-of-the-circumstances test where all relevant facts inform the economic dependence determination, the Department believes it is more accurate to consider the exclusivity of the work relationship under both permanence and control factors, especially as it may contribute to a fuller understanding of the parties' work relationship. *See Keller,* 781 F.3d at 807–09, 814 (explaining that consideration of the control exercised by the business that precluded the worker's ability to work for others ''informs our analysis of the permanency and exclusivity of the relationship''); *Scantland,* 721 F.3d at 1319 (''looking through the lens of economic dependence *vel non,* long tenure, along with control, and lack of opportunity for profit, point strongly toward economic dependence''). Courts may find exclusivity to be relevant under other factors as well, consistent with the totality-of-the circumstances approach. *See, e.g., Hobbs,* 946 F.3d at 833, 835 (finding that the work schedule imposed by the employer prevented workers from engaging

example, in *Keller* the court considered the exclusivity of the work relationship under the permanence factor because an exclusive work relationship is a hallmark of the regularity of many employment relationships, and under the control factor because an employer's action that directly or indirectly prevents workers from working for others (thereby imposing an exclusive relationship) is a relevant mechanism of control.[339] The Department believes it is appropriate to consider the weight of the case law when providing guidance, as the Department is doing consistently in this rule. For these reasons, the Department concludes that exclusivity should remain in the permanence factor and that it may also be considered under the control factor to the extent it speaks to the employer's control.

LIUNA suggested certain edits to the proposed regulatory text to better capture, in its view, the case law discussed in the NPRM where courts found that working exclusively for a particular employer for the duration of a seasonal or temporary job was indicative of employee status. LIUNA commented that the first sentence of the proposed regulatory text did not properly reflect this case law because it could be read solely as a characterization of work relationships that are indefinite or continuous: ''This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships.'' It suggested that the Department better align the regulatory text with the case law by substituting the language regarding exclusivity in that sentence with the phrase ''or exclusive of work for other employers.'' The Department agrees that the concept of exclusivity should not be limited to work relationships that are indefinite or continuous, and that it is more precise and aligned with the case law to substitute the language suggested, which the Department is adopting in this final rule. The Department wishes to emphasize, however, that the disjunctive word ''or'' is used in the regulatory text, and that it is intended to mean that exclusivity is not required in order for this factor to weigh in favor of employee status.[340]

LIUNA requested further clarifying edits that would remove ''project-based'' from the general description of work relationships that weigh in favor of independent contractor status in order to add a more specific sentence stating that exclusivity in definite-term, project-based working relationships in industries that require project-based work ''such as certain segments of the agricultural or construction industries'' is probative of employee status. Similarly, Outten & Golden noted that project-based work can be indicative of employment when it is ''regular, repeated, or when it is project-based, but still long-term'' and it recommended including in the regulatory text the examples of seasonal or temporary work that were discussed in the NPRM as being consistent with an employment relationship, such as seasonal construction, agriculture, and retail work and temporary staffing agencies. *See also* NELA; Nichols Kaster PLLP.[341] The Department declines to remove ''project-based'' from the general description of work relationships that weigh in favor of independent contractor status because courts and the Department have associated project-based work with independent contractor status,[342] but it notes that ''project-based'' work alone is not dispositive of whether this factor weighs in favor of independent contractor status because all considerations relating to the permanence of the work should be considered. The Department also declines to add a more specific sentence or examples as requested because the Department has determined that it is not appropriate to address particular industries in this regulation of general applicability.

NHDA posited that whether a work relationship is exclusive is less illustrative of whether a worker is in business for themself than the reason for the exclusivity, and that where a worker freely chooses to have an exclusive relationship with one transportation provider because of a ''satisfying selection of routes or loads that permits the worker to attain financial goals,'' that worker should ''not be judged as less in business for themselves than a worker who contracts with multiple transportation providers.'' The Department agrees that an exclusive relationship alone would not be determinative of the economic reality of the working relationship, and that it is important to look at all relevant factors, including factors referenced by the comment such as the worker's opportunity for profit or loss, to aid in the analysis. The Department notes that by recognizing that exclusivity weighs in favor of the worker being an employee, the Department is not stating either that independent contractors can never have exclusive relationships with other businesses or that employees who have nonexclusive relationships with employers because they work multiple jobs become independent contractors.

To the contrary, as discussed in the NPRM, although an exclusive relationship is often associated with an employment relationship and a sporadic or project-based, nonexclusive relationship is more frequently associated with independent contractor classification, courts have explained that simply having more than one job or working irregularly for a particular employer does not remove a worker from employee status and the protections of the FLSA. For example, in *Silk,* the ''unloaders'' came to the coal yard ''when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will.'' [343] The Court nevertheless determined that the unloaders were employees: ''That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act.'' [344] Similarly, as the Second Circuit explained in *Superior Care,* the fact that the temporary nurses ''typically work[ed] for several employers,'' was ''not dispositive of independent contractor status'' as ''employees may work for more than one employer

in outside work, which was relevant under the opportunity for profit or loss factor as well as the permanence factor).

[339] *Keller,* 781 F.3d at 807–09, 814–15.

[340] LIUNA recognized that the Department might be concerned that ''more emphatically stating the relationship between permanency and exclusivity would risk suggesting that a non-exclusive working relationship *never* supports employee status,'' which it noted would be inaccurate, as the Department discussed in the NPRM. The Department concurs that this would be inaccurate for the reasons discussed in the NPRM and herein, and that clarifying this aspect should not be understood to require an exclusive relationship in order to establish employee status.

[341] Nichols Kaster also requested that the Department include additional language from the preamble in the final regulatory text. The Department declines this suggestion in the interest of providing succinct statements regarding each factor of the economic reality test in this final rule. The Department notes, however, that the preamble will be accessible for additional information regarding the rule.

[342] *See, e.g., Henderson,* 41 F.3d at 570 (facts that supported an inference that a mechanic was economically dependent on the employer included that he ''primarily, if not exclusively'' worked for the employer for over three years rather than being hired for a specific repair project); *Carrell,* 998 F.2d at 332, 334 (finding welders to be independent contractors where they worked for multiple employers on a project-by-project basis rather than exclusively for one employer); AI 2015–1, 2015 WL 4449086, at *10 (withdrawn June 7, 2017).

[343] 331 U.S. at 706.

[344] *Id.* at 718.

without losing their benefits under the FLSA.'' [345]

Courts have also determined that the fact that a worker does not rely on the employer as their exclusive or primary source of income is not indicative of whether an employment relationship exists.[346] For example, the Sixth Circuit explained: ''[W]hether a worker has more than one source of income says little about that worker's employment status. Many workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet.'' [347] Commenters supported the Department's clarification in the NPRM, which the Department reiterates here, that exclusivity is not required in order to find a degree of permanence and that working multiple jobs does not necessarily favor independent contractor status—particularly because, as the Sixth Circuit noted, many workers' financial needs require them to have multiple sources of income. *See, e.g.,* IBT; LCCRUL & WLC; NELP. LCCRUL & WLC described a current client who ''often has to work for a variety of gig economy jobs simultaneously, such as Uber Eats, GoPuff, Instacart, and Caviar, to keep her finances afloat.'' And NELP observed that in ''low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy.''

Finally, the Department noted in the NPRM that where workers provide services under a contract that is routinely or automatically renewed, courts have determined that this indicates permanence and an indefinite working arrangement associated with employment.[348] The proposed regulation noting that work relationships that are indefinite in duration or continuous weigh in favor of employee status is consistent with this case law. Some commenters mistakenly believed that the regulatory text explicitly stated that contractual renewals equate to employee status and objected for largely the same reasons commenters objected to their reading of the proposed regulatory text to imply that businesses could not have long-term relationships with clients without being considered employees of their clients, to which the Department responded above. *See* Fight for Freelancers; NRF & NCCR.

The Department is finalizing the permanence factor (§ 795.105(b)(3)) with the modifications discussed herein.

Example: Degree of Permanence of the Work Relationship

A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as directed by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity. These facts indicate employee status under the permanence factor.

A cook has prepared specialty meals intermittently for an entertainment venue over the past 3 years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue. These facts indicate independent contractor status under the permanence factor.

4. Nature and Degree of Control (§ 795.110(b)(4))

In the NPRM, the Department proposed to modify § 795.105(d)(1)(i), which considered control as a ''core'' factor in the economic reality test. The 2021 IC Rule assessed the employer's and the worker's ''substantial control over key aspects of the performance of the work,'' which included setting schedules, selecting projects, controlling workloads, and affecting the worker's ability to work for others.[349] The 2021 IC Rule also stated that ''[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses . . . does not constitute control'' for purposes of the economic reality test.[350]

In its proposal and consistent with the 2021 IC Rule, the Department explained that it continues to believe that issues related to scheduling, supervision over the performance of the work (including the ability to assign work), and the worker's ability to work for others are relevant considerations in evaluating the nature and degree of control. The Department's proposal also considered additional aspects of control in the workplace that have been identified in the case law or through the Department's enforcement experience—such as control mediated by technology or control over the economic aspects of the work relationship. However, as noted above, the Department's proposal did not elevate control as a ''core'' factor in the analysis.[351]

In addition, and contrary to the 2021 IC Rule, the Department's proposed regulation included a sentence stating that an employer's compliance with

[345] *Superior Care,* 814 F.2d at 1060; *see also Saleem,* 854 F.3d at 142 n.24 (''It is certainly not unheard of for an individual to maintain two jobs at the same time, and to be an 'employee' in each capacity.''); *Keller,* 781 F.3d at 808 (agreeing with the Second Circuit that ''employees may work for more than one employer without losing their benefits under the FLSA''); *Circle C Invs.,* 998 F.2d at 328–29 (noting that ''[t]he transient nature of the work force is not enough here to remove the dancers from the protections of the FLSA''); *McLaughlin* v. *Seafood, Inc.,* 867 F.2d 875, 877 (5th Cir. 1989) (per curiam) (''The only question, therefore, is whether the fact that the workers moved frequently from plant to plant and from employer to employer removed them from the protections of the FLSA. We hold that it did not.''); *Hart* v. *Rick's Cabaret Int'l, Inc.,* 967 F. Supp. 2d 901, 921 (S.D.N.Y. 2013) (noting that ''countless workers . . . who are undeniably employees under the FLSA—for example, waiters, ushers, and bartenders''—work for multiple employers).

[346] *Superior Care,* 814 F.2d at 1060; *see also Halferty,* 821 F.2d at 267–68 (''it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment''); *DialAmerica,* 757 F.2d at 1385 (noting that ''[t]here is no legal basis'' to say that work that constitutes a second source of income indicates a worker's lack of economic dependence on a job because the proper analysis is ''whether the workers are dependent on a particular business or organization for their continued employment'').

[347] *Off Duty Police,* 915 F.3d at 1058. The 2021 IC Rule correctly noted that a handful of cases improperly conflate having multiple sources of income with a lack of economic dependence on the potential employer. See *86 FR 1173, 1178.* The 2021 IC Rule characterized such a ''dependence-for-income'' analysis as incorrect and a ''dependence-for-work'' analysis as correct. *Id. at 1173.* This critique continues to be valid, as is the observation that ''[i]t is possible for a worker to be an employee in one line of business and an independent contractor in another.'' *Id. at 1178 n.19.*

[348] *See, e.g., Brant,* 43 F.4th at 672 (stating that ''[a]utomatic [contract] renewal would weigh more heavily in favor of employee status''); *Scantland,* 721 F.3d at 1318 (finding one-year contracts that were automatically renewed to ''suggest substantial permanence of relationship''); *Pilgrim Equip.,* 527 F.2d at 1314 (finding laundry operators' one-year contracts that were routinely renewed indicated employee status); *Acosta* v. *Senvoy, LLC,* No. 3:16–CV–2293–PK, 2018 WL 3722210, at *9 (D. Or. July 31, 2018) (noting that one-year contracts that automatically renew are ''evidence that a worker is an employee''); *Solis* v. *Velocity Exp., Inc.,* No. CV 09–864–MO, 2010 WL 3259917, at *9 (D. Or. Aug. 12, 2010) (the fact that package delivery drivers understood their contracts to be of indefinite duration and that contracts were routinely renewed without renegotiation indicated employee status).

[349] *See* 86 FR 1246–47 (§ 795.105(d)(1)(i)).

[350] *Id.* at 1247 (§ 795.105(d)(1)(i)).

[351] *See supra* section III.A.

legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer.

a. Overview of Control Factor

Commenters from across the spectrum agreed that control was a highly relevant factor to the economic reality analysis. *See, e.g.,* Gig Workers Rising; U.S. Chamber. Some commenters objected to the Department's proposed text that shifted the focus of this factor back to the nature and degree of control exerted by the potential employer, rather than by the worker. The 2021 IC Rule described the factor as considering the worker's and the potential employer's nature and degree of control, while the NPRM described the factor as considering primarily the potential employer's nature and degree of control.[352] N/MA, for example, commented that ''a worker's right to control the manner and means by which a worker provides services is, and should remain, a primary consideration in the Department's discussion of the right to control factor.'' CWI described this aspect of the proposal as ''misguided'' because ''[f]ocusing on the individual's control ensures that the totality of the worker's business are evaluated, including control the worker may have over whether to subcontract, how to manage his workforce, whether and how to advertise his services, and whether to prioritize, stagger, or overlap projects.'' It added that such ''considerations are largely lost when the analysis is unduly narrowed to an evaluation of an individual putative employer's alleged control.'' *See also* NAM (''Instead of focusing on the control a worker exercises over their work (which would evidence that they are in business for themselves), the Department would rather determine 'employee' status on the employer's generally considered control over the work.''). In contrast, other commenters agreed with the Department's returned focus on the nature and degree of the potential employer's control. For instance, the State AGs stated that the ''case law is clear that the appropriate focus for this factor must be on the employer's control over the worker, and *not* the worker's control over the work.'' Similarly, Farmworker Justice commented that the NPRM ''helpfully clarifies that a hiring entity/employer who has the ability to control key aspects of the work is likely an employer.''

Regarding the proposed scope of the factor, one commenter criticized the Department's proposal for eliminating the 2021 IC Rule's ''express requirement of 'substantial' control.'' *See* Scalia Law Clinic. Additionally, business commenters generally disagreed with the inclusion of reserved control, stating that that this broadened the control factor and introduced additional uncertainty by using this ''undefined, vague terminology.'' U.S. Chamber; *see also* CWI. Other commenters, however, such as the State AGs, noted that inclusion of reserved control is ''the appropriate interpretation of the control factor and properly accounts for the variety of today's work arrangements.'' *See also* AFL–CIO (commenting that ''discounting contractual or reserved control is inconsistent with congressional intent to expand the coverage of the FLSA beyond the narrow confines of common law employment'').

A very large proportion of the comments received regarding the control factor addressed the proposal that an employer's compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations may indicate control, suggesting that the worker is economically dependent on the employer. Many commenters objected to this proposal. For example, Flex commented: ''Legally required control is generally disregarded since that is control imposed by the government, not by the client or hiring party. The client or hiring party is not choosing to exercise legally required control; it is required to do so.'' *See also* Richard Reibstein, publisher of legal blog. The WFCA and others commented that ''[r]equiring an independent contractor to comply with legal obligations, safety standards, contractual obligations, or industry standards should not be indicative of control'' because ''[t]hese requirements are standard in contracts and subcontracts.'' *See also* Genesis Timber; National Association of Home Builders (''NAHB''); NRF & NCCR.

Other commenters stated that the Department's proposal would disincentivize employers to prioritize safety and other beneficial policies, because employers would not want to risk workers being classified as employees. *See, e.g.,* Kentucky Trucking Association; Southeastern Wood Producers Association, Inc. The U.S. Chamber commented that workers and businesses should not be discouraged from incorporating contractual terms that ''support sound, lawful, safe work practices,'' as those terms do not evidence control over the worker by the business under the Act's economic realities test. SHRM stated that this aspect of the NPRM ''will deter some companies from upholding their obligations in this respect by holding the specter of a misclassification finding over their heads for simply trying to do right by the people who make their businesses viable.'' *See also* CWI (commenting that this aspect of the NPRM ''would effectively encourage businesses to avoid measures encouraging legal compliance and the safety of both independent workers and the public generally, so that they do not increase their risk of misclassification claims''). WPI noted that all businesses operate against regulatory backdrops and posited the following example: ''a regulation might require all people on a construction site to wear a hard hat. The builder might, therefore require site visitors, including the eventual tenant, to wear hardhats. Is the eventual tenant now the builder's employee based [on] the exercise of control over a worksite?'' [353] And multiple financial advisors submitted identical comments stating that ''[t]he Department should recognize that [supervision in order to comply with regulatory requirements] . . . helps my firm and me stay compliant with securities law and should not be viewed as a negative factor when determining my status under the [FLSA].'' Flex opposed this proposed language as well, and further commented that the proposed regulatory language ''lacks all of the context provided in the preamble'' and that, ''[i]f the Department's intent is to make clear that there 'may' be 'some cases' in which compliance with legal, safety, or quality control obligations 'may' be relevant, then the rule should say that and should provide the full context contained in the narrative.''

Some heavily regulated industries in particular expressed concern about this proposed provision, including the trucking, financial services, insurance, and real estate industries. Scopelitis stated that ''the proposal to consider compliance with legal, safety, or quality control obligations as employer-like control indicative of an employee relationship is untenable in the highly regulated trucking and logistics industries and any rollback of

[352] 86 FR 1180; 87 FR 62275 (proposed § 795.110(b)(4)).

[353] In its NPRM, the Department explicitly addressed this scenario, stating that ''if an employer requires all individuals to wear hard hats at a construction site for safety reasons, that is less probative of control.'' 87 FR 62248.

requirements for owner-operators to comply with such obligations will almost certainly lead to less safe roads in our Nation.'' [354] SIFMA commented that ''[i]t is important for the highly regulated securities industry that independent contractors do not morph into employees merely because they must remain in compliance with federal and state securities, banking, and insurance laws.'' The ACLI stated that ''[i]t also would place at risk the careful balance that the courts and legislatures have fashioned in confirming the importance and viability of independent contractor models while ensuring regulatory compliance to protect the public.'' And NAR stated that ''[w]hile there may be some degree of control over an individuals' work within broker-agent relationship as required by state law, the manner in which that work is completed—at the individuals' broad discretion, for example—is a critical distinction that should not weigh in favor of classification as an employee.'' Fight for Freelancers similarly explained that there are basic legal obligations for anyone involved in publishing, such as contract provisions that prohibit libel or theft of copyrighted material, and that such terms are ''not indicative of a business's control over how, when and where an article is written.''

Other commenters supported this proposed provision. The AFL–CIO commented that the very fact that a government entity or court ''imposes an obligation on an entity to ensure a workplace or a set of workers complies with law strongly suggests that responsible government officials believe that the entity stands in a relationship with the workers such that it is appropriate for it to do so.'' *See also* NELA (''When the employer, rather than the worker, controls compliance with legal, safety, or other obligations, it is evidence that the worker is not in fact in business for themselves because they are not doing the risk-management work involved in understanding and adhering to the legal and other requirements that apply to the work they perform and are not assuming the risk of noncompliance.''); NELP (''The Department should explain that if a government agency or other entity looks to the hiring entity for compliance, that fact alone suggests that the hiring entity has the requisite control to demand compliance.''). ROC United commented that it was ''an appropriate correction of the 2021 Rule'' because delivery companies tend to exert control with respect to customer service standards and that ''monitoring of drivers' compliance is indicative of the control [those companies] has over them.'' *See also* A Better Balance; Outten & Golden (commenting that the regulation should state that controls implemented by the employer to comply with legal obligations, safety standards, or contractual or customer service standards provides a strong indication of employee status). Finally, Intelycare supported this provision of the proposed regulation and further commented that the Department should explain that certain industries ''are so highly regulated such that it is inherent in the nature of the work that the company must comply, and exercise control to require their workers to comply, with legal and safety regulations'' and that in such circumstances the use of independent contractors is ''likely inappropriate.''

Upon consideration, the Department is adopting proposed § 795.110(b)(4) with several revisions in response to comments received. For decades, courts and the Department have taken the view that the control factor represents one facet of the economic reality test.[355] As noted in the NPRM, the Department continues to believe that control should be analyzed in the same manner as every other factor, rather than take an outsized role when analyzing whether a worker is an employee or independent contractor. As the Fifth Circuit stated in 2019, it ''is impossible to assign to each of these factors a specific and invariably applied weight.'' [356]

Regarding comments critiquing the Department's proposed regulatory text shifting the focus of this factor back to the nature and degree of control exerted by the potential employer rather than by the worker, the Department declines to make any alterations to this proposed text. The control factor has its roots in the common law, where the inquiry was whether the ''employer'' had the ''right to control the manner and means by which [work] is accomplished.'' [357] Courts have consistently, and for decades, considered this factor with the focus on the potential employer, not the worker. *See, e.g., Saleem,* 854 F.3d at 141 (''[A] company relinquishes control over its workers when it permits them to work for its competitors.''); *Razak,* 951 F.3d at 142 (phrasing the factor as ''the degree of the alleged employer's right to control the manner in which the work is to be performed''); *McFeeley,* 825 F.3d at 241 (phrasing the factor as the ''degree of control that the putative employer has over the manner in which the work is performed''); *Karlson,* 860 F.3d at 1093 (phrasing the factor as ''the degree of control exercised by the alleged employer over the business operations''); *Flint Eng'g,* 137 F.3d at 1440 (stating that, when ''applying the economic reality test, courts generally look at (1) the degree of control exerted by the alleged employer over the worker''); *Scantland,* 721 F.3d at 1316 (explaining that ''[t]he economic reality inquiry requires us to examine the nature and degree of the alleged employer's control''). Congress and the Department have also historically focused on the control exerted by the potential employer (until the 2021 IC Rule). In the House Report accompanying the 1966 FLSA Amendments, for example, Congress described the factor as ''[t]he degree of control which the principal [potential employer] has in the situation'' [358] and then affirmed that the ''committee fully subscribes to these criteria.'' In a 1968 Wage and Hour opinion letter, the Department described the factor as ''[t]he nature and degree of control retained or exercised by the principal;'' in a 1973 Wage and Hour Publication, it described the factor as ''the nature and degree of control by the principal;''

[354] Several commenters, such as the Pennsylvania Motor Truck Association for example, included a number of contractual provisions in their comment and stated that the Department ''has a duty to address each one in the context of any final rule as to whether it amounts to control.'' The Department cannot opine on a particular employer's discrete contractual provisions in a final rule. As stated in the 2021 IC Rule, ''it is not possible—and would be counterproductive—to identify in the regulatory text every type of control (especially industry-specific types of control) that can be relevant when determining under the FLSA whether a worker is an employee or independent contractor.'' 86 FR 1182.

[355] *See, e.g.,* WHD Op. Ltr. (Aug. 13, 1954) (applying six factors, of which control was one, that are very similar to the six economic reality factors currently used by almost all courts of appeals); *Shultz* v. *Hinojosa,* 432 F.2d 259, 264–65 (5th Cir. 1970) (affirming judgment in favor of Secretary of Labor that slaughterhouse worker was an employee under the FLSA under a multifactor economic reality test of which control was one of the factors).

[356] *Parrish,* 917 F.3d at 380 (quotation marks and citation omitted). The federal courts of appeals have taken this position for decades. *See also, e.g., Scantland,* 721 F.3d at 1312 n.2 (the relative weight of each factor ''depends on the facts of the case'') (citation omitted); *Selker Bros.,* 949 F.2d at 1293 (''It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . [, and] neither the presence nor the absence of any particular factor is dispositive.'').

[357] *Reid,* 490 U.S. at 751.

[358] *See* House Report No. 871, 89TH CONG., 1ST SESS., at 43 (1965). It is clear that Congress was referring to a potential employer by the use of the term ''principal'' because its articulation of the integral factor in the same section stated: ''The extent to which the services rendered are an integral part of the *principal's business.*'' In contrast, its articulation of the initiative factor stated: ''The initiative, judgment, or foresight exercised by the *one who performs the services.*'' *Id.* (emphases added).

and in longstanding Fact Sheet #13, the factor is also described as ''[t]he nature and degree of control by the principal.'' [359] Accordingly, the Department believes that the appropriate focus of this factor should be on the potential employer.

Moreover, as explained in the NPRM and consistent with the economic reality analysis, this factor should necessarily focus on whether the employer controls meaningful economic aspects of the work relationship because that focus is probative of whether the worker stands apart as their own business. Simply assessing whether the employer lacks control over discrete working conditions (*e.g.,* scheduling) or whether the employer exercises physical control over the workplace does not fully address whether the employer controls meaningful economic aspects of the work relationship.[360] Specifically, the Fifth Circuit applied this analytical approach in a case where an insurance sales firm not only ''controlled the hiring, firing, assignment, and promotion of the [workers' subordinates],'' but also controlled how the workers priced the insurance products, received leads for sales, and defined the territory in which the agents could sell products.[361] These actions made it clear that the employer, and not the workers, retained meaningful control over the ''economic aspects of the business,'' suggesting that the workers were employees.[362] The Third Circuit has similarly held that even though dancers had some scheduling flexibility, the control factor weighed in favor of employee status because the employer, and not the workers, controlled the economic aspects of the dancers' work, such as the price of services, the clientele to be served, and the operations of the club in which they worked.[363]

Regarding the comments received addressing the scope of the control factor such as whether reserved control should be included or whether the regulation should require ''substantial'' control, the Department declines to make the changes requested. First, the Department believes that the reference to reserved control should remain in the regulation as proposed. Control can certainly be exerted directly in the workplace by an employer, such as when it sets a worker's schedule, compels attendance, or directs or supervises the work.[364] As explained in the NPRM and addressed fully in section V.D. of this final rule, however, the absence of these more apparent forms of control does not invariably lead to the conclusion that the control factor weighs in favor of independent contractor status.[365] Employers may also exercise control in other ways, including reserved rights to control, because such reserved rights may, in some situations, be probative of the economic reality of the total situation. Second, the Department declines to modify the regulation to require ''substantial control'' as requested by the Scalia Law Clinic. The Department does not believe such a modifier is appropriate in the regulatory text because the totality of the circumstances must be considered, and this heightened requirement is not supported by case law. Of course, substantial control can be indicative of employee status as several cases have held, but ''substantial control'' is not a predetermined requisite under the economic reality test.[366] Moreover, as the regulatory text provides, ''[m]ore indicia of control by the potential employer favors employee status; more indicia of control by the worker favors independent contractor status.'' [367] Thus, substantial control by the employer would clearly favor employee status, though it is not required.[368]

Finally, current § 795.105(d)(1)(i) states that an employer requiring a worker to ''comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms . . . does not constitute control that makes the [worker] more or less likely to be an employee.'' [369] In the NPRM, the Department explained that a blanket prohibition on consideration of compliance with legal or other obligations would not be appropriate, and that certain instances of control should not be excluded as irrelevant to the economic reality analysis only because they are required by business needs, contractual requirements, quality control standards, or legal obligations. Moreover, the Department recognized that the ''case law is not uniform on this issue'' and undertook a detailed discussion explaining why a complete bar to ever considering such compliance with legal, safety, or health obligations, or quality control measures would be inappropriate under the economic reality test.

The Department took a more nuanced approach in the preamble discussion than some commenters recognized in their comments, and it continues to find cases such as *Scantland* and others—which recognize that compliance with legal or contractual obligations or quality control may be relevant evidence of control—persuasive and more consistent with a totality-of-the-circumstances, economic reality analysis.[370] The NPRM explained

[359] WHD Op. Ltr. June 25, 1968; ''Employment Relationship Under the Fair Labor Standards Act'', WHD Publication 1297, February 1973; WHD Fact Sheet #13 (July 2008).

[360] *See, e.g., Cornerstone Am.,* 545 F.3d at 343–44 (finding that control weighs in favor of employee status even where the employer disclaims control over ''day-to-day affairs'' of the workers because the employer controlled the meaningful economic aspects of the work). Other elements may also be included in this examination of control, such as those identified by the Supreme Court in *Whitaker House.* They include whether the worker could sell their products or services ''on the market for whatever price they can command;'' whether the worker's compensation was dictated by the employer; and whether management could fire the worker for failure to obey its regulations. 366 U.S. at 32–33.

[361] *Cornerstone Am.,* 545 F.3d at 343–44.

[362] *Id.* at 343.

[363] *Verma,* 937 F.3d at 230.

[364] *See, e.g., Scantland,* 721 F.3d at 1314 (finding workers to be employees, in part, because they ''were subject to meaningful supervision and monitoring by'' their employer).

[365] *See, e.g., Mr. W Fireworks,* 814 F.2d at 1049 (''[T]he lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence.'') (citation omitted); *Antenor,* 88 F.3d at 934 (noting in FLSA joint employment case that the Act reaches even those employers who ''[do] *not* directly supervise the activities of putative employees''). This has been the Department's perspective for almost 6 decades. *See* WHD Op. Ltr., FLSA–795, at 3 (Sept. 30, 1964) (determining that professional divers were employees of a diving corporation, despite the lack of control over their work, by noting ''that persons may be employees within the meaning of the Act even though they are unsupervised in their work, are not required to devote any particular amount of time to their work, [and] are under no restriction not to work for competitors of the employer'').

[366] For example, in *Driscoll,* the Ninth Circuit described the control factor as the ''degree of the alleged employer's right to control the manner in which the work is to be performed'' but then concluded that the employer possessed ''substantial control over important aspects'' of the workers' work. 603 F.2d at 755.

[367] 29 CFR 795.110(b)(4).

[368] The Department also received comments urging it to delete this sentence of the proposed regulatory text. *See* NELP; Outten & Golden. These commenters expressed concern that the concluding sentence suggested a relative weighing of facts relevant to control in lieu of a ''totality of the circumstances'' analysis, and that this ''implies a simple arithmetic tallying of the various listed facts'' that would ''invite an unnecessary contest that threatens to overshadow the purpose of the factor.'' The Department declines to delete this sentence because it believes that considering the various indicia of control and whether they weigh in favor of employee or independent contractor status can be a helpful analytical tool. However, the Department agrees that the correct analysis is an overall, qualitative analysis, and that the considerations described within the control factor should not be used as a checklist or in a ''tallying'' fashion, just as the economic reality factors should not be tallied but rather considered based on the totality of the circumstances.

[369] 86 FR 1247 (§ 795.105(d)(1)(i)).

[370] As the Eleventh Circuit explained in *Scantland,* the ''economic reality inquiry requires

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explicitly and with detail that compliance with legal requirements may not always be relevant to control, and that such compliance was only one facet of control. However, the Department takes seriously the many comments received from stakeholders about the proposed regulatory language, the legitimate points they raised, and the concerns commenters expressed, even though the Department does not necessarily agree with all issues raised.

In the NPRM, the Department was cognizant of the challenge of setting forth a regulation that would capture all of the facts relevant to the nature and degree of a potential employer's control while balancing the practical considerations of the way businesses, particularly in some industries, must simultaneously comply with a host of legal, regulatory, and business-related demands. While the Department sought to strike the suitable balance between these two concerns in the NPRM, the comments have persuaded the Department that the provision as proposed may lead to unintended consequences due to stakeholder confusion and uncertainty. The Department does not agree, however, with commenters who stated that the Department's proposed regulatory text would make compliance with the law a ''negative factor.'' As noted by commenters, businesses already must comply with various legal and regulatory requirements—for example, from the IRS, state licensing boards, and city ordinances. Additionally, the Department never had a blanket prohibition prior to the 2021 IC Rule on the consideration of compliance with legal obligations, and none of the mass uncertainty or noncompliance with legal norms suggested by commenters were apparent.[371] Nevertheless, the Department recognizes the confusion evident in the comments regarding this provision. The Department agrees with commenters, for example, that stated that a publication's required compliance with libel law for a writer is not probative of a worker's economic dependence on that publication but if the publication instructed how, when, and where the work is performed, that is relevant to the control analysis. To provide another example, a home care agency requiring a criminal background check for all individuals with patient contact in compliance with a specific Medicaid regulation requiring such checks would not be indicative of control. Accordingly, the Department is revising the regulation to state that ''actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control.''

The Department is further revising the regulation to state that ''actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control.'' This part of the regulatory text means that a potential employer's control over compliance methods, safety, quality control, or contractual or customer service standards that goes beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulation may in some—but not all—cases be relevant to the analysis of a potential employer's control if it is probative of a worker's economic dependence. For example, in contrast to the background check example in the prior paragraph, a home care agency's extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control. The Department continues to believe that control exerted by the employer to achieve these ends may be relevant to the underlying analysis of whether the worker is economically dependent on the employer, particularly where the employer dictates and enforces the manner and circumstances of compliance.

These instances of potential control, however, are relevant only if probative of the worker's economic dependence, as with any other consideration under the economic reality factors. For example, when an employer, rather than a worker, imposes safety or customer service obligations beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulations, it may be evidence that the worker is not in fact in business for themself. In those instances, they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance—a typical and expected risk that workers in business for themselves regularly assume. Moreover, the Department understands that parties representing a wide array of business relationships enter into contracts, and this regulation should not inhibit those practices. For example, if a potential employer requires all workers to sign a contract acknowledging that the business's general policy is that invoices for work projects must be submitted within a particular timeframe, this is not indicative of control because such a generally applicable contractual term does not itself suggest that a worker is economically dependent on the employer for work. In contrast, if a potential employer requires all workers to sign a contract outlining specifically how, when, and where the work must be performed, that specific direction would be indicative of control because it suggests that the workers are not operating independently. The Department believes that this revised text will be able to encompass control that is relevant to the overall analysis of economic dependence while providing businesses with a clear rule regarding compliance with specific legal obligations.

As the Department emphasized in the NPRM and again emphasizes here, the facts and circumstances of each case must be assessed, and the manner in which the employer chooses to implement such obligations will be highly relevant to the analysis. For example, under this final regulatory text, it is not indicative of control if a potential employer requires everyone who enters a construction site to wear a hard hat as required by city ordinance.

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us to examine the nature and degree of the alleged employer's control, *not why* the alleged employer exercised such control.'' 721 F.3d at 1316 (emphasis added). The court continued to explain that if ''the nature of a business requires a company to exert control over workers to the extent that [the employer] has allegedly done, then that company must hire employees, not independent contractors.'' *Id.; see also Schultz* v. *Mistletoe Express Serv., Inc.,* 434 F.2d 1267, 1271 (10th Cir. 1970) (noting that ''arguments that an independent contractor relationship is shown by . . . the need to comply with the regulations of federal and state agencies do not persuade us'' before affirming the conclusion that workers were employees under the FLSA).

[371] For example, in a 2014 Administrator's Interpretation ''Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act'' (withdrawn in 2020), the Department stated that ''under an economic realities analysis, all of the facts and circumstances of the relationship between a provider and the state must be evaluated, and no single factor is determinative. Relevant factors that must be considered when evaluating whether a state administering a consumer-directed program is an employer include the various legal requirements with which consumer-directed programs must comply, and how programs choose to comply with those requirements.'' *See* Administrator's Interpretation 2014–2, *available at* 2014 WL 2816951, at *5; *see also* Administrator's Interpretation 2015–1, *available at* 2015 WL 4449086, at *12 (''Some employers assert that the control that they exercise over workers is due to the nature of their business, regulatory requirements, or the desire to ensure that their customers are satisfied. However, control exercised over a worker, even for any or all of those reasons, still indicates that the worker is an employee.'').

However, if a potential employer chooses a specific time and location for its own weekly safety briefings that are not specifically required by law and requires all workers to attend, that may be probative of control. Similarly, it is not probative of control if a potential employer requires workers to provide proof of insurance required by state law, but if a potential employer mandates what insurance carrier workers must use, that may be probative of control.

The Department reminds stakeholders that this is merely one aspect of one factor of a multifactor test. Even if compliance with specific safety, contractual, customer service, or quality control requirements is indicative of control in a specific case, this does not compel a particular conclusion that the control factor favors employee status or that the overall analysis requires a particular result.[372] Thus, the final rule does not preclude a finding that a worker is an independent contractor where an employer obligates workers, for example, to comply with its own safety standards or quality control measures, after also considering other relevant factors in the economic reality analysis.

With these general principles in mind, the next sections address the Department's proposals regarding several aspects of control to be considered in determining whether the nature and degree of control indicates that the worker is an employee or an independent contractor. This discussion is intended to be an aid in assessing common aspects of control—including scheduling, supervision, price setting, and ability to work for others—but should not be considered an exhaustive list, given the various ways in which an employer may control a worker or the economic aspects of the work relationship. Additional changes to the final regulatory text in response to comments are also discussed throughout these sections.

b. Scheduling

As a consideration under the control factor, the Department proposed that''[f]acts relevant to the employer's control over the worker include whether the employer sets the worker's schedule[.]'' [373] While the 2021 IC Rule similarly recognized that a potential employer's control over ''key aspects of the performance of the work, such as by controlling the individual's schedule'' is relevant to determining employee or independent contractor status, the 2021 IC Rule also suggested that the worker's ''substantial control over key aspects of the performance of the work'' may be demonstrated simply by ''by setting his or her own schedule.'' [374] As explained in the NPRM, after further consideration and review of the case law, the Department considered that framing to be too narrow because it shifted focus away from the employer's control—potentially allowing a finding of independent contractor status under the control factor based solely on a worker setting their own schedule, irrespective of other relevant considerations under control—and did not encompass actions the employer may take that would limit the significance of the worker's ability to set their own schedule.

The Department recognizes that many independent contractor relationships include the worker's ability to start and end work as they see fit.[375] And the Department noted that such scheduling freedom may be probative of a worker's independent contractor status.[376] Yet, multiple courts of appeals have determined that workers were employees, rather than independent contractors, even when they had the flexibility to choose their work schedule.[377] Further, the Department noted that employers may still be able to limit the number of hours available for a worker to choose or arrange the sequence or pace of the work in such a way that it would not be possible for the worker to have a truly flexible schedule, thus exhibiting control that could indicate that a worker is an employee.[378]

As the Department noted, courts have often found that a worker's ability to set their own schedule, by itself, provides only minimal evidence that a worker is an independent contractor, particularly when the hiring entity exerts other types of control; therefore, the freedom to set one's schedule should be evaluated against other forms of control implemented by an employer.[379] The Department also cited the Tenth Circuit's common-sense observation that ''flexibility in work schedules is common to many businesses and is not significant *in and of itself.*'' [380] For example, in *Silk,* the ''unloaders'' who came to the coal yard ''when and as they please[d]'' were employees rather than

[372] For example, a court can consider control exerted over workers to comply with safety obligations as not indicative of control and nevertheless conclude upon consideration of all of the factors that such workers were employees under the FLSA. *See Rick's Cabaret,* 967 F. Supp. 2d at 916, 922.

[373] 87 FR 62275 (proposed § 795.110(b)(4)).

[374] 86 FR 1246–47 (§ 795.105(d)(1)(i)).

[375] *See, e.g., Franze,* 826 F. App'x at 77 (noting that schedule flexibility ''weigh[s] in favor of independent contractor status''); *Karlson,* 860 F.3d at 1094–96 (affirming a jury verdict finding a process server to be an independent contractor, in part, because the worker ''was not required to report for work[,] . . . did not punch a time clock,'' and did not have a set schedule, report a daily schedule to the employer, or face discipline for not working); *Express Sixty-Minutes,* 161 F.3d at 303 (determining that the employer ''had minimal control'' over the delivery drivers in part because the drivers ''set their own hours and days of work'' and could reject deliveries ''without retaliation,'' which was evidence that the worker was an independent contractor).

[376] 87 FR 62249 (citing *Saleem,* 854 F.3d at 146 (finding drivers who were able to set schedules that ''were entirely of their making'' were properly found to be independent contractors where, among other factors, drivers could select routes, there was no incentive structure for them to drive at certain times, and they could exercise business-like initiative)).

[377] *See, e.g., Verma,* 937 F.3d at 230, 232 (finding the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be ''narrow choices'' when evaluated against other types of control exerted by the employer and that a ''holistic assessment'' of all factors showed that the workers were not, ''as a matter of economic reality, operating independent businesses for themselves''); *Paragon,* 884 F.3d at 1235–38 (finding that even though a worker could set his own schedule, he was an employee, in part, because his flat rate of pay did not allow him profit based on his performance); *DialAmerica,* 757 F.2d at 1384–86 (finding telephone survey workers who set their own hours and were free from supervision to be employees); *Sureway,* 656 F.2d at 1370–71 (''circumstances of the whole activity'' show that laundry company ''exercises control over the meaningful aspects of the cleaning [work]'' despite the fact that workers could set their own hours).

[378] 87 FR 62248 (citing *Flint Eng'g,* 137 F.3d at 1441 (''The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline.''); *Doty* v. *Elias,* 733 F.2d 720, 723 (10th Cir. 1984) (''Since plaintiffs could wait tables only during the restaurant's business hours, [the employer] essentially established plaintiffs' work schedules.'')).

[379] *See, e.g., Verma,* 937 F.3d at 230 (the Third Circuit found the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be ''narrow choices'' when evaluated against other types of control by the employer, such as setting the price for services); *Hill* v. *Cobb,* No. 3:13–CV–045–SA–SAA, 2014 WL 3810226, at *4–5 (N.D. Miss. Aug. 1, 2014) (finding that even though workers had no specific hours or schedule and could ''come and go as [they] pleased'' the employer ''maintained extensive control over the remaining aspects'' of the business such that the control factor weighed in favor of employee status); *Wilson* v. *Guardian Angel Nursing, Inc.,* No. 3:07–0069, 2008 WL 2944661, at *15–16 (M.D. Tenn. July 31, 2008) (finding that although nurses could accept or reject shifts the employer exercised substantial control in other respects, such as over the manner in which nurses conducted their duties).

[380] 87 FR 62249 (citing *Snell,* 875 F.2d at 806) (emphasis added); *see also Circle C. Invs.,* 998 F.2d at 327 (finding that the employer had ''significant control'' over dancers indicating employee status even though they had ''input . . . as to the days that they wish to work''); *Doty,* 733 F.2d at 723 (''A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee.''); *Walling* v. *Twyeffort, Inc.,* 158 F.2d 944, 947 (2d Cir. 1946) (holding that workers who ''are at liberty to work or not as they choose'' were employees under FLSA).

independent contractors.[381] Flexibility that allows workers to use time between tasks or jobs may also be an inherent component of some business models, but such flexibility does not preclude a finding that the employer has sufficient control over a worker in other ways to weigh in favor of employee status. For instance, the Department noted that ''the power to decline work, and thus maintain a flexible schedule, is not alone persuasive evidence of independent contractor status when the employer can discipline a worker for doing so.'' [382] Moreover, both employees and independent contractors may possess scheduling flexibility in their working relationships.

As the discussion in the NPRM concluded, control over a worker's schedule exhibits just that: one form of control.[383] Both employees and independent contractors can take advantage of flexible work arrangements, which is why such scheduling flexibility, on its own, may not clearly indicate that the employer lacks control over the worker.[384] As the Department noted, this approach is consistent with the economic realities, totality-of-the-circumstances approach, where such scheduling flexibility should be weighed along with other aspects of control the employer may be implementing.

Several commenters expressed general support for the NPRM's discussion of scheduling flexibility. For example, the AFL–CIO noted that ''[t]he NPRM . . . correctly makes clear that . . . 'scheduling flexibility is not necessarily indicative of independent contractor status where other aspects of control are present[.]' '' In their comments, ACRE et al. and the Washington Center for Equitable Growth agreed that flexible work schedules can be common to employees and independent contractors alike and ACRE et al. noted that ''flexible schedules alone do not determine a worker's employment status.'' *See also* NPWF. PowerSwitch Action supported the NPRM's discussion of scheduling flexibility, commenting that the economic reality inquiry ''is not illuminated by whether a worker can choose to perform their work at nights instead of days (or vice versa), in short several-hour increments over a single day or several days, or in periods that vary seasonally.'' It contended that workers classified as employees have historically included workers with great scheduling flexibility across various industries, indicating that such freedoms are not synonymous with being an independent contractor. The LA Fed & Teamsters Locals agreed, noting that scheduling flexibility, alone, is a ''poor indicator[ ] of the economic realities of the contemporary working relationship'' unless that fact can ''actually demonstrate the worker's economic independence.'' NWLC noted that ''[t]he Department's guidance here is consistent with court decisions finding, for instance, that nurses, dancers, and delivery drivers . . . were employees even though they had substantial control over their work hours, because their employers retained control over prices for their services and/or other important elements of their jobs.''

Some commenters addressed industry specific practices. For example, ROC United noted that their members, who are restaurant workers, ''frequently decide when and how long to work,'' yet, ''once working, they have very little control over how they actually do the work,'' suggesting their economic dependence. UFCW similarly commented that, in their experience working with drivers, app-based companies ''threaten to expel workers from the platform or reduce the availability of work shifts, unless the worker continuously accepts jobs;'' a situation that limits the benefit of flexibility.[385] REAL Women in Trucking applauded ''the Department's decision to broaden its framing of the scheduling element from the 2021 Rule and to focus on whether apparent scheduling flexibility actually provides for economic independence or whether the worker is still functionally dependent.'' It noted that truckers can be constrained by other forms of control—such as retaliation for declining too many offered loads—and stated the proposal's ''emphasis on whether apparent scheduling flexibility is constrained by economic reality is accordingly well considered.''

The law firm Nichols Kaster noted that, in their experience, ''employers who misclassify their workers as independent contractors rely on the workers' ability to decline work as evidence of lack of control. But there is oftentimes no meaningful choice because declining work can result in discipline or other consequences.'' It suggested including language from the preamble in the final rule to emphasize this point. NELA agreed with the Department's discussion of scheduling flexibility and similarly suggested that the Department include more information about scheduling flexibility in the final rule. Moreover, Gale Healthcare Solutions noted that the term ''scheduling flexibility'' needs further refinement, since workers in the healthcare industry may have the flexibility to select their preferred shift from a job board but do not have the flexibility to decide when the shift starts and ends, and this ''inherently less 'flexibility' '' would indicate employee status. The Department declines commenters' suggestions to include additional content in the final regulatory text for this factor. The current proposal was intended to provide succinct statements regarding each factor of the economic reality test with the understanding that the preamble will be accessible for additional information regarding the rule, as will future subregulatory guidance.

Several commenters also expressed concern with the Department's approach, asserting that scheduling flexibility is a strong indicator of independent contractor status. For instance, Uber stated that ''a worker's ability to autonomously determine their own work schedule (days, hours, time of day, and more) is a strong predictor of independent status—on Uber, drivers and couriers can start and stop work whenever and wherever they choose, accepting only those offers they want to take[.]'' DoorDash asserted that ''[n]ot only is scheduling flexibility a significant distinction between employment and independent work: it gets to the very heart of the economic

[381] 331 U.S. at 706, 718.

[382] 87 FR 62249; *see, e.g., Off Duty Police,* 915 F.3d at 1060–62 (noting that ''[a]lthough workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job,'' which supported a finding that the control factor favored employee status for one set of workers; testimony that another set of workers may not have been punished for declining work did not clearly support either employee or independent contractor status under the control factor '); *see also Parrish,* 917 F.3d at 382 (ability to turn down projects without negative repercussion was among the reasons the control factor weighed in favor of independent contractor status).

[383] *See, e.g., Mr. W Fireworks,* 814 F.2d at 1048 (noting that work schedules compelled by the employer were, among other considerations within control, evidence that, ''[a]s a matter of economic reality'' the employer ''exercise[d] great control'' over the workers and thus, ultimately employee status).

[384] *See* 87 FR 62249 (citing *Collinge,* 2015 WL 1299369, at *4 (finding that the fact that on-demand ''[d]rivers are free to wait at home for their first delivery of the day, and . . . are free to 'kill time' on a computer or run personal errands'' in between jobs did not demonstrate lack of control ''because [it] merely show[s] that [the employer] is unable to control its drivers when they are not working, an irrelevant point.'') (footnotes omitted)).

[385] The comment noted specific practices that erode the benefit of scheduling flexibility, such as app-based platforms offering first access to premium deliveries or allowing workers first access to select shifts on the condition that they have accepted enough jobs in the prior month.

reality test.'' *See also* National Propane Gas Association.

SHRM suggested that the Department's treatment of scheduling flexibility is misguided because, for example, ''contract work may provide [low-wage earners] with control over their schedules, providing the ability to maximize their earnings and better attend to their personal obligations.'' Multiple individuals, like one ''independent healthcare professional,'' stressed that many people like them want ''the freedom to engage in flexible work arrangements that best meet our needs.''

The Department recognizes that many workers need and desire flexibility in their work schedules and seek out job opportunities that provide that flexibility. And, in some cases, control over one's schedule can be probative of an employer's lack of control over a worker, indicating that they may be an independent contractor.[386] However, case law has consistently held that scheduling flexibility may be a relatively minor freedom, especially in those cases where a worker is prevented from exercising true flexibility because of the pace or timing of work or because the employer maintains other forms of control, such as the ability to punish workers who may seek to exercise flexibility on the job.[387] In this way, the 2021 IC Rule's focus on scheduling flexibility as a fact that demonstrates ''substantial control over key aspects of the performance of the work'' misapplied relevant cases that suggest the opposite conclusion.[388] The proper lens for the test is the totality-of-the-circumstances analysis, which considers scheduling flexibility along with other forms of control the employer might exert, as well as with other factors in the economic reality test.[389]

Some commenters asserted that consideration of scheduling flexibility should take into account specific industry and/or contractual arrangements that limit its availability. For example, NRF & NCCR commented that the Department's proposed approach ''ignores key realities of business relationships common to retailers and restaurants.'' Examples include individuals who rent retail space but are constrained by limited operating hours of the building in which they rent, food delivery workers who may only be able to deliver food when a restaurant is open, or cleaning crews who can only do their work at night. They asserted that these types of limitations do not necessarily indicate that the worker lacks control over their schedule. The CA Chamber echoed this sentiment, noting that ''[a] business engaging a contractor to perform services is likely to have certain dates or times that they would prefer or possibly need that work to be performed,'' suggesting the Department did not take this reality into account. *See also* AFPF (asserting that the control analysis is complicated ''by adding to it such items of routine contractual terms'' like scheduling which ''cast no meaningful light on employer-employee status.''). The PGA noted, specific to its industry, that ''[golf] teaching professionals set their own schedules,'' yet ''their ability to teach at a particular space may be limited by the space's operating hours or conflicting events that require the use of the property.'' They asserted that this limitation ''should not be viewed as an example of a lack of control by the teaching professional.''

Dart contended that if the Department's perspective is that limited scheduling control by the worker indicates employee status, then many drivers who independently ''elect to transport similar loads along the same routes over a period of time, risk losing their status and independence under this factor.'' They asserted that drivers who wish to remain independent would thus have to ''arbitrarily switch routes and carriers, and . . . bear whatever costs or inefficiencies such switches may give rise to, simply to preserve their independent status under this factor'' and requested that the Department adopt ''language which specifically incorporates consideration of the reality of the industry in question.''

In addition, DoorDash suggested that the type of flexibility its workers possess is fundamentally different from the flexibility an employee may obtain from an employer. For instance, ''[h]aving some room to voice a preference about shifts or work remotely isn't true scheduling flexibility, because the ultimate control still belongs to their employers, who dictate things like deadlines and meeting schedules that can't be shirked.'' In contrast, DoorDash noted that its platform allows workers to work on their own time and walk away, potentially for weeks or months at a time.

The Department disagrees that its formulation of the control factor must explicitly consider unique contractual or industry-specific scenarios that might affect scheduling flexibility. The language of the proposed rule noted that ''[f]acts relevant to the employer's control over the worker include whether the employer sets the worker's schedule,'' or where the employer ''places demands on workers'' that do not allow them to work . . . when they choose.'' [390] To the extent a potential employer is exerting control over when and for how long an individual can work, that fact is indicative of the employer's control. And even in those scenarios where the worker's schedule is constrained by contract or employer requirements, such scheduling control is only one fact among many that could be considered under the control factor.

Finally, some commenters asserted that the Department's shift in focus to the employer's control was misguided. CWI suggested that ''where a result or service is perishable or deadline driven, based on the consumer's desire or the nature of the product or service, it is inappropriate to describe the final deadline as evidence of the business setting the worker's schedule.'' In this way, CWI argued, a focus on scheduling flexibility solely from the perspective of the employer, ''prevents a counterbalancing of those separate actions by the employee that, separate and apart from its direct interactions with the putative employer, establish he is in business for himself.'' Similarly, N/MA noted that a shift in focus ''from the worker's right to control the manner and means by which the work is performed to the purported employer's control . . . [is] misdirected,'' and does not consider ''the totality of the worker's business . . . including . . . whether the worker . . . determines to prioritize, stagger, or overlap projects from multiple entities'' as they see fit.

[386] *See, e.g., Express Sixty-Minutes,* 161 F.3d at 303 (determining that the employer ''had minimal control'' over the delivery drivers in part because the drivers ''set their own hours and days of work'' and could reject deliveries ''without retaliation,'' which was evidence that the worker was an independent contractor).

[387] *See, e.g., Verma,* 937 F.3d at 230 (ability to set hours, select shifts, stay beyond a shift, and accept or reject work were ''narrow choices'' when evaluated against other types of control by the employer, such as setting the price for services); *Off Duty Police,* 915 F.3d at 1060 (''Although workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job,'' which was evidence of the employer's ultimate control); *Flint Eng'g,* 137 F.3d at 1441 (''The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline.'').

[388] 86 FR 1247–48.

[389] *See, e.g., Pilgrim Equip.,* 527 F.2d at 1312 (''In the total context of the relationship neither the [workers'] right to hire employees *nor the right to set hours* indicates such lack of control by [the employer] as would show these operators are independent from it.'') (emphasis added).

[390] 87 FR 62275.

The Department's decision to present the control factor from the perspective of the employer's control over the economic aspects of the working relationship conforms to relevant case law describing the factor and also represents a common-sense understanding that an employer's ability to control a worker's time may be probative of the worker's status.[391] And as discussed earlier, where a worker has the ability to set their own work schedule, courts have often found this to be less significant relative to other ways in which the employer exerts control. As such, scheduling flexibility should not be considered potentially dispositive of the control factor as articulated in the 2021 IC Rule. Moreover, the rule does not eliminate the relevance of the worker's ability to control their schedule in the analysis, as the rule notes that ''more indicia of control by the worker,'' such as control over one's schedule, may ''favor[ ] independent contractor status.'' [392]

The Department is finalizing the scheduling portion of the control factor at § 795.105(b)(4) as proposed.

c. Supervision

With respect to the consideration of supervision within the control factor, the Department proposed that ''[f]acts relevant to the employer's control over the worker include whether the employer . . . supervises the performance of the work'' including ''whether the employer uses technological means of supervision (such as by means of a device or electronically)'' or ''reserves the right to supervise or discipline workers.'' [393] In describing its proposal, the Department noted the common-sense observation that an employer's close supervision of a worker on the job may be evidence of the employer's control over the worker, which is indicative of employee status. Conversely, as the Department noted, the lack of close supervision may be evidence that a worker is free from control and is in business for themself.[394] However, courts have found that traditional forms of in-person, continuous supervision are not required to determine that this factor weighs in favor of employee status.[395]

A lack of supervision is not alone indicative of independent contractor status,[396] such as when the employer's business or the nature of the work make direct supervision unnecessary. For example, in *Off Duty Police,* the Sixth Circuit determined that security officers were employees although they were ''rarely if ever supervised'' on the job, noting that ''the actual exercise of control 'requires only such supervision as the nature of the work requires.' '' [397] Moreover, ''the level of supervision necessary in a given case is in part a function of the skills required to complete the work at issue.'' [398] As the court noted, there was a limited need to supervise where officers in that case ''had far more experience and training than necessary to perform the work assigned.'' [399] And in *DialAmerica,* the Third Circuit concluded that homeworkers were employees even though they were subject to little direct supervision (a fact typical of homeworkers generally).[400] As the Second Circuit stated, ''[a]n employer does not need to look over his workers' shoulders every day in order to exercise control.'' [401]

In the NPRM, the Department also explained that employers may rely on training and hiring systems that make direct supervision unnecessary. As the Department noted, in *Keller* v. *Miri Microsystems LLC,* an employer relied on pre-hire certification programs and installation instructions when hiring their satellite dish installers.[402] The court noted that the employer had little day-to-day control over the workers and did not supervise the performance of their work, but that a factfinder could ''find that [the employer] controlled [the installer's] job performance through its initial training and hiring practices.'' [403] The Department also highlighted, from the Fifth Circuit's statement in *Parrish,* that the ''lack of supervision [of the individual] over minor regular tasks cannot be bootstrapped into an appearance of real independence.'' [404] Yet, the Department recognizes that a worker's ability to work without supervision may be probative of their independent contractor status, such as in *Nieman,* where the court affirmed a district court's conclusion that an insurance claims investigator was properly classified as an independent contractor, in part, because the investigator worked largely without supervision when setting up appointments, and deciding where to work and how and when to complete his assignments.[405]

Finally, the Department noted that supervision can come in many different forms beyond physical ''over the shoulder'' supervision, which may not be immediately apparent.[406] For instance, supervision can be maintained remotely through technology instead of, or in addition to, being performed in person, such as when supervision is implemented via monitoring systems that can track a worker's location and productivity, and even generate automated reminders to check in with supervisors.[407] Additionally, an employer can remotely supervise its workforce, for instance, by using electronic systems to verify attendance, manage tasks, or assess performance.[408]

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[391] For discussion of this issue generally, *see* section V.C.4(a).

[392] *Id.*

[393] 87 FR 62275 (proposed § 795.110(b)(4)).

[394] *Id.* at 62249.

[395] *See, e.g., Driscoll,* 603 F.2d at 756 (farmworkers could be employees of a strawberry farming company even where the potential employer exercised little direct supervision over them); *Twyeffort,* 158 F.2d at 947 (rejecting an employer's contentions that its tailors are independent contractors because they are ''free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish'').

[396] 87 FR 62249 n.393 (noting that the legislative history of the FLSA supports this point directly, since the definition of ''employ'' was explicitly intended to cover as employment relationships those relationships where the employer turned a blind eye to labor performed for its benefit) (citing *Antenor,* 88 F.3d at 934)).

[397] 915 F.3d at 1061–62 (quoting *Peno Trucking, Inc.* v. *Comm'r of Internal Revenue,* 296 F. App'x 449, 456 (6th Cir. 2008)).

[398] *Id.* at 1061.

[399] *Id.* at 1062.

[400] 757 F.2d at 1383–84. *See also McComb* v. *Homeworkers' Handicraft Coop.,* 176 F.2d 633, 636 (4th Cir. 1949) (''It is true that there is no supervision of [homeworkers'] work; but it is so simple that it requires no supervision.'').

[401] *Superior Care,* 840 F.2d at 1060; *cf. Antenor* 88 F.3d at 933 n.10 (explaining in an FLSA joint employment case that ''courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees'').

[402] 781 F.3d at 814.

[403] *Id.*

[404] 917 F.3d at 381 (quoting *Pilgrim Equip.,* 527 F.2d at 1312) (alteration in original)).

[405] *Nieman,* 775 F. App'x at 624–25.

[406] 87 FR 62250.

[407] *Id.* (citing, for example, *Ruiz* v. *Affinity Logistics Corp.,* 754 F.3d 1093, 1102–03 (9th Cir. 2014) (finding in a state wage-and-hour case that techniques used by an employer to monitor its furniture delivery drivers were a form of supervision that made it more likely that the drivers were employees; as the court noted, the employer ''closely monitored and supervised'' the drivers by, among other things, ''conducting 'follow-alongs'; requiring that drivers call their . . . supervisor after every two or three stops; monitoring the progress of each driver on the 'route monitoring screen'; and contacting drivers if . . . [they] were running late or off course''). *See also Scantland,* 721 F.3d at 1314 (finding ''meaningful supervision and monitoring'' in part because the employer required cable installers to log in and out of a service on their cell phones to record when they arrived on a job, when they completed a job, and what their estimated time of arrival was for their next job).

[408] *See id.* (relying on the Department's enforcement experience in this area). For example, an employer's use of electronic visitor verification (''EVV'') systems can be evidence of an employment relationship, especially in those instances where the employer uses the systems to set schedules, discipline staff, or run payroll systems, for example. *See Domestic Service Final Rule Frequently Asked Questions (FAQs),* U.S. Department of Labor (March

Thus, a totality-of-the-circumstances analysis properly includes not only exploring ways in which supervision is expressly exercised, but also those instances where supervision is not apparent but still used by the employer—either through the job's structure, training, or the use of technological tools.

Several commenters supported the Department's discussion of supervision generally. For instance, LCCRUL & WLC noted that case law confirms the fact that, ''direct, on-site supervision'' is not a prerequisite to find that a worker is an employee. As LCCRUL & WLC noted, the Department's approach toward supervision allows a ''more accurate and comprehensive determination of the economic reality of the parties' relationship.'' ACRE et al., PowerSwitch Action and other commenters noted that the Department's description of supervision is helpful, since it highlights the many ways in which a worker might be controlled at work through direct management or technological surveillance.

Commenters such as NELP and ROC United commended the Department's decision to address technologically-mediated supervision, since, as NELP noted, ''[m]any businesses today manage their workforces with monitoring systems that track productivity, location, and attendance.'' Providing this focus, NELP explained, ''will ensure that supervision is analyzed regardless of the medium used to accomplish it.'' As CLASP & GFI commented, ''new technologies make[ ] it easier for employers to keep close tabs on workers and simultaneously disengage from modes of management that, in a pre-digital world, would likely have been indicators of an employment relationship.'' The use of such technology, they noted, may particularly effect low-wage workers whose jobs can be easier to measure, such as warehouse workers whose efficiency in moving material can be readily quantified, or delivery drivers, whose speed, routes, and drop-off points can be managed digitally. As they describe, in some industries, digital ''surveillance has completely supplanted in-person supervision in cases where the nature of the work would otherwise require an onsite supervisor.''

While some comments supported the overall approach to supervision in the NPRM, others suggested that the Department go further, either by adding additional context to the regulatory text or discussing additional facets of supervision. For instance, Nichols Kaster commented that the Department's approach is helpful since ''supervision can take multiple forms'' and employers have often argued that their workers are independent contractors by citing to the fact that they don't engage in in-person supervision of their work. However, it, along with NELA, called on the Department to include more information from the preamble discussion in the final regulatory text, specifically language addressing supervision via automated systems and that the lack of apparent supervision would not necessarily be indicative of a worker's independent contractor status.

Similarly, NELP requested that the Department include language in the final regulatory text specifically clarifying ''that a lack of direct supervision may still support a finding of an employer's right to control if an employer can simply exert control when it deems it in the employer's interest to do so.'' Outten & Golden noted that the text of the final rule should also encompass the concept of ''monitoring,'' since ''many workers who work remotely . . . are primarily 'supervised' through digital monitoring.'' In addition, Gale Healthcare Solutions and IntelyCare suggested that the Department include supervision provided by onsite or related entities such as scenarios where healthcare staff sent by an employer to a worksite receive ''supervisory-like feedback'' on their performance that can be communicated back to their employer. Moreover, Gale Healthcare was concerned that if the Department indicated in the final rule that initial training—which some employers have deployed in lieu of direct supervision—is indicative of control, and thus employee status, that employers who wish to continue engaging independent contractors may forego such training, which could harm individuals in the healthcare industry.

The Department declines to adopt the additional regulatory language suggested by commenters, as it believes additional discussion is more appropriate for future subregulatory guidance. In response to NELP, the Department understands its suggestion as requesting additional detail regarding reserved control, which is discussed elsewhere in this final rule. The Department also declines to add the phrase ''monitoring'' to the final regulatory text as requested by Outten & Golden. As described below, the Department agrees that supervision of a worker includes all forms of supervision which go to the worker's performance of the work. Thus, while the act of collecting data through monitoring systems could be used to supervise the performance of work, it might instead serve other operational needs of the employer not related to control. Therefore, adding ''monitoring'' to the regulatory text would not be helpful at highlighting this distinction. Moreover, to the extent Outten & Golden's comments were intended to include monitoring to capture situations where the employer would monitor a worker and then exert supervisory control when needed or desired, the Department is confident that this scenario is very similar to its discussion of reserved control where an employer possesses supervisory control but elects to exert it when it chooses.[409] Where an employer reserves the right to use electronic or digital means of supervision—rather than traditional in-person supervision—to monitor a worker and thus correct or direct the performance of the work when it deems necessary, then this too would be relevant to the economic reality analysis.[410] Accordingly, the Department concludes that the regulatory language describing the control factor contains sufficient information to inform stakeholders about the scope of this factor.

The Department also recognizes the situation that Gale Healthcare Solutions and IntelyCare raise regarding supervision that may be performed by other entities where the work is performed and relayed back to a potential employer. However, the Department declines to add specific language addressing this scenario, since this scenario would require a fact-specific inquiry. For example, if a potential employer is exercising control, but delegates it to a third party that is conducting onsite supervision and then reports that to the employer, then the same analysis regarding the employer's supervision would apply. Finally, to Gale Healthcare's concern regarding training, while it may be indicative of other factors in the economic reality test (*e.g.,* skill and initiative), its relevance for the purposes of this portion of the control analysis is to simply highlight how training may be used by some employers to avoid any necessary supervision once the worker begins performing work. Such training that is not a replacement for close supervision,

20, 2023, 4:30 p.m.), *https://www.dol.gov/agencies/whd/direct-care/faq#g11* (discussing EVV systems at question #10 in relation to an FLSA joint employment analysis).

[409] *See* section V(D).

[410] *See generally Superior Care,* 840 F.2d at 1060 (finding that the employer's reserved right to perform in-person supervision of nursing staff was relevant to the economic reality analysis).

such as apprising workers of safety protocols, would not necessarily be indicative of supervisory-like control.

UFCW commended the Department's focus on providing additional context to the control factor analysis, specifically the ways in which an employer might use technology to supervise its workforce. However, as discussed in the section on examples used in the preamble, UFCW, several of its locals, and the AFL–CIO would also have the Department go further by providing additional examples of ways in which employers use technology, including surveillance, data collection, and algorithmic management tools, to supervise workers. According to UFCW, since ''employers in all industries are rapidly exploiting electronic surveillance to supervise workers,'' the final rule ''should additionally explain that a company's use of nontransparent computer algorithms (programming codes) to manage workers is evidence indicative of employer control.''

The Department agrees with commenters like the AFL–CIO that control over the performance of work that is exercised by means of data, surveillance, or algorithmic supervision is relevant to the control inquiry under the economic reality test. Such tools could be used directly by the employer or on their behalf to supervise the performance of the work. Digital tools are many times developed, controlled, and deployed to assist in (or independently conduct) supervision in ways that would have otherwise required in-person oversight. However, the Department believes that such tools, including algorithmic control, if used by the employer to supervise the performance of the work, are already captured by the regulatory text addressing a potential employer's use of ''technological means of supervision (such as by means of a device or electronically).'' Relatedly, the Department declines to add additional language suggesting actions like mere data collection would constitute supervision for the purposes of control. Like monitoring, an employer may collect data on business operations for purposes unrelated to its relationship to workers. Yet, the Department recognizes that where the employer collects information that then is used for the purposes of supervision and thus goes beyond information collection, that may be probative of an employer's control under this factor.

Several commenters disagreed with the Department's approach regarding supervision. CWI noted that a lack of supervision may in fact reflect that a worker is an independent contractor as independent contractors are often ''retained precisely because they perform work that the putative employer does not,'' which results in less supervision. CWI further contended that a lack of supervision should edge toward a finding of independent contractor status in most cases. This concern was echoed by N/MA, which suggested that the Department's approach ''turns the control factor upside down by effectively ignoring a lack of putative employer control.'' Many independent contractors, N/MA contended, function without supervision precisely because of the specialized or technical services they render. N/MA asserted that ''work that does not require supervision by the hiring entity is exactly the type of work that should be recognized as more likely to result in a determination of a lack of control over the manner and means by which the work is performed, and indicative of independence.''

The Department agrees with commenters that a lack of supervision may be probative of a worker's independent contractor status. That fact is reflected in case law as well as the Department's proposal.[411] For example, regarding N/MA's comment, the Department agrees that workers who deliver technical or specialized services may use that technical expertise to operate without supervision (either because the employer need not supervise a technically-proficient worker or the employer does not have the expertise themselves to meaningfully supervise). In such circumstances, an employer's lack of supervision may support a finding that the control factor weighs in favor of independent contractor status. The Department notes however, also consistent with case law, that the lack of supervision on its face should not halt a full analysis.[412] Lack of direct or in-person supervision may not indicate that the control factor weighs in favor of independent contractor status if there are other ways in which the employer is able to accomplish the same manner of control that would have otherwise been performed through close, in-person supervision over the performance of the work. As the Department indicated, for example, the employer may rely on detailed training or instructions, deploy electronic tools to direct the performance of the work remotely, or retain the right to conduct in-person supervision.

CWI further suggested that the Department's proposal missed a critical distinction. By focusing merely on the fact that supervision may be maintained by technological means, they asserted that the proposal did not distinguish between supervision through technology that is ''targeted toward the direction of the manner in and means by which the worker performs his work'' and monitoring that is ''targeted toward the particular goods or services at issue.''[413] The California and U.S. Chambers of Commerce and WPI agreed, with WPI similarly contending that electronic monitoring ''has little to no impact on economic realities, and that it is an often-commonplace component of normal arm's-length contracts.'' *See also* Cambridge Investment Research, Raymond James, and WFCA. As Flex similarly noted, technology is used to manage basic business functions and compliance monitoring, as well as ''enhance[ ] the user experience for consumers'' such as noting a driver's location, arrival time, or facilitating the exchange of money for the consumer. *See also* DSA; NHDA. Moreover, Flex noted that federal regulations require electronic monitoring for safety purposes in some industries, like trucking.[414] *See also;* American Trucking Association; State Trucking Associations; U.S. Chamber. Therefore, to avoid confusion, Flex suggested that references to technology should be stricken from the rule. *See also* DSA; PGA; Raymond James.

CWI also stated, however, that technological supervision ''coupled with some manner of corrective direction about the means and manner of performance may evidence employment,'' yet they commented that the Department's proposal ''sweeps too broadly.'' The Coalition of Business

[411] *See, e.g., Chao* v. *Mid-Atlantic Installation Servs., Inc.,* 16 F. App'x 104, 106–08 (4th Cir. 2001) (agreeing with the district court's analysis that the ability to complete jobs in any order, conduct personal affairs, and work independently is evidence that leans toward identifying a worker as an independent contractor).

[412] *See, e.g., Superior Care,* 840 F.2d at 1060 (''An employer does not need to look over his workers' shoulders every day in order to exercise control.''); *Driscoll,* 603 F.2d at 756 (farmworkers could be employees of a strawberry farming company even where the employer exercised little direct supervision over them); *Twyeffort,* 158 F.2d at 947 (rejecting an employer's contention that its tailors are independent contractors because they are ''free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish'').

[413] The comment noted, for example, that distributors of perishable goods like food and medicine use technological monitoring ''to ensure product integrity, compliance with customer and regulatory commitments, and even the safety of the public at large,'' not necessarily to exercise control over the worker as an employee.

[414] For discussion of comments related to actions taken to comply with regulatory requirements see section V(C)(4)(a).

Stakeholders noted that the language in the proposal could encompass the employer's or worker's use of everyday technologies that are used to run a contemporary workplace. Finally, the CA Chamber noted that independent contractors are also supervised, suggesting that it would be ''nonsensical to assert that you would hire a contractor and never oversee their services or check in on progress.''

The Department agrees with commenters such as CWI and WPI that employers may at times use technology to track information critical to their business or, as the CA Chamber notes, the mere status of work performed by a worker. Such actions can be performed consistent with an independent contractor relationship with a worker, even when the data being collected is generated from the actions of the worker. The Department thus agrees with CWI, for example, that the proposed regulatory text missed this nuanced distinction. However, as CWI noted, where such tracking is then paired with supervisory action on behalf of the employer such that the performance of the work is being monitored so it might then be directed or corrected, then this type of behavior may suggest that the worker is under the employer's control. Thus, the Department is adding additional language to the control factor to clarify that the relevant consideration is not simply the employer's use of technology to supervise, but the use of technology ''to supervise the performance of the work.'' This is why the Department disagrees with Flex's call to eliminate any reference to technology and WPI's assertion that the use of technology never implicates the analysis under the economic reality test. Such a complete bar would suggest that a worker's performance of the work can never be controlled or directed by technology, which is not correct, especially when such tools are not only ubiquitous in many employment settings, but also are specifically deployed by some employers to supervise and direct the means through which a worker performs their job. Moreover, the Department does not believe that the inclusion of a reference to technology, as noted by the Coalition of Business Stakeholders, would act as an unbounded factor, pulling in all forms of technology used in modern workplaces. The only forms of technology referenced by the rule are those that are deployed by the employer as a means of supervising the performance of the work which are thus probative of economic dependence, not all technologies that the employer might be using in their business.

The Department notes that comments received regarding the proposal's discussion of an employer's reserved control over the worker, including reserved rights to supervise, are addressed in the discussion of reserved rights in section V.D.

The Department is finalizing the supervision portion of the control factor at § 795.105(b)(4) with the revisions discussed herein.

d. Setting a Price or Rate for Goods or Services

Regarding the control factor's treatment of the ability to set a price or rate for goods or services, the Department proposed that this factor consider whether the ''employer controls economic aspects of the working relationship . . . including control over prices or rates for services.'' [415] As the Department noted, facts related to the employer's ability to set prices or rates of service relate directly to whether the worker is economically dependent on the employer for work and help answer the question whether the worker is in business for themself.[416]

At the outset, the Department noted that workers in business for themselves are generally able to set (or at least negotiate) their own prices for services rendered.[417] The Department further noted that one of the early Supreme Court cases applying the economic reality test concluded that the workers were employees in part because they were not ''selling their products on the market for whatever price they can command.'' [418] The Court explained that, instead, the workers were ''regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.'' [419] The Department also cited multiple court of appeals and district court decisions finding that an employer's command over the price or rate for services indicated their control over the worker and that the worker was thus less likely to be in business for themself.[420]

Conversely, the Department noted that when a worker negotiates or sets prices, those facts weigh in favor of independent contractor status.[421] For instance, in *Eberline* v. *Media Net, LLC,* the court found that a jury had sufficient evidence to conclude that a worker exerted control over meaningful aspects of his business in part due to ''testimony that installers could negotiate prices for custom work directly with the customer and keep that money without consequence.'' [422]

The Department also noted that the price of goods and services may sometimes be included in contracts between a business and an independent contractor.[423] The Department quoted *McFeeley,* where the court observed that a worker doesn't ''automatically become[ ] an employee covered by the FLSA the moment a company exercises any control over him. After all, a company that engages an independent contractor seeks to exert some control, whether expressed orally or in writing, over the performance of the contractor's duties[.]'' [424] Yet, the Department cautioned that the presence of a contract does not obviate the need for a complete analysis regarding the control exerted by the employer, such as the worker's ability to negotiate and alter the terms

[415] 87 FR 62275 (proposed § 795.110(b)(4)).

[416] 87 FR 62250.

[417] *Id.*

[418] *Whitaker House,* 366 U.S. at 32.

[419] *Id.*

[420] 87 FR 62250–51 (citing *Verma,* 937 F.3d at 230 (identifying, among other things, the employer's setting the price and duration of private dances as indicative of ''overwhelming control'' over the performance of the work); *Off Duty Police,* 915 F.3d at 1060 (concluding that certain security guards were employees, in part, because ''[the employer] set the rate at which the workers were paid''); *McFeeley,* 825 F.3d at 241–42 (affirming that a nightclub owner was exercising significant control because, among other things, it set the fees for private dances); *Cornerstone Am.,* 545 F.3d at 343–44 (finding the control factor weighed in favor of employee status where employer controlled ''meaningful'' economic aspects of the work, including pricing of products sold); *Selker Bros.,* 949 F.2d at 1294 (finding that, among other things, the fact that the employer set the price of cash sales of gasoline reflected the employer's ''pervasive control'' over the workers); *Agerbrink* v. *Model Serv., LLC,* 787 F. App'x 22, 25–26 (2d Cir. 2019) (determining that there were material facts in dispute regarding the worker's ''ability to negotiate her pay rate,'' which related to the degree of control exerted by the employer, and rejecting the employer's contention that the worker had control over her pay rate simply because she could either work for the amount offered or not work for that amount, stating that this ''says nothing of the power to negotiate a rate of pay''); *Karnes* v. *Happy Trails RV Park, LLC,* 361 F. Supp. 3d 921, 929 (W.D. Mo. 2019) (finding park managers to be employees in part because the park owners ''set all the prices''); *Hurst* v. *Youngelson,* 354 F. Supp. 3d 1362, 1370 (N.D. Ga. 2019) (finding relevant to the control analysis that the plaintiff was not free to set the prices she charged customers and had no ability to waive or alter cover charges for her customers).

[421] *Id.* at 62251.

[422] 636 F. App'x 225, 227 (5th Cir. 2016); *see also Nelson* v. *Texas Sugars, Inc.,* 838 F. App'x 39, 42 (5th Cir. 2020) (finding that because ''the dancers set their own schedule, worked for other clubs, chose their costume and routine, decided where to perform (onstage or offstage), kept all the money that they earned, and *even chose how much to charge customers for dances,* a reasonable jury could conclude that the Club did not exercise significant control over them'') (emphasis added).

[423] 87 FR 62251.

[424] *Id.* n. 410 (quoting *McFeeley,* 825 F.3d at 242–43).

of the contract. As the discussion in the NPRM concluded, it is evidence of employee status when an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it.[425]

Multiple commenters supported the Department's inclusion and description of price setting under the control factor. For example, the LA Fed & Teamsters Locals stated that this inclusion is a ''recognition of the great significance of an employer's control over setting prices for services'' which is ''much more reliable indicia of entrepreneurial status than less significant aspects of control.'' Such an approach, it suggested, will prevent employers from ''offering [workers] minor forms of control while effectively setting a ceiling on the workers' earnings by maintaining control over the rates offered to customers.'' The law firm Nichols Kaster noted that the proposal ''expounds on this important point and provides focus and clarity on what 'economic aspects' means.'' NELP stated that the Department's discussion of price setting appropriately recognized that price-setting is a form of control, since an independent contractor ''controls, and has the right to control, all important business decisions,'' including ''what good or service to sell and at what price.'' As NELP further noted, ''without the power to set prices for goods or services, a worker will likely be economically dependent on an employer for work, and if she wants to increase earnings, her only option is to work longer, harder, or more jobs.'' REAL Women in Trucking commended the Department for providing ''helpful clarity'' regarding price setting generally, providing an example of a worker's ability to negotiate rates where drivers select jobs from a ''free-market load board'' where they can negotiate the rates for their services and sign a rate contract directly with brokers.

Some commenters suggested revisions to the proposed regulatory language. For example, UFCW urged the Department to amend the discussion regarding control to include a discussion of information asymmetries, noting that where a company conceals pricing data, that would indicate that a worker is not an independent contractor, since the worker lacks key information regarding price that would affect entrepreneurial decisions they might make. ACRE et al. similarly suggested that the Department ''clarify in the rule that another factor in determining if workers are considered employees must include if a corporation exercises control over workers through pay structures,'' specifically bonus pay systems used by some transportation network companies that encourage workers to drive more. ACRE et al. also suggested that the Department clarify that price (or wage) setting is so critical to the analysis that ''workers who can not independently set their own wage rates are, *per se,* not independent contractors.'' *See also* Jobs With Justice; NELA; Outten & Golden; PowerSwitch Action.

The Department agrees that the lack of information regarding prices may prevent a worker from negotiating prices to further their own business. The Department believes that this concept was captured in the proposed language that the Department is finalizing which states that ''[w]hether the employer controls economic aspects of the working relationship'' should be considered, including ''control over prices or rates for services.'' [426] Control over price is one specific example and is not meant to be exhaustive. Further, the Department believes that defining the relationship in terms of ''information asymmetry'' would be less helpful to businesses that are trying to understand their obligations, since that term is ambiguous. Moreover, the Department is confident that situations in which the employer is controlling specific payment terms or pay structures are captured by the proposed regulatory language because the relevant inquiry focuses on an employer's control of ''economic aspects of the working relationship,'' which can embrace a nonexclusive set of considerations that may be relevant to a specific working relationship. Finally, the Department declines to adopt multiple commenters' suggestion to state that a worker's lack of control over prices would suggest conclusively that they are not independent contractors. As mentioned throughout this final rule, the Department declines suggestions to predetermine the weight of certain considerations, facts, or individual factors. The Department notes, however, that in a particular case, after considering all the facts of a particular relationship, control over pricing may be highly relevant to whether the control factor weighs in favor of employee or independent contractor status. This approach is consistent with case law, where a court ''adapt[s] its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case.'' [427]

Some commenters were opposed to the inclusion of price setting or the extent to which it may be used to illuminate the control factor of the economic reality test. For instance, the CA Chamber noted that while it ''generally agree[s] with the description of this facet of the control factor,'' it was concerned that it may receive too much weight in the analysis because some employees, ''such as salaried white-collar workers'' can negotiate their pay, while others, like an ''hourly employee on an assembly line'' may not. Therefore, the CA Chamber stated that considerations regarding price control, ''should have limited use in the analysis because it is not a defining feature of employment generally.'' *See also* AFPF; Richard Reibstein, publisher of legal blog.

The IFA noted its concern with the Department's treatment of price as it related to franchising relationships. IFA explained, ''[f]ranchisors commonly suggest resale prices for offerings across the franchise system and, subject to applicable law, may set minimum or maximum prices for products or services, or have uniform advertising requirements for system-wide promotions.'' IFA requested that the Department, ''expressly state that, in the franchise context, the fact that a franchisor sets prices for goods or services is not probative of an employment relationship.'' Similarly, ACLI shared that considerations regarding price are misplaced for the insurance industry, as ''neither insurers nor insurance agents have unlimited discretion to adjust prices however they see fit.'' In fact, ''[c]onsistent with the requirement of financial solvency, insurance agents and advisors have no say or influence over the price of the products that they sell on behalf of firms, and they are prohibited by law from 'rebating' any of the commissions earned from those sales,'' a fact that ''effectively bars them from getting involved in, or setting, pricing.'' The Alternative and Direct Investment Securities Association noted a similar arrangement among some investment advisors, who cannot fully negotiate rates for commissions because such rates are, in part, determined by the application of SEC regulations. Similarly, C.A.R. noted that real estate industry commission payments in California are required to be paid through a broker (with a written

[425] *Id.* (citing *Scantland,* 721 F.3d at 1315 (reversing summary judgment for the employer based in part on evidence that the workers ''could not bid for jobs or negotiate the prices for jobs'')).

[426] 87 FR 62275 (proposed § 795.110(b)(4)).

[427] *McFeeley,* 825 F.3d at 241.

agreement on how the commission will be shared between broker and salesperson). And the Coalition of Cattle Associations stated that cattle health processing crews, workers common in the cattle industry that care for herds, are similarly paid indirectly by a cattle farm that contracts for services of a company that engages crew members.

CWI commented that considerations around prices or rates are superfluous because ''[a] worker's ability to negotiate or otherwise impact the amounts that he earns for his work is already fully incorporated in the opportunity-for-profit-or-loss factor.'' Thus, CWI suggested that since this consideration should be withdrawn as it is redundant. The N/MA similarly noted that such overlapping analysis results in ''improper[ ] double counting.'' *See also* CMAA. & NRA.

The Department declines to adopt commenters' proposals to de-emphasize the relevance of control over prices or rates of service. Just as the Department declined the suggestion that it elevate the role of control over prices, the Department concludes that giving this consideration less weight would similarly undermine a totality-of-the-circumstances analysis. An employer's control over pricing should be one fact among all other facts considered under the control factor as it may be probative of a worker's economic dependence on a potential employer.

The Department recognizes that many industries, occupations, or even business sectors set prices and rates for goods or services in ways that are unique, as noted by commenters like ACLI and IFA. However, workers who are truly in business for themselves will generally control the fundamental economic components of their business, including the prices to charge customers or clients for the goods or services offered. As discussed in section V.C.4.a, the Department is revising the final regulatory text of this factor to state: ''Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control.'' However, beyond those obligations, where the potential employer exerts control to set rates or prices for services, the worker is more likely to be ''receiving the compensation the organization dictates,'' and thus less likely to be in business for themself.[428]

In addition, the Department disagrees with commenters such as CWI and N/MA contending that the discussion of price in both the nature and degree of control and opportunity for profit and loss factors is not warranted. In the former, the analysis is focused on the employer's actions that would control the economic aspects of the working relationship, while the discussion of the latter focuses on ways in which the individual has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work. Each discusses prices from different analytical points of view, an effort that is consistent with this final rule's approach, which is to analyze the working relationship in all its facets.

Finally, the Department declines commenter suggestions to omit any discussion of price setting under the control factor. The Department continues to believe, consistent with case law, that a potential employer's general control over the prices or rates for services—paid to the workers or set by the employer—is indicative of employee status. When an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it, this is relevant under the control factor. As such, the Department declines to create a carve-out for certain business models or industries, as requested by some commenters, although the Department emphasizes that this position is intended to be consistent with the case law on this issue and is not creating a novel interpretation. Importantly, however, as with all considerations discussed under all the factors, the Department does not intend for this fact to presuppose the outcome of employment classification decisions in any particular industry, occupation, or profession.

The Department is finalizing the price setting portion of the control factor at § 795.105(b)(4) as proposed.

e. Ability To Work for Others

Another consideration that the Department proposed under the control factor was whether the employer ''explicitly limits the worker's ability to work for others'' or ''places demands on workers' time that do not allow them to work for others.'' [429] This consideration was consistent with the 2021 IC rule, which also recognized that directly or indirectly requiring an individual to work exclusively for an employer was indicative of an employer-employee relationship.[430]

As explained in the NPRM, where an employer exercises control over a worker's ability to work for others, this is indicative of the type of control over economic aspects of the work that is associated with an employment relationship rather than an independent contractor relationship.[431] Control over a worker's ability to work for others may be exercised by directly prohibiting other work—for example, through a contractual provision.[432] It may also be exercised indirectly by, for example, making demands on workers' time such that they are not able to work for other employers,[433] or by imposing other restrictions that make it not feasible for a worker to work for others.[434] For

[428] *Whitaker House,* 366 U.S. at 32.

[429] 87 FR 62275 (proposed § 795.110(b)(4)).

[430] *See* 86 FR 1247 (§ 795.105(d)(1)(i)).

[431] 87 FR 62251–52.

[432] *See Parrish,* 917 F.3d at 382 (noting that the non-disclosure agreement did not require exclusive employment, and was therefore not an element of control that indicated employee status); *Off Duty Police,* 915 F.3d at 1060–61 (non-compete clause preventing workers from working for employer's customers for two years after leaving employment was among evidence supporting finding that control factor indicated employee status); *Express Sixty-Minutes,* 161 F.3d at 303 (''Independent Contractor Agreement'' did not contain a ''covenant-not-to-compete'' and drivers could work for other courier delivery providers, which indicated independent contractor status); *see also* WHD Op. Ltr., 2000 WL 34444342, at *1, 4 (Dec. 7, 2000) (workers were required to sign an agreement that prohibited them from working for other companies while driving for the employer, which suggested employee status); *but cf. Faludi* v. *U.S. Shale Sols., LLC,* 950 F.3d 269, 276–77 (5th Cir. 2020) (a non-compete clause ''does not automatically negate independent contractor status''); *Franze,* 826 F. App'x at 76–77 (although a non-compete provision prohibited drivers from driving routes and carrying products for competing companies, facts showed that the drivers ''controlled the overall scope of their delivery operations'' because of their control over distribution territories, ability to hire others, schedule flexibility, and lack of oversight).

[433] *See, e.g., Keller,* 781 F.3d at 813–14 (although worker was not prohibited from working for other companies, ''a reasonable jury could find that the way that [the employer] scheduled [the worker's] installation appointments made it impossible for [the worker] to provide installation services for other companies''); *Scantland,* 721 F.3d at 1313–15 (finding even if workers were not prohibited from working for other installation contractors their long hours and inability to turn down work suggested that the employer controlled whether they could work for others, which was in part why the control factor favored employee status); *Cromwell,* 348 F. App'x at 61 (''Although it does not appear that [the workers] were actually prohibited from taking other jobs while working for [the employers], as a practical matter the work schedule established by [the employers] precluded significant extra work.''); *Flint Eng'g,* 137 F.3d at 1441 (finding the hours the company required of the workers, coupled with driving time between home and remote work sites every day, made it ''practically impossible for them to offer services to other employers'').

[434] *See Brant,* 43 F.4th at 669–70 (despite having the contractual ability to haul freight for other carriers, a driver alleged that the company maintained a ''system for approving and monitoring

Continued

example, in *Scantland,* the Eleventh Circuit determined that cable technicians could not work for other companies, either because they were told they could not do so or because the workers essentially had an exclusive work relationship with the employer because they were required to work 5 to 7 days a week and could not decline work without risking termination or being refused subsequent work.[435] Thus, the employer controlled whether they could work for others, which suggested that they were economically dependent on the employer.[436]

The NPRM also recognized that some courts find that less control is exercised by a potential employer where the worker is not prohibited from working for others, particularly competitors, and that this may be indicative of an independent contractor relationship.[437] However, the Department declined to include in the regulatory text for the control factor a blanket statement that the ability to work for others is a form of control exercised by the worker that indicates independent contractor status. The Department was concerned that this framing, which was in the 2021 IC Rule, fails to distinguish between work relationships where a worker has multiple jobs in which they are economically dependent on each potential employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business.[438] As the Department noted, if one worker holds multiple lower-paying jobs for which they are dependent on each employer for work in order to earn a living, and a different worker provides services to multiple clients due to their business acumen and entrepreneurial skills, there are qualitative and legally significant differences in how these two scenarios should be evaluated under the economic reality test.

Ultimately, as stated in the NPRM, the question is ''whether a [worker's] freedom to work when she wants and for whomever she wants reflects economic independence, or whether those freedoms merely mask the economic reality of dependence.'' [439] Dating back to *Silk,* the ''unloaders'' who came to the coal yard ''when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will'' were deemed to be employees rather than independent contractors.[440] And as the Fifth Circuit has explained, ''[the] purposes [of the FLSA] are not defeated merely because essentially fungible piece workers work from time to time for neighboring competitors.'' [441] For example, in *Seafood, Inc.,* the Fifth Circuit examined whether piece-rate workers who peeled and picked crabmeat and crawfish for a seafood processor, and who were allowed ''to come and go as they please . . . and even to work for competitors on a regular basis'' were, as a matter of economic reality, dependent on their employers and therefore employees under the Act.[442] The court determined that the workers' ability to work for others was not dispositive, and that ''[l]aborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer'' because ''that freedom is hardly the same as true economic independence.'' [443] The Sixth Circuit has further observed that ''[m]any workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet.'' [444]

Several commenters supported the way the Department's proposal framed consideration of the ability to work for others within the control factor, including both direct and indirect means of limiting individuals' ability to work for others. *See, e.g.,* LA Fed & Teamsters Locals; NWLC; Real Women in Trucking; UFCW. For example, the LA Fed contended that the 2021 IC Rule ''misapplies the law'' by stating that workers could be found to exercise ''substantial control'' by having the ability to work for others, because ''[f]or decades, employees have been able to have multiple jobs . . . without losing the protections the law bestows on employees.'' The LA Fed supported the Department's proposal, explaining that it ''rightly recognizes that workers' ability to . . . work for others does not support independent contractor status unless . . . facts actually demonstrate the worker's economic independence.'' Similarly, the NWLC stated that the 2021 IC Rule ''impermissibly narrow[ed] the concept of control itself by focusing on control over work exercised by the individual worker, as opposed to the right to control by an employer'' and by using as an example a worker's ''substantial control'' through the ability to work for others despite many decisions finding workers to be employees even though they worked for others.

Some commenters requested that the Department provide a description of this aspect of the control factor that would address the workers' ability to work for others, not just the employer's actions, and state that where an individual has the ability to work for others, including competitors, this weighs in favor of independent contractor status. *See, e.g.,* CPIE; DoorDash; N/MA. For example, DoorDash commented that the proposed rule ''adopts a one-sided approach: if a hiring entity limits a worker's ability to work for others, that counts toward employee status, but if a worker has the freedom to work for others, that doesn't count toward independent contractor status.'' However, Outten & Golden observed that employer limitations on the ability to work for others cannot be viewed simply as the converse of a worker's ability to work for others: ''The fact that an employer entity does not prohibit outside work does not suggest independent contractor status because having multiple jobs is compatible with an employment relationship. However, being prohibited from working for others clearly indicates the control of an employer, rather than an independent contractor relationship.''

CWI also contended that the ''employer-centric focus'' of the proposed regulatory text addressing a worker's ability to work for others was ''misguided'' because, as the Department noted in the NPRM, there is appellate authority acknowledging ''a worker's ability to work for others—and thus develop multiple sources of business—as evidence of independent contractor status.'' CWI did not feel it

trips made for other carriers'' that was ''so complex and onerous that Drivers could not, as a practical matter, carry loads for anyone other than'' the company, which the court determined weighed in favor of employee status).

[435] 721 F.3d at 1313–15.

[436] *Id.* at 1315.

[437] *See, e.g., Razak,* 951 F.3d at 145–46 (discussing disputed facts regarding whether drivers could drive for other services—Uber contended drivers could drive for other services but drivers contended that they could not accept rides from other platforms while online for Uber; drivers also noted that Uber's Driver Deactivation Policy stated that soliciting rides outside the Uber system leads to deactivation and that activities conducted outside the Uber system, like ''anonymous pickups,'' were prohibited); *Paragon,* 884 F.3d at 1235 (finding control factor favored independent contractor status in part because worker could and did work for other employers); *Saleem,* 854 F.3d at 141–43 (drivers' ability to work for business rivals and transport personal clients showed less control by and economic dependence on the employer); *Express Sixty-Minutes,* 161 F.3d at 303 (control factor ''point[ed] toward independent contractor status'' in part because the ''Independent Contractor Agreement'' did not contain a covenant-not-to-compete and drivers could work for other courier delivery providers).

[438] 87 FR 62252.

[439] *Reich* v. *Priba Corp.,* 890 F. Supp. 586, 592 (N.D. Tex. 1995) (citing *Mednick,* 508 F.2d at 300, 301–02).

[440] 331 U.S. at 706, 718.

[441] *Seafood, Inc.,* 867 F.2d at 877.

[442] 861 F.2d at 451–53.

[443] *Seafood, Inc.,* 867 F.2d at 877.

[444] *Off Duty Police,* 915 F.3d at 1058.

was sufficient to address this factor by stating that a business placing a limitation on the ability to work for others was evidence of employee status because this failed to take into account ''the fact that a worker may be simultaneously (and in a multi-app situation, potentially at the exact same time) working for others.'' Moreover, referencing *Saleem,* CWI contended that the fact that a worker could earn income through work for others meant that the worker was ''less economically dependent on his putative employer.''

The Department notes that the mere fact that a worker earns income from more than one employer does not mean that the worker is not economically dependent on one or all of those employers, as a matter of economic reality. Economic dependence is based on an analysis of the multifactor economic reality test, not whether a worker is less financially dependent on the income they earn from any one employer.[445] As discussed under this factor and the permanence factor (section V.C.3), it is well established that having multiple jobs is not inconsistent with employee status under the FLSA, and in fact, workers are often required to take on more than one job just to make ends meet. Moreover, in *Saleem,* the case referenced in CWI's comment, the Second Circuit recognized that: ''a company relinquishes control over its workers when it permits them to work for its competitors.'' [446] This case supports the importance of looking to whether a potential employer restricts a worker's ability to work for others.

Similarly, N/MA argued that the focus should be on the worker's right to control and not the employer's control, because ''a freelancer may perform multiple projects among multiple separate (and sometimes competing) entities,'' and N/MA felt that the right to control factor should consider ''the totality of the worker's business . . . including control over whether the worker subcontracts any part of the work necessary to complete a project, whether and how the worker may advertise their services, and whether the worker determines to prioritize, stagger, or overlap projects from multiple entities.'' The Department views N/MA's comment to be advocating for a totality-of-the-circumstances test that is congruent with the economic reality test, including consideration not just of control, but also factors like opportunity for profit or loss, investment, and use of specialized skills in connection with business-like initiative. Whether a potential employer restricts a worker's ability to work for others would certainly not be the only consideration under control, nor would it preclude consideration of the other factors listed in N/MA's comment. Further, the Department notes that even within the control factor, the regulatory text acknowledges that ''more indicia of control by the worker favors independent contractor status.'' [447]

Several commenters pointed out the increased fluidity in terms of working for others that can be associated with using applications or platforms to access work. DoorDash explained with respect to its business that workers ''are free to work with anyone they want, including our competitors. Most importantly . . . they can do it in real time—even while they're logged into our app. If [they] find a better work opportunity (or work that's simply more appealing to them), they can switch back and forth.'' CEI noted that ''rideshare drivers often work for different app-based companies simultaneously. Anyone who calls for a ride using [Uber] has noticed the driver's car also bearing a Lyft sticker. . . This situation is common in gig work, where the companies are, in effect, bidding for the same workers.'' CEI further noted the Department's concern that the framing in the 2021 IC Rule, which indicated independent contractor status if a worker had the ability to work for others, fails to distinguish between work relationships where a worker has multiple jobs in which they are dependent on each employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business. CEI stated: ''The framing does not distinguish between the two scenarios because there is no significant distinction. A worker who has 'sought out multiple clients in furtherance of their business' is no less dependent on those clients than the hypothetical worker with multiple jobs.'' CEI suggested that the only solution to this problem was beyond the scope of this rulemaking and would require Congress to amend the FLSA to ''carve out specific professions.'' UFCW, however, did not view ''multi-apping'' as a unique concept that could not be addressed within the economic reality test, arguing that a ''worker who attempts to leverage earnings between two app-based platforms ('multi-apping') [is] now simply dependent on two platform companies for which the employee is waiting around for work to perform. This is not indicative of the worker exercising initiative to develop a business for themselves independent of these platform companies.''

The Department does not believe that the ability to use applications or platforms to access work necessitates changing how the ability to work for others is weighed when determining employee or independent contractor status. The Department reiterates that as always, the overall test is economic dependence. Even if a worker has the ability to more fluidly move among potential employers while performing work by using multiple applications, this does not necessarily mean that the entire control factor weighs in favor of independent contractor status. Nor is it dispositive of whether the worker is in business for themself rather than being subject to the control of the entity for whom they are performing work at any given time.[448]

While SHRM posited that the Department's proposal ''adopts an antiquated view of economic independence in its consideration of a worker's ability to work for others under the control factor'' because ''low-wage earners may, in fact, *gain* independence by maintaining the flexibility to work with multiple hiring entities,'' NELP observed that in ''low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy.'' For example, the LCCRUL & WLC described a current client who ''often has to work for a variety of gig economy jobs simultaneously, such as Uber Eats, GoPuff, Instacart, and Caviar, to keep her finances afloat.'' Further supporting the notion that the ability to work for multiple employers simultaneously does not necessarily indicate independent contractor status, the NDWA explained that home care workers may work for more than one third-party agency at the same time, ''given the scheduling irregularities and occasional disruptions in assignments that are an unavoidable part of the in-home personal care industry.'' However, it noted that ''[w]hile home care workers may choose to have multiple employers at the same time, it does not defeat the

[445] *See supra,* section V.B.

[446] *Saleem,* 854 F.3d at 141.

[447] 29 CFR 795.110(b)(4).

[448] *See, e.g., Razak,* 951 F.3d at 145–46 (discussing disputed facts regarding whether drivers could drive for other services simultaneously—Uber contended drivers could drive for other services, but drivers contended that they could not accept rides from other platforms while online for Uber).

conclusion that they are employees rather than independent contractors.''

After considering these comments, the Department declines to add a statement to the regulatory text stating that a worker's ability to work for others indicates independent contractor status. The Department believes that having multiple jobs can too often be necessary for financial survival in the modern economy, as many commenters and courts have noted.[449] For example, an employee may have two jobs, several part-time jobs, or a regularly-recurring seasonal job in addition to a full-time employment situation, and an independent contractor may also have multiple customers based on their exercise of business initiative. Thus, the mere ability to work for others is not necessarily an indicator of employee or independent contractor status.

Some commenters urged the Department to create an exception for industries like trucking where legal requirements make it more complicated for drivers to use the same equipment to work for another motor carrier. *See e.g.,* NHDA, Scopelitis, Garvin, Light, Hanson & Feary. However, Real Women in Trucking observed that ''the ability to work for others is key to whether a driver is economically dependent or not,'' noting that ''the Department's emphasis that both direct prohibitions on working for others and indirect barriers are relevant to this factor'' was ''[e]specially important'' because their members experienced working arrangements where they were nominally permitted to carry loads for other carriers, but ''this flexibility is not available in practice.''

This situation was addressed by the Seventh Circuit in a recent decision where the company retained sole discretion to deny the driver's request to haul freight for another carrier, and it also reserved the right to arrange for third-party monitoring of compliance with federal safety regulations at the driver's expense if he drove for other carriers.[450] Further, even if the driver received approval to haul for another carrier and could have afforded to pay for third-party compliance monitoring, he would have been required to remove or cover the company's identification on his truck and to display his own or the other company's information.[451] The court determined that these facts, showing that the company's ''system for approving and monitoring trips made for other carriers was so complex and onerous that Drivers could not, as a practical matter,'' haul loads for other carriers, weighed in favor of employee status.[452]

Although the Department is recognizing in this final rule that actions taken by a potential employer for ''the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation'' are not indicative of control, the Department continues to believe that where a business goes beyond compliance with the law or regulation in a way that serves the business's own compliance methods—for example, the system described in *Brant* that imposed several restrictions on the driver's ability to haul freight for others, including requiring the driver to pay for a third-party monitor—this may be indicative of control. Therefore, the Department declines to adopt a more blanket, imprecise provision pertaining to industry-specific limitations on the ability to work for others.

Moreover, commenters and the *Brant* decision have prompted the Department to conclude that the regulatory proposal addressed indirect means of limiting workers' ability to work for others too narrowly, as it only would have recognized situations in which the potential employer ''places demands on workers' time'' that do not allow them to work for others.[453] As NELP noted, ''whether a worker is truly free to work for others requires an examination of the facts on the ground; businesses may place demands on time or monetary penalties that effectively preclude a worker from seeking other work.'' Because businesses may impose financial demands or other restrictions on workers' ability to work for others such as the ''complex and onerous'' system in *Brant*—in addition to demands on time that do not allow them to work for others—the Department is revising the regulatory language in the final rule to encompass such situations. The revised text removes the word ''time'' and adds the words ''or restrictions'' after ''or places demands'' to more accurately capture indirect means of limiting workers' ability to work for others.

UFCW urged the Department to add additional considerations that are related to a potential employer limiting a worker's ability to work for others. First, it contended that platform companies essentially coerce workers to continuously accept work (which would preclude them from working for others) by threatening to terminate workers from the platform or reduce the availability of work shifts unless the worker continuously accepts jobs. Additionally, it noted that an employer may prohibit workers from developing their own business or customer base, for example, by prohibiting a platform worker from doing any independent work for customers they connect with through the app. The LCCRUL & WLC also described clients—a tow truck driver and a cannabis dispensary delivery driver—who similarly were not able to work for others because they were expected to be on call all day waiting for assignments. The Department agrees that these types of facts could be relevant to whether a potential employer has either explicitly limited the worker's ability to work for others or has placed demands or other restrictions on workers that do not allow them to work for others. However, the Department views these as encompassed within the final regulatory text, such that there is no need to add additional language.

Finally, OOIDA encouraged the Department to view the ability to work for others within a working arrangement as ''relevant, but not determinative of the relationship'' and as ''one of several considerations within the 'control' factor.'' The Department reaffirms that the ability to work for others is just one consideration within the control factor and agrees with the commenter that it is relevant, but not determinative, of whether the worker is an employee or independent contractor. Moreover, the control factor itself is not determinative of a worker's status—the economic reality test is a totality-of-the-circumstances test where no one factor is dispositive.[454]

The Department is finalizing the ability to work for others portion of control factor at § 795.105(b)(4) with the revisions discussed herein.

Example: Nature and Degree of Control

A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines where in the nursing home each nurse will work. Alpha House's internal policies prohibit nurses from working for other nursing homes while employed with

[449] *See supra,* section V.C.3.

[450] *Brant,* 43 F.4th at 669–70.

[451] *Id.*

[452] *Id.* (analyzing the driver's ability to haul freight for other carriers under the opportunity for profit or loss factor because it was relevant to whether the driver could exercise his managerial skill to increase profits by selecting more favorable loads or by driving for other carriers) (internal quotation marks omitted).

[453] 87 FR 62275 (proposed § 795.110(b)(4)).

[454] *See, e.g., Flint Eng'g,* 137 F.3d at 1441 (''None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.'').

Alpha House in order to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts indicate employee status under the control factor.

Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contacted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse simultaneously provides therapy sessions to residents at Beta House as well as other nursing homes in the community. The facts—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by Beta House, sets their own prices, and has the flexibility to select a work schedule–indicate independent contractor status under the control factor.

5. Extent to Which the Work Performed Is an Integral Part of the Potential Employer's Business (§ 795.110(b)(5))

In § 795.110(b)(5), the Department proposed to return to framing this factor as ''whether the work performed is an integral part of the employer's business.'' [455] The Department emphasized its belief that its proposed articulation of the integral factor—which considers whether the work is ''critical, necessary, or central to the employer's principal business''—better reflects the economic reality case law and is more consistent with the totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor than the 2021 IC Rule's ''integrated unit of production'' framing.[456]

The Department explained that the 2021 IC Rule's integral formulation relied on a rigid reading of *Rutherford* (which noted that the work was ''part of an integrated unit of production'' of the employer).[457] Having further considered the case law, the Department concluded in the NPRM that the 2021 IC Rule's approach did not reflect Supreme Court or federal appellate court precedent.[458] As the 2021 IC Rule acknowledged, the Supreme Court's decision in *Silk* determined that coal ''unloaders'' were employees of a retail coal company as a matter of economic reality in part because they were ''an integral part of the business[ ] of retailing coal.'' [459] The 2021 IC Rule interpreted this language as merely articulating a part of the overall inquiry rather than a specific factor useful for deciding the question of economic dependence or independence. But as the Department explained in the NPRM, the Court in *Silk* explicitly considered the fact that the workers were an ''integral part'' of the business to be relevant to the inquiry, and later courts likewise found this framing to be useful to the economic reality analysis—so much so that most federal courts of appeals routinely list ''integral'' as an enumerated factor, but no court of appeals uses ''integrated unit'' for this factor.[460] Additionally, the NPRM explained that the Department has also used this proposed approach to the integral factor for decades and has consistently found it to be a useful factor in the economic reality analysis.[461] For these reasons, the Department proposed to eliminate the ''integrated unit'' factor as an enumerated factor and instead to restore the integral factor, understood by courts as being focused on whether the work is critical, necessary, or central to the potential employer's business.[462]

The Department explained that most courts adopt a common-sense approach to determining whether the work or service performed by a worker is an integral part of a potential employer's business.[463] For example, if the potential employer could not function without the service performed by the workers, then the service they provide is integral.[464] The Department noted that ''[s]uch workers are more likely to be economically dependent on the potential employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer.'' [465] Additionally, courts also look at whether the work is important, critical, primary, or necessary to the potential employer's business.[466] In most cases, if a potential employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are performing work that is integral to the potential employer's business.[467]

The Department emphasized that the judicial treatment of the integral factor reflects the understanding that a worker who performs work that is integral to an employer's business is more likely to be employed by the business, whereas a worker who performs work that is more peripheral to the employer's business is more likely to be independent from the employer.[468] Finally, the Department

[455] 87 FR 62275 (proposed § 795.110(b)(5)).

[456] *Id.* at 62253.

[457] *Id.* at 62254; *Rutherford,* 331 U.S. at 729.

[458] 87 FR 62254; *see Silk,* 331 U.S. at 716 (unloaders were ''an integral part of the business[] of retailing coal''); *see also Off Duty Police,* 915 F.3d at 1055; *McFeeley,* 825 F.3d at 244; *Scantland,* 721 F.3d at 1319; *Flint Eng'g,* 137 F.3d at 1443; *Superior Care,* 840 F.2d at 1060–61; *Lauritzen,* 835 F.2d at 1537–38; *DialAmerica,* 757 F.2d at 1385; *Driscoll,* 603 F.2d at 755.

[459] 331 U.S. at 716.

[460] *Id.; see supra* section II.B.2.

[461] *See, e.g.,* WHD Fact Sheet #13 (July 2008) (listing ''[t]he extent to which the services rendered are an integral part of the principal's business'' as a factor).

[462] 87 FR 62254.

[463] *Id.* at 62253.

[464] *See, e.g., Off Duty Police,* 915 F.3d at 1055 (rejecting employer's argument that it was merely an agent between its customers and the officers because the company ''could not function without the services its workers provide''); *McFeeley,* 825 F.3d at 244 (''[E]ven the clubs had to concede the point that an 'exotic dance club could [not] function, much less be profitable, without exotic dancers.' '') (quoting Secretary of Labor's Amicus Br. in Supp. of Appellees at 24); *Capital Int'l,* 466 F.3d at 309 (finding security guards were integral to a business where company ''was formed specifically for the purpose of supplying'' private security); *cf. Johnson,* 371 F.3d at 730 (upholding jury verdict finding independent contractor status for security guards working for government housing authority and noting, with regard to integral factor, that the housing authority ''had functioned for years before and after the program'' under which security guards were hired).

[465] 87 FR 62253. *See, e.g., Brock* v. *Lauritzen,* 624 F. Supp. 966, 969 (E.D. Wis. 1985), *aff'd,* 835 F.2d 1529 (7th Cir. 1987) (finding that cucumber harvesters were integral to cucumber farmer's business and were ''economically dependent upon Lauritzen's business for their work during the cucumber harvest season'').

[466] *See, e.g., Alpha & Omega,* 39 F.4th at 1085 (noting that this factor ''turns 'on whether workers' services are a necessary component of the business' '') (quoting *Paragon,* 884 F.3d at 1237); *Flint Eng'g,* 137 F.3d at 1443 (finding rig welders' work to be ''an important, and indeed integral, component of oil and gas pipeline construction work'' because their work is a critical step on every transmission system construction project); *Lauritzen,* 835 F.2d at 1537–38 (''It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business[.]''); *cf. Paragon,* 884 F.3d at 1237 (''Because [the worker]'s management of the pecan grove was not integral to the bulk of Paragon's [construction] business, this factor supports consideration of [the worker] as an independent contractor.'').

[467] *See, e.g., Superior Care,* 840 F.2d at 1059 (for business that provided on-demand health care personnel, the nurses provided were themselves integral to the business).

[468] *See, e.g., Keller,* 781 F.3d 799 at 815 (''The more integral the worker's services are to the business, then the more likely it is that the parties have an employer-employee relationship.''); *DialAmerica,* 757 F.2d at 1385 (''workers are more

Continued

noted that while it is only one part of the overall inquiry, courts continue to find the integral factor useful for evaluating economic dependence.

Many commenters expressed agreement with the Department's decision to return to the framing of this factor as the extent to which the work performed is an integral part of the potential employer's business. *See, e.g.,* AFL–CIO; Century Foundation; IBT; NDWA; NELP; NWLC; ROC United; State AGs; Transport Workers Union of America. For example, NELP commented that it agreed with the statement in the NPRM that ''if the [employer] could not function without the service performed by the workers, then the service they provide is integral,'' explaining that this factor ''recognizes a simple truth: workers are more likely employees under the FLSA if 'they perform the primary work of the alleged employer.' '' AFL–CIO similarly commented that it ''strongly supports the return of this factor to its 'longstanding Departmental and judicial interpretation, rather than the 'integrated unit of production' approach that was included in the 2021 IC Rule.' '' The Century Foundation commented that ''[t]his factor helpfully looks at whether the work performed is an essential or critical aspect of the business,—*i.e.,* whether the work is critical to the main service or product that the business provides.'' NWLC agreed with the NPRM's rejection of the 2021 IC Rule's ''integrated unit'' framing of this factor, stating that the Department's proposal ''appropriately considers whether the work performed is an essential or critical aspect of the business—*i.e.,* whether the work is critical to the main service or product that the business provides.'' NWLC explained that the NPRM's ''framing is consistent with the long line of court decisions finding a worker's performance of work that is integral to the employer's business to be an indicator of employee status, reflecting the commonsense understanding that employers are more likely to hire employees to perform the tasks involved in providing the core products and/or services that their business offers.''

IBT expressed support for the Department's proposed articulation of the integral factor and recommended ''that guidance for this factor make explicitly clear the focus of the factor is on the work performed, not the individual worker.'' Outten & Golden also stated that the final regulatory text should incorporate the text from the NPRM stating that ''the focus of the integral factor is on the work performed, not the individual worker.'' As the Department explained in the NPRM, this approach evaluates whether the worker performs work that is central to the employer's business, not whether the worker possesses some unique qualities that render them indispensable as an individual.[469] An individual worker who performs the work that an employer is in business to provide but is just one of hundreds or thousands who perform the work is nonetheless an integral part of the employer's business even if that one worker makes a minimal contribution to the business when considered among the workers as a whole.[470] The Department believes that the proposed regulatory text, which states that ''[t]his factor considers whether the work performed is an integral part of the employer's business'' rather than ''whether any individual worker in particular is an integral part of the business'' sufficiently captures this understanding of the integral factor.

Some commenters urged the Department to maintain the 2021 IC Rule's framing of this factor as ''integrated unit of production,'' expressing the view that the 2021 IC Rule's approach is more consistent with *Silk* and *Rutherford. See e.g.,* Freedom Foundation; Scalia Law Clinic; U.S. Chamber; *see also* NELA; Outten & Golden. For example, Scalia Law Clinic commented that *Rutherford* and *Silk* ''make clear that the 'integral' factor concerns whether a worker is part of an integrated unit of production, not whether she is economically important to a business operation.'' The U.S. Chamber commented that ''focusing the integral prong on an integrated unit of production is fully supported by the extant decisional law'' stating that ''[t]he Supreme Court has described this prong as considering whether the worker is part of an 'integrated economic unit' in the putative employer's business.'' The Freedom Foundation similarly commented that the Supreme Court in *Rutherford* espoused the proper articulation of the factor as ''integrated unit of production'' explaining that '' '[i]ntegral' and 'integrated' could be described as near homonyms . . . they are etymologically related words that sound similar but have different meanings.'' The Freedom Foundation further explained that '' '[i]ntegral,' in the sense described by the Department . . . means 'necessary to make a whole complete; essential, fundamental;' whereas 'integrated' in the sense used by the Supreme Court in *Rutherford* means 'with various parts linked or coordinated.' '' The Freedom Foundation commented that it believes the Department misrelies on *Silk* to support its proposed framing of the integral factor, noting that ''*Silk* did not include integrality in its list of factors, nor did it apply it as a factor of decision.'' *See also* I4AW (factor was originally articulated as ''integrated unit of production'' but ''[o]ver the years . . . morphed, without explanation, into whether a role was 'integral' to the business hiring the putative contractor. . . . [T]his scrivener's error has created greater confusion for businesses that want to be or work with ICs and has made it more difficult for courts to permit independent contract work'').

NELP agreed with the Department's framing of the integral factor but stated that ''[t]o provide further clarity on this factor, the DOL should recognize that the question of integration is not an either/or proposition'' noting that ''[w]hether the work is integral such that the business could not offer its goods or services without it . . . is important to consider'' but ''it does not define the outer limits of this factor.'' NELP explained that ''[a]s the Supreme Court has recognized[,] whether the work is part of an 'integrated unit of production' also informs whether the worker is more likely to be an employee or independent contractor.''

After considering these comments, the Department is retaining the approach proposed in the NPRM, which considers whether the work performed by the worker is an integral part of the employer's business. As discussed below, the Department believes that its proposed approach to the integral factor is more consistent with longstanding judicial precedent and decades of Department guidance than the 2021 IC Rule's articulation of this factor, which focused on whether the worker is part of a ''integrated unit of production.'' The Department notes, however, that it does not intend to preclude consideration of the potential relevance of the Supreme Court's discussion of the ''integrated unit of production'' in *Rutherford.* Consistent with the totality-of-the-circumstances approach, under which all relevant facts should be considered, the Department recognizes that the extent to which a worker is

likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer'').

[469] 87 FR 62254. *See, e.g., Montoya* v. *S.C.C.P. Painting Contractors, Inc.,* 589 F. Supp. 2d 569, 581 (D. Md. 2008) (explaining that ''this factor does not turn on whether the individual worker was integral to the business; rather, it depends on whether the service the worker performed was integral to the business'').

[470] 87 FR 62254 (giving the example of one operator among many in a call center).

integrated into a business's production processes may be relevant to the question of economic dependence or independence and may be considered under any relevant enumerated factor, or as an additional factor. For example, as the Department expressed in the NPRM, indicators that a worker is integrated into an employer's main production processes, such as whether the worker is required to work at the employer's main workplace or wear the employer's uniform, may illustrate an employer's control over the work being performed.[471]

Commenters' claims that the 2021 IC Rule's emphasis on the ''integrated unit of production'' is more consistent with applicable judicial precedent than the approach proposed in the NPRM stands in sharp contrast to decades of judicial precedent and Departmental guidance. The Supreme Court's decision in *Silk* determined that coal ''unloaders'' were employees of a retail coal company as a matter of economic reality in part because they were ''an integral part of the business [ ] of retailing coal.'' [472] Some commenters took the position that the Court in *Silk* merely mentioned the integral nature of the work performed but did not intend for it to be a factor considered in the overall inquiry. However, the Supreme Court in *Silk* emphasized that its list of factors was not intended to be exhaustive, but instead consisted of factors the Court believed would be useful to courts and agencies applying the economic reality test in the future. Moreover, the Court explicitly considered it relevant to the determination of employment status that the coal unloaders in *Silk* were an ''integral part'' of the retail coal business, and the majority of federal courts of appeals have likewise adopted this consideration as a relevant factor for the inquiry into economic dependence or independence.[473]

Commenters attempted to cast aside decades of judicial precedent by employing an overly rigid understanding of *Rutherford,* an understanding that no federal court of appeals has adopted as the standard for this factor in the decades since *Silk* and *Rutherford.* As the Department has emphasized, the approach in this final rule is underpinned by a desire to bring consistency and clarity to the economic reality inquiry by aligning this rule with the approach taken by the majority of federal appellate case law. Nearly all the federal courts of appeals expressly consider whether the work performed is an integral part of the potential employer's business as a sixth enumerated factor in the economic dependence or independence inquiry.[474] The Fifth Circuit has not expressly enumerated the integral factor but has at times assessed integrality as an additional relevant factor.[475] The Department has also long considered whether the work performed is an integral part of the employer's business as a factor in the economic realities' inquiry.[476] For example, in one of the Department's earliest pronouncements of the economic reality factors—a 1949 WHD opinion letter distilling the six ''primary factors which the Court considered significant'' in *Rutherford* and *Silk*—the first factor enumerated was ''the extent to which the services in question are an integral part of the 'employer[']s' business.'' [477]

The Department disagrees with the commenters' contention that the approach proposed by the Department and taken by nearly every federal court of appeals is a result of a misunderstanding of *Rutherford, Silk,* the FLSA, and the economic reality inquiry. The historical approach to this factor by the Department and the courts stands in stark contrast to the fact that not a single federal court of appeals identifies ''integrated unit of production'' as the standard for this enumerated factor of the economic reality test. Commenters identified one federal appellate decision that they contend applied *Rutherford's* ''integrated unit of production'' as the standard for this factor in an independent contractor inquiry under the FLSA, *Tobin* v. *Anthony-Williams Mfg. Co.*[478] *See e.g.,* CPIE; CWI; DSA; IBA; N/MA. The decision in *Tobin* does not, however, stand for the proposition that the relevant standard for this factor under the enumerated factors of the economic reality test is whether workers are part of an ''integrated unit of production.'' Instead, *Tobin* was a factually analogous case to *Rutherford* where the Eighth Circuit found it relevant to the overall economic reality inquiry that the timber haulers and wood workers were part of one integrated unit of production.[479] Consistent with the Department's discussion above, *Tobin* illustrates how *Rutherford's* ''integrated unit of production'' framing may be considered when relevant to the question of economic dependence. Moreover, the Eighth Circuit has elsewhere recognized that the extent to which the work performed is integral to the employer's business is one of the enumerated factors under the economic reality test.[480]

A number of commenters expressed concerns that the Department's proposed articulation of the integral factor was an attempt to adopt one of the prongs of the ABC test. *See, e.g.,* 4A's; Club for Growth; Fight for Freelancers; NRF & NCCR; U.S. Chamber; WSTA. For example, the U.S. Chamber commented that ''it appears that the Proposed Rule's shift away from the Supreme Court's focus on an 'integrated unit' to whether the work is 'critical, necessary, or central' is a thinly veiled attempt to inject Prong B of the ABC test—whether the work takes place outside the usual course of the putative employer's business—into the analysis.'' The Club for Growth, NRF & NCCR, and the U.S. Chamber contended that the Department's proposal for the integral factor was at odds with the Department's explanation elsewhere in the NPRM that the Department believes the ABC test to be inconsistent with Supreme Court precedent interpreting the FLSA, and as such, cannot be adopted without Supreme Court or congressional alteration of the applicable analysis under the FLSA. Fight for Freelancers also commented that ''[the integral factor] is the most likely to misclassify legitimate independent contractors as employees, because it is so similar to the B-prong of the ABC Test.''

Although there may be conceptual overlap between the Department's proposed integral factor and Prong B of the ABC test, as discussed above, the Department is not adopting an ABC test. The assertion that the Department's proposal regarding the integral factor is an attempt to insert Prong B of an ABC test in this rule is baseless. First, the integral factor is but one factor in a

[471] 87 FR 62254.

[472] 331 U.S. at 716.

[473] *See supra* section II.B.2.

[474] *See e.g., Superior Care,* 840 F.2d at 1058–59; *DialAmerica,* 757 F.2d at 1382–83; *McFeeley,* 825 F.3d at 241; *Off Duty Police,* 915 F.3d at 1055; *Lauritzen,* 835 F.2d at 1537–38; *Alpha & Omega,* 39 F.4th at 1082; *Driscoll,* 603 F.2d at 754; *Sureway,* 656 F.2d at 1368; *Paragon,* 884 F.3d at 1235; *Scantland,* 721 F.3d at 1311–12; *Morrison,* 253 F.3d at 11.

[475] *See, e.g., Hobbs,* 946 F.3d at 836.

[476] *See* WHD Op. Ltr. (June 23, 1949); 27 FR 8033; WHD Fact Sheet #13 (1997); WHD Fact Sheet #13 (July 2008); AI 2015–1, available at 2015 WL 4449086.

[477] WHD Op. Ltr. (June 23, 1949).

[478] 196 F.2d 547, 550 (8th Cir. 1952) (analyzing whether timber haulers and wood workers were ''an integrated part of defendant's production set-up'').

[479] *Id.*

[480] *Alpha & Omega,* 39 F.4th at 1082 (stating ''[w]e assume without deciding that the economic realities test is appropriate in determining whether a worker is an employee or independent contractor under the FLSA'' and articulating the sixth relevant factor as ''the degree to which the alleged employee's tasks are integral to the employer's business.'').

multifactor inquiry, where no one factor is dispositive, and where the totality of the circumstances is considered to determine the ultimate question of whether a worker is economically dependent on the potential employer for work or is in business for themself. The totality-of-the-circumstances test thus stands in stark contrast to an ABC test, in which each element of the test is dispositive. As the Department expressly recognized in the NPRM, and reaffirms here, not all workers who perform integral work are employees, and there may be times when this factor misaligns with the ultimate result. This is entirely consistent with the totality-of-the-circumstances approach.[481] Prong B of the ABC test, on the other hand, is dispositive of employment status. If the hiring entity cannot show that the work being performed by the worker is outside the usual course of the hiring entity's business, employment status is found regardless of the other factors of the ABC test.[482] Thus, while a worker can perform work that is integral to the potential employer's business and still be considered an independent contractor under this final rule, a worker performing work in the usual course of their potential employer's business will always be an employee under the ABC test. In this final rule, the Department is returning to the longstanding understanding of the integral factor consistent with decades of court precedent and Department guidance applying the economic reality test under the FLSA. Again, the Department is not adopting an ABC test.

Several commenters expressed concerns that the integral factor would lead to virtually every worker being classified as an employee since most, if not all, work performed for a business could theoretically be considered critical or necessary to an employer's business. *See, e.g.,* Alabama Forestry Association; FMI; Goldwater Institute; MEP; NAFO; Scalia Law Clinic; U.S. Chamber. For example, Scalia Law Clinic commented that ''[a]ll work for a business is in some sense 'critical, necessary, or central to . . . [a] business,' because businesses only hire workers that add economic value.'' The U.S. Chamber similarly commented that ''[t]he Department has mistakenly equated 'integral' with 'critical, necessary, or central to the employer's business'. . . . Taken literally, this could include *every* independent contractor, because a business would not hire an independent contractor unless it was 'necessary' to do so.'' NAFO similarly commented ''[t]his new interpretation makes it impossible to understand or apply the 'integral' factor'' noting that the Department's rule ''would effectively subsume virtually every contracting or subcontracting relationship because all subcontractors perform a function that the entity deems 'integral' to a product or a service—otherwise, it would not contract with them.'' MEP further explained that ''[t]his is particularly the case with small businesses that need to rely on outside expertise.'' As an example, MEP noted that IT, security, services, marketing, or legal consulting services, may not be the main intent of the business, but they may be critical or necessary to the business.

As a threshold matter, the Department reiterates that, as with the other enumerated factors of the economic reality test, the integral factor is just one area of inquiry that is considered along with the other factors to reach the ultimate determination of economic dependence or independence. The Department again emphasizes that it is ''not always true that workers whose work is integral are employees.'' [483] Additionally, commenters' assertions that this factor would subsume every contracting relationship and would always weigh in favor of employee status are misguided. The commenters misapply the Department's articulation of this factor by suggesting that virtually every type of work commissioned by a business would be considered integral, since businesses do not contract for work that isn't necessary or critical to their functioning. The key limiting word that commenters appear to overlook is ''principal.'' As illustrated by the example the Department provided for this factor in the NPRM, which is also part of this final rule, while it might in some sense be critical or necessary for a business to hire an accountant to manage their tax obligations, for example, this accounting work may nonetheless not be critical, necessary, or central to the potential employer's principal business. To further illustrate, a coffee shop's ''principal'' business is making, selling, and serving coffee. A coffee shop might need window washers to ensure clear views and a clean appearance for customers, but the window washers are not generally integral to the principal business of the coffee shop. Commenters maintaining that any work contracted by a business is central, necessary, or critical to its functioning overlook this important limitation of the integral factor—only work that is critical, necessary, or central to the potential employer's principal business is integral.

Some commenters requested clarification for their specific industries, expressing concerns that in certain industries laws and regulations mandate relationships such that the work performed would be considered an integral part of the potential employer's business. For example, NAR commented ''that the extent to which the work is performed as an integral part of the employer's business within the real estate industry context, is mandated by state laws and regulations.'' NAR suggested the Department's rule ''should recognize such industry nuances, understanding that compliance with state statutory and regulatory provisions does not conflict with the ability to work as an independent contractor under the test.'' ACLI similarly commented that ''if insurance and/or securities industry laws and regulations compelling agents and registered representatives to affiliate with licensed insurers and broker dealers were sufficient to negate independent contractor status, this factor would perpetually weigh against independent contractor status for insurance industry relationships.'' ACLI requested the Department ''categorically affirm that where laws or regulations dictate that an insurance worker must be affiliated with a company in the same business . . . the integral part of the business factor be viewed as at most a neutral factor.''

As the Department repeatedly states throughout this final rule, no one factor is dispositive, and the ultimate question is whether as matter of economic reality the worker is in business for themself or is economically dependent on the potential employer for work. If the work being performed is necessarily integral to the business of the potential employer, the integral factor may weigh in favor of employee status, but it is only one part of the inquiry. It is not dispositive. Where the other factors weigh in favor of independent contractor status, and the economic reality as a whole indicates the worker is in business for themself, the overall conclusion may likely be that the worker is an independent contractor; notably, compliance with specific, applicable legal obligations is addressed in the discussion of the control factor, section V.C.4.a of this preamble. This inquiry, however, is specific to the

[481] *See, e.g., Meyer,* 607 F. App'x at 123 (''Although tennis umpires are an integral part of the U.S. Open,'' other factors supported determination that umpires were independent contractors.); *Perdomo* v. *Ask 4 Realty & Mgmt., Inc.,* No. 07–20089, 2007 WL 9706364, at *4 (S.D. Fla. Dec. 19, 2007) (construction worker's work was integral to remodeling business, but economic reality factors as a whole indicated independent contractor status).

[482] 87 FR 62231.

[483] 87 FR 62253.

factual circumstances of a particular relationship, and the Department cannot broadly make a determination about the status of an entire sector of workers whose economic relationships are varied. Therefore, the Department declines to provide exemptions from a particular factor for certain industries.

After consideration of the comments received, the Department reiterates its belief that the extent to which the work performed is an integral part of the potential employer's business sheds light on the ultimate inquiry of whether a worker is economically dependent on the potential employer for work or is in business for themself. The Department is returning to this framing of the integral factor in this final rule because this approach is more consistent with Supreme Court precedent, decades of judicial precedent in the federal courts of appeals, and the totality-of-the-circumstances approach than the 2021 IC Rule's ''integrated unit of production'' framing of this factor. The Department is adopting the integral factor as proposed in the NPRM with minor wording changes to provide additional clarity (adding ''of the business'' to the end of the second sentence of the regulatory text to state ''whether the function they perform is an integral part *of the business*'')*.*

The Department is finalizing the integral factor (§ 795.110(b)(5)) as discussed herein.

Example: Extent to Which the Work Performed Is an Integral Part of the Employer's Business

A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because picking tomatoes is an integral part of farming tomatoes, and the company is in the business of farming tomatoes, the tomato pickers are integral to the company's business. These facts indicate employee status under the integral factor.

Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business. Therefore, these facts indicate independent contractor status under the integral factor.

6. Skill and Initiative (§ 795.110(b)(6))

The Department proposed that the skill and initiative factor consider ''whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.'' The Department stated that ''[t]his factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work.'' The Department further stated that, ''[w]here the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.'' [484]

The Department explained that the proposed regulatory text for this factor would reaffirm the longstanding principle that this factor indicates employee status where the worker lacks specialized skills. The Department further explained that it believed that the application of initiative in connection with specialized skills is useful in answering the overarching inquiry of whether the worker is economically dependent on the employer for work or is in business for themselves, and that, as a result, it was ''proposing to reintegrate initiative into this factor and no longer exclude consideration of initiative when applying this factor, as provided in the 2021 IC Rule.'' The Department then discussed the case law supporting its position that a worker's lack of specialized skills when performing the work generally indicates employee status, but also reiterated that no one factor is dispositive, consistent with the overarching economic realities analysis. Because both employees and independent contractors can be highly skilled and/or bring specialized skills to the work relationship, the Department discussed how focusing on whether the worker uses ''the specialized skills in connection with business-like initiative'' is helpful in distinguishing between the two classifications and further discussed the case law and its prior guidance supporting such an approach. Finally, the Department acknowledged that some facts showing an exercise of initiative can be relevant under the skill factor and another factor, and explained that considering facts showing an exercise of initiative under more than one factor to the extent appropriate depending on the facts of a case is consistent with and furthers the totality-of-the-circumstances approach to assessing the economic realities of the work relationship.[485]

In addition to the numerous comments generally supporting the Department's six-factor analysis, a number of commenters expressed support for the NPRM's discussion of the skill and initiative factor. For example, NDWA stated that the NPRM's analysis ''is helpful because requiring initiative as well as skill better answers the questions of whether a worker is in business for themselves.'' The Shriver Center agreed. The Leadership Conference similarly stated that the NPRM's analysis ''is helpful because we believe that all work is skilled work in the colloquial sense of the term, and elevating the question of whether a worker can exercise initiative as well as skill better answers the question of whether a worker is in business for themselves.'' Gale Healthcare Solutions advised that for nurses, ''adding business initiative to skill is an appropriate measure for distinguishing workers who should be classified as independent contractors . . . from those who, while they employ nursing skills in the performance of their work, do not do so in combination with the business-like initiative needed to grow a nursing practice.'' The LA Fed & Teamsters Locals commented that the NPRM ''appropriately recognizes that while a lack of specialized skills indicates employee status, the exercise of such specialized skills does not indicate independent contractor status absent the worker's using business-like initiative in relation to those skills.'' And ROC United stated that the NPRM's ''decision to include skill and initiative as a stand-alone factor is another improvement over the 2021 Rule,'' and that the NPRM ''correctly recognizes that most work that does not require specialized skills is not performed by independent contractors (*e.g.,* security guards, janitors, drivers, landscape workers, and call center workers).'' *See also* NELP (expressing agreement with also including in this factor ''an analysis of whether the worker uses those skills in connection with 'business-like initiative' ''); NWLC (commenting that the NPRM would correctly restore consideration of initiative to this factor and affirm that ''a true independent contractor is likely to have specialized skills'' and use those skills to exercise ''business-like initiative'').

Some other commenters that generally supported the Department's proposal requested changes to or clarifications of the skill and initiative factor. For example, SMACNA stated that ''[t]his is correct as far as skills'' but added that, ''for workers who are highly skilled, the 'skill and initiative' factor should not be

[484] *See generally* 87 FR 62275 (proposed § 795.110(b)(6)).

[485] *See generally id.* at 62254–57.

used to weigh against employee status.'' The case law, however, does not support the position that, for highly skilled workers, this factor should not weigh against employee status.[486] Real Women in Trucking stated that it would appreciate clarification that, ''although truck driving typically is not classified as 'skilled' labor in other contexts, it requires sufficient skill that, when combined with business-like initiative, drivers are appropriately considered independent contractors.'' The Department agrees that, consistent with the analysis for this factor and its discussion of commercial drivers' licenses (CDLs) below, this factor would indicate independent contractor status for a worker who uses truck-driving skills in connection with business-like initiative.

Farmworker Justice stated that ''courts have made clear that 'most farm labor jobs require little specialized skill' '' and ''encourage[d] the DOL to include reference to such cases in the Final Rule, as it has for workers in numerous other industries, such as janitors, security guards, landscape workers, and call center workers.'' The Department agrees with this characterization of the case law regarding ''most farm labor jobs'' and notes that it has taken that position in its own enforcement actions.[487] IBT ''supports the Department's proposal for this factor,'' ''applauds the Department's recognition that several courts have already determined that certain workers including, drivers, security guards, janitors, landscape workers, and call center workers do not require specialized skills,'' and ''recommends that guidance for this factor include specific instruction that asks courts to rely on the previous decisions finding certain occupations do not require prior experience; the workers are dependent on training from the employer to perform the work; or that the work requires no training, and thus are indicators that the relevant worker(s) lack(s) specialized skills.'' The Department declines to include that type of instruction as it is unnecessary in light of these court decisions. Moreover, the Department is not intending to identify any particular occupation as lacking specialized skills in all cases.

NELA stated that, ''[a]lthough the Proposed Rule correctly reestablishes the link between skill and business-like initiative as the *raison d'etre* of the factor, it does not make clear enough that the factor only points to independent contractor status when such a link is found.'' NELA suggested accordingly that the final rule ''would be strengthened by incorporating a few key principles from the commentary into the rule itself.'' NELA requested that sentences from the NPRM stating that the ''fact that workers are skilled is not itself indicative of independent contractor status'' and that ''[b]oth employees and independent contractors may be skilled workers'' be added to the regulatory text.[488] The Department agrees that including versions of these sentences in the regulatory text will help sharpen the point that use of skills in connection with business-like initiative is what distinguishes between independent contractors and employees under this factor. Accordingly, the Department is revising the last sentence of the proposed regulatory text for this factor to be two sentences and to read (the italicized language is new as compared to the NPRM): ''Where the worker brings specialized skills to the work relationship, *this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers.* It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.''

The Department, however, believes that it is unnecessary to add the following sentence that NELA suggested incorporating into the regulatory text: ''To indicate possible independent contractor status, the worker's skills should demonstrate that they exercise independent business judgment.'' This sentence would be duplicative of the existing regulatory text language that it ''is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.'' The Department further believes that adding ''only'' to this existing regulatory text language (as NELA requested) so that it would read that it ''is only the worker's use . . .'' would not provide clarification, especially considering the changes that the Department is making to the regulatory text.

Numerous commenters opposed, disagreed with, and/or requested changes to, or clarifications of, the proposed skill and initiative factor. For example, CWI stated that, although it agrees that ''both skill and initiative may play a role in the independent contractor calculus,'' it ''fundamentally disagrees, however, that those considerations should be treated as a standalone factor in the economic realities calculus.'' And N/MA stated that ''[c]onsideration of skill and initiative as a stand-alone factor creates confusion and ambiguity, and results in the considerations under that factor being provided outsized weight in the totality of the circumstances analysis.'' *See also* Scalia Law Clinic (''The NPRM creates a new definition of the 'skill' factor that gives it greater weight, despite precedent to the contrary.''). However, courts and the Department have invariably included some version of skill and initiative as a separate and distinct factor in their analyses for decades. Consistent with the Department's repeated statements in this final rule, this factor should not be given, as a predetermined matter, any different weight than any of the other factors.[489]

SHRM commented that the NPRM ''purports to convert a standard consideration utilized by myriad independent contractor classification tests—the degree of skill required by the work—into an assessment of a worker's business acumen.'' *See also* TheDream.US (describing a focus on business-like initiative as an ''amorphous qualification to an otherwise straightforward consideration''). SHRM expressed concern that ''[t]his is not only a drastic departure from a well-settled standard, but it also negates the Proposed Rule's decree that a worker's *opportunity* for profit or loss based on their managerial skill is relevant to their classification as an employee or an independent contractor.'' Many federal courts of appeals consider initiative as part of this factor,[490] and thus, it is by no means a

[486] *See id.* (citing cases).

[487] *See, e.g., Perez* v. *Howes,* 7 F. Supp.3d 715, 724–25 (W.D. Mich. 2014), *aff'd,* 790 F.3d 681 (6th Cir. 2015).

[488] The first sentence was at 87 FR 62255 (quoting *Superior Care,* 840 F.2d at 1060); the second sentence was at 87 FR 62256.

[489] *See* 29 CFR 795.110(a)(2) (''Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case.''). Scalia Law Clinic further commented that, ''[w]hile the 2021 [IC] Rule did not prohibit considering a worker's skill, [it] rightly excluded skill from its 'core factors.' '' As explained in this final rule and as the regulatory text provides, however, the Department is rejecting the concept of ''core'' factors in favor of not giving a predetermined weight to any factor. *See id.* The 2021 IC Rule stated (and Scalia Law Clinic reiterated in its comment) that skill should be given lesser weight because highly-skilled workers can be employees and comparatively lesser-skilled workers can be independent contractors. The Department believes, however, that this is better addressed by reintegrating initiative into the skill factor for the reasons explained in the NPRM and herein and by reinforcing that all factors determine a worker's status.

[490] *See, e.g., Hobbs,* 946 F.3d at 834; *Parrish,* 917 F.3d at 385; *Cornerstone Am.,* 545 F.3d at 345;

''drastic departure.'' Moreover, because both employees and independent contractors may be skilled workers, considering whether a worker uses specialized skills in connection with business-like initiative—rather than considering only whether the worker has specialized skills—helps to distinguish the worker's status and is probative of the ultimate question of economic dependence.[491] And there is no basis for asserting that the skill and initiative factor ''negates'' the relevance of the opportunity for profit or loss factor; both factors are relevant to the analysis even if, as explained in the NPRM,[492] some facts showing an exercise of initiative can be considered under both factors.

FSI, Coalition of Business Stakeholders, and NRF & NCCR similarly objected to the inclusion of initiative in this factor. FSI stated that including initiative in the skill factor contravenes *Silk* and that ''this alteration represents yet another way in which the Proposed Rule repeatedly and improperly emphasizes 'entrepreneurial drive' as an overarching consideration across many factors.'' The Coalition of Business Stakeholders and NRF & NCCR disagreed with the inclusion of initiative in this factor and described it as ''inconsistent'' with *Silk.* This factor, however, is consistent with *Silk*. The unloaders in *Silk* performed ''simple tasks'' [493] and were employees, in part, for that reason; the Department's skill and initiative factor would likewise point to employee status for such unloaders. The ''driver-owners'' in *Silk,* on the other hand, seemed to use their truck-driving skills in a business-like way, drove for multiple clients, and were described by the Court as ''small businessmen.'' [494] The Department's skill and initiative factor would likewise point to independent contractor status for such driver-owners.

FSI further stated that emphasizing ''entrepreneurial drive'' may ''lead to erroneous classification decisions because, among other considerations, some workers may strongly prefer to work as independent contractors, not for the flexibility to grow their businesses, but for the flexibility to control their workloads and to work when they want to.'' It added that, ''while initiative is an appropriate consideration in favor of independent contractor status, its absence does not indicate that a worker is not pursuing independence.'' 4A's similarly stated that the ''the proposed rule could create uncertainty for agencies that utilize legitimate independent contractor relationships to carry out important business functions, but their freelance talent does not have entrepreneurial drive or take personal initiative to expand their business to working with other agencies or in house marketing shops.'' The Department continues to believe that whether workers with specialized skills use those skills in connection with business-like initiative is probative of their status as employees or independent contractors. Using such skills to ''grow'' or ''expand'' their work is a prime example of business-like initiative as the commenters recognize, but there may be other ways in which workers can use such skills in connection with business-like initiative. Of course, the determination of a worker's status ultimately requires consideration of the totality of the circumstances—not just the skill and initiative factor.

DSA stated that ''[a]n individual could not have a specialized skill, but still take the initiative of an independent business or vice versa. If the rule were to go forward as proposed, and each factor pointed in different directions, there could be confusion as to where a ruling may come down on this one factor.'' The Department does not believe this to be the case when applying the skill and initiative factor. As explained in the NPRM, courts have often recognized that a worker's lack of specialized skills to perform the work indicates that the worker is an employee. As the Tenth Circuit, for example, has explained, ''the lack of the requirement of specialized skills is indicative of employee status.'' *Flint Eng'g,* 137 F.3d at 1443 (quoting *Snell,* 875 F.2d at 811) (alteration omitted).[495] When a worker lacks specialized skills, this factor will indicate employee status even if the worker exercises ''the initiative of an independent business.'' That initiative, of course, is very relevant to the overall analysis, and the worker who lacks the specialized skills but exercises ''the initiative of an independent business'' may very well be an independent contractor after considering all of the factors. For those reasons, there should be no confusion. The landscaper example in the NPRM's discussion of the skill and initiative factor provides additional explanation; the landscaper's landscaping work does not require specialized skills, but the landscaper's use of initiative and other facts may demonstrate that the landscaper is an independent contractor.[496]

The U.S. Chamber similarly commented that the NPRM was ''wrong to focus on 'specialized skills' as probative in determining independent contractor status.'' The U.S. Chamber further commented that ''a focus on 'the amount of skill required' separate from a worker's initiative that impacts the worker's profits is an unnecessarily restrictive view of independent work currently being performed in the U.S. economy.'' In making these arguments, however, the U.S. Chamber did not rebut the substantial case law relied on by the Department explaining that the use of specialized skills in an independent or business-like way is what makes this factor probative of employee or independent contractor status. The Department grounds this factor in that case law. Citing drivers among other occupations, the U.S. Chamber added that ''[e]ven low-skilled workers can work as independent contractors if they have a skill that they can market to customers.'' *See also* Scalia Law Clinic. The Department agrees, as stated above, that workers lacking specialized skills can be independent contractors when all of the

Express Sixty-Minutes, 161 F.3d at 305 (''The district court did not discuss initiative during its evaluation of this factor. We agree with the Secretary that the skill and initiative factor points toward employee status.''); *Flint Eng'g,* 137 F.3d at 1443 (quoting *Selker Bros.,* 949 F.2d at 1295); *Circle C. Invs.,* 998 F.2d at 328; *Superior Care,* 840 F.2d at 1060; *DialAmerica,* 757 F.2d at 1387.

[491] *See, e.g., Scantland,* 721 F.3d at 1318; *Flint Eng'g,* 137 F.3d at 1443; *Selker Bros.,* 949 F.2d at 1295; *Superior Care,* 840 F.2d at 1060; *DialAmerica,* 757 F.2d at 1387.

[492] *See* 87 FR 62256–57.

[493] 334 U.S. at 718.

[494] *Id.* at 719.

[495] *See also, e.g., Razak,* 951 F.3d at 147; *Off Duty Police,* 915 F.3d at 1055–56; *Iontchev,* 685 F. App'x at 550; *Walsh* v. *EM Protective Servs. LLC,* No. 3:19–cv–00700, 2021 WL 3490040, at *7 (M.D. Tenn. Aug. 9, 2021); *Acosta* v. *New Image Landscaping, LLC,* No. 1:18–cv–429, 2019 WL 6463512, at *6 (W.D. Mich. Dec. 2, 2019); *Acosta* v. *Wellfleet Commc'ns, LLC,* No. 2:16–cv–02353–GMN–GWF, 2018 WL 4682316, at *7 (D. Nev. Sept. 29, 2018), *aff'd sub nom. Walsh* v. *Wellfleet Commc'ns,* No. 20–16385, 2021 WL 4796537 (9th Cir. Oct. 14, 2021); *Perez* v. *Super Maid, LLC,* 55 F. Supp. 3d 1065, 1077–78 (N.D. Ill. 2014); *Harris* v. *Skokie Maid & Cleaning Serv., Ltd.,* No. 11 C 8688, 2013 WL 3506149, at *8 (N.D. Ill. July 11, 2013); *Campos* v. *Zopounidis,* No. 3:09–cv–1138 (VLB), 2011 WL 2971298, at *7 (D. Conn. July 20, 2011); *Solis* v. *Int'l Detective & Protective Serv., Ltd.,* 819 F. Supp. 2d 740, 752 (N.D. Ill. 2011).

[496] 87 FR 62255 (''A landscaper, for example, may perform work that does not require specialized skills, but application of the other factors may demonstrate that the landscaper is an independent contractor (for example, the landscaper may have a meaningful role in determining the price charged for the work, make decisions affecting opportunity for profit or loss, determine the extent of capital investment, work for many clients, and/or perform work for clients for which landscaping is not integral).''). DSA's statement that the examples of welders in the NPRM's discussion of the skill and initiative factor do not include the scenario where ''there is no specialized skill, but the ability to independently market a business'' overlooked the landscaper example that addresses that scenario.

factors are considered. In addition, the Department continues to believe that the landscaper example in the NPRM's discussion of this factor, an example which the Department reaffirms, addresses that scenario.[497] Moreover, no one fact or factor determines whether a worker of any skill level is an employee or independent contractor.

MEP described the Department's articulation of this factor as ''unreasonably narrow'' and stated that the Department ''should recognize a wide variety of skills that demonstrate an individual's business-like initiative.'' It added that the Department ''should not be in the business of judging which skills are considered specialized or nonspecialized or place high or low value on the skills independent contractors provide.'' As noted in the NPRM, courts have identified some occupations where workers were found to lack specialized skills (for example, security guards, traffic control officers, drivers, janitorial work, landscaping, and call center workers).[498] The Department is seeking to ground this factor in that case law. Certain occupations may often lack specialized skills, but the Department cannot say that a particular occupation always lacks specialized skills. For example, a explained below, drivers may often lack specialized skills, but drivers with CDLs may have a specialized skill. Moreover, determining whether a worker has specialized skills is just one part of the inquiry, and workers who lack specialized skills may still be independent contractors. The landscaper example referenced above is one example of a worker who can be an independent contractor even if the work is unskilled, and this outcome is possible in other industries because a worker's classification is ultimately determined by application of all of the factors.

NRF & NCCR recommended that ''specialized skills'' be changed to ''skill, talent or creativity,'' referencing singers at restaurants among other examples. Again, the Department is not seeking to limit the types of work that involve skills or taking the position that any particular occupation lacks specialized skills. Instead, consistent with the bulk of case law, the Department is focusing this factor on whether the worker uses their specialized skills in connection with business-like initiative—rather than only considering whether the worker has specialized skills—because that focus is probative of the ultimate question of economic dependence.

Regarding the NPRM's statement that ''[n]umerous courts have found that driving is not a specialized skill,'' NHDA commented that ''a number of courts have found professional driving, including driving that requires a commercial driver's license (CDL), involves specialized skills'' (footnote omitted). *See also* Scopelitis. These commenters added that ''[a] driver with a CDL is a clear indicator of an individual pursuing a specialized skill to engage in a business.'' OOIDA commented similarly, stating that the cases relied on by the Department in the NPRM ''were focused on automobile driving, not the driving of a commercial motor vehicle,'' and that it was ''unclear whether the Department believes the driving skills required for a Class A Commercial Drivers License (CDL) are not specialized.'' Considering these comments and the requests for clarification, the Department clarifies that it recognizes the distinctive nature of CDLs and further recognizes that drivers performing work requiring such licenses are likely using specialized skills as compared to drivers generally.[499] As with any worker, consideration of whether a driver with a CDL uses that specialized skill in connection with business-like initiative determines whether this factor indicates employee or independent contractor status.

CPIE stated that ''the NPRM's interpretation would ignore any initiative that is not attributable to an individual's specialized skill,'' expressed concern that this factor may not always align with the ultimate outcome, and ''respectfully urges DOL to interpret this factor to consider any business initiative that demonstrates an individual's economic independence, regardless of whether the initiative is attributable to any skills.'' As an initial matter, the Department notes that it is not unusual when applying a multifactor economic realities analysis for one factor to not align with the ultimate outcome when the analysis is applied and the totality of the circumstances is considered. Regardless, any business initiative by a worker is plainly relevant to the analysis and may be considered under the opportunity for profit or loss depending on managerial skill factor and other factors, as the landscaper example in the NPRM's discussion of the skill and initiative factor demonstrates. Accordingly, this rulemaking accounts for IBA's comment that ''[a] true measure of economic independence would not restrict the analysis of skill and initiative to considering only specialized skills and only initiative attributable to those skills but instead would consider 'all major components open to initiative,' such as 'business management skills.' '' If not under the skill and initiative factor, the factors comprising the economic realities analysis certainly consider all types of initiative and business management skills by the worker.

Fight for Freelancers asserted that, in the case of a highly skilled worker who is asked by ''one of her regular clients'' to do ''a task that requires far less skill''

[497] *See also Iontchev,* 685 F. App'x at 550–51 (finding that the ''service rendered by the Drivers did not require a special skill,'' but concluding that, ''[u]nder the totality of the circumstances, the Drivers were not economically dependent upon [the employer]'' and thus independent contractors).

[498] *See, e.g., Razak,* 951 F.3d at 147 (noting that it ''is generally accepted that 'driving' is not itself a 'special skill' '' in determining that the skill factor weighs in favor of employee status); *Off Duty Police,* 915 F.3d at 1055–56 (noting that ''[t]he skills required to work for ODPS are far more limited than those of a typical independent contractor'' in finding that the skill factor weighed in favor of employee status for security guards and traffic control workers); *Iontchev,* 685 F. App'x at 550 (''The service rendered by the [taxi drivers] did not require a special skill.''); *EM Protective Servs.,* 2021 WL 3490040, at *7 (traffic control officers require ''relatively little skill'' and security guards require ''minimal skill,'' indicating employee status); *New Image Landscaping,* 2019 WL 6463512, at *6 (facts that ''little or no skill was required'' and ''prior landscaping experience'' was not required meant that skill factor favored employee status for landscapers); *Wellfleet Commc'ns,* 2018 WL 4682316, at *7 (explaining that skill factor favored employee status for call center workers because ''all that Defendants required was the ability to communicate well and read a script''); *Super Maid,* 55 F. Supp. 3d at 1077–78 (noting, in finding that skill factor favored employee status, that ''[m]aintenance work, such as cleaning, sweeping floors, mowing grass, unclogging toilets, changing light fixtures, and cleaning gutters, does not necessarily involve such specialized skills as would support independent contractor status,'' and that ''cleaning services, although difficult and demanding, were even less complex than those maintenance services'') (internal quotation marks omitted); *Skokie Maid,* 2013 WL 3506149, at *8 (''The maids' work may be difficult and demanding, but it does not require special skill,'' indicating employee status.); *Campos,* 2011 WL 2971298, at *7 (''There is no evidence that Campos's job as a delivery person required him to possess any particular degree of skill. Campos did not need education or experience to perform his job. Although he needed a driver's license in order to legally drive his vehicle for deliveries, the possession of a driver's license and the ability to drive an automobile is properly characterized as a 'routine life skill' that other courts have found to be indicative of employment status rather than independent contractor status.''); *Int'l Detective & Protective Serv.,* 819 F. Supp. 2d at 752 (finding that the ''vast majority of the Guards' work . . . did not require any special skills'').

[499] NRF & NCCR commented that ''[t]he fact that many people have regular driver's licenses should not be viewed as in any way negating or reducing the likelihood that a contractor who meets the other factors will be properly treated as an independent contractor.'' As the Department has clearly and repeatedly stated, no one fact will determine a worker's status as an employee or independent contractor.

than usual, the worker ''would now have to tell her client—with whom she likes to work—that she cannot provide what the client needs for this particular project, because it does not make use of her more specialized skills.'' The Department recognizes that using specialized skills in connection with business-like initiative does not preclude (and, in fact, may often also include) performance of lower-skilled tasks. Whether the worker uses specialized skills to perform the work is not determined by isolating any one task performed by the worker; instead, consistent with a totality-of-the-circumstances approach, the worker's work on the whole should be considered to determine if the worker uses specialized skills in connection with business-like initiative.

Coalition of Business Stakeholders stated that the Department's articulation of this factor ''dispenses with all independent consideration of a worker's specialized skills obtained or developed separate and apart from the hiring entity'' and ''all but ensures consideration of this factor will preclude an independent contractor finding.'' This comment overlooks the totality-of-the-circumstances nature of the analysis; no one factor can preclude an independent contractor or employee finding. Contrary to this commenter's assertion, the Department believes that the worker's skills developed separate and apart from the hiring entity are relevant. The regulatory text providing that this factor indicates ''employee status . . . where the work is dependent on training from the employer to perform the work'' reflects that bringing skills to the work relationship (*i.e.,* skills developed separate and apart from the employer) may indicate independent contractor status if the skills contribute to business-like initiative.

Regarding training, America Outdoors Association stated that it ''may benefit an outfitter to train an independent contractor, or pay for a first aid certification class, in order for the contractor to better serve out the terms of the contract.'' Referencing a labor shortage in its industry, WFCA stated that ''the mere fact that a contractor or dealer is willing to pay to train independent contractor should not make the worker an employee'' and asked that the regulatory text be revised to reflect that. *See also* ABC. As an initial matter, some basic training in a workplace, such as paying for a first-aid certification class, does not prevent a finding that a worker uses specialized skills to perform the work. Instead, the analysis is more general and, as the regulatory text states, should focus on whether the worker is dependent on training from the employer to perform the work. Finally, the revision requested by WFCA is unnecessary given that the regulatory text already provides generally that ''the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity'' and, ''[c]onsistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive.'' [500]

The Department is finalizing the skill and initiative factor (§ 795.110(b)(6)) as discussed herein.

Example: Skill and Initiative

A highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. These facts indicate employee status under the skill and initiative factor.

A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. These facts indicate independent contractor status under the skill and initiative factor.

7. Additional Factors (§ 795.110(b)(7))

Section 795.105(d)(2)(iv) of the 2021 IC Rule stated that additional factors may be considered if they are relevant to the ultimate question of whether the workers are economically dependent on the employer for work or in business for themselves.[501] The Department proposed to retain this provision with only minor editorial changes, moving it to § 795.110(b)(7). Specifically, the Department's proposed regulatory text provided that ''[a]dditional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the employer for work.'' [502]

The Department explained in the NPRM that retaining this provision would ''reiterate[ ] that the enumerated factors are not to be applied mechanically but should be viewed along with any other relevant facts in light of whether they indicate economic dependence or independence.'' [503] Additionally, it reemphasized that ''only factors that are relevant to the overall question of economic dependence or independence should be considered.'' [504] The Department explained that this approach reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the enumerated factors. The Department reasoned that this approach is consistent with the Supreme Court's guidance in *Silk,* where the Court cautioned that its suggested factors are not intended to be exhaustive.[505] Additionally, this approach is also consistent with the approach that courts and the Department have used in the decades since *Silk* to determine whether workers are employees or independent contractors under the FLSA.[506]

Like in the 2021 IC Rule, the Department proposed not to identify any specific additional factors, and specifically declined to identify the ''degree of independent business organization and operation,'' a factor considered in prior departmental guidance, as a seventh factor in the analysis. The Department explained that given the ''focus in this proposed rulemaking on reflecting the economic reality factors commonly used by the circuit courts of appeals, the Department chose not to include the worker's 'degree of independent business organization and operation' as a seventh factor.'' [507] The Department noted that it was not aware of any court that has used this as a standalone factor and expressed concerns that ''facts that may relate to whether a worker has an independent business organization—such as whether the worker has incorporated or receives an Internal

[500] 29 CFR 795.110(a)(1) and (a)(2), respectively.

[501] 86 FR 1247.

[502] 87 FR 62275 (proposed § 795.110(b)(7)).

[503] *Id.* at 62257.

[504] *Id.*

[505] 331 U.S. at 716 (''No one [factor] is controlling nor is the list complete.'').

[506] *See generally* 87 FR 62257; *infra* n.512.

[507] 87 FR 62257.

Revenue Service (IRS) Form 1099 from an potential employer—reflect mere labels rather than the economic realities and are thus not relevant.'' [508]

A few commenters expressed support for the Department's proposed section on additional factors. *See e.g.,* NWLC; AFL–CIO; DSA; and State AGs. DSA commented that it ''agrees with the Department's retention of the 2021 IC Rule that additional factors may be considered if they are relevant to the ultimate question of economic dependence.'' The AFL–CIO expressed support for the Department's additional factors provision, noting that the Department correctly recognized that additional factors should be considered when relevant to the economic reality.

Several commenters expressed concerns with a perceived vagueness and lack of clarity arising from inclusion of additional factors, and some requested that the Department delete the additional factors section from the final rule entirely. For example, IEC commented that ''[t]he proposed rule does little to further define 'additional factors' which will only lead to employers, employees, and independent contractors'' speculating about ''how to apply this in their analysis.'' SBA expressed concerns with what it described as an ''open-ended factor'' and recommended the Department delete it. Inline Translation Services similarly commented that ''[t]he catch all phrase 'additional factors' should be removed entirely,'' stating that ''this open ended clause could introduce innumerable other factors during labor audits with very uncertain and unpredictable outcomes.'' AFPF expressed concerns that ''[s]takeholders will have no clarity as to what additional factors may be considered in any particular case.''

Goldwater Institute commented that ''[t]o the extent an employer has concluded its economic dependence analysis and finds that the worker is indeed an independent contractor, this final consideration could ostensibly swallow the rule.'' The National Restaurant Association also expressed concerns with the Department's decision not to define specific additional factors, commenting that the undefined additional factors section could create confusion as it offers ''little guidance to the regulated community.'' [509]

NAFO commented that ''this catch-all factor provides [the Department] a vague and highly discretionary means by which it can determine whether there is something that 'indicates' whether a worker is economically dependent on an employer for work without historical precedent or guidance.'' The Coalition of Business Stakeholders similarly expressed that ''the [Department] inserts into the Proposed Rule a mechanism whereby it can hinge its classification decision on anything it deems to 'indicate' that a worker is either in business for themselves or economically dependent on an employer, regardless of whether such consideration has historically, or ever, been considered as part of the classification analysis.'' *See also, e.g.,* MEP, Promotional Products Association International.

Contrary to some of the commenters' assertions, the Department reiterates that the proposed regulatory language on additional factors is consistent with and reflects decades of Supreme Court and federal appellate court precedent—as well as guidance from the Department including the 2021 IC Rule—emphasizing that the enumerated economic realities factors are not exhaustive. For example, the Supreme Court explained in *Silk* that ''[n]o one [factor] is controlling nor is the list complete.'' [510] Many federal courts of appeals have also emphasized that the enumerated factors are not exhaustive.[511] Courts have reiterated that ''[t]he determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality rather than technical concepts,' . . . determined by reference not to 'isolated factors but rather upon the circumstances of the whole activity.' '' [512] The Department's guidance has emphasized a similar approach. For example, WHD Fact Sheet #13 has indicated that its factors are not exhaustive and stated that ''the Supreme Court has held that it is the total activity or situation which controls'' the inquiry and that ''[t]he employer-employee relationship under the FLSA is tested by 'economic reality' rather than 'technical concepts.' '' [513] AI 2015–1 explained that courts ''routinely note that they may consider additional factors depending on the circumstances.'' [514]

The Department continues to believe that the additional factors section is entirely consistent with how the courts and the Department have approached the economic realities inquiry for decades, including in the 2021 IC Rule. Commenters expressing concerns that the consideration of additional factors will lead to confusion and uncertainty overlook several important considerations. First, as mentioned, this has been the approach of the courts and the Department for decades—the enumerated economic realities factors are not exhaustive, all relevant facts should be considered, and the focus of the determination should be grounded in the economic realities as opposed to any isolated factors. There is no basis for the concern that the retention of a regulatory provision stating what courts, the Department, and the regulated community have understood to be part of the economic reality test under the FLSA for over 75 years will result in confusion and uncertainty as opposed to consistency and familiarity. Second, the additional factors section is not

[508] *Id.*

[509] The Department notes that it included the additional factors provision in the 2021 IC Rule in response to the National Restaurant Association's comment in that rulemaking expressing concern about the lack of a specific regulatory provision acknowledging that additional factors could be relevant. Specifically, as explained in the 2021 IC Rule, the Restaurant Association contended that ''facts and factors'' that were not listed in the Department's 2020 proposal, which included two core factors and three additional factors, ''may be relevant to the question of economic dependence even if they would not be as probative as the two core factors.'' They expressed ''concern that future courts may ignore these unlisted but potentially relevant considerations in response to this rulemaking'' and ''requested that the Department revise the regulatory text to explicitly recognize that unlisted factors may be relevant.'' 86 FR 1196.

[510] 331 U.S. at 716.

[511] *See Sureway,* 656 F.2d at 1370 (stating that ''the courts have identified a number of factors that should be considered'' when determining if an individual is an employee under the FLSA but noting that ''the list is not exhaustive''); *Razak,* 951 F.3d at 143 (noting that the Third Circuit agreed with *Sureway* ''that 'neither the presence nor absence of any particular factor is dispositive' '' and explaining that '' 'courts should examine the circumstances of the whole activity,' determining whether, 'as a matter of economic reality, the individuals are dependent upon the business to which they render service' '') (internal citation omitted); *Hobbs,* 946 F.3d at 836 (stating that ''[b]ecause the *Silk* factors are non-exhaustive, we will also look to other factors to help gauge the economic dependence of the pipe welders''); *Parrish,* 917 F.3d at 387 (stating that the ''*Silk* factors being 'non-exhaustive', other relevant factors may be in play in an employee vel non analysis''); *Karlson,* 860 F.3d at 1092 (''No one [factor] is controlling nor is the list complete.'') (quoting *Silk,* 331 U.S. at 716) (internal quotations omitted); *Scantland,* 721 F.3d at 1312 (''We note, however, that these six factors are not exclusive and no single factor is dominant.''); *Lauritzen,* 835 F.2d at 1534 (''Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.''); *Superior Care,* 814 F.2d at 1043 (explaining that ''[t]hese factors are not exhaustive'' and ''must always be aimed at an assessment of the 'economic dependence' of the putative employees, the touchstone for this totality of the circumstances test'') (internal citation omitted).

[512] *Saleem,* 854 F.3d at 140 (quoting *Barfield* v. *New York City Health & Hospitals Corp.,* 537 F.3d 132, 141 (2008) quoting *Goldberg,* 366 U.S. at 33, and *Rutherford,* 331 U.S. at 730)) (internal quotation marks omitted).

[513] *See* WHD Fact Sheet #13 (July 2008).

[514] 2015 WL 4449086, at *3 n.4 (withdrawn June 7, 2017).

unbounded and includes clear constraining language in the regulatory text, emphasizing that only those additional factors which indicate that the worker is economically dependent on the potential employer for work or in business for themself can be considered. This reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the six enumerated factors. While the department declines to specify any particular additional factors, the language of the regulatory text appropriately limits the scope of potentially relevant additional facts or factors that might be considered.

Moreover, the Department recognizes that, in many instances, consideration of additional factors will not be necessary because the relevant factual considerations can and will be considered under one or more of the enumerated factors. The additional factors section is simply a recognition by the Department, consistent with decades of case law, that a rule applying to varying economic relationships across sectors of the economy must be applied in a non-mechanical fashion and must focus on the totality of the circumstances.

The U.S. Chamber expressed concern that the additional factors section ''has the potential to swallow the six defined factors,'' and that ''[b]usinesses and workers alike are being asked to consider, weigh, and make significant business decisions under a test that has unlimited undefined possibilities.'' The U.S. Chamber distinguished the NPRM's additional factors section from the 2021 IC Rule's section on additional factors, asserting that the 2021 IC Rule constrained or narrowed the additional factors application by, first, explicitly assigning more weight to core factors than any potentially relevant additional factors, and second, by identifying relevant additional factors.

Some commenters suggested that the Department assign the category of potentially relevant additional factors less weight than the enumerated factors. *See* SHRM; U.S. Chamber. But as the Department explained in the NPRM, ''to assign a predetermined and immutable weight to certain factors ignores the totality-of-the-circumstances, fact-specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time.'' [515] This is true both in respect to the elevation of core factors above non-core and additional factors in 2021 IC Rule, and with respect to the suggested devaluation of potential additional factors that some commenters urged here.

Other commenters asked the Department to specifically recognize certain additional factors. For example, DSA suggested that the Department identify as an additional factor ''the recognition of independent contractor status for businesses under other statutes, such as the Internal Revenue Code and numerous state statutes.'' TechServe Alliance urged the Department to ''consider the degree of independent business formalization (incorporation, licenses, taxes) in analyzing'' independent contractor status. ACRE et al. requested that the Department consider the degree of transparency provided to a worker about the nature of the work, such as the location, scope, and pay for a particular task, as an additional factor. SIFMA commented that the Department should recognize employment or independent contractor agreements as an additional factor relevant to the economic reality inquiry. ABC suggested the Department recognize as an additional factor ''whether it is a recognized, longstanding practice for a large segment of the industry to treat certain types of workers as independent contractors.'' A legal blogger urged the Department to clarify some additional factors courts have used in determining whether there is an employment relationship, stating that, for example, ''the courts have considered whether the potential employer has the right to terminate the worker for any reason at any time; whether the parties are subject to an agreement indicating an intent to establish an independent contractor relationship; and whether the worker operates in the form of a corporate entity, including as a limited liability company.''

After further consideration, and consistent with the NPRM, the Department declines to identify in this final rule any particular additional factors that may be relevant. The Department believes that the regulatory text addressing additional factors, which focuses on whether the additional factors are indicative of whether the worker is in business for themselves or is economically dependent on the potential employer for work, is sufficiently constrained to narrow the possible relevant considerations and sufficiently flexible to capture potentially relevant factual considerations that fall outside the enumerated factors. In light of this, the Department believes it is unnecessary to specify any additional factors. The Department previously identified the ''degree of independent business organization and operation'' as a seventh factor that it considered in its analysis.[516] However, as noted in the NPRM, the Department is not aware of any court that has used this as a standalone factor, and the Department declines to identify this as a standalone factor in this final rule. Additionally, as explained in the NPRM, the Department is concerned that facts such as whether the worker has incorporated or receives an IRS Form 1099 from a potential employer reflect mere labels rather than the economic realities and are thus not relevant. The Department has similar concerns that contractual provisions indicating the intent of the parties to establish an independent contractor relationship also may reflect mere labels rather than the economic realities and are thus not relevant. To the extent facts such as the worker having a business license or being incorporated may suggest that the worker is in business for themself, they may be considered either as an additional factor or under any enumerated factor to which they are relevant. However, consistent with an economic reality analysis, it is important to inquire into whether the worker's license or incorporation are reflective of the worker being in business for themselves as a matter of economic reality. For example, if a potential employer requires a worker to obtain a certain license or adopt a certain form of business as a condition for performing work, this may be evidence of the potential employer's control, rather than a worker who is independently operating a business.[517]

Finally, Flex requested that the Department clarify whether it still agrees with guidance as to the lack of relevance of certain factors expressed in WHD Fact Sheet #13. Flex urged the Department to ''add guidance to the proposed rule that mirrors the subregulatory guidance in Fact Sheet #13 and make clear that the same factors previously deemed not relevant are still deemed not relevant.'' While the Department declines to identify specific factors as never relevant to the inquiry of whether a worker is economically dependent or in business for themselves, the Department agrees that certain factors are generally immaterial

[515] 87 FR 62236.

[516] *See* WHD Fact Sheet #13 (July 2008).

[517] *See, e.g., Safarian* v. *American DG Energy Inc.,* 622 F. App'x 149, 151 (3d Cir. 2015) (even where ''the parties structure[ ] the relationship as an independent contractor, . . . the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities'').

in determining the existence of an employment relationship because they reflect mere labels rather than the economic realities, and do not indicate whether a worker is in business for themselves or is economically dependent on a potential employer for work. As it has stated previously, the Department continues to believe that ''such facts as the place where work is performed, the absence of a formal employment agreement, . . . whether an alleged independent contractor is licensed by State/local government,'' and ''the time or mode of pay'' do not generally indicate whether a worker is economically dependent or in business for themself.[518]

The Department is finalizing the additional factors section (§ 795.110(b)(7)) as proposed with one minor editorial change as explained.

D. Primacy of Actual Practice (2021 IC Rule § 795.110)

The Department proposed to remove § 795.110 of the 2021 IC Rule and use that section for the discussion of the economic reality factors.[519] Section 795.110 of the 2021 IC Rule provided that in determining economic dependence ''the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.'' [520] In the NPRM, the Department explained that this absolute rule ''is overly mechanical and does not allow for appropriate weight to be given to contractual provisions in situations in which they are crucial to understanding the economic realities of a relationship.'' [521] The Department expressed its belief that a less prescriptive approach is more faithful to the totality-of-circumstances economic reality analysis, such that contractual or other reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence.[522]

In its proposal, the Department acknowledged that contractual authority may in some instances be less relevant, but noted that the 2021 IC Rule's position that actual practice is always more relevant is incompatible with an approach that does not apply the factors mechanically but looks to the totality of the circumstances in evaluating the economic realities. The Department explained that the focus is always on the economic realities rather than mere labels, but contractual provisions are not always mere labels. Instead, contractual provisions sometimes reflect and influence the economic realities of the relationship. The Department explained that within each factor of the test, there may be actual practices that are relevant, and there may also be contractual provisions that are relevant and that this examination will be specific to the facts of each economic relationship and cannot be predetermined.[523]

In the NPRM, the Department also discussed the 2021 IC Rule's response to ''comments asserting that prioritizing actual practice would make the economic reality test impermissibly narrower than the common law control test.'' [524] The 2021 IC Rule asserted that ''the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA.'' [525] As the Department noted in the NPRM, this view of the FLSA's scope of employment is inconsistent with the Supreme Court's observations that ''[a] broader or more comprehensive coverage of employees'' than under the FLSA ''would be difficult to frame,'' [526] and that the FLSA ''stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'' [527] The Department further explained that the ''2021 IC Rule's blanket diminishment of the relevance of the right to control is inconsistent with the Supreme Court's observations that the FLSA's scope of employee coverage is exceedingly broad and broader than what exists under the common law.'' [528] Finally, the Department recognized that the fact that the employer's right to control is part of the common law test shows that it is a useful indicator of employee status.[529]

Multiple commenters expressed support for the Department's decision to remove the 2021 IC Rule's provision on the primacy of actual practice. For example, the State AGs agreed with the NPRM's reasoning, noting ''that unexercised contractual powers among the parties may be equally as relevant to determining economic dependence as exercised powers'' and stating that ''[t]he Department rightly recognizes that the parties' actual practice is not more relevant than any other factor as to the question of economic dependence.'' The LA Fed & Teamsters Locals stated ''a worker cannot be said to be acting independently in running their own business if they are unable to make and effectuate certain decisions because another entity has reserved power over those decisions.'' Similarly, NELP commented that the NPRM rightly recognized ''that contractual provisions can be powerful silencers; a right that is never exercised may be more significant evidence of control than a right that is routinely ignored.'' Justice at Work Pennsylvania commented that they support the Department's position on the primacy of actual practice ''which would restore the broad, holistic test for FLSA employment, as intended by Congress.'' Gale Healthcare Solutions similarly commented that they ''agree with DOL's proposal to remove Section 795.110 of the 2021 IC Rule, as every fact that is relevant to economic dependence should be considered in the analysis of economic dependence, and contractual possibilities—not just actual practices—should be considered.''

A number of commenters, however, expressed disagreement with the Department's proposal to remove this provision of the 2021 IC Rule. For example, FMI commented that ''control has always been evaluated based upon the actual exercise of control, that is, what the actual practice of the business and worker is—not the theoretical reservation of control.'' Cambridge Investment Research commented that ''[m]erely because an independent contractor elects not to take advantage of his or her independence or freedom says nothing about whether in fact the worker is properly classified.'' The U.S. Chamber expressed concern that the NPRM ''contradicts the principle that '[i]t is not significant how one ''could have'' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts.' '' N/MA urged the Department to maintain the 2021 IC Rule's position ''that unexercised contractual rights are not irrelevant, they are simply not as informative as the actual experience of the parties,'' expressed concerns that the NPRM ''turns the economic realities test into a focus on economic possibilities,'' and noted that ''[c]ontractual provisions that are truly important necessarily manifest in the actual experiences of the worker.'' CWI similarly commented: ''To be clear, the 2021 IC Rule does not provide that unexercised rights are irrelevant. It merely states the obvious:

[518] WHD Fact Sheet #13 (July 2008).

[519] 87 FR 62257.

[520] 86 FR 1247 (§ 795.110).

[521] 87 FR 62258.

[522] *Id.*

[523] *See generally* 87 FR 62258.

[524] 87 FR 62258.

[525] 86 FR 1205.

[526] *Rosenwasser,* 323 U.S. at 362–63.

[527] *Darden,* 503 U.S. at 326.

[528] 87 FR 62258.

[529] *Id.* In *Silk,* the Supreme Court described this standard as ''power of control, whether exercised or not, over the manner of performing service to the industry.'' 331 U.S. at 713 (citing Restatement of the Law, Agency, sec. 220).

that what the control a putative employer actually exercises is more informative than the control it could exercise.'' *See also* CWC; MEP; NRF& NCCR.

Upon considering the comments, the Department is finalizing the removal of § 795.110 of the 2021 IC Rule (Primacy of actual practice). Consistent with case law and the Department's historical position prior to the 2021 IC Rule, the Department declines to create a novel bright line rule that assigns a predetermined and immutable weight or level of importance to reserved rights. As explained in the NPRM, the Department believes a less prescriptive approach is more faithful to the totality-of-the-circumstances, economic-reality analysis, and contractual or other reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence.[530] The significance of each fact in the analysis should be informed by its relevance to the economic realities and this analysis will be specific to the facts of each economic relationship and cannot be predetermined. Finally, the Department's approach to the reserved right to control is more consistent with the historical bounds of the control factor than the 2021 IC Rule's blanket diminishment of the relevance of the right to control, which was inconsistent with the Supreme Court's observations that the FLSA's scope of employee coverage is exceedingly broad, even more so than under the common law.[531] That the common law test includes the employer's right to control shows that it is a useful indicator of employee status.[532] As such, the Department believes that removal of this provision is appropriate. Specific concerns raised in the comments relevant to this issue are discussed and addressed in this section below.

Several commenters expressed concerns that the proposed removal of the primacy of actual practice provision was inconsistent with longstanding case law and previous guidance issued by the Department. *See, e.g.,* CWC; DSA; FSI; Scalia Law Clinic; U.S. Chamber. For example, FMI expressed concerns that the NPRM was inconsistent with ''the articulation of the control factor in Administrator's Interpretation (AI) No. 2015–1 (July 15, 2015)'' which FMI contends ''debunked the idea that reserved control should be a consideration.'' FMI also suggested that the NPRM was inconsistent with case law cited in AI 2015–1 which expressed that a ''worker's control over meaningful aspects of the work must be more than theoretical—the worker must actually exercise it.'' *See also* CWC. DSA commented that the 2021 IC Rule's elevation of actual practice as always more relevant than contractual or theoretical possibilities was consistent with a 1949 Opinion Letter that stated ''ordinarily, a definite decision as to whether one is an employee or independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal.'' The U.S. Chamber commented that the NPRM was inconsistent with decades of court precedent holding that ''the focus is on economic reality, not contractual language.'' According to the U.S. Chamber, the NPRM ''would effectively elevate reserved contractual rights above the actual practice of the parties'' and the ''economic realities test would be replaced by a contractual reservation test.'' Similarly, MEP expressed its position that the 2021 IC Rule ''ensures the true nature of the contractual relationship is considered above all but leaves room for theoretical possibilities to still be considered,'' which it contended is consistent with court precedent.

Contrary to these comments, the Department's approach to this issue is consistent with both prior Departmental guidance as well as judicial precedent. As the Department explained in the NPRM, AI 2015–1 recognized six economic realities factors that followed the six factors used by most federal courts, including a control factor described as ''the degree of control exercised or retained by the employer.'' [533] The NPRM also noted ''AI 2015–1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative.'' [534] Thus, contrary to FMI's contention, the NPRM's approach to the primacy of actual practice is consistent with AI 2015–1's non-mechanical, totality-of-the-circumstances approach to the economic dependence inquiry and the potential relevance of the reserved right to control as an indicator of economic reality.[535] Additionally, the Department's approach to this issue is certainly not in tension with the notion that the economic reality inquiry cannot be made without evidence of the day-to-day working relationship between a worker and their potential employer.[536]

As the Department emphasizes in this final rule, it in no way intends to depart from case law which similarly emphasizes consideration of the actual behavior of the parties in deciding the economic reality inquiry.[537] Indeed, the Department's position is more consistent with the case law, which does not deem actual practice and reserved rights to be mutually exclusive and instead requires a nuanced consideration of all relevant facts.[538] Some commenters misconstrued the Department's proposal to remove the primacy of actual practice provision from the regulatory text. To be clear, the Department does not seek to elevate the weight of theoretical or contractual rights above the weight of actual practice. Rather, the Department affirms that actual practice is always relevant to the economic reality test. Further, the Department agrees that in many—if not most—circumstances the actual practices of the parties will be more relevant to the economic reality than reserved rights or unexercised contractual terms (as, for example, where an employer theoretically or contractually permits workers to decline work assignments, but in practice disciplines workers who decline assignments).[539] And, as the Department explained in the NPRM, it does not intend to in any way minimize or disregard the longstanding case law that considers the actual behavior of the parties in order to determine the

[530] 87 FR 62258.

[531] *Id.*

[532] *Darden,* 503 U.S. at 323 (common-law employment test considers ''the hiring party's right to control the manner and means by which the product is accomplished'') (quoting *Reid,* 490 U.S. at 751–52); Restatement (Third) of Agency, sec. 7.07, Comment (f) (2006) (''For purposes of respondeat superior, an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work.'').

[533] 87 FR 62223.

[534] *Id.*

[535] AI 2015–1, 2015 WL 4449086, at *11 (withdrawn June 7, 2017). Additionally, AI 2015–1 cited, among other cases, *Superior Care,* for the proposition that ''[a]n employer does not need to look over his workers' shoulders every day in order to exercise control.'' In *Superior Care,* even though the parties stipulated that actual practice of the parties was to have infrequent supervisory visits, the Second Circuit found more probative of control the fact that the employer ''unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes.'' *Superior Care,* 840 F.2d at 1060.

[536] *See* WHD Op. Ltr. (June 23, 1949) (''Ordinarily a definite decision as to whether one is an employee or an independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal.'').

[537] *See infra* n.541.

[538] See discussion regarding the Seventh Circuit's decision in *Brant* v. *Schneider Nat'l, infra.*

[539] *See Off Duty Police,* 915 F.3d at 1060–61 (finding that, among other things, officers' testimony that they were disciplined for turning down assignments, despite having the right to do so, supported employee status).

economic reality.[540] These cases reflect a bedrock principle about the economic reality test, which looks to the reality of a situation rather than assuming that a written label, contractual arrangement, or form of business, is dispositive.

This case law, however, does not require or even support the adoption of a generally applicable rule that in all circumstances reserved or unexercised rights, such as the right to control, are in every instance less indicative of the economic reality than the actual practices of the parties. Such a rule would be inconsistent with federal appellate court precedent recognizing that reserved rights may be more probative, such as the temporary nurse staffing agency in *Superior Care* that reserved the right to supervise the nurses even though in actuality it did so infrequently.[541] The 2021 IC Rule's mandate regarding the primacy of actual practice effectively established a bright line rule that has not been adopted by courts and is in tension with longstanding instructions from courts that a totality-of-the-circumstances analysis be applied in order to analyze a worker's economic dependence. As such, rejecting the 2021 IC Rule's prescriptive regulation is more consistent with a non-mechanical, fact-specific approach to the economic dependence or independence inquiry that has been adopted by the courts.[542]

Some commenters seemingly conflated the terms ''economic reality'' and ''actual practice.'' *See, e.g.,* FSI (defining ''actual practice'' as ''the economic reality of the relationship at issue''). Again, the Department's position is not departing from or minimizing case law holding that the focus of the inquiry is on the ''economic reality, not contractual language.'' [543] Courts routinely consider both reserved rights and actual practice in order to evaluate the overall question of economic reality. For example, the Seventh Circuit recently addressed both in *Brant.*[544] In that case, the court examined the operating agreement signed by the driver, which purported to grant the driver broad authority over how to conduct their work, but also ''retain[ed] the right to gather remotely and to monitor huge quantities of data about how drivers conducted their work.'' The court rejected the company's argument that the broad grant of authority in the agreement was dispositive of independent contractor status because it found that the company exercised complete control over meaningful aspects of the transportation business, including by retaining the right to gather data that could be used to terminate the driver for noncompliance, which weighed in favor of employee status.[545]

Moreover, none of the case law cited by commenters—and to the best of the Department's knowledge, no existing case law—stands for the proposition that reserved or unexercised rights cannot under any circumstances be indicative of the economic realities, nor does the 2021 IC Rule's provision state that reserved rights are never relevant. Rather, as discussed, the case law is more consistent with the approach the Department is adopting in this final rule, which recognizes that while mere contractual language is not generally driving the economic reality inquiry, reserved contractual rights, like reserved control, may in certain cases be equally as, or more, indicative of the economic reality than the actual practice of the parties.

N/MA expressed their view that the Department ''failed to identify any scenarios in which a contractual, but unexercised right would be more relevant than the parties' actual practices in assessing a worker's day-to-day economic realities.'' The NPRM illustrated how reserved rights might be more indicative of the economic reality than actual practice where, for example, a potential employer reserves the right to supervise workers despite rarely making supervisory visits.[546] The mere existence of such reserved rights to control the worker may strongly influence the behavior of the worker in their performance of the work even absent the employer actually exercising its contractual rights. As a result, this reserved right to supervise may be more indicative of the reality of the economic relationship between the worker and the potential employer than the potential employer's apparent hands-off approach to supervision.

Several commentors also expressed concerns that the NPRM's approach will lead to an inconsistent application of the economic reality test and a lack of certainty and clarity for employers, workers, and factfinders. For example, SHRM urged the Department to retain the actual practice provision from the 2021 IC Rule, noting the NPRM ''implies that unexecuted contractual rights may be more important than real-world practices'' and ''will require HR professionals to speculate on how WHD or a court may interpret each individual criterion'' which will ''surely result in inconsistencies in application and the resulting confusion will lead to continued uncertainty for employers and workers.'' NAHB expressed similar concerns about clarity, noting that ''actual practice is more relevant than what may be contractually or theoretically possible . . . and it provides a clearer and simpler federal test for determining worker status for regulated employers and small businesses.'' Because the entirety of the economic reality must be considered in the analysis, the Department finds that it cannot reduce the inquiry to only actual practice and that the 2021 IC Rule's predetermined elevation of actual practice above unexercised or reserved rights is not fully consistent with the economic reality inquiry that the Department and courts have followed for decades.

The Coalition of Business Stakeholders expressed concerns that the Department failed to ''specify just how important such 'reserved control' is'' and stated that the NPRM exacerbates ''the uncertainty with which the Proposed Rule may be implemented'' and ''apparently directs the factfinder to weigh the control factor in favor of employee classification if a hiring entity *merely possesses* the ability to exercise control of a worker, regardless of whether the hiring entity ever has exercised such control.'' The Coalition of Business Stakeholders also commented that by including ''the vague concept of 'reserved control', which is to be considered in some unstated capacity, the Proposed Rule broadens the control factor far beyond its historical bounds and creates such uncertainty that the definition of 'control' under the Proposed Rule is

[540] *See, e.g., Parrish,* 917 F.3d at 387 (''[T]he analysis is focused on economic reality, not economic hypotheticals.''); *Saleem,* 854 F.3d at 142 (''[P]ursuant to the economic reality test, it is not what [workers] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.'') (internal quotation marks and citation omitted); *Sureway,* 656 F.2d at 1371 (''[T]he fact that Sureway's 'agents' possess, in theory, the power to set prices, determine their own hours, and advertise to a limited extent on their own is overshadowed by the fact that in reality the 'agents' work the same hours, charge the same prices, and rely in the main on Sureway for advertising.'').

[541] *See Superior Care,* 840 F.2d at 1060.

[542] *See, e.g., Flint Eng'g,* 137 F.3d at 1441 (''None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.''); *Superior Care,* 840 F.2d at 1059 (''Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.'').

[543] *See, e.g., Parrish,* 917 F.3d at 388.

[544] 43 F.4th 656 (7th Cir. 2022).

[545] *Id.* at 666.

[546] *See Superior Care,* 840 F.2d at 1060 (''Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. An employer does not need to look over his workers' shoulders every day in order to exercise control.'')

unworkable and would all but preclude an independent contractor finding.'' The Department notes again that reserved control was included in the 2021 IC Rule.[547] In any event, the Coalition of Business Stakeholders misconstrues the Department's discussion of reserved control. The Department does not take the position that reserved rights are always indicative of economic dependence, and certainly does not preclude the existence of factual circumstances where this fact could be found to weigh in favor of independent contractor status. Moreover, the Department reiterates, consistent with decades of case law and guidance from the Department, that ''the economic reality test is a multifactor test in which no one factor or set of factors automatically carries more weight and that all relevant factors must be considered.'' [548] The notion that the Department's position that the reserved right of control can be indicative of the economic reality in some circumstances somehow makes the economic reality test ''unworkable'' and ''all but precludes an independent contractor finding'' is simply inconsistent with a multifactor totality-of-the-circumstances approach in which this is but one potentially relevant fact under one factor. That a potential employer's reserved right to control might indicate an employment relationship does not preclude a finding of independent contractor status based on other factual indicators of the economic reality of the relationship.

IWF expressed concerns that NPRM's approach to the primacy of actual practice was inconsistent, noting that ''even accepting the Department's focus on theory, the proper application of this factor is far from clear. . . . The Proposed Rule states both that (1) '[i]t is often the case that the actual practice of the parties is more relevant to the economic dependence inquiry than contractual or theoretical possibilities,' and (2) 'in other cases the contractual possibilities may reveal more about the economic reality than the parties' practices.' '' The Department's recognition that actual practice is often more relevant to the economic dependence inquiry than contractual possibilities is not at all inconsistent with its position that, in some factual circumstances, reserved contractual rights can be more or equally as indicative of the economic reality as the actual practices of the parties. The Department is rejecting the overly broad and mechanical approach that in all factual circumstances, for every worker in every industry and occupation, actual practice is always more indicative of the economic reality than reserved rights or contractual possibilities. The Department's position is more consistent with the case law, which does not deem these two concepts to be mutually exclusive and instead requires a nuanced consideration of all relevant facts.[549]

Some commenters felt that the Department was focusing solely on how reserved rights might be used to find employee status. For example, IWF stated that the Department was interested in reserved rights only to the extent they support finding employee status. *See also* Coalition of Business Stakeholders. Minnesota Trucking Association commented that it would support the NPRM's logic on the relevance of reserved rights to the economic realities test ''so long as the analysis also considers the rights the worker possesses but also chooses not to exercise.'' *See also* CLDA. The Department does not agree with the contention that its approach to actual practice and reserved rights would always only be used to indicate employee status.[550] The inquiry should take every aspect of the relationship into account if relevant to the economic reality and the worker's dependence on their potential employer.[551]

The Club for Growth Foundation expressed concerns with the Department's statement that a reserved right to supervise workers, even unexercised, ''may strongly influence the behavior of the worker in [his or her] performance of the work,'' and this ''may be more indicative of the reality of the economic relationship between the worker and the company than the company's apparent hands-off practice,'' noting that ''even under this example a company that does not intervene is surely exercising less control than one that does.'' This comment misunderstands the relevant inquiry. The question is not whether a potential employer who reserves the right to control their workers can be said to exercise more control than a different potential employer who in actual practice exercises control over their workers. Rather, the inquiry is whether, as a matter of economic reality, a potential employer's reserved right of control is probative of a worker's economic dependence. The 2021 IC Rule mechanically provided that actual practice is always more relevant than reserved control. By removing that provision, this final rule takes the position that all relevant aspects of the working relationship, including reserved rights, should be considered, without placing a thumb on that scale.

The U.S. Chamber also raised concerns that having ''contractual language eclipse actual practice would flip the economic realities on its head'' and ''would also prohibit certain facts from being introduced into evidence: namely, the actual practice of the parties, which according to the Supreme Court is the touchstone of the analysis.'' The Department reiterates firmly that this final rule neither tips the scales in favor of contractual language over actual practice nor excludes the consideration of any relevant facts demonstrating economic dependence. Rather, the Department is merely declining to adopt a bright-line rule predetermining how relevant facts may be considered, recognizing that in some factual circumstances reserved rights may be as indicative of the economic reality as the actual practice of the parties. Additionally, the Department's final rule does not prohibit any subset of facts from being introduced into evidence before a factfinder, and certainly does not prohibit facts about the actual practices of the parties from being introduced into evidence. To the contrary, the purpose of eliminating the actual practice provision from the 2021 IC Rule is to ensure that all facts relevant to inquiry of economic dependence or independence may be considered.[552] Within each factor of the test, there may be actual practices that are relevant, and there may also be

[547] 86 FR 1204 (''As emphasized in the NPRM, and as the plain language of § 795.110 makes clear, unexercised powers, rights, and freedoms are not irrelevant in determining the employment status of workers under the economic reality test.'').

[548] 87 FR 62222; *see, e.g., Scantland,* 721 F.3d at 1312 n.2 (the relative weight of each factor ''depends on the facts of the case'') (quoting *Santelices,* 147 F. Supp. 2d at 1319); *Selker Bros.,* 949 F.2d at 1293 (''It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.'').

[549] See discussion regarding the Seventh Circuit's decision in *Brant* v. *Schneider Nat'l, supra.*

[550] *See, e.g., Faludi* 950 F.3d at 275–76 (determining that an attorney was an independent contractor even though facts ''point[ed] in both directions,'' such as the attorney's fairly lengthy tenure, even though he had the right to leave whenever he wanted upon giving 15 days' notice, and a non-compete clause under which the attorney worked exclusively for the company, but which the court found ''does not automatically negate independent contractor status'').

[551] *See* section V.C.4.a (discussing why the control factor is discussed from the employer's perspective).

[552] *See Superior Care,* 840 F.2d at 1059 (''Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.'').

contractual provisions that are relevant. The examination is specific to the facts of each economic relationship and cannot be predetermined.

For all of the foregoing reasons, the Department is finalizing the removal of § 795.110 of the 2021 IC Rule (Primacy of actual practice). As discussed in section V.C, § 795.110 of this rule contains a new provision discussing the economic reality test and the economic reality factors.

E. Examples of Analyzing Economic Reality Factors (2021 IC Rule § 795.115)

Several commenters addressed the examples that the Department provided in the proposed rule to illustrate the application of each factor of the economic reality test as applied to various factual scenarios. The Department provided these examples in the preamble of the proposal rather than in the final text of the regulations—as was the case with the 2021 IC Rule—to provide readers an application of the proposed factor immediately following the detailed description of each factor along with the discussion of the case law and rationale.[553] Each example provided two scenarios: one where the facts indicated that a factor pointed toward employee status and one where the facts indicated that a factor pointed toward independent contractor status. As the Department cautioned in the NPRM, additional facts or alterations to the examples could change the resulting analysis.[554] Moreover, no example attempted to determine the worker's ultimate status, only which way a particular factor would point based on the described facts.

Several commenters found the examples generally helpful or applied them to their industry practices. For instance, the Advisor Group applied the Department's skill and initiative example to financial advisors. A freelance writer and editor found the examples provided in the preamble to be reasonable, though they suggested that sections describing each factor were narrower than the examples suggested. The AFL–CIO commended the Department's ''decision to provide examples of how each of the various factors have been applied in commonly-occurring fact patterns.''

Other commenters had concerns regarding the examples or suggested alterations to various examples. For instance, the CA Chamber suggested that the investment factor example was confusing since the relative investments of a graphic designer would be dwarfed by a design firm, leading to different outcomes depending on whether the graphic designer worked for a large firm or a sole proprietor. In addition, a comment from two fellows at the Heritage Foundation suggested that this example was ambiguous because it was unclear if all the facts in the example, including the worker's investment in equipment, office space, and marketing, were required for the analysis.

Regarding the investment factor example, the Department discussed relative investments in the first scenario, where a worker occasionally purchased and used their own drafting tools while working for a commercial design firm. These tools were minor investments that do not further the worker's independent business beyond completing specific jobs for the commercial design firm. Regarding the CA Chamber's concern that the size of the business would alter a relative investment analysis, the example was not intended to alter the size of the hypothetical employer. However, to avoid confusion, the Department is aligning the examples to ensure that both feature a ''commercial design firm'' as the hypothetical employer. Additionally, the regulatory text for the investments factor explains that, in addition to comparing the sizes of the worker's and the employer's investments, the focus should be on comparing the nature of their investments to determine whether the worker is making similar types of investments as the employer that suggest that the worker is operating independently.[555]

Further, commenters were concerned that the same facts that point toward independent contractor status under the investment prong example would point toward employee status under the integral prong. As the Department stated in the NPRM, however, the examples are intended to be aids to apply the discussion of each proposed factor; the examples are not designed to illustrate the application of the full totality-of-the-circumstances test. For instance, the Department's investment example intentionally does not address whether the designer is integral to the commercial design firm, which would necessitate a separate analysis.

Regarding the integral factor, IWF was concerned that the examples were unhelpful because they covered two different industries and did not illuminate what kinds of activities would be considered central or important. The Department's intent regarding this factor was to illuminate those tasks that are core to the functioning of the business, *e.g.,* jobs which the ''employer could not function without the service performed by the workers.'' [556] Here, a farm selling tomatoes could not function without the work of those picking the tomatoes. However, while a business is generally required to file their tax returns, failure to do so would not immediately halt the operations of the farm, suggesting that non-payroll accounting support is ''more peripheral to the employer's business.'' [557] The Department's intent was to provide a comparison meant to highlight the ''common-sense approach'' many courts have taken when evaluating this factor.[558]

Similarly, ABC was concerned that the example for the opportunity for profit or loss factor did not differentiate the facts between the two workers in a way that would demonstrate which facts were determinative of the analysis. As they noted, even if a worker relies on word of mouth instead of traditional advertising or only works for one client at a time, they can still be found to be independent contractors. However, the example of the landscaper includes a scenario where the first landscaper does not actively market their services and a second where the landscaper does market their services. The inclusion of these facts in the example does not indicate that the Department believes that traditional marketing is required for a worker to be classified as an independent contractor, only that such affirmative marketing may be probative of the worker acting in a way consistent with being in business for themself. Put another way, the Department intentionally drafted the examples to avoid giving the impression that certain facts are always less or always more probative to the analysis of any given factor.

SMACNA noted that the Department's second example for skill and initiative featuring a welder should omit the fact that the welder has specialty skills, since that should not change the general analysis under this factor. Instead, it suggested that the example should clarify how the welder '' 'markets those skills in a manner that evidences business-like initiative.' '' Similarly, the DSA's comment noted that the skill and

[553] 87 FR 62259.

[554] *Id.*

[555] The Department notes that it has edited the investment example to omit the reference to a ''freelance graphic designer.'' While the department recognizes that indendent contractors may go by many names, its intent is to ensure that the examples reflect consistent terminology. Because the Department used the phrase ''independent contractor'' throughout the examples.

[556] 87 FR 62253.

[557] *Id.*

[558] *Id.*

initiative example (featuring a welder) only drew a distinction between the two workers based on their ability to market their services where both workers have specialized skill. It proposed including an example where a worker has no specialized skill but can still market their services to demonstrate initiative. Finally, ABC objected to the same example, noting that the skills of the workers ''should not have to be paired with independent business marketing skills'' to find that a worker is an independent contractor.

The Department chose to display both workers as having high technical skills to illuminate the discussion regarding skill in the NPRM. Specialized skills are required for this factor to point to independent contractor status, but specialized skills alone are not sufficient; it is the use of those specialized skills to ''contribute to business-like initiative that is consistent with the worker being in business for themself instead of being economically dependent on the employer.'' [559] As the Department noted in the NPRM, ''workers who lack specialized skills may be independent contractors even if this factor is very unlikely to point in that direction in their circumstances.'' [560] Thus the existence of specialized skills or the marketing of services, while relevant to the analysis under this factor, would not necessarily resolve the ultimate inquiry of the worker's classification.

Several comments suggested that the Department include new industry-specific examples for various factors. For instance, Gale Healthcare Solutions requested that the Department provide an example that would apply to on-demand nursing staffing scenarios. 4A's requested that specific industries, such as ''video production professionals, web designers, freelance writers, [and] fashion workers'' be included as examples. And NAFO requested that a forestry example be included in the section of the rule discussing the integral factor.

The Department recognizes that examples specific to an industry can provide helpful guidance for that segment of the regulated community. As the Department explained, however, its intent is for the examples to provide general guidance to regulated parties in this rulemaking. Adding examples specific to commenter industries would reduce their general applicability to other parties and would require more facts and detail than can be included to create succinct, yet helpful, examples. The Department mentions various industries or occupations in the examples to provide recognizable context for the reader; the examples do not provide the Department's definitive view on the ultimate outcome of the totality-of-the-circumstances analysis.

Some commenters suggested that the Department add examples to capture newer facets of the economic reality factors. For instance, one commenter suggested that the Department should include an example to show how an employer's collection of data related to how a worker performs and use of that data to enhance their operations could be part of the economic reality analysis. The AFL–CIO similarly suggested that the Department should include an example where an employer implements control using algorithms.

In addition, commenters suggested that the Department should provide more examples of how current facets of the economic reality test would be applied. For instance, LeadingAge requested more examples of how the Department views reserved control and more examples regarding situations in which a worker's ability to work for others is constrained by the number of hours or days they need to work. Flex suggested that if the Department were to retain language under the control factor related to regulatory or contractual control, then the Department should provide ''a comprehensive set of examples to illustrate that such cases would be rarities.'' And CPIE requested additional examples of where the Department would find a worker to be properly classified as an independent contractor, particularly under the control, investment, and skill and initiative factors.

The Department agrees with commenters like the AFL–CIO that topics like control over data or algorithmic supervision are highly relevant to some workers and could have an impact on the economic reality test. However, as noted above, the purpose of the examples is to provide aids to applying the information just discussed in the preamble as to each factor. The Department intends for the examples to provide general guidance to regulated parties and not to be tied to the specifics of certain businesses or jobs. The examples reflect the Department's enforcement experience in some of the most commonly occurring scenarios.

In addition, the Department understands that commenters such as LeadingAge would prefer more context regarding reserved control. However, the Department declines to add that additional context to the current examples, which were drafted to address common themes regarding each factor to illuminate the preamble discussion, not present every fact or issue presented in the proposed rule. The Department is also concerned that additional results-oriented examples—such as those requested by NAHB specifically addressing when a worker would be classified as an independent contractor under certain factors—would not be helpful to the broader public. Such examples could leave the impression that the proper classification of workers rests on one or a handful of factors. To the contrary, the Department believes the current examples' focus on illustrating the basic analysis under a single factor and noting that the results indicate potential classification under each factor, but not the ultimate result, provides more useful guidance for this rule. Moreover, industry- or profession-specific examples relaying how a worker's ultimate classification would be resolved are best addressed in subregulatory guidance after the issuance of this final rule as necessary.

Commenters suggested that the Department provide examples that mix and compare the factors together. For instance, Grantmakers in the Arts suggested that the Department include examples that demonstrate the resolution of a worker's status after applying multiple factors and ArcBest Corporation provided an example applying the full economic reality test to an owner operator in the trucking industry. The Department declines to offer such examples in this rulemaking. While a multifactor example might appear helpful, the Department is also concerned that such an example could potentially prejudge a specific case in a specific industry or occupation not yet before the Department or a court, without adequate factual predicates. Moreover, such an example would undermine the Department's efforts to align the economic reality analysis with current precedent, which requires a consideration of all the factors. Finally, any multifactor analysis would require a larger number of facts to be useful, which may be less generally useful to workers and businesses who may not be able to analogize the given example to their current working relationships.

IBA commented that some examples were too similar to prior withdrawn subregulatory guidance. The Department notes that it assembled these examples, in part, by reviewing case law, opinion letters, the 2021 IC Rule, and other subregulatory guidance. Each source was consulted and helped the Department arrive at the examples provided.

[559] 87 FR 62254.

[560] *Id.* at 62255.

Other commenters requested that the Department keep examples that were provided in the 2021 IC Rule. For instance, the Arizona Trucking Association suggested that the Department keep the trucking example from the 2021 IC Rule. Similarly, NAWBO noted how helpful the trucker and home repair examples were in the 2021 IC Rule. As explained above, some facets of the 2021 IC Rule's examples no longer align with the approach in this final rule. For instance, the 2021 IC Rule's app-based home repair example discusses investment as a component of the opportunity for profit or loss factor. As proposed in the NPRM and finalized here, however, the two factors are separate and evaluated independently.

Finally, some commenters suggested that the Department include examples in the final rule's regulatory text, as was done with the 2021 IC Rule. For instance, the author of an independent contractor legal blog requested that more examples be provided in the regulatory text, including those related to the integral factor. 4A's similarly requests that examples be included in the regulatory text and that they better correlate with modern trends in employment.

The Department recognizes that examples are helpful to workers and businesses alike. The Department continues to believe, however, that the examples provided in the NPRM currently provide the greatest value by residing in the preamble to the final rule following the detailed discussion of the relevant factor. In this way, the examples can provide a capstone for each section's discussion of the relevant economic reality factor, rather than being disconnected from that discussion and appearing only in regulatory text. The Department is confident that the examples initially provided in the NPRM preamble, as modified in the preamble to this final rule in response to comments received, serve this explanatory purpose. Over time, the Department will continue providing guidance where necessary through subregulatory guidance.

As it did in the NPRM, the Department is including examples of each factor in the preamble to this final rule. As discussed above, the example of the investment factor has been clarified. In addition, non-substantive changes have been made to the final sentence of each paragraph in each example to clearly indicate which factor is under discussion and that the facts of each example indicate employee or independent contractor status under that factor.

F. Severability (§ 795.115)

The Department proposed that the regulatory text include a severability provision.[561] Specifically, the Department proposed that, if any provision of its regulation ''is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from [the regulation] and shall not affect the remainder thereof.'' [562] The Department noted that the 2021 IC Rule contained a severability provision and that it was not proposing any edits to that provision.[563]

In addition, the Department explained in the NPRM that rescission of the 2021 IC Rule would be separate from the new regulations regarding employee and independent contractor status promulgated to replace the 2021 IC Rule: ''That rescission would operate independently of the new content in any new final rule, as the Department intends it to be severable from the substantive proposal for adding a new part 795.'' The Department further explained that, even if the ''substantive provisions'' (*i.e.,* the new regulations) of a final rule were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule become operative. Instead, in such case, for all of the separate reasons for rescinding the 2021 IC Rule set forth by the Department, the rescission would still take effect, and ''the Department would rely on circuit case law and provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example, a Field Assistance Bulletin).'' As the Department noted, relying on federal appellate case law and subregulatory guidance consistent with that case law for determining whether a worker is an employee or independent contractor would accurately reflect the FLSA's text and purpose as interpreted by the courts and offer a standard familiar to most stakeholders.[564]

Few commenters addressed severability, and the focus of their comments was more on the severability of the rescission of the 2021 IC Rule from the proposed regulations to replace it than the proposed severability provision at 29 CFR 795.115. Several commenters supported the Department's position that the rescission of the 2021 IC Rule is severable from the proposed regulations to replace it. For example, Farmworker Justice stated that ''[b]oth the rescission of the 2021 IC Rule and the newly proposed portion of the [NPRM] are critical to reinstating stability and clarity in the Department's approach to defining an employee.'' It advocated that the ''Department should expressly state that it intends for the rescission of the 2021 IC Rule to be severable from the new portion of the [NPRM].'' The AFL–CIO agreed that ''the severability clause and DOL's explanation of that clause in the preamble to the NPRM make clear that, in the unlikely event a court were to decide to enjoin some portion of the Final Rule addressing the economic reality test, DOL intends that the rescission of the 2021 IC Rule should still take effect.'' It described this approach as ''cautious'' and ''prudent'' and added that ''the severance clause makes clear that DOL intended that the rescission of the 2021 IC Rule stands on its own.'' LIUNA also supported ''the Department's decision to render rescission of the 2021 IC Rule severable from the substantive proposal for adding further regulatory guidance.'' It added that the Department was ''correct to conclude that, in the unlikely event its substantive proposals are 'invalidated, enjoined, or otherwise not put into effect,' the 2021 IC Rule should still not become operative.''

Several other commenters criticized the Department's position that the rescission of the 2021 IC Rule is severable from the proposed regulations to replace it. For example, Freedom Foundation stated that ''[t]he rescission of the [2021 IC Rule] and the adoption of the proposed rule should not be severable'' and added that the Department's ''promise that in the absence of a regulation it would provide subregulatory guidance has a hollow ring.'' Raymond James described the Department's position as ''present[ing] workers and business with a Hobson's Choice: either accept the new regulations, or there will be no regulations at all.'' It stated that, ''[c]onsidering that the Department will not even consider making discrete changes, it does not seem appropriate to require businesses and workers to accept a wholesale re-write or face the risks of having no rule at all.'' And CWI asserted that the reference to '' 'substantive' provisions'' in the NPRM's severability discussion were

[561] 87 FR 62275 (proposed § 795.115).

[562] *Id.*

[563] *Id.* at 62259.

[564] *See generally id.* at 62233.

inconsistent with how, ''[e]lsewhere'' in the NPRM, ''the Department present[ed] the Proposed Rule as only 'interpretive guidance.' ''

Having considered the comments, the Department is finalizing the severability provision in 29 CFR 795.115 as proposed and finalizing its proposal that the rescission of the 2021 IC Rule set forth in this final rule is separate and severable from the new part 795 regulations for determining employee or independent contractor status under the FLSA set forth in this final rule. No commenter questioned the well-settled legal principle that one portion of a rule may remain operative if another portion is deemed impermissible as long as the agency would independently adopt the remaining portion and the remaining portion can operate sensibly without the impermissible portion.[565] The Department continues to believe that rescission of the 2021 IC Rule is proper for all of the reasons stated in this final rule, and its intent accordingly is for the rescission to remain operative even if this final rule's regulations replacing the 2021 IC Rule are invalidated for any reason. In addition, the Department continues to believe that if any particular provision or application of this final rule is invalidated, the rest should continue in effect and can operate sensibly. In such case, case law and the Department's subregulatory guidance, as appropriate, would provide a familiar and longstanding standard for businesses and workers. Freedom Foundation's assertion that this ''has a hollow ring'' neglects the multiple forms of subregulatory guidance, including fact sheets and field assistance bulletins, that the Department may issue. And there was no ''Hobson's Choice'' between the proposed rule and ''having no rule at all''; the Department has carefully considered the many comments to the proposed rule and, as reflected in this final rule, has made numerous changes as a result of those comments. Finally, CWI took the Department's reference to ''substantive provisions'' out of context. The Department's reference to the proposed regulatory provisions as ''substantive'' was not a characterization of this rulemaking, but an effort to distinguish promulgating the new part 795 regulations from rescinding the 2021 IC Rule.

G. Amendments to Regulatory Provisions at §§ 780.330(b) and 788.16(a)

Finally, in addition to the proposed regulations at part 795, the Department proposed to amend existing regulatory provisions addressing employee or independent contractor status under the FLSA in particular contexts at *29 CFR 780.330(b)* (tenants and sharecroppers) and *29 CFR 788.16(a)* (certain forestry and logging workers).[566] Specifically, the Department proposed to replace these provisions with cross-references to the guidance provided in part 795. The Department did not receive commenter feedback regarding the proposed amendments of these provisions. Accordingly, the Department finalizes the amendments to these provisions as proposed.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This final rule does not contain a collection of information subject to OMB approval under the PRA.

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

Under Executive Order 12866, as amended by Executive Order 14094, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[567] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this rule is a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.[568] Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this rule and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

In this rule, the Department is rescinding and replacing regulations addressing the classification of workers as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act's text and purpose as interpreted by the courts. For decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor). To answer this ultimate inquiry of economic dependence, the courts and the Department have historically conducted a multifactor totality-of-the-circumstances analysis, considering multiple factors with no factor or factors being dispositive to determine whether a worker is an employee or an independent contractor under the FLSA.

In January 2021, the Department published a rule titled ''Independent Contractor Status Under the Fair Labor Standards Act'' (2021 IC Rule) that

[565] *See, e.g., Carlson* v. *Postal Regulatory Comm'n,* 938 F.3d 337, 351 (D.C. Cir. 2019).

[566] 87 FR 62274.

[567] *See* 88 FR 21879 (Apr. 11, 2023); 58 FR 51735, 51741 (Oct. 4, 1993).

[568] *See* 76 FR 3821 (Jan. 21, 2011).

provided guidance on the classification of independent contractors under the FLSA.[569] As explained in sections III, IV, and V above, the Department believes that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by the courts and, had it been left in place, would have had a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. The 2021 IC Rule included provisions that were in tension with this longstanding case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These and other provisions in the 2021 IC Rule narrowed the application of the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself. The Department believes that retaining the 2021 IC Rule would have had a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. Departing from the longstanding test applied by the courts also increases the risk of misapplication of the economic reality test, which the Department believes could result in the increased misclassification of workers as independent contractors.

Therefore, the Department is rescinding the 2021 IC Rule and replacing it with an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. Of particular note, the regulations set forth in this final rule do not use ''core factors'' and instead return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Regarding the economic reality factors, this final rule returns to the longstanding framing of investment as its own separate factor, and integral as an integral part of the potential employer's business rather than an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights to control while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor. The Department also made several adjustments to the proposed regulations after consideration of the comments received, including revisions to the regulations regarding the investment factor and the control factor (specifically addressing compliance with legal obligations).

The Department believes this rule is more grounded in the ultimate inquiry of whether a worker is in business for themself or is economically dependent on the employer for work. Workers, employers, and independent businesses should benefit from affirmative regulatory guidance from the Department further developing the concept of economic dependence and how each economic reality factor is probative of whether the worker is economically dependent on the employer for work or is in business for themself.

When evaluating the economic impact of this rule, the Department has considered the appropriate baseline with which to compare changes. As discussed in section II.C.3., on March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a federal district court in the Eastern District of Texas issued a decision vacating the delay and withdrawal of the 2021 IC Rule and concluded that the 2021 IC Rule became effective on March 8, 2021.[570] Because the 2021 IC Rule is in effect according to the district court until this final rule takes effect and would continue to be in effect in the absence of this rule, the Department believes that the 2021 IC Rule is the proper baseline to compare against when estimating the economic impact of this rule.[571] Compared to the 2021 IC Rule, the Department anticipates that this rule may reduce misclassification of employees as independent contractors, because this rule is more consistent with existing judicial precedent and the Department's longstanding guidance. The 2021 IC Rule's elevation of certain factors, devaluation of other factors, and its preclusion of consideration of relevant facts under several factors could result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it was prior to the 2021 IC Rule to classify workers as independent contractors rather than FLSA-covered employees. As discussed in section III.B., the Department received comments indicating confusion about how to apply the analysis in the 2021 IC Rule, which could lead to misclassification of workers as independent contractors. The issuance of this rule could reduce or prevent this type of misclassification from occurring.

Because the Department does not have data on the number of misclassified workers and because there are inherent challenges in determining the extent to which the rule would reduce this misclassification, much of the analysis is presented qualitatively, aside from rule familiarization costs, which are quantified.[572] The Department has therefore provided a qualitative analysis of the effects (transfers and benefits) that could occur because of this reduced misclassification.

As discussed above, the 2021 IC Rule is the appropriate baseline to represent what the world could look like going forward in the absence of this rule. However, this baseline may not fully reflect what the world would look like absent this rule. Until March 2022, the Department had not been using the framework for analysis from the 2021 IC Rule when assessing independent contractor status in its enforcement and compliance assistance activities because the Department had published final rules delaying the effective date of, and subsequently withdrawing, the 2021 IC Rule. (As described in section II.C., a federal district court in March 2022 vacated the Department's Delay and Withdrawal Rules and ruled that the 2021 IC Rule had taken effect in March

[569] *See* 86 FR 1168.

[570] *See CWI* v. *Walsh,* 2022 WL 1073346.

[571] OMB Circular A–4 notes that when agencies are developing a baseline, ''[it] should be the best assessment of the way the world would look absent the proposed action.''

[572] The Department uses the term ''misclassification'' throughout this analysis to refer to workers who have been classified as independent contractors but who, as a matter of economic reality, are economically dependent on their employer for work. These workers' legal status would not change under the 2021 IC Rule or this rule—they would properly be classified as employees under both rules. The Department notes that sources cited in this analysis may use other misclassification standards which may not align fully with the Department's use of the term.

2021.) Further, as explained earlier in section III.B., the Department is not aware of any federal district or appellate court that has endorsed the 2021 IC Rule's analysis in the course of resolving a dispute regarding the proper classification of a worker as an employee or independent contractor. Therefore, if the Department were to instead compare this final rule to the current economic and legal landscape that continues to reflect the courts' longstanding multifactor economic reality test, the economic impact would be much smaller, because this rule is consistent with that landscape (*i.e.,* the longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022).

The Coalition to Promote Independent Entrepreneurs agreed that the 2021 IC Rule is the correct baseline to analyze the recission of the rule, but not the separate issue of issuing new regulations ''containing a new interpretation of the multifactor economic reality test.'' This commenter appeared to disagree with the Department's explanation that ''under the *current economic and legal landscape* baseline, the economic impact of DOL's proposed new iteration of the test might, or might not, be 'much smaller.' '' It asserted that the direction of this economic impact would be negative, because the rule would lead to increased uncertainty and confusion and would create an adverse economic impact by ''denying individuals their right to be recognized as independent contractors under the FLSA.'' The Department addresses claims from this commenter and others on the potential costs and benefits of this rule throughout this economic analysis.

The Department does not believe, as reflected in this analysis, that this rule will result in widespread reclassification of workers. That is, for workers who are properly classified as independent contractors, the Department does not, for the most part, anticipate that the guidance provided in this rule will result in these workers being reclassified as employees. Especially compared to the guidance that was in effect before the 2021 IC Rule, the test put forth in this rule would not make independent contractor status significantly less likely. Rather, impacts resulting from this rule will mainly be due to a reduction in misclassification. If the 2021 IC Rule had been retained, the risk of misclassification could have increased. As noted previously in section III, the 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under several factors, which is a departure from judicial precedent applying the economic reality test, could result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it was prior to the 2021 IC Rule to classify certain workers as independent contractors rather than FLSA-covered employees. This rule could therefore help prevent this misclassification by providing employers with guidance that is more consistent with longstanding precedent.

Many commenters who wrote in opposition to the proposed rule were concerned that, because of this rule, many independent contractors would be reclassified as employees, and that there would be a large negative impact associated with this reclassification. For example, a senior research fellow at the Mercatus Center said ''DOL implicitly assumes that 100 percent of potential contracting jobs will be turned into employment jobs; this assumption is extremely optimistic and downplays very significant consequences in connection with the rule in question.'' Cambridge Investment Research Inc. stated that the practical result of the Proposed Rule would be that many workers will be reclassified as employees, including those who want to be independent contractors. However, the proposed rule explicitly noted that the Department does not expect any widespread reclassification of independent contractors as employees, and at no point assumed that 100 percent of contracting jobs would be turned into employment jobs. The Department believes that concerns about widespread reclassification are not realistic because the Department is adopting guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule, derived from the same analysis that courts have applied for decades and have been continuing to apply since the 2021 IC Rule took effect.

The Department received multiple comments discussing the negative impacts of widespread reclassification and citing research about potential job losses and loss of earnings. For example, Littler's Workplace Policy Institute says, ''[A] study published last April concluded that widespread reclassification would destroy as many as 769,000 work opportunities and wipe out $9.1 billion in earnings.[573] The proposed rule fails to take these effects into account.'' The Chamber of Progress cites this same study, noting that, ''A national rule reclassifying independent contractors as employees could result in approximately 4.4 million people being involuntarily reclassified[.]'' However, the study that these data points come from is an analysis of the potential impacts of a nationwide ABC test. The Chamber of Progress release about the report states, ''Specifically, the study examines the 'ABC Test,' which is used in a variety of state and federal proposals to determine whether a worker is an employee or an independent contractor.'' The Department believes that the reclassification effects raised by these commenters cannot be applied to this rule, because the Department's economic reality test is not the ABC test.

While the Department responds throughout this economic analysis to comments about the potential negative impacts of the rule from those who are in opposition, it is important to note that any reclassification or job loss estimates associated with a nationwide ABC test are not appropriate to apply to this rule because this rule does not adopt an ABC test and are therefore not included in the Department's estimated impacts.

B. Estimated Number of Independent Contractors

To provide some context on the prevalence of independent contracting, the Department first estimated the number of independent contractors. There are a variety of estimates of the number of independent contractors spanning a wide range depending on methodologies and how the population is defined.[574] There is no data source on independent contractors that perfectly mirrors the definition of independent contractor in the Department's regulations. There is also no regularly published data source on the number of independent contractors and data from the current year does not exist, making it difficult to examine trends in independent contracting or to measure how regulatory changes impact the number of independent contractors.

The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) offers an appropriate lower bound for

[573] ''New Study Finds Millions Could Lose Work if U.S. Reclassifies Contractors,'' April 6, 2022. *https://progresschamber.org/new-study-finds-millions-could-lose-work-if-u-s-reclassifies-contractors/.*

[574] The Department uses the term ''independent contractor'' throughout this analysis to refer to workers who, as a matter of economic reality, are not economically dependent on their employer for work and are in business for themselves. The Department notes that sources cited in this analysis may use other definitions of independent contractors that may not align fully with the Department's use of the term.

the number of independent contractors; however, there are potential biases in these data that will be noted. This was the estimation method used in the 2021 IC Rule and the proposed rule, and the Department has not found any new data or analyses to indicate a need for any changes. Some recent data sources provide an indication of how COVID–19 may have impacted the number of independent contractors, but this is inconclusive. Additionally, estimates from other sources will be presented to demonstrate the potential range.

The U.S. Census Bureau conducts the CPS, and it is published monthly by the Bureau of Labor Statistics (BLS). The sample includes approximately 60,000 households and is nationally representative. Periodically since 1995, and most recently in 2017, the CPS included a supplement to the May survey to collect data on contingent and alternative employment arrangements. Based on the CWS, there were 10.6 million independent contractors in 2017, amounting to 6.9 percent of workers.[575] The CWS measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week.

The BLS's estimate of independent contractors includes ''[w]orkers who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are self-employed or wage and salary workers.'' BLS asks two questions to identify independent contractors:[576]

- Workers reporting that they are self-employed are asked: ''Are you self-employed as an independent contractor, independent consultant, freelance worker, or something else (such as a shop or restaurant owner)?'' (9.0 million independent contractors). We refer to these workers as ''self-employed independent contractors'' in the remainder of the analysis.
- Workers reporting that they are wage and salary workers are asked: ''Last week, were you working as an independent contractor, an independent consultant, or a freelance worker? That is, someone who obtains customers on their own to provide a product or service.'' (1.6 million independent contractors). We refer to these workers as ''other independent contractors'' in the remainder of the analysis.

[575] Bureau of Labor Statistics, ''Contingent and Alternative Employment Arrangements—May 2017,'' USDL–18–0942 (June 7, 2018), *https://www.bls.gov/news.release/pdf/conemp.pdf*.

[576] The variables used are PES8IC=1 for self-employed and PES7=1 for other workers.

It is important to note that independent contractors are identified in the CWS in the context of the respondent's ''main'' job (*i.e.,* the job with the most hours).[577] Therefore, the estimate of independent contractors does not include those who may be an employee for their primary job, but may also work as an independent contractor.[578] For example, Lim et al. (2019) estimate that independent contracting work is the primary source of income for 48 percent of independent contractors.[579] Applying this estimate to the 10.6 million independent contractors estimated from the CWS, results in 22.1 million independent contractors (10.6 million ÷ 0.48). Alternatively, a survey of independent contractors in Washington found that 68 percent of respondents reported that independent contract work was their primary source of income.[580] However, because this survey only includes independent contractors in one state, the Department has not used this data to adjust its estimate of independent contractors.

The CWS's large sample size results in small sampling error. However, the questionnaire's design may result in some non-sampling error. For example, one potential source of bias is that the CWS only considers independent contractors during a single point in time—the survey week (generally the week prior to the interview).

These numbers will thus underestimate the prevalence of independent contracting over a longer timeframe, which may better capture the size of the population.[581] For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.[582] They found that ''[a]lthough 1 percent of adults earned income from the Online Platform Economy in a given month, more than 4 percent participated over the three-year period.'' Additionally, Collins et al. (2019) examined tax data from 2000 through 2016 and found that the number of workers who filed a form 1099 grew substantially over that period, and that fewer than half of these workers earned more than $2,500 from 1099 work in 2016. The prevalence of lower annual earnings implies that most workers who received a 1099 did not work as an independent contractor every week.[583]

The CWS also uses proxy responses, which may underestimate the number of independent contractors. The RAND

[577] While self-employed independent contractors are identified by the worker's main job, other independent contractors answered yes to the CWS question about working as an independent contractor last week. Although the survey question does not ask explicitly about the respondent's main job, it follows questions asked about the respondent's main job.

[578] Even among independent contractors, failure to report multiple jobs in response to survey questions is common. For example, Katz and Krueger (2019) asked Amazon Mechanical Turk participants the CPS-style question ''Last week did you have more than one job or business, including part time, evening, or weekend work?'' In total, 39 percent of respondents responded affirmatively. However, these participants were asked the follow-up question ''Did you work on any gigs, HITs or other small paid jobs last week that you did not include in your response to the previous question?'' After this question, which differs from the CPS, 61 percent of those who indicated that they did not hold multiple jobs on the CPS-style question acknowledged that they failed to report other work in the previous week. As Katz and Krueger write, ''If these workers are added to the multiple job holders, the percent of workers who are multiple job holders would almost double from 39 percent to 77 percent.'' *See* L. Katz and A. Krueger, ''Understanding Trends in Alternative Work Arrangements in the United States,'' RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5), p. 132–46 (2019).

[579] K. Lim, A. Miller, M. Risch, and E. Wilking, ''Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data,'' Department of Treasury, p. 61 (Jul. 2019), *https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf*. From table 5, the total number of independent contractors across all categories is 13.81 million. The number of independent contractors in the categories where these workers earn the majority of their labor income from independent contractor earnings is 6.63 million. 6.63 million ÷ 13.81 million = 0.48.

[580] Washington Department of Commerce, ''Independent Contractor Study,'' p. 21 (Jul. 2019), *https://deptofcommerce.app.box.com/v/independent-contractor-study*.

[581] In any given week, the total number of independent contractors would have been roughly the same, but the identity of the individuals who do it for less than the full year would likely vary. Thus, the number of unique individuals who work at some point in a year as independent contractors would exceed the number of independent contractors who work within any 1-week period as independent contractors.

[582] D. Farrell and F. Greig, ''Paychecks, Paydays, and the Online Platform,'' JPMorgan Chase Institute (2016), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911293*. The authors define the Online Platform Economy as ''economic activities involving online intermediaries.'' This includes ''labor platforms'' that ''connect customers with freelance or contingent workers'' and ''capital platforms'' that ''connect customers with individuals who rent assets or sell goods peer-to-peer.'' As such, this study encompasses data on income sources that the Department acknowledges might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship. However, the Department believes that including data on income earned through online platforms is useful when discussing the potential magnitude of independent contracting.

[583] B. Collins, A. Garin, E. Jackson, D. Koustas, and M. Payne, ''Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns,'' IRS SOI Joint Statistical Research Program (2019) (unpublished paper), *https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf*.

American Life Panel (ALP) survey conducted a supplement in 2015 to mimic the CWS questionnaire but used self-responses only. The results of the survey were summarized by Katz and Krueger (2018).[584] This survey found that independent contractors comprise 7.2 percent of workers.[585] Katz and Krueger identified that the 0.5 percentage point difference in magnitude between the CWS and the ALP was due to both cyclical conditions, and the lack of proxy responses in the ALP.[586] Therefore, the Department believes a reasonable upper-bound on the potential bias due to the use of proxy responses in the CWS is 0.5 percentage points (7.2 versus 6.7).[587] [588]

Another potential source of bias in the CWS is that some respondents may not self-identify as independent contractors. For example, Abraham et al. (2020) estimated that 6.6 percent of workers in their study initially responded that they are employees but were then determined (by the researcher) to be independent contractors based on their answers to follow-up questions.[589] Additionally, individuals who do what some researchers refer to as ''informal work'' may in fact be independent contractors though they may not characterize themselves as such.[590] This population could be substantial. Abraham and Houseman (2019) confirmed this in their examination of the Survey of Household Economics and Decision-making. They found that 28 percent of respondents reported doing ''informal work'' for money over the past month.[591]

Conversely, another source of bias in the CWS is that some workers who self-identify as independent contractors may misunderstand their status or may be misclassified by their employer. These workers may answer the survey in the affirmative, despite not truly being independent contractors. While precise and representative estimates of nationwide misclassification are unavailable, multiple studies suggest its prevalence in numerous sectors in the economy.[592] See section VII.D.2. for a more thorough discussion of the prevalence of misclassification.

Because reliable data on the potential magnitude of the biases discussed above are unavailable, and so the net direction of the biases is unknown, the Department has not attempted to calculate how these biases may impact the estimated number of independent contractors.

As noted above, integrating the estimated proportions of workers who are independent contractors on secondary or otherwise excluded jobs produces an estimate population of 22.1 million, representing the total number of workers working as independent contractors in any job at a given time. Given the prevalence of independent contractors who work sporadically and earn minimal income, adjusting the estimate according to these sources captures some of this population. It is likely that this figure is still an underestimate of the true independent contractor pool. This is because, in part, the CWS estimate represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, which is why the Department applied the research literature and adjusted this measure to include workers who are independent contractors in a secondary job or who were excluded from the CWS estimate due to other factors.

1. Range of Estimates in the Literature

To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 1. Other studies were also considered but are excluded from this table because the study populations were broader than just independent contractors, limited to one state, or include workers outside of the United States.[593] The RAND ALP,[594] the Gallup Survey,[595] and the General Social Survey's (GSS's) Quality of Worklife (QWL) [596] supplement are

[584] *See* L. Katz and A. Krueger, ''The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,'' (2018).

[585] *Id.* at 49. The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. *Id.* at 31.

[586] *Id.* at Addendum (''Reconciling the 2017 BLS Contingent Worker Survey'').

[587] Note that they estimate 6.7 percent of employed workers are independent contractors using the CWS, as opposed to 6.9 percent as estimated by the BLS. This difference is attributable to changes to the sample to create consistency.

[588] In addition to the use of proxy responses, this difference is also due to cyclical conditions. The impacts of these two are not disaggregated for independent contractors, but if we applied the relative sizes reported for all alternative work arrangements, we would get 0.36 percentage point difference due to proxy responses. Additionally, this may not entirely be a bias. It stems from differences in independent contracting reported by proxy respondents and actual respondents. As Katz and Krueger explain, this difference may be due to a ''mode'' bias or proxy respondents may be less likely to be independent contractors. *Id.* at Addendum p. 4.

[589] K. Abraham, B. Hershbein, and S. Houseman, ''Contract Work at Older Ages,'' NBER Working Paper 26612 (2020), *http://www.nber.org/papers/w26612.*

[590] The Department believes that including data on what is referred to in some studies as ''informal work'' is useful when discussing the magnitude of independent contracting, although not all informal work is done by independent contractors. The Survey of Household Economics and Decision-making asked respondents whether they engaged in informal work sometime in the prior month. It categorized informal work into three broad categories: personal services, on-line activities, and off-line sales and other activities, which is broader than the scope of independent contractors. These categories include activities like house sitting, selling goods online through sites like eBay or craigslist, or selling goods at a garage sale. The Department acknowledges that the data discussed in this study might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship, but it nonetheless provides some useful data for this purpose.

[591] K. Abraham, and S. Houseman, ''Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income,'' RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), *https://www.jstor.org/stable/10.7758/rsf.2019.5.5.06.*

[592] *See, e.g.,* U.S. Gov't Accountability Off., GAO–09–717, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* 10 (2008) (''Although the national extent of employee misclassification is unknown, earlier national studies and more recent, though not comprehensive, studies suggest that employee misclassification could be a significant problem with adverse consequences.'').

[593] Including, but not limited to: McKinsey Global Institute, ''Independent Work: Choice, Necessity, and the Gig Economy'' (2016),*https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy;* Kelly Services, ''Agents of Change'' (2015), *https://www.kellyservices.com/global/siteassets/3-kelly-global-services/uploadedfiles/3-kelly_global_services/content/sectionless_pages/kocg1047720freeagent20whitepaper20210x21020final2.pdf;* Robles and McGee, ''Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey'' (2016); *Upwork,* ''*Freelancing in America*'' *(2019); Washington Department of Commerce,* ''*Independent Contractor Study,*'' *(Jul. 2019), https://deptofcommerce.app.box.com/v/independent-contractor-study;* D. Farrell and F. Greig, ''Paychecks, Paydays, and the Online Platform,'' JPMorgan Chase Institute (2016), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911293;* MBO Partners, ''State of Independence in America'' (2016); Abraham et al., ''Measuring the Gig Economy: Current Knowledge and Open Issues'' (2018), *https://www.nber.org/papers/w24950;* B. Collins, A. Garin, E. Jackson, D. Koustas, and M. Payne, ''Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns,'' IRS SOI Joint Statistical Research Program (2019) (unpublished paper), *https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf;* Gitis et al., ''The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends,'' American Action Forum (2017), *https://www.americanactionforum.org/research/gig-economy-research-policy-implications-regional-economic-demographic-trends/#ixzz5IpbJp79a;* Dourado and Koopman, ''Evaluating the Growth of the 1099 Workforce,'' Mercatus Center (2015), *https://www.mercatus.org/publication/evaluating-growth-1099-workforce.*

[594] *See* L. Katz and A. Krueger, ''The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,'' (2018).

[595] ''Gallup's Perspective on The Gig Economy and Alternative Work Arrangements,'' Gallup (2018), *https://www.gallup.com/workplace/240878/gig-economy-paper-2018.aspx.*

[596] *See* Abraham et al., ''Measuring the Gig Economy: Current Knowledge and Open Issues''

Continued

widely cited alternative estimates. However, the Department chose to use sources with significantly larger sample sizes and/or more recent data for the primary estimate.

Jackson et al. (2017) [597] and Lim et al. (2019) [598] use tax information to estimate the prevalence of independent contracting. In general, studies using tax data tend to show an increase in prevalence of independent contracting over time. The use of tax data has some advantages and disadvantages over survey data. Advantages include large sample sizes, the ability to link information reported on different records, the reduction in certain biases such as reporting bias, records of all activity throughout the calendar year (the CWS only references one week), and inclusion of both primary and secondary independent contractors. Disadvantages are that independent contractor status needs to be inferred; there is likely an underreporting bias (*i.e.,* some workers do not file taxes); researchers are generally trying to match the IRS definition of independent contractor, which does not mirror the scope of independent contractors under the FLSA; and the estimates include misclassified independent contractors.[599] A major disadvantage of using tax data for this analysis is that the detailed source data are not publicly available and thus the analyses cannot be directly verified or adjusted as necessary (*e.g.,* to describe characteristics of independent contractors, etc.).

TABLE 1—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING

Source	Method [a]	Definition [b]	Percent of workers	Sample size	Year
CPS CWS	Survey	Independent contractor, consultant or freelance worker (main only).	6.9	50,392	2017
ALP	Survey	Independent contractor, consultant or freelance worker (main only).	7.2	6,028	2015
Gallup	Survey	Independent contractor	14.7	5,025	2017
GSS QWL	Survey	Independent contractor, consultant or freelancer (main only)	14.1	2,538	2014
Jackson et al	Tax data	Independent contractor, household worker	[c] 6.1	~5.9 million [d]	2014
Lim et al	Tax data	Independent contractor	8.1	1% of 1099–MISC and 5% of 1099–K.	2016

[a] The CPS CWS and the GSS QWL are nationally representative, and the ALP CWS is approximately nationally representative. The Gallup poll is demographically representative but does not explicitly claim to be nationally representative. Lastly, the two tax data sets are very large random samples and consequently are likely to be nationally representative, although the authors do not explicitly claim so.

[b] The survey data only identify independent contractors on their main job. Jackson et al. include independent contractors as long as at least 15 percent of their earnings were from self-employment income; thus, this population is broader. If Jackson et al.'s estimate is adjusted to exclude those who are primary wage earners, the rate is 4.0 percent. Lim et al. include independent contractors on all jobs. If Lim et al.'s estimate is adjusted to only those who receive a majority of their labor income from independent contracting, the rate is 3.9 percent.

[c] Summation of (1) 2,132,800 filers with earnings from both wages and sole proprietorships and expenses less than $5,000, (2) 4,125,200 primarily sole proprietorships and with less than $5,000 in expenses, and (3) 3,416,300 primarily wage earners.

[d] Estimate based on a 10 percent sample of self-employed workers and a 1 percent sample of W–2 recipients.

2. COVID–19 Adjustment to the Estimated Number of Independent Contractors

The Department's estimate of the number of independent contractors, 22.1 million, is based primarily on 2017 data. Because COVID–19 has had a substantial impact on the labor market, it is possible that this estimate is not currently appropriate. The Department conducted a search for more recent data to indicate any trends in the number of independent contractors since 2017. The findings are inconclusive but generally do not indicate an increase.

The Federal Reserve Board's annual Survey of Household Economics and Decisionmaking (SHED) provides measures of the economic well-being of U.S. households. The Federal Reserve Board publishes a report ''Economic Well-Being of U.S. Households'' summarizing the findings of each survey.[600] One subsection of the Employment section describes the results of the questions related to ''The Gig Economy.'' While the survey questions about work in the ''gig economy'' include more types of work scenarios than just independent contracting, a decrease from 30 percent to 20 percent of adults answering ''yes'' from 2017 to 2020 may indicate that the number of independent contractors in this industry also decreased during that time period.[601] The report summarizing the 2021 data is available, but unfortunately the gig economy questions were revised substantially, so a comparable value is not available for 2021. Moreover, trends of potential independent contractors in one industry are not necessarily indicative of trends across the economy.

MBO Partners, a company with the goal of connecting enterprise organizations and top independent professionals, also conducts an annual survey and prepares a research report of the findings.[602] In all groups of ''independent workers,'' MBO Partners

(2018), *https://www.nber.org/papers/w24950,* Table 4.

[597] E. Jackson, A. Looney, and S. Ramnath, ''The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,'' OTA Working Paper 114 (2017), *https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf.*

[598] K. Lim, A. Miller, M. Risch, and E. Wilking, ''Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data,'' Department of Treasury, p. 61 (Jul. 2019), *https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.*

[599] In comparison to household survey data, tax data may reduce certain types of biases (such as recall bias) while increasing other types (such as underreporting bias). Because the Department is unable to quantify this tradeoff, it could not determine whether, on balance, survey or tax data are more reliable.

[600] Consumer and Community Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs, ''Economic Well-Being of U.S. Households in 2021,'' Board of Governors of the Federal Reserve System (2022). Reports from all years available at *https://www.federalreserve.gov/publications/report-economic-well-being-us-households.htm.*

[601] The report defines gig work as including ''three types of non-traditional activities: offline service activities, such as child care or house cleaning; offline sales, such as selling items at flea markets or thrift stores; and online services or sales, such as driving using a ride-sharing app or selling items online.'' Consumer and Community Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs, ''Economic Well-Being of U.S. Households in 2017,'' Board of Governors of the Federal Reserve System (May 2018).

[602] MBO partners, ''The Great Realization: 11th Annual State of Independence,'' (2021). Annual reports are available at *https://www.mbopartners.com/state-of-independence/previous-reports/.*

similarly found a decrease in the number from 2017 to 2020. Conversely, in total, the 2021 report shows a large increase from 2020, enough that the number of independent workers in 2021 is larger than the 2017 number. However, this increase occurs only in the ''occasional independent'' workers category, described as those who work part-time and regularly, but without set hours. Comparing the number of part-time and full-time independent workers yields similar values in 2017 and 2021, so the Department believes that no adjustments are needed to the 2017 estimate of 22.1 million independent contractors.

A few commenters said that the Department underestimated the number of independent contractors in the U.S. because the estimate is based on outdated data. Commenters such as the Coalition for Workforce Innovation referenced a more recent study from Upwork, which found that ''59 million workers performed freelance work in the past 12 months, representing 36%—or more than one-third—of the entire U.S. workforce.'' [603] As discussed above, the Department acknowledges that its estimate of independent contractors could be an underestimate. However, the estimates presented in the Upwork study could be an overestimate because their definition of ''freelancer'' likely also includes some workers who would be classified as employees under the FLSA in addition to those who would be classified as independent contractors.[604] Furthermore, the Department was unable to verify whether their sample of 6,000 workers was representative of all workers in the U.S. While the Department appreciates this additional context on the potential scope of independent contracting in the U.S., the estimate of independent contractors in this analysis has not been revised.

3. Demographics of Independent Contractors

The Department reviewed demographic information on independent contractors using the CWS, which, as stated above, only measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week. According to the CWS, these primary independent contractors are most prevalent in the construction and professional and business services industries. These two industries comprise 44 percent of primary independent contractors. Independent contractors tend to be older and predominately male (64 percent). Millennials (defined as those born 1981–1996) have a significantly lower prevalence of primary independent contracting than older generations: 4.2 percent for Millennials compared to 7.2 percent for Generation X (defined as those born 1965–1980) and 10.2 percent for Baby Boomers and Matures (defined as individuals born before 1965).[605] However, other surveys that capture secondary independent contractors, or those who did informal work as independent contractors show that the prevalence of informal work is lower among older workers. Abraham and Houseman (2019), find that among 18- to 24-year-olds, 41.3 percent did informal work over the past month. The rate fell to 25.7 percent for 45- to 54-year-olds, and 13.4 percent for those 75 years and older.[606] According to MBO partners, the COVID–19 pandemic may have accelerated this trend; when accounting for both primary and secondary independent work, 2021 marked the first year that Millennials and members of Generation Z (34 percent and 17 percent of independent workers respectively) outnumbered members of Generation X and Baby Boomers (23 percent and 26 percent respectively) as part of the independent workforce.[607]

According to the CWS, 64 percent of primary independent contractors are men. Additionally, Garin and Koustas (2021) find that men comprise both a larger share of independent contractors who perform work through traditional contracting arrangements and those who secure work through online platforms.[608] This study also found that a greater share of men than women who earn income in this way are primarily self-employed; women who perform online platform work are more likely to use that work to supplement other income.[609]

According to the CWS, white workers are somewhat overrepresented among primary independent contractors; they comprise 85 percent of this population but only 79 percent of the population of workers. Conversely, Black workers are somewhat underrepresented (comprising 8 percent and 13 percent, respectively).[610] The opposite trends emerge when evaluating the broader category of ''informal work'', where racial minorities participate at a higher rate than white workers.[611] Primary independent contractors are spread across the educational spectrum, with no group especially overrepresented. The same trend in education attainment holds for workers who participate in informal work.[612]

[603] ''Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market,'' Upwork, December 8, 2021. *https://www.upwork.com/press/releases/upwork-study-finds-59-million-americans-freelancing-amid-turbulent-labor-market*. Full study available at *https://www.upwork.com/research/freelance-forward-2021*.

[604] Their report defines freelancers as ''[i]ndividuals who have engaged in supplemental, temporary, project- or contract-based work, within the past 12 months.'' While many of these workers could be independent contractors, some workers engaged in supplemental or temporary work could likely be considered employees.

[605] The Department used the generational breakdown used in the MBO Partners 2017 report, ''The State of Independence in America.'' ''Millennials'' were defined as individuals born 1981–1996, ''Generation X'' were defined as individuals born 1965–1980, and ''Baby Boomers and Matures'' were defined as individuals born before 1965.

[606] K. Abraham, and S. Houseman, ''Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income,'' RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), *https://www.aeaweb.org/conference/2019/preliminary/paper/QreAaS2h*. Note that this informal work may be broader than what would be considered independent contracting and includes activities like babysitting/housesitting and selling goods online through sites like eBay and Craigslist.

[607] This data comes from the 2021 edition of the MBO Partners report, ''The State of Independence in America.'' While maintaining the generational breakdown used in the 2017 edition, ''Generation Z'' was additionally defined as individuals born 1997–2012. *https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf*.

[608] Garin, A. and Koustas, D., ''The Distribution of Independent Contractor Activity in the United States: Evidence from Tax Filings,'' (2021). *https://www.irs.gov/pub/irs-soi/21-rp-independent-contractor-activity.pdf*.

[609] *Id*.

[610] These numbers are calculated by the Department and based on the CWS respondents who state that their race is ''white only'' or ''black only'' as opposed to identifying as multi-racial.

[611] K. Abraham, and S. Houseman, ''Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income,'' RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), *https://www.aeaweb.org/conference/2019/preliminary/paper/QreAaS2h*.

[612] *Id*.

TABLE 2—CHARACTERISTICS OF WORKERS, ALL WORKERS AND INDEPENDENT CONTRACTORS

Demographic	Number of workers (millions)	Percent of workers	Number of independent contractors (primary job) (millions)	Percent of independent contractors
Total	158.9	100	10.6	100
By Age				
16–20 (Generation Z)	8.2	5.1	0.1	0.7
21–37 (Millennials)	59.2	37.3	2.5	23.4
38–52 (Generation X)	49.8	31.3	3.6	33.8
53+ (Baby Boomers and Matures)	43.6	27.5	4.5	42.1
By Sex				
Female	75.4	47.4	3.8	35.7
Male	85.4	53.7	6.8	64.3
By Race				
White only	125.6	79.1	9.0	84.6
Black only	20.3	12.8	0.9	8.3
All other races	14.9	9.4	0.8	7.1
By Ethnicity				
Hispanic	27.0	17.0	1.6	14.8
Not Hispanic	133.8	84.2	9.0	85.2
By Industry				
Agr, forestry, fishing, and hunting	2.6	1.6	0.2	2.0
Mining	0.8	0.5	0.0	0.1
Construction	11.0	6.9	2.0	19.3
Manufacturing	16.5	10.4	0.2	2.2
Wholesale and retail trade	20.5	12.9	0.8	7.9
Transportation and utilities	8.0	5.1	0.6	5.7
Information	3.0	1.9	0.2	2.2
Financial activities	10.9	6.9	1.0	9.6
Professional and business services	19.3	12.2	2.7	25.1
Educational and health services	36.2	22.8	1.0	9.6
Leisure and hospitality	15.1	9.5	0.7	6.2
Other services	7.8	4.9	1.0	9.7
Public administration	7.2	4.6	0.0	0.4
By Education				
Less than high school diploma	14.3	9.0	1.0	9.3
High school diploma or equivalent	41.9	26.4	2.6	24.4
Less than Bachelor's degree	45.3	28.5	2.8	26.5
Bachelor's degree	37.3	23.5	2.7	25.5
Master's degree or higher	21.9	13.8	1.5	14.5

Note: Estimates based on the 2017 CPS Contingent Worker Survey.

An individual commenter wrote that because the COVID–19 pandemic created specific burdens for women and people of color and resulted in the increased participation of both groups in self-employment, the use of 2017 data reduces the inclusion of these workers. The commenter cited a study from the Center for Economic Policy and Research (CEPR), which found ''[t]he share of employed women who report being self-employed rose from 7.5 percent in the pre-pandemic period to 8.2 percent: an increase of 0.7 percentage points. By contrast, the share of employed men who report being self-employed rose by just 0.3 percentage points (from 12.1 percent to 12.4 percent).'' [613] The study also found ''[t]he share of employed Blacks who reported being self-employed rose from 5.8 percent to 6.8 percent: an increase of 1.0 percentage point. . . . For Hispanics, there was a 1.5 percentage point rise in shares from 8.4 percent to 9.9 percent . . . . By contrast, the rise in self-employment among whites was just 0.2 percent, from 11.3 to 11.5 percent.'' While the Department acknowledges that the demographic makeup of independent contractors could have shifted following the COVID–19 pandemic, the data cited in the CEPR study includes all self-employed persons, which is a broader population than independent contractors. It is possible that this data may also reflect the demographic trends of the more specific population of

[613] Annabel Utz, Julie Yixia Cai, & Dean Baker, ''The Pandemic Rise in Self-Employment: Who is Working for Themselves Now,'' Center for Economic and Policy Research. (August 2022). *https://cepr.net/the-pandemic-rise-in-self-employment-who-is-working-for-themselves-now/.*

independent contractors, but the Department has not made any adjustments to its overall estimate of the number of independent contractors.

C. Costs

1. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses and current independent contractors associated with reviewing the new regulation. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments and government entities using independent contractors, and the current number of independent contractors; (2) the wage rates for the employees and for the independent contractors reviewing the rule; and (3) the number of hours that it estimates employers and independent contractors will spend reviewing the rule. This section presents the calculation for establishments first and then the calculation for independent contractors.

Regulatory familiarization costs may be a function of the number of establishments or the number of firms.[614] Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple locations and may require some locations to familiarize themselves with the regulation at the establishment level. Other firms may either review the rule to consolidate key takeaways for their affiliates or they may rely entirely on outside experts to evaluate the rule and relay the relevant information to their organization (*e.g.,* a chamber of commerce). The Department used the number of establishments to estimate the fundamental pool of regulated entities—which is larger than the number of firms. This assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

To estimate the number of establishments incurring regulatory familiarization costs, the Department began by using the Statistics of U.S. Businesses (SUSB) to define the total pool of establishments in the United States.[615] In 2019, the most recent year available, there were 7.96 million establishments. These data were supplemented with the 2017 Census of Government that reports 90,075 local government entities, and 51 state and federal government entities.[616] The total number of establishments and governments in the universe used for this analysis is 8,049,229.

This universe is then restricted to the subset of establishments that engage independent contractors. In 2019, Lim et al. used extensive IRS data to model the independent contractor market and found that 34.7 percent of firms hire independent contractors.[617] These data are based on annual tax filings, so the dataset includes firms that may contract for only parts of a year. Multiplying the universe of establishments and governments by 35 percent results in 2.8 million entities.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.[618] According to the Occupational Employment and Wage Statistics (OEWS), these workers had a median wage of $32.59 per hour in 2022 (most recent data available).[619] Assuming benefits are paid at a rate of 45 percent of the base wage,[620] and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $52.80. The Department assumes that it will take on average about 1 hour to review the rule. In the proposed rule, the Department assumed a review time of 30 minutes, but has increased this estimate in response to concerns from commenters that the regulatory familiarization costs were understated. The Department has provided a discussion of these comments at the end of this section. The Department believes that 1 hour, on average, is appropriate, because while some establishments will spend longer to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Furthermore, the analysis outlined in this rule aligns with existing judicial precedent and previous guidance released by the Department, with which much of the regulated community is already familiar. Total regulatory familiarization costs to businesses in Year 1 are estimated to be $148,749,744 ($52.80 × 1 hour × 2,817,230) in 2022 dollars.

For regulatory familiarization costs for independent contractors, the Department used its estimate of 22.1 million independent contractors and assumed each independent contractor will spend 30 minutes to review the regulation. In the proposed rule, the Department assumed that it would take independent contractors an average of 15 minutes to review the regulation but has also increased this estimate in the final rule in response to commenters' concerns. The average time spent by independent contractors is estimated to be shorter than for establishments and governments. This difference is in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule change published by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. This time is valued at $23.46, which is the median hourly wage rate for independent contractors in the CWS of $19.45 updated to 2022 dollars using the gross domestic product (GDP) deflator.[621] [622] Therefore, regulatory familiarization costs to

[614] An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment contrasts with a firm, or a company, which is a business and may consist of one or more establishments. *See* BLS, ''Quarterly Census of Employment and Wages: Concepts,'' *https://www.bls.gov/opub/hom/cew/concepts.htm.*

[615] U.S. Census Bureau, 2019 SUSB Annual Datasets by Establishment Industry. *https://www.census.gov/data/datasets/2019/econ/susb/2019-susb.html.*

[616] U.S. Census Bureau, 2017 Census of Governments. *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[617] Lim et al., *supra* n.512, Table 10: Firm sample summary statistics by year (2001–2015), *https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.*

[618] A Compensation/Benefits Specialist ensures company compliance with federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, ''13–1141 Compensation, Benefits, and Job Analysis Specialists,'' *https://www.bls.gov/oes/current/oes131141.htm.*

[619] The 2021 IC Rule used the mean wage rate to calculate rule familiarization costs, but the Department has used the median wage rate here, because it is more consistent with cost analyses in other Wage and Hour Division rulemakings. The Department used the median wage rate in the Withdrawal Rule. 86 FR 24321. Generally, the Department uses median wage rates to calculate costs, because the mean wage rate has the potential to be biased upward by high-earning outlier wage observations.

[620] Calculated using BLS Employer Costs for Employee Compensation data. The Department took the average of the most recent four quarters of Total Benefits per Hour Worked for Civilian Workers (Series ID CMU1030000000000D) divided it by the average of the most recent four quarters of Wages and Salaries Cost per Hour Worked for Civilian Workers (Series ID CMU1020000000000D). *https://www.bls.gov/ncs/data.htm.*

[621] Based on Department calculations using the individual level data. The Department also calculated the mean hourly wage for independent contractors using the CWS data and found that the mean wage in 2017 was $27.29, which would be $32.92 updated to 2022 dollars using the GDP deflator.

[622] In the 2021 IC rule the Department included an additional 45 percent for benefits and 17 percent for overhead. These adjustments have been removed here, because independent contractors do not usually receive employer-provided benefits and generally have overhead costs built into their hourly rate.

independent contractors in Year 1 are estimated to be $259,233,000 ($23.46 × 0.5 hour × 22.1 million).

The total one-time regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be $408 million. Regulatory familiarization costs in future years are assumed to be de minimis. Employers and independent contractors would continue to familiarize themselves with the applicable legal framework in the absence of the rule, so this rulemaking is not expected to impose costs after the first year. This amounts to a 10-year annualized cost of $56.4 million at a discount rate of 3 percent or $54.3 million at a discount rate of 7 percent.

Multiple commenters said that they were concerned that the Department's rule familiarization cost estimate was too low. Commenters asserted that the Department's initial estimate of 30 minutes to review the rule was too short, and that it would take firms much longer to read and understand the final rule. For example, a comment from two fellows at the Heritage Foundation estimated that ''[e]ven individuals with very high rates of reading and comprehension'' would need more than two hours to read the full proposal. The Coalition for Workforce Innovation said that while a person could simply read the rule in 30 minutes, it wouldn't be enough time to understand the rule and translate the understanding into advice to be communicated within the organization. The U.S. Chamber of Commerce commented, ''[a]n economically appropriate approach for gauging the scale of familiarization costs is to assume no less than one hour of familiarization time for both affected workers and hiring establishments.'' The Modern Economy Project commented that the complexity of the rulemaking and of the issue of worker classification necessitates more time for review. Other commenters echoed similar sentiments. In response to all the comments received on this topic, the Department reconsidered the time for rule familiarization and doubled its original estimates, increasing them to 1 hour for potentially affected firms and 30 minutes for independent contractors. The Department believes that a longer time estimate would not be appropriate because this estimate represents an average of the firms who may spend more time for review, and those who will not spend any time reviewing the rule.

Some commenters also expressed concerns with the Department's assumption that the rule would be read by a Compensation, Benefits, and Job Analysis Specialist. For example, the Coalition for Workforce Innovation stated, ''businesses task their high-level, well-trained human resources workers, in-house attorneys, and outside counsel with this responsibility at an hourly rate well exceeding $50.'' The U.S. Chamber of Commerce wrote that the ''Department's selection of 'Compensation, Benefits and Job Analysis Specialist' as the model reviewer for its calculation of familiarization costs misunderstands and misrepresents the seriousness and complexity of the regulation being proposed.'' The Department acknowledges that in some cases, higher-paid senior workers could be charged with reading this rule, but believes that the use of the Compensation, Benefits, and Job Analysis Specialist hourly wage is consistent with other rules released by the Wage and Hour Division and the Department, including the 2021 IC Rule.[623] The Department notes that it did not receive any comments objecting to the use of this occupation in its rule familiarization calculation in the 2021 IC Rule.

2. Comments Received on the Department's Cost Analysis

Some commenters asserted that the Department did not properly consider all of the potential costs of the regulation. For example, commenters such as the Financial Services Institute said that the Department did not consider substantial costs of the rule, such as the cost that will arise from businesses being forced to provide health insurance and other benefits to their former independent contractors or the indirect costs of higher taxes. The Department notes that these costs would be considered transfers and are discussed in section VII.E of this economic analysis. Other commenters mentioned that the rule would lead to significant compliance costs for firms. For example, two fellows from the Heritage Foundation commented that in addition to familiarizing themselves with the rule, the firm would have to perform an individualized assessment of the economic relationship with each of their contractors, renegotiate or cancel existing contracts, spend time converting independent contractors into employees, engage with labor unions and elections, and deal with enforcement actions. The Cetera Financial Group said that the ongoing cost of compliance for employers is considerable. They stated that applying this rule only to independent financial professionals would create an obligation for employers to track the earnings and hours worked for more than 140,000 independent financial professionals in the U.S. As discussed above, the Department does not believe that this rule will lead to widespread reclassification (and additional tracking of hours and earnings), and for the limited cases in which reclassification could occur, many of these costs should already be incurred by firms. For example, as a matter of good practice, firms should already be assessing the economic relationship of contractors when they engage in business with them.

Other commenters wrote that the rule would actually reduce compliance costs. For example, the Laborers' International Union of North America (LIUNA) urged the Department to consider reduced compliance costs as an important impact of the rule. They stated that the rule will improve public understanding of legal obligations because it codifies judicial precedent in a comprehensive, accessible, and reliable format.

D. Benefits and Transfers

1. Increased Consistency

This rule presents a detailed analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. This analysis will provide more consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. The analysis will provide a consistent approach for those businesses that engage (or wish to engage) independent contractors, who the Department recognizes play an important role in the economy. The rule's consistency with judicial precedent could also help to reduce legal disputes.

2. Reduced Misclassification

This rule will provide consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. This clear guidance could help reduce the occurrence of misclassification.

[623] 86 FR 1228 (''The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.'').

The prevalence of misclassification of employees as independent contractors is unclear, but the literature indicates it is substantial. A 2020 National Employment Law Project (NELP) report, for example, reviewed state audits and concluded that ''these state reports show that 10 to 30 percent of employers (or more) misclassify their employees as independent contractors.'' [624] Similarly, a 2000 Department of Labor study also found that among audits from nine states, ''employers with misclassified workers ranged from approximately 10% to 30%.'' [625] This same report found that depending on the state, between 1 percent and 9 percent of workers are misclassified as independent contractors.

Misclassification disproportionately affects Black, indigenous, and people of color (BIPOC) because of the disparity in occupations affected by misclassification.[626] Commenters echoed these concerns and provided additional supporting information. For example, a joint comment from the Lawyers Committee for Civil Rights Under Law (LCCRUL) and The Washington Lawyer's Committee for Civil Rights and Urban Affairs (WLC) stated, ''[d]ue to occupational segregation, the sectors in which misclassification is most prevalent are comprised disproportionately [of] BIPOC workers, especially Black and immigrant workers.'' [627] Looking at 2021 BLS data, LCCRUL and WLC noted that 41% of workers in the construction industry identify as Black, Asian, or Hispanic. As discussed in the section below, research has shown that misclassification is prevalent in the construction industry. LCCRUL and WLC also point out, ''[i]n gig-based jobs, where the classification of workers as independent contractors is a defining characteristic of the industry, people of color and immigrants are also overrepresented: 30% of Latinx adults, 20% of Black adults, and 19% of Asian adults work in such jobs, compared to 12% of white adults.'' [628] NELP also agreed, stating, ''[i]ndependent contractor misclassification by companies is also strikingly racialized, occurring disproportionately in occupations in which people of color, including Black, Latinx, and Asian workers, are overrepresented.'' NELP analyzed the March 2022 Current Population Survey Annual Social and Economic Supplement (CPS ASEC) data and found that workers of color comprise just over a third of workers overall but comprise between 47 and 91 percent of workers in industries such as construction, trucking, delivery, home care, agricultural, personal care, ride-hail, and janitorial and building service.[629]

Misclassification contravenes one of the purposes of the FLSA: eliminating ''unfair method[s] of competition in commerce.'' [630] When employers misclassify employees as independent contractors, they illegally cut labor costs, undermining law-abiding competitors.[631] While the services offered may be comparable at face value, the employer engaging in misclassification is able to offer lower estimates and employers following the rules are left at a disadvantage.

Multiple commenters also provided data on the prevalence and harms of misclassification, specifically in the construction industry. For example, the Illinois Economic Policy Institute (ILEPI), the National Electrical Contractors Association (NECA) and the International Brotherhood of Electrical Workers (IBEW), the United Brotherhood of Carpenters and Joiners (UBC), and North America's Building Trades Unions (NABTU), among others, all cite to a study from Russell Ormiston et al., which found that between 12 and 21 percent of the construction industry workforce were either misclassified as independent contractors or working ''off-the-books.'' [632] The paper notes that these results suggest that ''between 1.30 and 2.16 million workers were misclassified or working in cash-only arrangements.'' Although the impacts discussed in this study involve broader labor violations than independent contractor misclassification, its results are still useful for understanding the extent of the problem. Commenters asserted that not only is misclassification prevalent in the construction industry, but it is also harmful to workers and to employers who do not misclassify their workers. For example, SWACCA noted that when construction companies misclassify their workers, they avoid costs such as overtime, workers' compensation, unemployment insurance, employment taxes, and compliance with health and safety requirements. They explained that when ''high road'' employers are unable to compete with contractors who are misclassifying their workers, it leads to a ''race to the bottom,'' which further degrades working conditions in construction. UBC discussed a report on the number of construction worker families in the U.S. enrolled in safety net programs, such as Medicaid, Temporary Assistance for Needy Families (TANF), and the Supplemental Nutrition Assistance Program (SNAP). UBC noted that the report found, ''[s]hockingly, 3 million families, or 39 percent of construction worker families, are enrolled in at least one safety net program, costing state and federal taxpayers $28 billion a year.'' [633] They further explained that ''[t]he authors of the report attributed the high degree of reliance on public assistance to a number of factors. Chief among those were low pay, wage theft, misclassification as independent contractors, off-the-books payments, and 'payroll fraud.' '' While the costs discussed in that report reflect a variety of factors, if misclassification contributes to just a share of this overall cost, the costs of misclassification could still be significant, especially for just one industry. If this final rule s then able to reduce a fraction of overall misclassification in the U.S., the

[624] NELP, ''Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,'' (Oct. 2020), *https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020.*

[625] Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, ''Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs'' Report of Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), *https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.*

[626] NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, (Oct. 2020) (describing how misclassification rates are higher in certain industries such as construction, trucking, janitorial, and home care work), *https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020.*

[627] Marina Zhavoronkova et al., Occupational Segregation in America, Center for American Progress (Mar. 29, 2022), *https://www.americanprogress.org/article/occupational-segregation-in-america/.*

[628] Risa Gelles-Watnick & Monica Anderson, Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce, PEW RSCH. CTR. (Dec. 15, 2021), *https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differencesstand-out-in-the-u-s-gig-workforce/.*

[629] NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see CPS Annual Social and Economic Supplement, U.S. Census Bureau, *https://data.census.gov/mdat/#/search?ds=CPSASEC2022.*

[630] 29 U.S.C. 202(a), (b).

[631] *Id.*

[632] Russel Ormiston, Dale Belman, & Mark Erlich, ''An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry,'' (Jan. 2020), available at *https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf.*

[633] Ken Jacobs, Kuichih Huang, Jenifer MacGillvary and Enrique Lopezlira, ''The Public Cost of Low-Wage Jobs in the US Construction Industry,'' UC Berkeley Labor Center (January 2022), *https://laborcenter.berkeley.edu/the-public-cost-of-low-wage-jobs-in-the-us-construction-industry/.*

Department would anticipate benefits for affected workers and businesses in competition.

E. Additional Discussion of Transfers

1. Employer-Provided Fringe Benefits

Misclassification of independent contractors culminates in a reduced social safety net starting with the individual and cascading out through the local, state, and federal programs. Employees who are misclassified as independent contractors generally do not receive employer-sponsored health and retirement benefits, potentially resulting in or contributing to long-term financial insecurity.

Employees are more likely than independent contractors to have health insurance. According to the CWS, 75.4 percent of independent contractors have health insurance, compared to 84.0 percent of employees. This gap between independent contractors and employees is also true for low-income workers. Using CWS data, the Department compared health insurance rates for workers earning less than $15 per hour and found that 71.0 percent of independent contractors have health insurance compared with 78.5 percent of employees. Lastly, the Department considered whether this gap could be larger for traditionally underserved groups or minorities. Considering the subsets of independent contractors who are female, Hispanic, or Black, only the Hispanic independent contractors have a statistically significant difference in the percentage of workers with health insurance (estimated to be about 18 percentage points lower).[634]

Additionally, a major source of retirement savings is employer-sponsored retirement accounts. According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the BLS Employer Costs for Employee Compensation (ECEC) found that in 2022, employers paid 5.1 percent of employees' total compensation in retirement benefits on average ($2.16/$42.48).[635] A 2017 Treasury study found that in 2014, while forty two percent of wage earners made contributions to an individual retirement account (IRA) or employer plan, only eight percent of self-employed individuals made any retirement contribution.[636] Smaller retirement savings could result in a long-term tax burden to all Americans due to increased reliance upon social assistance programs.

To the extent that this rule would reduce misclassification, it could result in transfers to workers in the form of employer-provided benefits like health care and retirement benefits. The National Retail Federation questioned this assumption, asserting that ''it does not take into account the myriad of insurance arrangements that are available to individuals and their families.'' While some independent contractors do have health insurance, as evidenced in the data discussed above, they are insured at a lower rate than employees.

As shown in Table 3 below, using data from BLS Employer Costs for Employee Compensation, the Department has calculated the average cost to employers for various benefits as a percentage of the average cost to employers for wages and salaries. This share was then applied to the median weekly wage of both full-time and part-time independent contractors to estimate the value of these benefits to an average independent contractor if they were to begin receiving these benefits. The Department estimated that the value of these benefits could average more than $15,000 annually for full-time independent contractors and more than $6,000 annually for part-time independent contractors. This example transfer estimate could be reduced if there is a downward adjustment in the worker's wage rate to offset a portion of the employer's cost associated with these new benefits.

TABLE 3—POTENTIAL TRANSFERS ASSOCIATED WITH EMPLOYER-PROVIDED FRINGE BENEFITS

Employer-provided benefit	Employer cost for benefit as a share of employer cost for wages and salaries (%) (Q4 2022) [a]	Value of benefit for the median weekly wage of a full-time independent contractor ($1017) [d]	Value of benefit for the median weekly wage of a part-time independent contractor ($398) [d]
Health Insurance	11.2	$113.90	$44.58
Retirement [b]	7.4	75.26	29.45
Paid Leave [c]	10.8	109.84	42.98
Total Annual Value of Benefits	.....	15,547.90	6,084.62

[a] The share for each benefit is calculated as the cost per hour for civilian workers divided by the wages and salaries cost per hour for civilian workers. Series IDs CMU1150000000000D, CMU1180000000000D, and CMU1040000000000D divided by Series ID CMU1020000000000D.
[b] Includes defined benefit and defined contribution retirement plans.
[c] Includes vacation, holiday, sick and personal leave.
[d] Earnings data from the 2017 CWS (*https://www.bls.gov/news.release/conemp.t13.htm*) were inflated to Q3 2022 using GDP Deflator.

2. Tax Liabilities

As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. Thus, if workers' classifications change from independent contractors to employees, there could be a transfer in federal tax liabilities from workers to employers.[637] Although this rule only addresses whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax

[634] To measure if the difference between these proportions is statistically significant, the Department used the replicate weights for the CWS. At a 0.05 significance level, the proportion of Hispanic independent contractors with any health insurance is lower than the proportion for all independent contractors.

[635] BLS Employer Costs for Employee Compensation—December 2022. *https://www.bls.gov/news.release/pdf/ecec.pdf.*

[636] Jackson, E., Looney, A., & Ramnath, S., Department of Treasury, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,* Working Paper #114 (Jan. 2017), *https://home.treasury.gov/system/files/131/WP-114.pdf.* As discussed in the 2021 IC Rule, this study defines retirement accounts as ''employer-sponsored plans,'' which may not encompass all of the possible long-term saving methods. *See* 86 FR 1217.

[637] *See* 86 FR 1218.

purposes.[638] These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.[639] In sum, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment). Some of this increased tax liability may be partially or wholly paid for by the individuals and companies that engage independent contractors, to the extent that the compensation paid to independent contractors accounts for this added tax liability. However, changes in compensation are discussed separately below. Changes in benefits, tax liability, and earnings must be considered in tandem to identify how the standard of living may change.

The Coalition to Promote Independent Entrepreneurs contended that the Department's analysis of transfers is problematic and that the claim that employers are likely to keep the status of most workers the same across all benefits and requirements is legally incorrect. In the Department's enforcement experience, employers generally classify workers as employees or independent contractors for all purposes. The Department is not making any statement regarding employers' compliance with other laws that use different standards for employee classification than the FLSA.

In addition to affecting tax liabilities for workers, this rule could have an impact on state tax revenue and budgets. Misclassification results in lost revenue and increased costs for states because states receive less tax revenue than they otherwise would from payroll taxes, and they have reduced funds to unemployment insurance, workers' compensation, and paid leave programs.[640] Although it has not been updated more recently, the IRS conducted a comprehensive worker misclassification estimate in 1984 using data collected by auditors. At the time, the IRS found misclassification resulted in an estimated total tax loss of $1.6 billion in Social Security taxes, Medicare taxes, Federal unemployment taxes, and Federal income taxes (for Tax Year 1984).[641] [642] To the extent workers were incorrectly classified due to misapplication of the 2021 IC Rule, that could have led to reduced tax revenues.

Generally, employer requirements pertaining to unemployment insurance, disability insurance, or worker's compensation are on behalf of employees, therefore independent contractors do not have access to those benefits. Reduced unemployment insurance, disability insurance, and worker's compensation contributions result in reduced disbursement capabilities. Misclassification of employees as independent contractors thus impacts the funds paid into such state programs. Even if the misclassified worker is unaffected because they need no assistance, the employer has not paid into the programs as required. As a result, the state has diminished funds for those who require the benefits. For example, in Tennessee, from September 2017 to October 2018, the Uninsured Employers Fund unit ''assessed 234 penalties against employers for not maintaining workers' compensation insurance, for a total assessment amount of $2,730,269.60.'' [643] This amount represents only what was discovered by the taskforce in thirteen months and in just one state. By rescinding the 2021 IC Rule, this rule could prevent this increased burden on government entities.

3. FLSA Protections

When workers are properly classified as independent contractors, the minimum wage, overtime pay, and other requirements of the FLSA no longer apply. The 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the FLSA minimum wage of $7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees). Concerning overtime pay, not only do independent contractors not receive the overtime pay premium, but the number of overtime hours worked (more than 40 hours in a workweek) by independent contractors is also higher. Analysis of the CWS data indicated that, before conditioning on covariates, primary self-employed independent contractors are more likely to work overtime at their main job than employees, as 29 percent of self-employed independent contractors reported working overtime versus just 17 percent for employees.[644] Additionally, independent contractors who work overtime tend to work more hours of overtime than employees. According to the Department's analysis of CWS data, among those who usually work overtime, the mean usual number of overtime hours for independent contractors is 15.4 and the mean for employees is 11.8 hours. Independent contractors are also not protected by other provisions in the FLSA that are centered on ensuring that women are treated fairly at work, including employer-provided accommodations for breastfeeding workers and protections against pay discrimination.

As discussed above, compared to the 2021 IC Rule, this rule could result in reduced misclassification of employees as independent contractors. Any reduction in misclassification that occurs because of this rule would lead to an increase in the applicability of these FLSA protections for workers and subsequently may result in transfers relating to minimum wage and overtime pay. Specifically, to the extent misclassified workers were not earning the minimum wage, reduced misclassification would increase hourly wages for these workers to the federal minimum wage. Similarly, to the extent misclassified workers were not receiving the applicable overtime pay, reduced misclassification would increase overtime pay for any overtime hours they continued to work. However, compared to the current economic and legal landscape where courts and parties outside the Department are not necessarily using the 2021 IC Rule's framework for analyzing employee or independent contractor classification

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

[639] Internal Revenue Service, ''Publication 15, (Circular E), Employer's Tax Guide'' (2023 *https://www.irs.gov/publications/p15.* The social security tax has a wage base limit of $160,200 in 2023. There is no wage base limit for Medicare Tax.

[640] *See, e.g.,* Lisa Xu and Mark Erlich, Economic Consequence of Misclassification in the State of Washington, Harvard Labor and Worklife Program, 2 (2019), *https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf;* Karl A. Racine, Issue Brief and Economic Report, Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry, 13 (September 2019), *https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf.*

[641] Treasury Inspector General for Tax Inspection 2013, Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings, *https://www.oversight.gov/sites/default/files/oig-reports/TIGTA/201330058fr_0.pdf.*

[642] Adjusted for inflation using the CPI–U, the current value of this tax loss would be $4.5 billion.

[643] NELP, *supra* n.553.

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

and are instead continuing to use longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022, these transfers (and the other transfers discussed above) would be less likely to occur.

4. Hourly Wages, Bonuses, and Related Compensation

In addition to increased compliance with minimum wage and overtime pay requirements, potential transfers may also result from this rulemaking as a consequence of differences in earnings between employees and independent contractors.[645] Independent contractors are generally expected to earn a wage premium relative to employees who perform similar work to compensate for their reduced access to benefits and increased tax liability. However, this may not always be the case in practice. The Department compared the average hourly wages of current employees and independent contractors to provide some indication of the impact on wages of a worker who is reclassified from an independent contractor to an employee.

The Department used an approach similar to Katz and Krueger (2018).[646] Both regressed hourly wages on independent contractor status [647] and observable differences between independent contractors and employees (*e.g.,* occupation, sex, potential experience, education, race, and ethnicity) to help isolate the impact of independent contractor status on hourly wages. Katz and Krueger used the 2005 CWS and the 2015 RAND American Life Panel (ALP) (the 2017 CWS was not available at the time of their analysis). The Department used the 2017 CWS.[648]

Both analyses found similar results. A simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees (*e.g.,* $27.29 per hour for all independent contractors versus $24.07 per hour for employees using the 2017 CWS). However, when controlling for observable differences between workers, Katz and Krueger found no statistically significant difference between independent contractors' and employees' hourly wages in the 2005 CWS data. Although their analysis of the 2015 ALP data found that primary independent contractors earned more per hour than traditional employees, they recommended caution in interpreting these results due to the imprecision of the estimates.[649] The Department found no statistically significant difference between independent contractors' and employees' hourly wages in the 2017 CWS data.

Based on these results, the Department believes it is inappropriate to conclude independent contractors generally earn a higher hourly wage than employees. The Department ran another hourly wage rate regression including additional variables to determine if independent contractors in underserved groups are impacted differently by including interaction terms for female independent contractors, Hispanic independent contractors, and Black independent contractors. The results indicate that in addition to the lower wages earned by Black workers in general, Black independent contractors also earn less per hour than independent contractors of other races; however, this is not statistically significant at the most commonly used significance level.[650]

A group of DC economists provided a comment discussing an analysis they performed using aggregate data and analysis from individual-level IRS tax data from Washington, DC.[651] In their study, they found that taxpayers who switched from employment to self-employment saw a decrease in income and vice versa. They found, ''[b]etween 2013–2018 switching from a typical wage-earning job *to* self-employment, was associated with a 20–50 percent drop in income, while switching *away* from self-employment was associated with an income increase of 65–85 percent.'' They also note that low-income tax filers who switched from self-employment to a wage-earning job approximately doubled their income from 2013–2018. However, this analysis is specifically focused on workers in Washington, DC, and the definition of self-employment may differ from independent contractor classification under the FLSA.

The Coalition for Workforce Innovation asserted that the Department failed to consider additional studies reconfirming that independent contractors earn more than traditional employees. They cite the Upwork study, saying ''[t]he number of freelancers who earn more by freelancing than in their traditional jobs continues to grow: 44% of freelancers say they earn more freelancing than with a traditional job in 2021, . . . up from 39% in 2020 and 32% in 2019.'' [652] The Department notes that even if 44% of freelancers say that they earn more than they would under traditional employment, that would still mean that a larger share of freelancers (56%) either report earning the same or less than with traditional employment. Also, as discussed in section VII.B.1, the nature of this study and its definition of freelancing may not be applicable to how independent contracting is discussed in this rule.

The Economic Policy Institute (EPI) also submitted a comment with a quantitative analysis of the difference in the value of a job to a worker who is classified as an independent contractor rather than as an employee. Their analysis reviewed data for workers in 11 occupations identified as particularly vulnerable to misclassification: construction workers, truck drivers, janitors and cleaners, home health and personal care aides, retail sales workers, housekeeping cleaners, landscaping workers, call center workers, security guards, light truck delivery drivers, and manicurists and pedicurists.

F. Analysis of Regulatory Alternatives

Pursuant to its obligations under Executive Order 12866,[653] the Department assessed four regulatory alternatives to this rule.

The Department had previously considered and rejected two of these alternatives in the 2021 IC Rule—adopting either a common law or ABC test for determining employee or independent contractor status.[654] The Department reaches the same

[645] The discussion of data on the differences in earnings between employees and independent contractors in the 2021 IC Rule was potentially confusing and included some evidence that was not statistically significant, so the findings and methodology are discussed again here.

[646] L. Katz and A. Krueger, ''The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,'' (2018).

[647] On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of ''traditional'' employees.

[648] In both Katz and Krueger's regression results and the Department's calculations, the following outlying values were removed: workers reporting earning less than $50 per week, less than $1 per hour, or more than $1,000 per hour. Choice of exclusionary criteria from Katz and Krueger (2018).

[649] See top of page 20, ''Given the imprecision of the estimates, we recommend caution in interpreting the estimates from the [ALP].'' The standard error on the estimated coefficient on the independent contractor variable in Katz and Krueger's regression based on the 2015 ALP is more than 2.5 times larger than the standard error of the coefficient using the 2017 CWS.

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

[651] This analysis can also be found at: *https://ora-cfo.dc.gov/blog/self-employment-income-drop.*

[652] ''Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market,'' Upwork, December 8, 2021, *https://www.upwork.com/press/releases/upwork-study-finds-59-million-americans-freelancing-amid-turbulent-labor-market.* Full study available at *https://www.upwork.com/research/freelance-forward-2021.*

[653] E.O. 12866 section 6(a)(3)(C)(iii), 58 FR 51741.

[654] *See* 86 FR 1238.

conclusion in this final rule. Section IV above discusses why legal constraints prevent the Department from adopting either of these alternatives and the comments received regarding these alternatives.

For a third alternative, the Department considered a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule. As the Department has noted throughout this final rule, there are multiple instances in which it is consistent or in agreement with the 2021 IC Rule. However, the numerous ways in which the 2021 IC Rule described the factors were in tension with judicial precedent and longstanding Department guidance and narrowed the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself. For these reasons, and as discussed in sections III and IV above, the Department has ultimately concluded that a complete recission and replacement of the 2021 IC Rule is needed.

For a fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee and independent contractor classification through subregulatory guidance. For more than 80 years prior to the 2021 IC Rule, the Department primarily issued subregulatory guidance in this area and did not have generally applicable regulations on the classification of workers as employees or independent contractors. The Department considered rescinding the 2021 IC Rule and continuing to provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example a Field Assistance Bulletin). Rescinding the 2021 IC Rule without issuing a new regulation would have lowered the regulatory familiarity costs associated with this rulemaking. As explained in sections III, IV, and V above, however, the Department continues to believe that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers. Specifically, issuing regulations with an explanatory preamble allows the Department to provide in-depth guidance. Additionally, issuing regulations allowed the Department to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process. Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue. Therefore, the Department is not rescinding the 2021 IC Rule and providing only subregulatory guidance.

VIII. Final Regulatory Flexibility Act (FRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their rules on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities.

A. Need for Rulemaking and Objectives of the Rule

As discussed in section II.C.3., on March 14, 2022, a district court in the Eastern District of Texas issued a decision vacating the Department's delay and withdrawal of the 2021 IC Rule and concluding that the 2021 IC Rule became effective on March 8, 2021. The Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts and, had it been left in place, would have had a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test. Therefore, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.

The Department is rescinding and replacing regulations addressing whether workers are employees or independent contractors under the FLSA. Of particular note, the regulations set forth in this final rule do not use ''core factors'' and instead return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Regarding the economic reality factors, this final rule returns to the longstanding framing of investment as a separate factor, and integral as an integral part of the potential employer's business rather than an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor. The Department also made several adjustments to the proposed regulations after consideration of the comments received, including revisions to the regulations regarding the investment factor and the control factor (specifically addressing compliance with legal obligations).

The Department believes that rescinding the 2021 IC Rule and replacing it with regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—will be helpful for both workers and employers. The Department believes this rule will help protect employees from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) independent contractors as well as for those who wish to work as independent contractors.

B. Significant Issues Raised in Public Comments, Including by the Small Business Administration Office of Advocacy

Several commenters submitted feedback in response to the NPRM's Initial Regulatory Flexibility Analysis (IRFA) or otherwise addressing the potential impact of this rulemaking on small entities. Commenters, including the Small Business Administration Office of Advocacy (SBA) contended that the Department has severely underestimated the economic impacts of this rule on small businesses and independent contractors. For example, several commenters criticized the rule familiarization time estimates referenced in the IRFA, with the Independent Electrical Contractors, the Small Business & Entrepreneurship

Council (''SBE Council''), and SBA citing the length of the NPRM as evidence that the Department was providing an underestimate. By contrast, the SWACCA asserted that the ''well understood framework'' of the NPRM's proposed guidance would reduce regulatory familiarization costs for stakeholders ''compared to the January 2021 Rule's novel, untested weighted framework.''

As explained in section VII.C., the Department considered all of the comments received on this topic and has increased the regulatory familiarization cost estimate for this rule to 1 hour for firms and 30 minutes for independent contractors, who may be small businesses themselves. The Department believes that this time estimate is appropriate because it represents an average, in which some small businesses will spend more time reviewing the rule and others will spend no time reviewing.

Some commenters asserted that the Department failed to identify other potential costs of this rulemaking. For example, SBA wrote that ''DOL has failed to estimate any costs for small businesses and independent contractors to reclassify workers as independent contractors, for lost work, and for business disruptions.'' Similarly, SBE Council wrote that the IRFA did ''not include the cost to a small business or small entity if an independent contractor is determined to be 'misclassified,' or if a small business or small entity loses business revenue due to the loss of human capital, or the cost to comply with the new rule, or if an independent contractor loses business due to potential or actual misclassification.'' As discussed in greater detail in section III(C) and VII(A), the Department does not believe that this rule will lead to widespread reclassification.

SBA claimed that the IRFA for failed to address certain employment-related costs related to the reclassification of independent contractors as employees (*e.g.,* payroll tax obligations, employment benefits costs, etc.) that were mentioned in the NPRM's Regulatory Impact Analysis; *see also* American First Legal Foundation (''AFL'') (''The Department failed to consider that small businesses reclassifying independent contractors as employees under the Proposed Rule will substantially increase their respective tax burdens.''); Engine (asserting that ''startups that err on the side of caution and hire or shift to full-time workers'' may have to ''offer more robust compensation packages'' to compete with larger competitors). The Department's Regulatory Impact Analysis only provides a qualitative discussion of these potential transfers and explains that these transfers may result from reduced misclassification resulting from this rule. The Department does not believe that coming into compliance with the law would be a ''cost'' for the purposes of the economic analyses of this rulemaking.

SBA also commented that ''many independent contractors or freelance workers, who may also be small businesses, believe they will lose work because of this rule.'' The Department does not believe that this rule will lead to job losses because most workers who were properly classified as independent contractors before the 2021 IC Rule will continue to retain their status as independent contractors.

Finally, AFL was concerned about the Department ''treating small businesses the same as all other entities'' and asserted that Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'') requires the Department to creation an exemption waiving the application of civil money penalties for small entities ''that will inevitably misapply the confusing and inconsistent 'economic reality' test.'' *See also* Engine (''It is unclear how the proposed rule, if implemented, will be enforced consistent with SBREFA, if the Department does not accommodate differing compliance requirements by waiving or reducing penalties when circumstances warrant.''). In response to these comments, the Department notes that courts apply the same economic reality test when evaluating the FLSA employment status of any worker alleged to be an independent contractor, regardless of the size of the potential employer.[655] Similarly, the Department is striving to provide a generally-applicable regulation in this rulemaking. As with other enforcement-related requests from commenters described in section II.E., whether the Department should reduce or waive certain civil money penalties for small entities found to have violated the FLSA is an enforcement issue that is beyond the scope of this rulemaking.

[655] *See, e.g., Rutherford,* 331 U.S. at 724 (noting that the slaughterhouse involved in the case ''had one hourly paid employee'' prior to hiring the alleged independent contractors at issue); *Silk,* 331 U.S. at 706 (describing the employer at issue as an individual named ''Albert Silk, doing business as the Albert Silk Coal Co.,'' who ''owns no trucks himself, but contracts with workers who own their own trucks to deliver coal'').

C. Estimating the Number of Small Businesses Affected by the Rulemaking

The Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status, to estimate the number of small entities.[656] The Department then applied these thresholds to the U.S. Census Bureau's 2017 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry.[657] These ratios of small to large establishments were then applied to the more recent 2019 Statistics of United States Businesses (SUSB) data on number of establishments.[658] Next, the Department estimated the number of small governments, defined as having population less than 50,000, from the 2017 Census of Governments.[659] In total, the Department estimated there are 6.5 million small establishments or governments who could potentially have independent contractors, and who could be affected by this rulemaking. However, not all of these establishments will have independent contractors, and so only a share of this number will actually be affected. The impact of this rule could also differ by industry. As shown in Table 2 of the regulatory impact analysis, the industries with the highest number of independent contractors are the professional and business services and construction industries.

Additionally, as discussed in section VII.B., the Department estimates that there are 22.1 million independent contractors. Some of these independent contractors may be considered small businesses and may also be impacted by this rule.

D. Compliance Requirements of the Final Rule, Including Reporting and Recordkeeping

This rule provides guidance for analyzing employee or independent contractor status under the FLSA. It does not create any new reporting or

[656] SBA, Summary of Size Standards by Industry Sector, 2017, *https://www.sba.gov/sites/default/files/2018-05/Size_Standards_Table_2017.xlsx.* The most recent size standards were issued in 2022. However, the Department used the 2017 standards for consistency with the older Economic Census data.

[657] The 2017 data are the most recently available with revenue data.

[658] For this analysis, the Department excluded independent contractors who are not registered as small businesses, and who are generally not captured in the Economic Census, from the calculation of small establishments.

[659] 2017 Census of Governments. *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

recordkeeping requirements for businesses.

In the Regulatory Impact Analysis, the Department estimates that regulatory familiarization to be one hour per entity and one-half hour per independent contractor. The per-entity cost for small business employers is the regulatory familiarization cost of $52.80, or the fully loaded median hourly wage of a Compensation, Benefits, and Job Analysis Specialist multiplied by 1 hour. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is $11.73 or the median hourly wage of independent contractors in the CWS multiplied by 0.5 hour.

E. Steps the Department Has Taken To Minimize the Significant Economic Impact on Small Entities

The RFA requires agencies to discuss ''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.'' [660] As discussed earlier in section VII.F., the Department does not believe that it has the legal authority to adopt either a common law or ''ABC'' test to determine employee or independent contractor status under the FLSA, foreclosing the consideration of these alternatives for purposes of the RFA.

As explained in section VII.F., the Department considered two other regulatory alternatives: a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule in the new rule; and completely rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance, as the Department had done for over 80 years prior to the 2021 IC Rule. The Department believes that the overall economic impact of retaining some portions of the 2021 IC Rule while issuing a rule to revise other portions of the rule would not minimize the economic impact on small entitles as they would incur costs to familiarize themselves with the new regulation. Similarly, the Department believes that the overall economic impact of fully rescinding the 2021 IC Rule and providing subregulatory guidance, would not necessarily minimize the economic impact on small entities as they would incur some costs to familiarize themselves with any subregulatory guidance. Moreover, as explained in sections III, IV, and V above, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers, particularly over the long term.

[660] 5 U.S.C. 603(c).

IX. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate, or by the private sector. Adjusting the threshold for inflation using the GDP deflator, using a recent annual result (2021), yields a threshold of $165 million. Therefore, this rulemaking is expected to create unfunded mandates that exceed that threshold. *See* section VII for an assessment of anticipated costs and benefits.

X. Executive Order 13132, Federalism

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

XI. Executive Order 13175, Indian Tribal Governments

This rule will not have tribal implications under Executive Order 13175 that require a tribal summary impact statement. The rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 780

Agriculture, Child labor, Wages.

29 CFR Part 788

Forests and forest products, Wages.

29 CFR Part 795

Employment, Wages.

For the reasons set out in the preamble, the Wage and Hour Division, Department of Labor amends Title 29 CFR chapter V, as follows:

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

■ 1. The authority citation for part 780 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219. Pub. L. 105–78, 111 Stat. 1467.

■ 2. Amend § 780.330 by revising paragraph (b) to read as follows:

§ 780.330 Sharecroppers and tenant farmers.

* * * * *

(b) In determining whether such individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

* * * * *

PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

■ 3. The authority citation for part 788 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

■ 4. Amend § 788.16 by revising paragraph (a) to read as follows:

§ 788.16 Employment relationship.

(a) In determining whether individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

* * * * *

■ 5. Add part 795 to read as follows:

PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT

Sec.

Authority: 29 U.S.C. 201–219.

§ 795.100 Introductory statement.

This part contains the Department of Labor's (the Department) general interpretations for determining whether workers are employees or independent

contractors under the Fair Labor Standards Act (FLSA or Act). See 29 U.S.C. 201–19. These interpretations are intended to serve as a ''practical guide to employers and employees'' as to how the Department will seek to apply the Act. *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 138 (1944). The Administrator of the Department's Wage and Hour Division will use these interpretations to guide the performance of their duties under the Act, unless and until the Administrator is otherwise directed by authoritative decisions of the courts or the Administrator concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any act or omission in the course of such reliance, the interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. 29 U.S.C. 259.

§ 795.105 Determining employee or independent contractor classification under the FLSA.

(a) *Relevance of independent contractor or employee status under the Act.* The Act's minimum wage, overtime pay, and recordkeeping obligations apply only to workers who are covered employees. Workers who are independent contractors are not covered by these protections. Labeling employees as ''independent contractors'' does not make these protections inapplicable. A determination of whether a worker is an employee or independent contractor under the Act focuses on the economic realities of the worker's relationship with the worker's potential employer and whether the worker is either economically dependent on the potential employer for work or in business for themself.

(b) *Economic dependence as the ultimate inquiry.* An ''employee'' under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). ''Employer'' is defined to ''include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee.'' 29 U.S.C. 203(d). The Act's definitions are meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work. A worker is an independent contractor, as distinguished from an ''employee'' under the Act, if the worker is, as a matter of economic reality, in business for themself. Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.

§ 795.110 Economic reality test to determine economic dependence.

(a) *Economic reality test.* (1) In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used. These factors are tools or guides to conduct a totality-of-the-circumstances analysis. This means that the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the potential employer for work or is in business for themself.

(2) The six factors described in paragraphs (b)(1) through (6) of this section should guide an assessment of the economic realities of the working relationship and the question of economic dependence. Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular relationship. Moreover, these six factors are not exhaustive. As explained in paragraph (b)(7) of this section, additional factors may be considered.

(b) *Economic reality factors*—(1) *Opportunity for profit or loss depending on managerial skill.* This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

(2) *Investments by the worker and the potential employer.* This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker's investments should be considered on a relative basis with the potential employer's investments in its overall business. The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

(3) *Degree of permanence of the work relationship.* This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is

exercising their own independent business initiative.

(4) *Nature and degree of control.* This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the potential employer's control over the worker include whether the potential employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose. Whether the potential employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control. Actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control. More indicia of control by the potential employer favors employee status; more indicia of control by the worker favors independent contractor status.

(5) *Extent to which the work performed is an integral part of the potential employer's business.* This factor considers whether the work performed is an integral part of the potential employer's business. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part of the business. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the potential employer's principal business.

(6) *Skill and initiative.* This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work. Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

(7) *Additional factors.* Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work.

§ 795.115 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

Signed this 2nd day of January, 2024.

Jessica Looman,

Administrator, Wage and Hour Division.

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Part III

Department of Housing and Urban Development

24 CFR Parts 91, 570 and 1003
Submission for Community Development Block Grant Program, Consolidated Plans, and Indian Community Development Block Grant Program Changes; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91, 570, and 1003

[Docket No. FR–6148–P–01]

RIN 2506–AC52

Submission for Community Development Block Grant Program, Consolidated Plans, and Indian Community Development Block Grant Program Changes

AGENCY: Office of Assistant Secretary for Community Planning and Development and Office of Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: HUD is proposing to revise the Community Development Block Grant (CDBG) and related Section 108 loan guarantee program regulations to make it easier for recipients to promote economic development and recovery in low- and moderate-income communities and support investments in underserved areas. This proposed rule also would revise provisions related to Consolidated Plan and citizen participation requirements for the CDBG program and institute quarterly reporting to improve performance with respect to timeliness. HUD is also proposing to make certain corresponding changes to the Indian Community Development Block Grant (ICDBG) program regulations to align the ICDBG program with the revisions being made to the CDBG program regulations.

DATES: Comments are due by March 11, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this rule. Communications must refer to the above docket number and title. There are two (2) methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

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

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

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

Public Inspection of Public Comments. All comments and communications properly submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Director, Office of Block Grant Assistance, Room 7282, U.S. Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; telephone (202) 708–3587 (this is not a toll-free number) for the CDBG and Section 108 loan programs. Heidi Frechette, Deputy Assistant Secretary for Native American Programs, Room 4108 U.S. Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; telephone (202) 402–6321 (this is not a toll-free number) for the ICDBG program. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301–5320) (hereinafter ''the Act'') establishes the CDBG and complementary Section 108 loan guarantee (Section 108) programs, and the ICDBG program. HUD's regulations implementing: (1) the Consolidated Plan and citizen participation requirements governing the CDBG program are located at 24 CFR part 91, entitled, ''Consolidated Submissions for Community Planning and Development Programs;'' (2) the CDBG program are located at 24 CFR part 570, entitled ''Community Development Block Grants;'' and (3) the Section 108 program are located at 24 CFR 570 subpart M, entitled ''Loan Guarantees.'' The Consolidated Plan regulations were promulgated in 1994 and 1995 (60 FR 1878 and 60 FR 1943; January 5, 1994, and January 5, 1995, respectively), and amended HUD's existing regulations to replace the then-current Comprehensive Housing Affordability Strategies with a rule that combined into a single consolidated submission the planning and application aspects of, among others, the CDBG program. The Consolidated Plan regulations reflected HUD's view that the purpose of the Consolidated Plan submission is to enable States and localities to examine their needs and design ways to address those needs that are appropriate to their circumstances. The ICDBG program regulations, which are located at 24 CFR part 1003, entitled ''Community Development Block Grants for Indian Tribes and Alaska Native Villages,'' were promulgated in 1996 (61 FR 40084, July 31, 1996), and set forth the requirements and procedures for awarding CDBG funds to Indian Tribes.

II. Background

The CDBG and Section 108 Programs

The CDBG program and its loan guarantee component, the Section 108 program, are some of the most potent Federal tools for local governments to assist community and economic development. State and local governments nationwide—each State, more than 1,200 cities and counties, the District of Columbia, Puerto Rico, and four U.S. territories—rely on annual formula CDBG funds to develop meaningful projects and provide essential services that create sustainable, healthy, and prosperous communities for primarily low- and moderate-income persons. The programs' unique flexibility allows grantees to use CDBG funds, as well as Section 108 guaranteed loan proceeds

leveraged from their CDBG allocations, for projects and services that meet each community's needs. As a grantee develops strategies for addressing its needs, however, it generally evaluates the viability of activities that it wishes to include in its program. It may, for example, decide that it wants to invest in an underserved area that it has determined to be a food desert. This investment could take the form of a loan to a business that would agree to construct a food store to serve residents of that area. Such assistance to a business would be subject to the CDBG national objectives criteria and public benefit standards. However, HUD has not substantively updated the national objectives criteria and public benefit standards for economic development activities carried out with CDBG, ICDBG, and Section 108 funds for over twenty years. Changes over time in market conditions, inflation, and evolving community development practices have effectively limited the types of activities grantees could carry out. As a consequence, the grantee's plans could be short-circuited by the inability or unwillingness of a business to comply with the current requirements.

The limitations under the current regulations have thus deprived grantees of viable alternatives when developing programs that would best address their needs, and in some cases prevented communities from using CDBG funds to stimulate potentially transformative economic revitalization outcomes. By removing the impediments and disincentives to the use of CDBG funds for economic development activities, the proposed changes could result in a greater proportion of available CDBG funds being used for economic development. It does not follow, however, that spending more on economic development must result in less spending on other activities, because the additional economic development spending could be funded with loans guaranteed under the Section 108 program. For example, if a grantee wants to undertake an economic development activity but also wishes to carry out another activity, *e.g.,* housing rehabilitation, it could use Section 108 as the funding source for the economic development activity and its CDBG allocation for the other activity. If relatively more CDBG funds are expended for economic development purposes, however, it must be presumed that such increase is the result of grantees having determined that the higher spending level is necessary and prioritized to address their local community and economic development needs.

The ICDBG Program

Under the ICDBG program, HUD provides competitive grants annually to Indian Tribes to carry out eligible activities. The program regulations largely mirror the CDBG program regulations.

Lessons Learned From the COVID–19 Pandemic

HUD and CDBG grantees experienced an unusual opportunity to employ new program policies before making them part of the CDBG program's regulatory canon. The COVID–19 pandemic created a historical economic crisis resulting in the closure of small businesses, significant job loss, and other economic hardship with notable disparities in underserved communities. These exposed and exacerbated impacts and inequities that largely affected underserved persons and communities across the United States, particularly among low-income and underserved populations who were already economically marginalized and lacked housing security. Historically marginalized communities of color, particularly those in racially or ethnically concentrated areas of poverty, disproportionately experienced disinvestment and have been denied economic opportunities. In 2020, HUD oversaw the Community Development Block Grant CARES Act (CDBG–CV) program to provide grants to States, insular areas, and local governments to prevent, prepare for, and respond to the spread of COVID–19. Lessons learned from the quick deployment of CDBG–CV accelerated the grantees' and HUD's understanding of needed program improvements.

The insights gleaned from the CDBG–CV Program informed this important but routine opportunity to update CDBG and ICDBG regulations to introduce pre-tested flexibilities, mainly related to economic development activities; is responsive to feedback from HUD communities; and is informed by the implementation of CDBG and ICDBG over the past several decades. The new regulatory flexibilities implemented with $5 billion in CDBG–CV for communities revealed longstanding hindrances to long-term economic growth, particularly for low- and moderate-income persons.

The flexibilities, waivers and alternative requirements introduced through CDBG–CV for Economic Development Activities enabled grantees to move quickly to help small businesses, particularly for underserved communities while retaining sufficient regulatory controls to ensure program benefit is planned and delivered compliantly. This Proposed Rule enables the Federal Government to continue bolstering economic recovery through job creation while addressing economic inequities, by, for example, strengthening small businesses and investing in enduring job opportunities in underserved communities. On January 20, 2021, the President issued Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (86 FR 7009), and in February 2023, the President issued Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (88 FR 10825), both which call for a whole-of-government effort to advance racial equity and support underserved communities. Further, through Executive Order 14002, Economic Relief Related to the COVID–19 Pandemic (86 FR 7229), issued on January 22, 2021, the President directed Federal agencies to use their full resources to address the economic crisis, specifically to reduce unnecessary barriers and improve coordination among programs funded by the Federal Government. The approach seeks to create opportunities for the improvement of communities that have been historically underserved.

III. This Proposed Rule

Consistent with Executive Orders 13985, 14002, and 14091 and in response to changed market conditions, HUD seeks to provide authority that would allow CDBG grantees and Section 108 borrowers (hereinafter referred to collectively as ''recipients'') to implement funding more effectively and efficiently in their communities.

The proposed changes also would enhance the CDBG program's goal of primarily benefitting low- and moderate-income (''LMI'') persons while removing obstacles that prevent the use of the program in targeted areas and for economic development activities. The proposed changes will not have any impact on the allocation of CDBG funds among recipients. The changes would particularly benefit underserved communities, including historically marginalized communities of color experiencing disproportionate disinvestment and denial of economic opportunities.

The proposed rule also aims to improve data collection to measure effectiveness and improve program outcomes through more effective use of CDBG funds, while ensuring CDBG and

Section 108 recipients use funds efficiently and in a timely manner to benefit their communities. The proposed rule would change national objectives criteria to remove impediments to carrying out economic development activities, update the public benefit standards to allow CDBG and Section 108 recipients greater flexibility in undertaking economic development activities, and incorporate several changes to eligible activities under the CDBG and Section 108 programs. The proposed rule would also simplify regulations to encourage CDBG and Section 108 recipients to invest CDBG funds [1] in underserved communities.

Further, the proposed rule would make corresponding changes to the ICDBG regulations in part 1003, where appropriate, to ensure that the CDBG and ICDBG regulations continue to [align. Finally, the proposed rule would remove outdated provisions and make technical corrections.

The proposed rule could result in incentivizing investment in communities by streamlining and improving mechanisms for greater flexibility of funds to flow to economically distressed communities while signaling the Federal Government's willingness to support these investments. These investments would enable communities to encourage, build, and expand activities that revitalize communities.

A. Targeting Resources Towards Communities With the Greatest Need

HUD wants CDBG and Section 108 recipients to make greater use of CDBG funds in economically distressed communities, particularly those designated through other Federal or State programs. The proposed rule addresses aspects of 24 CFR part 570 that HUD considers to be unnecessarily cumbersome to economic development activities and otherwise proposes to revise or add additional flexibility for CDBG and Section 108 recipients in facilitating economic development. The proposed rule would make it easier for CDBG and Section 108 recipients to carry out job creation and retention activities while reducing recordkeeping burdens on CDBG and Section 108 recipients and assisted businesses [2] alike. HUD has re-envisioned the public benefit standard and proposes to simultaneously remove disincentives for economic development, add flexibility in demonstrating public benefit, and update standards to reflect current and future market conditions. HUD believes these proposed changes would provide CDBG and Section 108 recipients with a greater ability to support business development and assist States and local governments in bolstering job creation.

National Objectives Criteria [3]

HUD's regulations at §§ 570.208,[4] 570.483,[5] and 1003.208 provide the criteria for determining whether a CDBG-, Section 108–,[6] or ICDBG-assisted activity complies with one or more of the national objectives. CDBG recipients must use at least 70 percent of their CDBG funds for activities that benefit LMI persons. An activity may meet the LMI national objective through providing benefit to residents of a particular geographic area, serving a limited clientele, supporting housing activities, or creating or retaining permanent jobs. Additionally, CDBG and Section 108 recipients may meet a national objective by using funds for activities that aid in the prevention or elimination of slums or blight or that meet an urgent community development need. However, the current criteria, including presumptions, are unnecessarily complicated and outdated and can impose substantial burdens on prospective CDBG and Section 108 recipients and assisted businesses. Similarly, the regulations for activities that assist in the prevention or elimination of slums or blight restrict the ability to use CDBG funds for certain types of activities in such areas. HUD therefore proposes the following changes.

Low- and Moderate-Income Criteria—Creating or Retaining Jobs

The most widely used national objective for economic development activities under the CDBG program is the creation or retention of permanent jobs where at least 51 percent of those jobs, computed on a full-time equivalent basis, involve the employment of LMI persons. To demonstrate compliance with the LMI job creation/retention national objective (§§ 570.208(a)(4), 570.483(b)(4), and 1003.208(d)), the activity must be designed to create or retain jobs where at least 51 percent of those jobs are held by or made available to LMI persons. For the retention of jobs, the recipient must also demonstrate that the jobs would be lost without CDBG assistance, and the jobs are known to be held by LMI persons and/or the job(s) can reasonably be expected to turn over within the following two years and that steps will be taken to ensure that the job(s) will be filled by or made available to LMI persons upon turnover. The primary CDBG-assisted activity that uses these national objectives criteria is a special economic development activity carried out under § 570.203 for Entitlement Communities and activities under section 105(a)(17) of the Act by units of general local government in a State's nonentitlement areas.[7] These criteria may also be met by other CDBG-assisted activities, such as assistance to microenterprises under § 570.201(o) or § 570.483(c)(1).

Based on programmatic experience, documenting whether a job is held by or made available to an LMI person can present a financial and administrative burden on recipients due to the data that recipients must gather and collect from assisted businesses. To help alleviate this burden, HUD is proposing to make changes to the presumptions provided in current §§ 570.208(a)(4)(iv), 570.483(b)(4)(iv), and 1003.208(d) (with references to, respectively, §§ 570.208(a)(4)(v) and 570.483(b)(4)(v)) to add a presumption based on the location of an assisted business. Revising the criteria for the presumption would significantly clarify the standards for recipients and encourage greater use of CDBG and ICDBG funds for job creation and retention activities in LMI areas.

The proposed revised regulations accomplish these goals by: (1) standardizing the presumptive poverty

[1] As the term ''CDBG funds'' is defined at § 570.3 to include Section 108 guaranteed loan funds, references to use of ''CDBG'' funds or ''CDBG''-assisted activities in this preamble also applies to Section 108 guaranteed loan funds unless otherwise noted.

[2] An assisted business receives CDBG and/or Section 108 guaranteed loan funds from a recipient to carry out an eligible activity, and must comply with CDBG and/or Section 108 requirements.

[3] This preamble divides the discussion of proposed changes to § 570.208 into multiple sections. In this ''Targeting Resources Towards Communities with the Greatest Need'' section, the preamble discusses proposed changes to §§ 570.208(a)(4) and (b) and 570.483(b)(4) and (c) because the proposed changes affect primarily economic development activities.

[4] 24 CFR part 570 Subpart C—Eligible Activities (§§ 570.200–570.210) applies to CDBG entitlement recipients and Section 108 borrowers.

[5] 24 CFR part 570 Subpart I—State Community Development Block Grant Program (§§ 570.480–570.497) applies to States, nonentitlement public entities receiving Section 108 guaranteed loan funds assistance, and units of general local government in a State's nonentitlement areas that receive CDBG funds.

[6] Nonentitlement public entities receiving Section 108 guaranteed loan funds may be subject to 24 CFR 570.480 through 24 CFR 570.497.

[7] 24 CFR part 570, subpart I—State Community Development Block Grant Program (§§ 570.480–570.497) applies to States, Section 108 borrowers, and units of general local government that receive CDBG funds.

rate with the same standard as was generally required to designate areas as economically distressed [8] (2) requiring recipients to use poverty rates based on American Community Survey [9] (ACS) data, instead of only from the most recently available decennial census; and (3) removing the higher poverty requirement for central business districts, which is not required by statute; this will encourage investments in economically distressed communities, particularly with central business districts that serve as hubs of economic activity. Further, other proposed revisions to the LMI jobs national objective would improve readability and remove references to outdated programs.

Question for comment #1: Would the proposed revised presumption encourage recipients to increase their use of funds for economic development activities? Would the reduced burden on businesses be a significant or decisive factor in encouraging them to use CDBG funds for projects in underserved communities? What is the anticipated effect of eliminating the higher poverty requirement and the other poverty-related policies on private business investment in communities that lack access to opportunity? What are the trade-offs between reaching more areas and having less targeting if the neighborhood poverty threshold is reduced from 30 percent to 20 percent? What other incentives could CDBG recipients establish that would encourage investment in communities, including historically marginalized communities of color, that have historically not received CDBG-funded investment or that experience relatively low private sector investment? How might HUD better encourage economic development in underserved communities, including historically marginalized communities of color, who have had disproportionately experienced disinvestment and have been denied economic opportunities?

Modifying Prohibition on Assisting Relocation

HUD proposes to revise the definition of labor market area (LMA) to allow CDBG grantees and Section 108 recipients more flexibility in providing assistance to relocating businesses. Currently, §§ 570.210(a) (for CDBG entitlement recipients) and 570.482(h) (for States) prohibit grantees from directly assisting businesses that relocate from one LMA to another if the relocation is likely to result in a significant loss of employment in the LMA from which the relocation occurs. Sections 570.210(b)(2) and 570.482(h)(2)(ii) also prevent communities from combining metropolitan LMAs or metropolitan LMAs with non-metropolitan LMAs so that they can provide assistance to a business that relocates within a (combined) LMA. This revision leaves the prohibition intact but provides CDBG and Section 108 recipients with greater flexibility (through revisions of §§ 570.210(b)(2) and 570.482(h)(2)(ii) [10] allowing combination of LMAs) to stay in compliance with requirements.

While the prohibition in §§ 570.210(b)(2) and 570.482(h)(2)(ii) is intended to prevent communities from using CDBG funds to ''shift'' jobs from other communities, it has on balance made it unnecessarily difficult for grantees to provide assistance to businesses even when relocation would not necessarily cause job losses in another community. The definition of LMA (as defined by the Bureau of Labor Statistics) has changed multiple times since HUD instituted the prohibition in 2006, the boundaries of LMAs have changed, and some communities have fallen outside the definitions of both metropolitan and non-metropolitan LMAs. Further, logistics and supply chain changes and developmental changes across communities could allow businesses to retain jobs within a newly defined LMA within commuting distance of the old location (thus not poaching jobs from another community).

For example, a business with a processing plant in a metropolitan LMA received a code enforcement violation that required the business to either expand the plant to remedy the violation or relocate. Since the business was in a denser metropolitan area, it did not have the space to expand the plant. The business identified a location within commuting distance of the plant in an adjacent non-metropolitan LMA. The State CDBG grantee wanted to provide assistance through the non-entitlement unit of general local government to the business as part of the relocation but was prohibited by § 570.482(h)(1) because the relocation would have resulted in job loss in the metropolitan LMA from which the relocation would have occurred. The business could not find other assistance to relocate the plant, and as a result had to close the plant and terminate the jobs at the plant.

Therefore, HUD proposes to allow grantees to combine a metropolitan LMA and a non-metropolitan LMA if the relocation is necessary for business reasons such as code enforcement compliance, or expansion. This would allow CDBG grantees to provide assistance to businesses for relocation for valid business reasons while still preventing communities from poaching jobs from nearby communities.

Prevention or Elimination of Slums or Blight

HUD also proposes to revise the criteria for activities that address slums and blight on an area basis. Some of the criteria for activities to address slums or blight on an area basis are subjective and difficult for HUD to verify and monitor. The proposed revisions to §§ 570.208(b)(1)(ii) and 570.483(c)(1)(ii) would allow the recipient to determine the type of objectively verifiable data that demonstrates that the area is experiencing physical or economic distress, such as abandoned properties and properties with known or suspected environmental contamination. The proposed rule also would update recordkeeping requirements for this revision at § 570.506(b)(8)(ii).

For activities that address slums or blight on a spot basis, the proposed revisions at §§ 570.208(b)(2) and 570.483(c)(2) would remove the requirement that rehabilitation activities be limited to eliminating conditions detrimental to public health and safety. HUD has interpreted ''detrimental to public health and safety'' to mean that the condition must pose a threat to the general public. This requirement presents a major hurdle for recipients seeking to address slums and blight in their communities because it limits rehabilitation activities that recipients can carry out.

For example, a recent Section 108 applicant sought to redevelop a blighted former hotel into a modern mixed-use commercial and residential development; the project required extensive environmental remediation. However, the requirement that rehabilitation activities eliminate conditions detrimental to public health and safety prevented the applicant from allocating CDBG funds toward uses of the project because the conditions were contained within the blighted site and therefore did not pose a threat to the general public. Although the applicant was eventually able to allocate CDBG

[8] Census tract poverty rate of 20 percent.

[9] HUD chooses to use ACS data which provides poverty rates determined by Census Bureau data provided by HUD. This data set includes linkages between HUD's administrative records and a range of information, spanning race to employment status. This enables HUD to use a more cost-effective approach to match its data assets.

[10] These regulations implement the anti-pirating provisions in section 105(h) of the HCDA, added in 1998.

funds to meet the criteria, it was unnecessarily difficult, and the restriction threatened to prevent the applicant from being able to fill the project's financing gap with Section 108 funds.

Question for comment #2: Relative to current requirements, would the proposed revision encourage recipients to carry out activities in underserved and blighted communities and therefore allow recipients to assist economic development in areas most in need of jobs and economic revitalization? If the proposed revision does not encourage recipients to carry out activities in underserved and blighted communities, please explain why and share possible alternative standards that might more effectively balance HUD's goal of enabling recipients broader flexibility with using funds for remediation while still ensuring funds are allocated in a manner that broadly benefits the general public.

Documentation of National Objectives Criteria Compliance—Creation or Retention of Jobs § 570.506

Section 570.506 (for entitlement CDBG and Section 108 recipients) requires each recipient to establish and maintain records sufficient to enable HUD to determine whether the recipient has met applicable requirements, including whether activities meet the criteria for national objectives at § 570.208. Recipients may meet those criteria by carrying out activities (*e.g.,* economic development activities) that benefit LMI persons based on the creation or retention of jobs. The recipient must maintain information on the size and annual income of the person's family, except for activities presumed to benefit LMI persons based upon the census tract where the person resides or in which a business is located. Currently, this information is gathered primarily by the assisted business from employees and their family members. HUD does not prescribe methods for documenting LMI status, so they will vary by grantee (as to the information it requires the business to collect) and by business (ranging from self-certification to externally provided information).

The proposed rule would make two changes to the documentation requirements at § 570.506 to reduce the burden on businesses in documenting jobs held by or made available to LMI persons. First, HUD proposes to clarify that the recipient, instead of the assisted business, may collect information regarding the size and annual income of the person's family to document compliance with the national objective for economic development activities (HUD notes that the recipient may still choose to require that the assisted business collect the data if it prefers). Second, HUD proposes to allow the recipient to substitute records (such as, for example, a certification by the assisted business) showing the annual wages or salary of the job claimed to be held by an LMI person in lieu of maintaining records of the person's family size and income to reduce the information collection burden. Absent evidence to the contrary,[11] HUD will consider a job applicant/taker income-qualified if the annual wages or salary of the job is at or under the HUD-established income limit for a one-person family. HUD already provides similar options to CDBG-Disaster Recovery (CDBG–DR) grantees.[12]

As an example of how this would change how potential LMI jobs are evaluated, under HUD's current policy if an assisted business employed an individual at an LMI-eligible wage, but that individual lived in a family with multiple incomes that, in total, exceeded the LMI-eligibility threshold, then the recipient would not be able to claim that the individual was in an LMI-created or retained job. However, under our proposal, a recipient would now be able to demonstrate eligibility simply through examining the income provided by the job instead of the income received by the job-holder's family. As a result, the assisted business would now be able to claim this individual was in an LMI-created or retained job. HUD notes that while this may, on the margins, result in certain jobs being newly identified as LMI, overall HUD expects this change will substantially reduce burden on documenting these jobs while broadly still identifying the same set of jobs. Moreover, working at the business/position level has the added advantage for auditors of allowing cross checking with State labor databases, which may allow for improved oversight.

This clarification and alternative method would streamline the documentation process, reduce the burden on assisted businesses, and remove a disincentive to use CDBG funds for job creation and retention activities. Presently, the burden of collecting information on family income often falls on the businesses assisted with CDBG funds. Recipients are typically more willing and better equipped than the assisted businesses to collect information regarding the size and annual income of the person's family. This burden operates as a disincentive to many businesses that would otherwise be willing to partner with recipients to carry out job creation and retention activities.

Other entities that receive funding from CDBG recipients to carry out activities, such as non-profit subrecipients, are typically viewed as ''standing in the shoes of the grantee'' and, as such, are required to fulfill the responsibilities that would otherwise belong to the grantee. Businesses, on the other hand, are not subrecipients and typically are inexperienced in executing the functions required of a grantee or a subrecipient, such as collecting income data on family members (*i.e.,* non-employees). Because a business lacks such experience, it often views itself as ill-equipped to perform those functions and is more likely to decline participation in economic development projects. The changes to the documentation requirements for economic development activities address the unique status of businesses in the CDBG program's compliance framework and increase the likelihood that grantees can successfully implement community and economic development strategies.

Question for comment #3: Are the proposed changes to the regulations, such as simplifying recordkeeping requirements, enough of an incentive for recipients to use CDBG funds for economic development activities? Would the reduced burden on businesses encourage them to carry out economic development projects with CDBG funds in underserved communities? Because most grantees provide one-time assistance (such as a loan or grant) to each assisted business and because the wage for the job to be filled must be sufficient to allow the business to attract and retain the employee it needs, HUD does not anticipate this provision will produce any wage pressures. However, would the proposed change to substitute wage information for records of family size and income incentivize employers to keep wages at or below LMI levels in

[11] Such as, for example, evidence that might be brought to HUD's attention based on audits or HUD monitoring.

[12] This approach was pioneered in collaboration with the State of New York after 9/11/2001 and honed further in 2006 after Katrina with the five Gulf Coast States. It has remained in continuous use in CDBG–DR and CDBG–CV and reduced burden substantially for businesses and the grantee while enabling sufficient documentation to support conclusions that at least 51 percent of jobs created or retained are LMI. (It is key to note that 100 percent is not the goal here.) Despite multiple OIG audits reviewing these programs, no findings have emerged bearing on issues with this approach. Given the track record, the main program has probably been overly conservative in not adopting this approach sooner.

order to qualify for assistance? Are there alternative ways that might HUD better encourage economic development in underserved communities, including historically marginalized communities of color, particularly racially or ethnically concentrated areas of poverty, who have disproportionately experienced disinvestment and have been denied economic opportunities?

Special Economic Development Activities § 570.203

Section 570.203 governs the use of CDBG funds for special economic development activities and includes an illustrative list of eligible forms of assistance to private for-profit businesses. Section 570.203(b) already lists forms of support by which recipients can provide assistance to private, for-profit businesses where the assistance is appropriate to carry out an economic development project. HUD has previously interpreted this provision to allow CDBG assistance to New Markets Tax Credit (NMTC) investment vehicles. The proposed revisions would explicitly allow recipients to provide assistance to an economic development project through a for-profit entity that passes the funds through a financing mechanism (*e.g.,* Qualified Opportunity Funds and NMTC investment vehicles). This clarification would make clear that such assistance through a financing mechanism is not limited to NMTC investment vehicles and is eligible under § 570.203(b). Many economic development activities are carried out in conjunction with other forms of assistance and Federal tax benefits that provide additional sources of financing for economic development, particularly in LMI areas. HUD wants to facilitate the use of CDBG funds by recipients to fill financing gaps that cannot be met by other sources and launch critical economic development projects, particularly in underserved communities with a history of disinvestment, by eliminating the time to seek additional clarification from HUD on activity eligibility for individual projects to streamline the process for use of CDBG funds.

HUD proposes to clarify at § 570.203(c) the types of eligible job training or employment services. Currently, to be eligible as an economic development service under § 570.203(c), the job training or employment support services must be provided to or involve specific job positions resulting from the assistance being provided. HUD has discovered numerous situations in which grantees have provided CDBG funds for general employment readiness programs (such as interviewing skills or resume-writing classes) and attempted to categorize such classes as economic development services. To be eligible economic development services, the beneficiaries must either have been selected for or be under active consideration for specific job positions. If the individuals are not receiving training for specific positions at a specific business, general employment readiness programs or trainings for individuals in career fields are eligible only as public service activities or, in limited cases, as part of a § 570.204 community economic development project carried out by a Community-Based Development Organization.

HUD notes that it is not proposing any changes that would expand microenterprise assistance under § 570.203. Section 570.201(o) of the Code of Federal Regulations and section 105(a)(22) of the Act provide thorough avenues for CDBG grantees to assist microenterprise activities; likewise, sufficient authority currently exists for Section 108 borrowers to assist many microenterprise activities through economic development activities authorized under § 570.203(b).

Public Benefit Standards § 570.209

Section 570.209 contains guidelines and standards for carrying out economic development activities under § 570.203 and, in some instances, § 570.204.[13] The recipient is responsible for ensuring that at least a minimum level of public benefit is obtained from the expenditure of CDBG funds. HUD has discretion in identifying and determining the nature of the public benefit and their standards for measuring their acceptability. The changes proposed for the public benefit standards are based on feedback and experiences of recipients for the past thirty years. The public benefit standards set forth the types of public benefit that will be recognized and the minimum level of each that must be obtained for the amount of CDBG funds used. CDBG recipients must meet standards for their aggregated activities during the program year as well as for each individual activity. The current regulations provide two options for meeting the aggregate and individual standards: creating or retaining permanent jobs or providing goods or services to LMI residents of the area served by the activity. For activities addressing public benefit through creation/retention of jobs, the maximum amount of CDBG/Section 108 assistance per full-time equivalent (''FTE'') job for activities in the aggregate is $35,000; for individual activities, the maximum is $50,000. For activities providing goods or services to residents of an area (*e.g.,* grocery stores, laundromats, food banks, pantry items, drug stories), the maximum amount of CDBG/Section 108 assistance per LMI person served for activities in the aggregate is $350; for individual activities, the maximum is $1,000.

HUD established these standards in 1995 as required by section 806(a) of the Housing and Community Development Act of 1992 (the ''1992 Act'') (Pub. L. 102–550, 106 Stat. 3672). This provision of the 1992 Act required HUD to establish by regulation guidelines to assist CDBG recipients to evaluate and select economic development activities for assistance with CDBG funds. Subsequent inflation has resulted in CDBG funds no longer supporting the same proportion of the costs of creating and retaining jobs as they did when HUD created the standards. This precludes recipients from using CDBG funds for some economic development activities and has made recipients increasingly less able to feasibly implement economic development activities. For example, in program year 2012, approximately $238 million in CDBG funds were used to support almost 2,000 economic development activities, whereas, by 2022, only $69 million in CDBG funds were used to support about 1,100 economic development activities. Further, HUD believes the two options do not provide recipients enough flexibility in demonstrating a public benefit.

The proposed changes re-envision the public benefit standards for economic development activities and would allow recipients to better support business development, stimulate job growth, and provide needed goods and services to LMI persons. HUD can facilitate economic development while simultaneously furthering the purpose of the 1992 Act through the following proposed reforms to the public benefit standards: (1) eliminating the aggregate standard; (2) raising the individual standard to $100,00 per full-time equivalent, permanent job created or retained and $2,000 per LMI person to whom goods or services are provided by the activity; (3) adding an alternative standard which HUD must approve in writing whereby recipients can demonstrate that the activity would create a significant public benefit despite not meeting the jobs or services standards (such as being part of a hazard mitigation and climate change resilience

[13] For recipients under subpart I, § 570.482(f) applies to activities pursuant to sections 105(a)(14), (15), and (17), and certain activities eligible under section 105(a)(2) of the Act.

strategy for an LMI area, supporting critical infrastructure, or meeting a community benefit defined or described in the requirements governing another Federal program); and (4) providing Section 108 applicants the option to allow HUD to calculate the cost of an economic development activity on a net present value basis to more accurately reflect the lower cost of an activity funded with a loan (which generates a return of the original CDBG outlay) versus an activity that involves a grant or other form of subsidy.

First, HUD's proposal to eliminate the aggregate standard at §§ 570.209(b)(1) and 570.482(f)(2) stems from the disincentive it has created to use CDBG funds for economic development and because it is burdensome beyond any observed benefit. (The Public Benefit Standards are applied to the average of the expenditures for the activities funded over a 12-month period.) In particular, recipients with low-volume economic development programs effectively apply the aggregate standards to individual activities in an effort to reduce the risk of failing to comply. In other words, the original intention to an aggregate standard was to give recipients flexibility to occasionally target activities that were more costly. That flexibility has not worked out in practice.

For example, a grantee may identify a high-impact project at the beginning of its program year that would create one job per $50,000 of CDBG assistance; however, local market conditions could make it difficult to predict how many other economic development activities would be assisted and how many jobs would be created. Faced with this uncertainty, the grantee may hesitate to provide funds to the high-impact project for fear of not meeting the aggregate standard. This scenario reflects how the aggregate standard restricts the ability of recipients to leverage CDBG funds for high-impact investments in their communities, particularly through Section 108 loan guarantees, because providing funds at the maximum level of the individual standard for one activity would require funding other economic development activities at public benefit levels significantly below the aggregate standard.

Additionally, the number of exceptions from the aggregate standard creates confusion for borrowers in planning their economic development programs, making the standard overly burdensome. (See current §§ 570.209(b)(2)(v)(A) through (N) and 570.482(f)(3)(v)(A) through (N)).

Second, HUD proposes to raise the dollar thresholds at §§ 570.209(b)(3)(i)(A) and (B) and 570.482(f)(4)(i)(A) and (B) for the individual standard. Maintaining the current standards would continue to hinder recipients' ability to use CDBG funds for future economic development activities and limit recipients' ability to leverage CDBG funds through revolving loan funds and Section 108 loan guarantees. The $100,000 and $2,000 amounts approximate the inflation-adjusted value of the current standards. HUD believes that updating these standards to reflect market conditions would allow CDBG funds to be more competitive for use in economic development activities. By comparison, the Small Business Administration (SBA) 504 Loan program allows a benefit of up to $100,000 per job created depending on the type of activity. HUD also proposes to include a provision at §§ 570.209(b)(5) and 570.482(f)(6) that would permit HUD to issue periodic notices to update those values (and the net present values for Section 108 borrowers, as described below) to reflect inflation.

Question for comment #4: Would the proposed changes encourage a recipient to target CDBG projects in underserved communities in their jurisdiction? Would the proposed individual standards more accurately reflect the amount of CDBG funds necessary to carry out job creating activities? What is the likely effect on investment in underserved areas? How might HUD better encourage economic development in underserved communities, including historically marginalized communities of color, particularly racially or ethnically concentrated areas of poverty, who have disproportionately experienced disinvestment and have been denied economic opportunities? How frequently should the standard be updated for inflation, and should HUD update the standard automatically with a self-executing inflation calculation?

Third, the public benefit standards provide a narrow choice of two measures for determining a public benefit: amount of assistance per job created or retained or amount per LMI person served by the activity. HUD believes these measures provide insufficient options to measure the public benefit a project may provide. For example, the SBA 504 Loan program offers recipients who cannot meet the minimum jobs requirement an alternative of meeting one of eighteen community development, public policy, or energy reduction measures. While HUD understands the value of having objective and uniform benchmarks for demonstrating public benefit, the current standards unduly restrict recipients' ability to demonstrate public benefit through use of CDBG funds for economic development activities. Further, CDBG assistance for small businesses may be used with funding under another Federal program (*e.g.,* SBA) that has different standards. To provide flexibility to recipients in demonstrating such an alternative public benefit, proposed provisions at §§ 570.209(b)(3)(iii) and 570.482(f)(4)(iii) would permit HUD to approve requests by recipients that an applicable activity demonstrates an acceptable public benefit if the activity would result in a significant contribution to the goals and purposes of the CDBG program.

Question for comment #5: How can recipients demonstrate an alternative public benefit? For example, an increasing number of communities have either used or explored using CDBG funds for critical lifeline projects that have received funding from other Federal agencies, including the U.S. Department of Energy and the Federal Emergency Management Agency. Would it be appropriate to use objectives for other Federal programs to satisfy the CDBG program public benefit standards? Should there be additional criteria for what can be considered an alternative public benefit, and if so what might they be?

Fourth, HUD proposes to add a new option for Section 108 applicants at §§ 570.209(b)(3)(ii) and 570.482(f)(4)(ii) that would address the concerns expressed by program participants regarding a disparity in treatment of economic development assistance in the form of a loan and other forms of assistance, such as grants, when measuring public benefit. When a recipient uses CDBG funds for an economic development activity in the form of a loan to a third party (*e.g.,* a business), the loan is expected to be repaid over some term. Any repayment of that loan reduces the ultimate cost of that activity to the CDBG program. On the other hand, when a recipient uses CDBG funds to make grants to third parties, the cost to the CDBG program is the actual amount of the grant. The existing regulations Section 108 treat activities that involve loans in the same way they treat activities that involve grants: *i.e.,* the cost of an activity is measured based on the nominal amount of the assistance provided to the third party. This treatment distorts the cost per unit of output (*e.g.,* jobs) for an activity that provides assistance in the form of a loan because the standard fails to measure the actual cost of the activity accurately. Although HUD recognized this disparity when it first proposed the

public benefit regulations, it did not provide an alternative to use of the nominal amount of the loan for calculation of the public benefit due to the complexity of implementing an alternative methodology for use by recipients. Now, however, HUD could use the procedures and models prescribed by the Office of Management and Budget (OMB) for determining the ''credit subsidy cost'' to the Federal Government of making direct Federal loans to determine the cost to a grantee's CDBG program of carrying out activities that involve loans from Section 108 recipients to third parties. These proposed procedures for determining the cost of such third-party loans through calculating the cost of the activity based on the net present value of the activity would address the concerns expressed to HUD by recipients regarding measuring the true cost to the CDBG program of an economic development activity that involves a loan to a third party. HUD can address its original concern about using an alternative methodology by reserving the use of an alternative measure of public benefit to Section 108-funded activities when HUD can determine the cost of a loan to the CDBG program through using a methodology routinely applied under Federal credit programs. HUD will describe in a separate notice the procedures it will use in calculating the cost of a loan.

Question for comment #6: Would the proposed option for measuring the public benefit for loan activities on a net present value basis facilitate the use of Section 108 financing for economic development activities?

B. Improving Data Collection From the CDBG Program To Measure Effectiveness

Revision of Consolidated Plan Publication Requirements as Identified in Citizen Participation Plans §§ 91.105(b), 91.115(b)

Entitlement and State recipients must identify in their citizen participation plans how they will publish their Consolidated Plans in a manner that permits their residents, public agencies, and other interested parties an opportunity to examine their contents and submit comments. HUD expects each grantee to undertake a multifaceted approach to publication after considering the nature of the jurisdiction and its citizens. The principle for jurisdictions is to create and implement a citizen participation plan designed to get program-related information to and from persons who will be affected by the contents of the Consolidated Plan or who may seek to participate in the grantee's programs.

HUD proposes to amend §§ 91.105(b)(2) and 91.115(b)(2) to encourage grantees to use additional forms of communication to make citizens aware of publication of the Consolidated Plan. The proposal adds methods of making the Consolidated Plan publicly accessible to persons with disabilities and provide meaningful access to limited English proficient persons, such as: email; text message (SMS); social media; media advertisements; public service announcements; notifying neighborhood organizations; and placement of hard copies of the Plan in public places such as libraries and neighborhood centers, and notifications on grocery store bulletin boards. These sections illustrate new examples of optional publication methods but are not required. HUD already considers these proposed methods to be valid and useful methods of publishing Consolidated Plans and encourages grantees to update citizen participation plans to include these methods. Recipients are reminded that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the implementing regulations at 24 CFR part 8, which provides rights to persons with disabilities in HUD-funded programs and activities, continue to require grantees to ensure effective communication for persons with disabilities, and that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* and its implementing regulations, require a recipient to take reasonable steps to provide language assistance to ensure meaningful access to programs and activities for persons who are limited English proficient (LEP).

Adding Substantial Amendment Criterion to the Citizen Participation Plan § 91.105(c)

Section 91.105(c)(1) requires an entitlement grantee to identify in its citizen participation plan what it considers to be a substantial amendment to its Consolidated Plan. This provision also states that a recipient must consider a change in the use of CDBG funds from one eligible activity to another as a substantial amendment to its Consolidated Plan. However, the provision does not state that adding activities not previously listed in a recipient's Consolidated Plan or Action Plan is a substantial amendment.

Since a recipient is required to notify the public of all the activities it intends to carry out with CDBG funds, HUD proposes to clarify that adding an activity not previously identified in the Consolidated Plan or Action Plan must be considered a substantial amendment in the citizen participation plan.

Setting Quantitative, Neighborhood Level Goals in the Consolidated Plan and Measuring Performance in Reports §§ 91.215, 91.520

Section 91.215(a)(1) requires local government recipients to identify the general priorities for allocating investment geographically within the jurisdiction. HUD has observed that many grantees target some or all activities geographically. To the extent that a local government recipient chooses to target investment (as opposed to undertaking jurisdiction-wide activities), HUD proposes to require recipients to set at least one quantitative, neighborhood-level outcome goal in their Consolidated Plan and to report performance in the Consolidated Annual Performance and Evaluation Reports (CAPERs). This would enable HUD to assess local government recipients' progress in addressing housing, homeless assessment, and other identified needs on a sub-jurisdiction level and provide a richer understanding of how grant funds enable grantees to achieve local community development objectives. HUD proposes to change § 91.520(d) to require an entitlement grantee to report in the CAPER at least one quantitative, neighborhood-level outcome goal accomplishment related to one or more sub-jurisdiction priority, if established pursuant to § 91.215(a)(1).

Section 91.215(g) encourages entitlement recipients, through the Consolidated Plan, to identify locally designated areas that are being targeted for neighborhood revitalization efforts that are carried out through multiple activities in a concentrated or coordinated manner. In this rule, HUD proposes to add examples of areas that may be targeted for neighborhood revitalization efforts. These areas can include areas that were designated as economically distressed areas by the Federal Government or the State that exhibit significantly high levels of poverty or low median income, including historically underserved and marginalized communities. HUD believes that encouraging entitlement recipients to consider targeting efforts in these areas during the planning process will result in recipients developing a more holistic understanding of the needs of these areas and how they can best use CDBG funds to revitalize such areas.

C. Improving Program Outcomes

Mixed-Use Properties §§ 570.3, 570.200

Mixed-use properties have become increasingly popular as development trends across the country have encouraged locating residential units, office space, and/or commercial space on the same property and often in the same building. Section 570.200(b)(1) contains special policies governing facilities containing both eligible and ineligible uses. It allows recipients to provide funds for a public facility otherwise eligible for assistance under the CDBG program even if it is part of a multiple-use building containing ineligible uses. Recipients may also provide funds for an eligible activity in a multiple-use property (that is not a public facility), but the existing regulation lacks clarity on the circumstances when such use is permissible. This lack of clarity limits recipients from using CDBG funds for eligible activities in mixed-use properties.

HUD proposes to revise § 570.200(b)(1) to clarify that recipients can assist eligible activities if they are part of mixed-use properties that also contain ineligible uses, so long as the recipient expends CDBG funds only on the eligible use. The revised provision would continue to allow for CDBG and Section 108 guaranteed loan funds to be involved in such a project so long as there is an eligible activity that costs can be allocated to cover. While the prohibition on new housing construction is applicable for both Section 108 borrowers and CDBG recipients pursuant to § 570.207(b)(3), costs in mixed-use and mixed finance developments may be allocable under the new draft regulation and our current interpretation of the requirements. HUD expects this revision would facilitate economic development by expanding the scope of activities for which recipients can use CDBG funds. The proposed rule also would add a definition of ''mixed-use property'' at § 570.3.

Closeout § 570.509

HUD proposes to amend the CDBG closeout regulations at § 570.509 to conform with 2 CFR 200.344 and with the proposed modifications to timeliness at § 570.902. Under this proposal, HUD would have the flexibility to separately cancel a grantee's financial access to a grant and remove the grant's availability from the line of credit while allowing some additional time, if needed, for a grantee to meet certain program requirements, such as meeting a national objective. HUD expects that each grantee will expend all funds and close out each grant financially by the end of the eighth program year of the grant.[14] Further, the proposed rule would make clear that certain requirements survive grant closeout, such as but not limited to record retention responsibilities and property management. Although the proposed changes would explicitly separate the grant programmatic closeout procedures from financial account cancellation procedures, they would not change the requirement that final annual performance reports are due within 90 days after the close of the jurisdiction's program year.

For example, a grantee uses the remainder of one grant's funds to acquire a school to convert to housing. The grantee uses funds from other sources for construction costs. Under this proposal, HUD could cancel the financial account while explicitly retaining the ability to enforce compliance with all program requirements related to the activity underway, particularly those bearing on national objectives. The regulations would continue to govern change of use requirements (*e.g.,* investments such as community centers or parks).

HUD recognizes that there are many things that could disrupt a grantee's intended timeline for activity completion: litigation, disasters, limited construction seasons due to weather, or other extenuating circumstances. To complete all program activities, including, but not limited to, meeting national objectives and satisfying reporting requirements, grantees are permitted to request an extension of up to two years of the six-year period of performance proposed in the *Continuing Capacity* section of this rule.

Question for comment #7: Would other or additional modifications to the closeout process ease grantee burden and ensure that HUD can confirm that grantees have met programmatic requirements prior to closeout?

D. Addressing Poor Performance

Repayment of CDBG Funds for Disallowed Costs §§ 570.495, 570.910

Sections 570.495 (for State recipients) and 570.910 (for entitlement recipients) provide corrective and remedial actions that HUD may impose on recipients when HUD identifies deficiencies in recipient performance. HUD may disallow costs if recipients expend CDBG funds for ineligible activities or for activities that do not meet a national objective, or do not comply with 2 CFR part 200, subpart E, cost principles. Currently, HUD advises recipients to reimburse their CDBG program account or letter of credit with non-Federal funds based on 2 CFR 200.405(c), which states that any cost allocable to a particular Federal award (or cost objective) under the principles provided for in 2 CFR part 200 may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by Federal statutes, regulations, or terms and conditions of the Federal awards, or for other reasons. However, this prohibition would not preclude the non-Federal entity from shifting costs that are allowable under two or more Federal awards in accordance with existing Federal statutes, regulations, or the terms and conditions of the Federal awards. In addition, 2 CFR 200.441 states that costs resulting from non-Federal entity violations of, alleged violations of, or failure to comply with, Federal, State, Tribal, local or foreign laws and regulations are unallowable, except when incurred as a result of compliance with specific provisions of the Federal award, or with prior written approval of the Federal awarding agency.

However, part 570 does not clearly state the source of repayments as the result of such violations. The proposed rule would explicitly do so in §§ 570.495(a)(4) and 570.910(b)(5) and would also make clear that recipients must make repayments for disallowed costs with non-Federal funds. In lieu of such repayments, HUD proposes to revise § 570.495(a)(4) and add § 570.910(c) to permit a recipient to request a voluntary grant reduction (VGR) from a current or future year's allocation of funds. VGRs have long been used in lieu of repayment, and this proposed rule would codify the policy and the procedure for requesting a VGR.

Timely Performance § 570.902

This rule proposes to revise § 570.902 to institute regular quarterly public reporting by HUD on grant progress for entitlement grantees, with each grant labeled (*e.g.,* ''first year,'' ''on track,'' or ''under target'') based on the pace of expenditure necessary to achieve grant closeout by the target date at the end of the period of performance. HUD's increase in frequency of public reports will use existing grant data to provide grantees with additional time to make adjustments to their respective programs. The public report may be used by citizens for information, grantees for management information,

[14] CDBG grant funds not disbursed from the grantee's line of credit after eight years will be cancelled and recaptured by the U.S. Department of Treasury at the end of the eighth Federal fiscal year due to statutory and regulatory requirements.

and HUD for risk assessment, oversight, and as a signal for technical assistance needs. HUD believes this would improve the current system of only providing timeliness feedback to grantees and HUD Field offices annually. With more frequent progress information, grantees should be able to adjust their programs more nimbly and avoid timeliness issues.

Section 104(e)(1) of the Act requires that HUD annually determine whether each CDBG grantee has carried out its activities in a timely manner. HUD must also assess whether each grantee has continuing capacity to carry out activities in a timely manner. Under the existing entitlement regulations at § 570.902, HUD measures timely performance at a single, annual point in time and communicates any issues to a grantee via letter. In accordance with the existing regulations, an entitlement grantee must meet an ''all open CDBG grants'' portfolio standard, requiring it to have a total undisbursed portfolio balance no greater than 1.5 times its most recent annual grant amount remaining in the line of credit. HUD conducts this test 60 days prior to the end of the grantee's program year, and in recent years, HUD has put increased emphasis on enforcing timely expenditure using this standard.

HUD considers a grantee to have timely performance issues if its portfolio balance exceeds 1.5 times its most recent annual grant amount for two years in a row. If this happens, HUD first offers the grantee a chance for an informal consultation with program officials prior to determining a corrective action or sanction. A common course of action for HUD in cases of continued grantee timeliness issues is reducing the next year's grant allocation of a grantee.

Although the timeliness regulations and procedures comply with the statutory direction, the combination of the annual 1.5 standard with the adoption of grant-based accounting and stagnant CDBG grant amounts appears to have created an unintended—and undesired—consequence. HUD has observed grantees budget and use more funds for annual ''soft'' expenditures, such as code enforcement, administration, planning, public services, and salaries for activity delivery, and less funds directly assisting major brick-and-mortar activities. HUD's observations and grantee feedback indicate that HUD's enforcement of the existing timeliness standard has resulted in pressuring grantees' local funding decisions away from large brick-and-mortar activities, which characteristically deliver greater benefits but require longer expenditure timeframes. Grantees are making funding and priority decisions based less on long-term community needs than on a need to comply with the portfolio balance requirement. For example, a large Midwest city recently identified the need to comply with the 1.5 requirement as the reason for its choice to assist an activity providing sidewalk improvements in low-income neighborhoods even though it believed a better fit for its community development priorities would be a significant multi-unit, multi-structure, housing rehabilitation project. HUD has noted numerous other similar examples during informal timeliness consultations.

This concerns HUD because the objectives of the CDBG program at section 101(c) of the Act emphasize development of viable urban communities by providing suitable living environments. If the timeliness enforcement standard is causing grantees to shift funding decisions away from activities generating long-lasting improvements, the standard undercuts the purposes of the Act.

Further, the current timeliness standard incorrectly captures both high- and low-capacity grantees. An adjusted line of credit balance in excess of 1.5 times the grant amount, measured at a point in time in the grantee's program year, is not always an indicator of poor performance. Higher-capacity grantees who try to budget substantial portions of two or more grants for a major local project are identified incorrectly by the existing standard as low-performing. These grantees do not typically exhibit non-compliance in other areas of their portfolio and their HUD Field office grant managers frequently vouch for their capacity to deliver the expected project benefits. Current timeliness requirements can discourage activities that if not for these requirements would otherwise advance statutory program objectives. Conversely, low-capacity grantees with known problems across a decade or more, have sometimes not been captured under this current requirement.

Lessons learned from implementation of other programs incorporating the CDBG framework, including the Neighborhood Stabilization Program (NSP) and other CDBG–DR appropriations, helped inform this proposal. Several versions of obligation, expenditure, and other progress standards have existed in these programs, with mixed results. For example, obligation deadlines in the first NSP funding round and some early CDBG–DR grants caused grantees to select some projects less aligned with community needs and goals. Recent CDBG–DR rules, which combine a period of performance based on actual community development practice with public tracking reports, have provided a simple, workable standard that enables local choices while enhancing transparency and accountability. The takeaway from HUD's experience with timeliness is that the enforcement mechanism influences local choices towards or away from significant construction activities and may affect the pace of grant disbursement, and that applying a new standard for CDBG grantees will better serve the purpose of the Act.

This proposal seeks to enhance oversight of timeliness while reducing pressure on grantees to fund minor, quickly implementable activities or soft costs rather than providing assistance for larger projects with more significant local community development outcomes. This approach would set a standard for a clear lack of continuing capacity for timely implementation, comply with the Act, and better accommodate eligible major construction activities. The rule would also set, for the first time, a separate standard for grantee continuing capacity (see below for further detail).

Timeliness and Program Income §§ 570.489, 570.504

Note that the rules related to the intersection of timeliness and program income would not change under this proposal. The Act and the current regulations provide that program income received by a grant recipient or subrecipient is additional CDBG funds. The regulations would continue to require that grantees use available program income prior to additional drawdown of line of credit funds. However, revolving funds are a special case. This proposed rule addresses revolving funds because some grantees have inappropriately used these accounts to simply hold program income, effectively evading timely expenditure requirements. The proposed timely expenditure standard for revolving funds is that grantees use at least one half of a fund's balance (taken at the beginning of the program year) for eligible revolving fund activities or re-program the unused amount each year. The proposed rule seeks to prevent grantees from placing program income in revolving funds indefinitely with new language at § 570.504(f) that would permit HUD to take corrective actions against entitlement grantees with inactive or excessive revolving funds. HUD also

proposes to hold States accountable for ensuring that revolving funds remain active adding a new § 570.489(f)(4).

Continuing Capacity § 570.902

The current regulations do not provide a standard for determining that a grantee no longer has the continuing capacity to carry out activities in a timely manner. Although this proposed rule does not change HUD's ability to assess capacity on a case-by-case basis to determine capacity, it would add a data-driven measure of lack of capacity: a portfolio consideration of a grantee's continuing capacity to deliver activities in a timely manner based on overall progress under multiple grants over a rolling four-quarter period rather than by a single annual snapshot of the aggregate balance. At any given time, each grantee will have up to six grants (or up to eight if a period of performance waiver is provided) available in its CDBG line of credit. Proposed § 570.902(a)(4) would provide that if any three or more of those grants are simultaneously identified as Slow Spenders for four or more consecutive quarters, HUD would determine that the grantee lacks the continuing capacity to undertake timely program activities, will provide an opportunity for an informal consultation meeting, and will then take appropriate action, including corrective action or sanction up to and including a reduction to the grant amount for the succeeding program year.

Question for comment #8: In proposing this shift, HUD is aware that the overall balance of funds in CDBG lines of credit may increase. Given the commitment to quarterly public status reports at the grant level, is this problematic? If yes, how? Also, if yes, suggest an alternate approach. If you are a grantee, will the timeliness proposal affect your local activity choices in favor of transformative or major construction projects? Additionally, the Department seeks feedback from the public, including from States, on whether it would be appropriate to apply the proposed new timeliness requirements for entitlements to States.

Criteria for National Objectives—Meeting a National Objective, Appropriate Data Source §§ 570.200, 570.208, 570.483

The proposed rule would add a time period for CDBG-assisted activities to meet one of the three national objectives of the CDBG program. Currently, there is no time period in which CDBG-assisted activities must meet a national objective. This lack of a defined period of time for an activity to meet a national objective undercuts the primary purpose of the Act because recipients cannot demonstrate that they are using CDBG-funded activities to develop viable urban communities by providing decent housing, a suitable living environment, and expanding economic opportunities, principally for LMI persons.

To ensure that recipients fulfill the purpose of the Act and that CDBG-assisted activities benefit LMI persons and households, HUD proposes that activities be given six years from the initial drawdown of CDBG funds to meet a national objective or the length of the period of performance and any extension permitted under § 570.509, whichever is shorter. HUD believes that six years is an adequate time period for recipients to demonstrate that an activity will meet a national objective. HUD proposes to revise § 570.200(a)(2) requiring recipients to demonstrate that activities carried out under Subpart C meet a national objective within six years of the initial drawdown of CDBG funds for an activity.

HUD also proposes to remove multiple references in §§ 570.208(a) (for entitlement recipients) and 570.483 (for State recipients) to sources of data recipients should use in determining income characteristics, such as poverty and income levels, of potential beneficiaries or areas served. Notice CPD–19–02, published February 14, 2019 (*https://www.hud.gov/sites/dfiles/OCHCO/documents/19-02cpdn.pdf*), provides recipients guidance on using data for compliance with CDBG, CDBG–DR, and NSP grant requirements.[15] The proposed rule would direct recipients to use information provided by HUD to the fullest extent feasible as opposed to the most recently available decennial census data, which may have become outdated and difficult to locate.

Question for comment #9: Is six years from the initial drawdown of CDBG funds an adequate time period to demonstrate that activities have met a national objective?

E. Clarifying the Eligible Uses of CDBG

Definitions §§ 570.3, 570.206, 570.481

Activity Delivery Costs

Recipients and subrecipients may incur costs related to carrying out specific activities eligible under §§ 570.201–570.204 and 570.703, which are typically referred to as ''activity delivery costs.'' Unlike program administrative costs that are eligible under § 570.206 for overall program management, coordination, monitoring, and evaluation, a recipient incurs activity delivery costs on an activity-by-activity basis. The regulations do not specifically define this term; therefore, HUD proposes to add a definition at § 570.3. HUD proposes to define activity delivery costs as the allowable costs of work performed by a recipient, subrecipient, or contractor in carrying out specific activities eligible under §§ 570.201–570.204 (for CDBG entitlement recipients) and 570.703 (for Section 108 borrowers). For example, under this proposal, a grantee could charge 20 percent of an employee's salary and related expenses (*e.g.,* fringe benefits) to an activity provided it maintains records that support the allocation of costs to the activity. Some grantees would choose to maintain such records to ensure they do not exceed the cap on program administrative costs.

Recipients, subrecipients, and contractors must use the cost principles at 2 CFR part 200, subpart E in determining the allowability of the costs. In particular, recipients, subrecipients, and contractors must ensure that activity delivery costs consisting of staff salaries are allocable to the specific activity and adequately documented. HUD proposes a new reference in the introductions to § 570.206 to emphasize that activity delivery costs for CDBG entitlement recipients are separate from program administrative costs.

Elderly

CDBG recipients and subrecipients carry out public services that specifically benefit elderly persons. Recipients across the United States have widely varying definitions of ''elderly'' that they use for CDBG-assisted activities that specifically target this population. Because part 570 does not define the term ''elderly,'' HUD has received requests for guidance regarding the definition of elderly. Although ''elderly person'' is defined at § 5.100, HUD believes including the definition at § 570.3 would make clear the definition of ''elderly'' for certain CDBG-assisted activities. HUD proposes to add the definition of elderly at § 570.3 that states that for activities pursuant to § 570.202, ''elderly'' means a person 62 years of age or older. This definition would align CDBG-assisted housing activities with other HUD programs. However, HUD would continue to permit CDBG recipients and subrecipients to define ''elderly'' consistent with State law to permit recipients the flexibility to carry out non-housing activities that benefit elderly persons.

[15] This data is based on the American Community Survey 2011–2015 5-year estimates and may be found at *https://www.hudexchange.info/programs/acs-low-mod-summary-data/.*

Entitlement Amount

The definition of entitlement amount contains a reference to ''a metropolitan city and an urban county.'' Periodically, OMB issues bulletins that contain revised delineations of metropolitan statistical areas, micropolitan statistical areas, and combined statistical areas. These bulletins update OMB's designations of metropolitan areas, counties included in metropolitan areas, and principal cities of those metropolitan areas. These principal cities usually have populations below the statutory threshold of 50,000 to become a metropolitan city but are considered principal cities of the metropolitan areas in which they are located. Therefore, HUD proposes to add the term ''principal cities'' as designated by OMB in the definition of ''entitlement amount'' at § 570.3 because HUD considers principal cities entitlement recipients that will receive a CDBG grant if they accept entitlement status.

Period of Performance

HUD proposes to add a definition of ''period of performance'' in §§ 570.3 and 570.481(a)(4) that would provide recipients a six-year time period to expend a grant's funds or the length of the origin year grant's period of availability for expenditure in accordance with §§ 570.200(k) or 570.480(h), whichever is shorter, beginning on HUD's approval of a grant agreement for a given grant. The proposed definition would apply to the proposed closeout procedures at § 570.509 and timeliness requirements at § 570.902. For Section 108 loan guarantees, the period of performance begins on the date of HUD's guarantee of a promissory note or other obligation and confers the same six-year time limit.

Under the Federal financial rules at 2 CFR 200.211(b)(5) every Federal grant must have a designated period of performance. For CDBG grants, HUD began adopting these rules in 2015. Under CDBG appropriations, HUD has allowed the period of performance to be the statutory availability of grant funds. In general, HUD has up to three years to obligate grants, and there are five additional years of funding availability. For example, grants from the 2014 appropriation are no longer available for expenditure after September 30, 2021.

Drawing from lessons learned, HUD looked to CDBG–DR grantees' fund expenditure patterns. In developing the CDBG–DR timely expenditure expectations, HUD reviewed the spending performance of CDBG–DR grants awarded in response to disasters in 2006 and 2008. In May 2013, HUD reviewed historical data on quarterly disbursements of funds from these appropriations. This analysis concluded that most CDBG–DR-funded recovery activity is completed within three to four years, and the recovery of CDBG–DR grantees is largely complete after six years. For an average grant, the third year following grant agreement execution typically shows the peak amount of expenditures. Program experience with annual CDBG grantees, who generally have fewer challenging programs than do CDBG–DR grantees, indicates that a six-year period of performance would be generous for both entitlements and State grantees.

Question for comment #10: Is the proposed six-year period of performance an appropriate period of time to expend funds for activities under a given grant?

Overall Benefit Requirement § 570.200

Section § 570.200(a)(3) currently states that entitlement recipients, non-entitlement CDBG recipients in Hawaii, and recipients of insular area funds must ensure that over a period of time specified in their certification, not to exceed three years, not less than 70 percent of the aggregate of CDBG fund expenditures shall be for activities meeting the criteria under § 570.208(a), (d)(5), or (6) for benefiting LMI persons. These recipients must ensure that during their chosen period of certification not less than 70 percent of the aggregate of CDBG funds expended during that period benefit LMI persons. This requirement is identified in the Act at section 101(c) and cannot be waived. Therefore, HUD proposes to revise § 570.200(a)(3) to reinforce that recipients may not expend more CDBG funds in a subsequent certification period to meet the statutory requirement.

Eligible and Ineligible Activities §§ 570.200, 570.201, 570.202, 570.206, 570.207, 570.703

Applicable Environmental Review Procedures in Part 58

HUD proposes to make a slight revision to § 570.200(h)(1)(iii), which requires that costs and activities funded are in compliance with the environmental review procedures stated in 24 CFR part 58. There has been some confusion whether the intent of this provision is just to apply whatever part 58 requirements would otherwise apply, or to actually extend applicability of part 58 choice-limiting prohibitions even to pre-application activities that aren't prohibited under Part 58 itself. In order to clarify that this provision is not meant to add a prohibition on reimbursement of expenses for activities that began before application for CDBG, where the pre-application activities commenced prior to a completed environmental review and Release of Funds, the revision would refer to compliance with ''applicable'' environmental review procedures in 24 CFR part 58.

Acquisition of Real Property

Section 570.201(a) currently permits grantees to use CDBG funds to acquire real property by long-term lease. However, it does not specify the length of time that constitutes a long-term lease for the purpose of compliance with § 570.201(a). ''Long-term lease'' has been interpreted in various ways. The 1998 Guide to National Objectives and Eligible Activities for Entitlement Communities defines a long-term lease as 15 years or more. Consistent with this guidance, HUD proposes to add a parenthetical statement to § 570.201(a) that would clearly define a ''long-term lease'' as 15 years or more.[16]

Tornado Safe Shelters

Section 2 of the Tornado Shelters Act (Pub. L. 108–146; 117 Stat. 1883, enacted December 3, 2003) amended section 105(a) of the Act to permit the construction or improvement of tornado shelters for residents of manufactured housing in certain neighborhoods as an eligible activity under the CDBG program. The Tornado Shelters Act permits tornado shelters as an eligible activity if they are located in a neighborhood that (1) contains at least 20 manufactured housing units within such proximity to the shelter that the shelter is available to the resident in the event of a tornado, (2) consists predominantly of persons of low and moderate income (*i.e.,* recipients must be able to document that at least 51 percent of the residents of the service area of the tornado shelter are of low and moderate income); and (3) is located within a State in which a tornado has occurred during the fiscal year for which with amounts to be used were made available or the preceding 3 fiscal years, as determined by the Secretary in consultation with the Administrator of the Federal Emergency Management Agency. HUD has not codified this use of CDBG funds in the regulations, but recipients may use such funds for the construction of tornado-

[16] Under the CDBG program, long-term leases of 15 years are considered acquisition for URA purposes and subject the URA's 49 CFR part 24, subpart B, real property acquisition requirements. See HUD Handbook 1378 Chapter 1–4.I.7 page 1–8 for more details.

safe shelters under the authority provided by statute. HUD proposes to add a provision at § 570.201(r) that would codify the use of CDBG funds for tornado safe shelters as an eligible activity in accordance with the statute. Since the statute requires that neighborhoods where tornado shelters are constructed or improved with CDBG funds be predominantly LMI, recipients must be able to document that at least 51 percent of the residents of the service area of the tornado shelter are of low and moderate income.

Ineligible Activities

HUD proposes at § 570.207(a)(4) to explicitly list general administrative and operating expenses of public or nonprofit entities as an ineligible activity. HUD's experience is that these entities believe that general administrative costs and operating expenses are eligible activities under §§ 570.201–570.206. However, while recipients may use CDBG funds for program administrative costs, the regulations do not allow public or nonprofit entities to do so. HUD believes that the proposed addition of this ineligible activity, in addition to the proposed addition of the definition of ''activity delivery costs'' in § 570.3, would provide greater clarity to public and nonprofit entities and encourage them to use CDBG funds directly for activities (as well as for activity delivery costs). Public and nonprofit entities also cannot categorize these ineligible expenses as providing technical assistance; the proposed rule would revise the definition of ''technical assistance'' at § 570.201(p) to reflect that prohibition.

Use of CDBG Grant Funds for Section 108 Activities

HUD proposes to clarify eligible uses of CDBG funds for loan repayment, issuance, underwriting, servicing, and other cost associated with Section 108 activities. Although already described at § 570.705(c), HUD believes that adding a cross-reference in subpart C (with a new § 570.201(s)) may provide potential borrowers a better understanding of their ability to finance Section 108 activities with CDBG funds.

Reconstruction Under § 570.202

Reconstruction of buildings or structures has been eligible for CDBG assistance since 1996. Section 105(a)(4) of the Act states that clearance, removal, reconstruction, and rehabilitation of buildings and improvements (including interim assistance and financing public or private acquisition for reconstruction or rehabilitation, and reconstruction or rehabilitation of privately owned properties, and including the renovation of closed school buildings) is an eligible CDBG-assisted activity. Buildings reconstructed with CDBG funds may be publicly or privately owned and residential or non-residential.

Unlike other parts of the CDBG regulations that explicitly state that recipients and subrecipients may use CDBG funds to reconstruct public facilities and improvements (§ 570.201(c)), privately owned utilities (§ 570.201(l)), and commercial/industrial structures as part of a special economic development activity (§ 570.203(a)), § 570.202 does not clearly identify reconstruction as an eligible activity related to housing. To make clear that reconstruction is an eligible activity under § 570.202, HUD proposes to add the words ''and reconstruction'' to the introductory language at § 570.202(a).

Administrative Expenses To Facilitate Housing

The provision at § 570.206(g), Administrative expenses to facilitate housing, is no longer an eligible activity in the CDBG program because the provision applied only to units identified in a grantee's Housing Assistance Plan (HAP). HUD discontinued use of the HAP by CDBG grant recipients in the mid-1990s. Section 570.206(g) cannot be read to just substitute costs related to the Consolidated Plan for costs formerly eligible in connection with the HAP. Therefore, HUD proposes to remove § 570.206(g) and replace it with a provision addressing how CDBG funds may be used to support eligible administrative and planning costs for the HOME Investment Partnerships Program (HOME).

Section 17 of the United States Housing Act of 1937

Section 570.206(h) refers to the Rental Rehabilitation and the Housing Development programs that were authorized by Section 17 of the United States Housing Act of 1937 (''the 1937 Act''), Public Law 75–412, 50 Stat. 888. Congress repealed Section 17 in Section 289 of the Cranston-Gonzalez National Affordable Housing Act of 1990 (42 U.S.C. 12839) and terminated assistance to these programs. HUD therefore proposes to remove and reserve § 570.206(h). HUD similarly proposes to remove and reserve § 570.201(m), which allowed CDBG funds to be used for construction of housing under Section 17 of the 1937 Act, as well as to remove a corresponding cross-reference to § 570.201(m) at § 570.207(b)(3)(ii).

Section 108 Eligible Activities

Section 108 borrowers can undertake site preparation activities related to redeveloping real property that borrowers have acquired or rehabilitated with Section 108 funds or that is for an economic development purpose. The wording of § 570.703(f) makes it unclear that all such site preparation activities must relate to either of those two purposes. This proposed rule would clarify this requirement.

Finally, the proposed rule would remove and reserve an eligible activity, § 570.703(j), related to activities authorized under section 17(d) of the 1937 Act (42 U.S.C. 1437o(d)); such authorized activities are no longer carried out since the repeal of the statute in 1991.

Criteria for National Objectives §§ 570.208, 570.483

Timeline To Meet a National Objective

HUD seeks to ensure that the recipients use CDBG–funded activities to develop viable urban communities by providing decent housing, a suitable living environment, and expanding economic opportunities, principally for LMI persons. CDBG-funded activities that fail to meet a national objective within a reasonable timeframe undercut the purpose of the Act. HUD proposes to require at § 570.200(a)(2) that recipients demonstrate that the acquisition meets a national objective within six years of the date of the initial drawdown of CDBG funds for the activity or the length of the period of performance and any extension permitted under 24 CFR 570.509, whichever is shorter. To reinforce this requirement in the national objectives criteria sections of part 570, HUD proposes to insert the six-year timeframe to meet a national objective at §§ 570.208(e) and 570.483(g).

For example, recipients may acquire real property but fail or struggle to meet a national objective based on unforeseen circumstances. The recipient or subrecipient may acquire property with the intention of constructing a public facility such as a recreation center on the site or making infrastructure improvements where affordable housing will later be developed, but unforeseen circumstances prevent the proposed activity from occurring as planned. Rather than change the use of the real property for a purpose that will meet the planned or other national objective, the recipient or subrecipient may simply hold the property indefinitely. In this circumstance, Office of Inspector General audits have documented that the length of time between acquiring

property and meeting a national objective will be excessively long.[17] The proposed change would ensure that activities meet a national objective in a timely manner to meet the purpose of the Act.

Low and Moderate Income—Area Benefit

To demonstrate compliance with the national objective of benefit to LMI persons on an area basis (§§ 570.208(a)(1) and 570.483(b)(1)), a CDBG-assisted activity must have a defined service area. The service area must be primarily residential, and at least 51 percent of the residents in this service area must be LMI persons. Certain exception requirements at § 570.208(a)(1)(ii) allow a threshold of lower than 51 percent in limited circumstances. When designating the service area for a CDBG-assisted activity, the service area should be accurately described and proportionate to the size of the CDBG-assisted activity. For example, a recipient cannot automatically presume a large park serves just the neighborhood in which it is located; it may serve the entire jurisdiction of the recipient. To meet the criteria at § 570.208(a)(1) or § 570.483(b)(1), the recipient must use the most recent Census Bureau data provided by HUD or conduct a survey to determine if a minimum of 51 percent of the residents in the defined service area are LMI.[18] CDBG-assisted activities that often use this national objective include water/sewer installation and/or improvements, rehabilitation or construction of public facilities and improvements, acquisition and/or disposition of real property, clearance and remediation activities, and some public service activities.

Low- and Moderate-Income—Limited Clientele

To demonstrate compliance with the national objective of benefit to LMI persons-limited clientele (§§ 570.208(a)(2) and 570.483(b)(2)), a CDBG-assisted activity must: (1) benefit members of a group presumed to be LMI, as such groups are described in § 570.208(a)(2)(i)(A) and § 570.483(b)(2)(ii)(A); (2) require information on family size and income to demonstrate that not less than 51 percent of the beneficiaries are LMI; (3) be restricted to low- and moderate-income persons; or (4) be of such nature and be in such location that it may be concluded that the beneficiaries of the CDBG-assisted activity are low and moderate income, as such nature and locations are described in §§ 570.208(a)(2)(i)(D) and 570.483(b)(2)(ii)(D). The LMI limited clientele national objective is often met by CDBG-assisted activities that are: restricted to children, such as tutoring and recreation programs; senior services, such as Meals on Wheels; the removal of architectural barriers; and public facilities for special populations such as the homeless and domestic violence shelters.

HUD proposes revisions to the limited clientele provision that would state the requirements more clearly and that would provide better guidance to recipients. In addition to the proposed definition of ''elderly'' at § 570.3, HUD proposes references to that definition at §§ 570.208(a)(2)(i)(A) and 570.483(b)(2)(ii)(A) with parenthetical statements after ''elderly persons.''

Further, HUD proposes to clarify the presumed LMI group of ''illiterate adults.'' Some CDBG recipients have interpreted the term ''illiterate adults'' to mean illiterate in a person's native language, while other recipients have interpreted it to mean adults that are illiterate in English. Neither the Act nor part 570 define illiteracy. HUD's position at one time was that, for the CDBG program, an illiterate adult is one who is unable to read or write in any language. However, HUD has reconsidered that definition and proposes to codify HUD's current interpretation at §§ 570.208(a)(2)(i)(A) and 570.483(b)(2)(ii)(A) that illiterate adults are adults unable to read and write in English and in their first language, if the adult's first language is not English.

Question for comment #11: Would the proposed definition for adult illiteracy accurately reflect the presumed LMI group of ''illiterate adults''?

HUD also proposes to broaden the application of the presumed LMI group of ''battered spouses'' to cover all survivors of domestic violence. Survivors of dating violence, sexual assault, and stalking are categories included in survivors of domestic violence. The current category of ''battered spouses'' limits the presumption to spouses. However, unmarried survivors of violence may be presumed to be LMI. Therefore, HUD proposes to remove ''battered spouses'' from the presumed categories of LMI persons and replace it with ''survivors of domestic violence'' at §§ 570.208(a)(2)(i)(A) and 570.483(b)(2)(ii)(A). HUD interprets ''battered spouses'' to be a subcategory of ''survivors of domestic violence'' still presumed to be LMI under those provisions.

Furthermore, HUD proposes to interpret survivors of human trafficking to be a subcategory of homeless persons, which is presumed to be LMI under these provisions. HUD considers human trafficking, including both labor and sex trafficking, to be ''other dangerous or life-threatening conditions that relate to violence against the individual or family member'' under paragraph 4 of the definition of ''homeless'' at § 578.3. Where an individual or family is fleeing, or is attempting to flee human trafficking, that has either taken place within the individual's or family's primary nighttime residence or has made the individual or family afraid to return to their primary nighttime residence; and the individual or family has no other residence; and the individual or family lacks the resources or support networks to obtain other permanent housing; HUD would consider that individual or family to qualify as ''homeless'' under the definition. By including survivors of human trafficking as a subcategory of homeless, HUD would be better able to ensure that they have access to the benefits and services necessary for their safety, protection, and basic well-being.

Finally, HUD proposes to add categories of groups of persons at §§ 570.208(a)(2)(i)(A) and 570.483(b)(2)(ii)(A) that, when served exclusively or in combination with groups of persons in other listed categories, may be presumed to benefit persons, 51 percent of whom are LMI, barring any evidence to the contrary: persons who meet the Federal poverty guidelines and persons who are insured by Medicaid. The Federal poverty guidelines, established by the Department of Health and Human Services based on poverty thresholds published by the Census Bureau, estimate the minimum amount of income needed to cover basic needs. Medicaid coverage varies by State and other eligibility requirements, but income qualification is generally less than four times the Federal poverty guidelines. Further, while nearly all jurisdictions in the U.S. have more LMI persons than persons in poverty, in a small number of jurisdictions more persons are in poverty than are LMI. Allowing grantees to presume that persons in poverty are LMI will address

[17] In 2014, the HUD OIG sampled CDBG projects and audited corresponding activities. OIG found the possibility that stalled activities did not meet a national objective compliance due to reporting problems or delayed implementation (resulting in stalled status). For reference, this is an example report: *https://www.hudoig.gov/sites/default/files/documents/2014-LA-1007_0.pdf.*

[18] HUD issued technical assistance for conducting local income surveys. For more information, please visit *https://www.hudexchange.info/programs/cdbg/cdbg-income-survey-toolkit/.*

such anomalies and simplify requirements across other Federal programs that also provide benefits to persons who meet the Federal poverty guidelines.

Low and Moderate Income—Housing Activities

To demonstrate compliance with the LMI housing national objective (§§ 570.208(a)(3) and 570.483(b)(3)), a CDBG-assisted residential structure must be occupied by predominantly LMI households. Unlike the other LMI national objectives, meeting the LMI housing national objective is based on households rather than individuals or families. A household is all the persons that occupy a housing unit, whether related or unrelated. Meeting the LMI housing national objectives criteria is also based on the number of housing units. Each single-unit structure must be occupied by an LMI household. In a two-unit structure, one unit must be so occupied. Where there are three or more units in a structure, a minimum of 51 percent of the households must be occupied by LMI households. CDBG-assisted activities that may meet this national objective include homeownership assistance, housing rehabilitation (single and multifamily), and acquisition of real property where a recipient or subrecipient will construct housing units using another funding source. Pursuant to § 570.207(b)(3), recipients or subrecipients may not use CDBG or Section 108 funds for new housing construction unless it is provided under the last resort housing provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*) (URA) regulations at 49 CFR part 24, it is authorized as part of direct homeownership assistance for LMI households under § 570.201(n), or a qualified Community-Based Development Organization is carrying out the activity under § 570.204.

Some exceptions permit eligible activities to meet the LMI housing national objective where less than 51 percent of multifamily units are occupied by LMI households. Such activities include assistance for an eligible activity to reduce the development cost of the new construction of a multifamily, non-elderly rental housing project where not less than 20 percent of the units will be occupied by LMI households at affordable rents. In addition, the proportion of the total cost of developing the project to be paid with CDBG funds must be no more than the proportion of units in the project that will be occupied by LMI households (§§ 570.208(a)(3)(i) and 570.483(b)(3)(i)). The proposed rule would add as additional exceptions substantial rehabilitation (as defined at § 5.100) and conversion of a nonresidential structure to a multifamily, non-elderly rental housing project. This change would align treatment of substantial rehabilitation with new construction for purposes of meeting the national objectives criteria for housing activities.

HUD Review of Consolidated Plan § 91.500

Some recipients believe that a Consolidated Plan that is not disapproved by HUD pursuant to § 91.500(a) constitutes an approval of the eligibility of the activities for the applicable programs identified in the plan. Because the Consolidated Plan is a planning document, HUD is unable to determine that a grantee will carry out the activity in compliance with program requirements, including eligible activity requirements. Grantees may amend plans, including planned activities, at any time and amendments are not subject to HUD review. However, because the Plan describes a substantial number of activities for many different CPD programs; reviewing each individual activity within the plan for compliance would be burdensome for CPD field offices and significantly lengthen review of the Consolidated Plan and delay grantees' ability to carry out activities. CPD seeks to ensure the eligibility of activities through risk analysis and monitoring after grantees have carried out activities. Therefore, HUD proposes to add language to § 91.500(a) stating that the fact that HUD has not disapproved the Consolidated Plan does not constitute approval of the activities identified in the Plan as being compliant with relevant program requirements and does not confer a determination of the eligibility of the activities in the Consolidated Plan.

Urban County Qualification/ Requalification Process § 570.307

Currently, § 570.307 requires the Secretary to determine, after reviewing qualification documentation from an urban county, whether the county is qualified to receive CDBG funds. Each year, HUD publishes a notice, *Instructions for Urban County Qualification for Participation in the Community Development Block Grant (CDBG) Program,*[19] setting forth the qualification process, which generally runs from May to September. Once urban counties complete the qualification/requalification process, they remain qualified for three successive Federal fiscal years, as stated in § 570.307(d). However, the CDBG urban county qualification process does not have a statutory or regulatory completion date. Therefore, HUD proposes to insert a provision at § 570.307(h) that would require urban counties to complete the urban county qualification or requalification process no later than September 30 of the year of qualification or requalification.

Section 217(b)(3) of title II of the Cranston-Gonzalez National Affordable Housing Act, as amended (NAHA) (42 U.S.C. 12747(b)(3)), and §§ 92.50(a) and 92.101(a)(1) require that, in order to receive a HOME formula allocation for a fiscal year as a consortium, units of general local government be qualified/requalified as consortia in accordance with HOME requirements by the last day of the prior fiscal year, which is September 30 of each year. Most urban counties and HOME consortia select the same three-year qualification period to simplify the qualification process for both entities, and HOME consortia may change their three-year qualification cycles so that they coincide with the urban county's three-year qualification period. Because the CDBG program does not currently have a deadline to complete the process, however, an urban county that is also a HOME consortium may not complete the qualification process for the consortium by September 30 because of an issue that arises with a participating unit of local government with regard to its participation in the urban county's CDBG program. While this will not affect a consortium's CDBG funding, such an action may result in a loss of its HOME funding for that fiscal year. Therefore, a September 30 deadline for the urban county qualification process may help align the programs and eliminate problems that arise regarding a consortium's timely completion of its qualification or requalification as a HOME consortium under the requirements in 24 CFR part 92.

Exclusion of Section 108-Generated Revenue From Program Income § 570.500

HUD proposes to remove language from § 570.500(a)(4)(ii) that excludes from the definition of ''program income'' revenues generated by certain activities financed by a Section 108 loan guarantee. HUD adopted § 570.500(a)(4)(ii) to promote the use of Section 108 financing for economic development activities. However, the regulations are confusing to recipients

[19] Available at: *https://www.hud.gov/sites/dfiles/OCHCO/documents/2023-02cpdn.pdf.*

who want to use Section 108-generated revenue for other eligible activities because the recipients may infer that such revenue is not subject to any restrictions. That inference would be incorrect, however, because significant restrictions on the use of the program income do exist. Access to the revenue is restricted because it is by default pledged as security for repayment of the guaranteed loan for the term of the loan, which may be up to 20 years. Further, some recipients have noted that the requirement to use miscellaneous revenue for activities located in a HUD-approved Neighborhood Revitalization Strategy Area (NRSA) limits the provision's utility when implementing an NRSA would not be practicable for them. Given these problems and given that this exclusion has not provided any apparent benefits to Section 108 borrowers, HUD proposes to remove this provision. HUD believes that other proposed changes to the regulations will promote the increased use of CDBG and Section 108 funding for economic development more effectively and efficiently than maintaining the program income exclusion.

Treatment of Excess Program Income § 570.504

Currently, § 570.504(b)(2)(iii) requires each recipient to calculate the amount of program income cash balances on hand at the end of each program year (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances in lump sum drawdown accounts, and cash and investments held for Section 108 loan guarantee security needs). After all deductions, the recipient must determine if the cash balances as of the end of the program year exceed 1/12 of the most recent annual grant. The recipient must remit any excess amount to HUD as soon as practicable after the end of the program year. The regulations provide for the excess amount to be placed in the recipient's line of credit. HUD has determined that it cannot place the excess program income in a line of credit. Therefore, HUD proposes to require that the recipient send such excess program income to the United States Treasury. Note that the amount to be remitted to HUD does not include program income cash balances needed for various program purposes, *e.g.,* amount pledged as security for a Section 108 loan.

Definition of Program Income—State CDBG Program § 570.489

In the definition of program income for the State CDBG program at § 570.489(e)(2)(iv)(C), an exclusion allows a unit of general local government funded by a State to retain up to $100 per year in interest on deposit of grant funds before disbursement of the funds for activities for CDBG administrative expenses. The amount of $100 previously aligned with § 85.21(h)(2)(i), which has been replaced by 2 CFR 200.305(b)(9), and which currently allows a unit of general local government funded by a State to retain up to $500 per year. Therefore, HUD proposes to update § 570.489(e)(2)(iv)(C) by replacing the dollar amount with a reference to 2 CFR 200.305(b)(9).

Reporting Data on Use of CDBG Funds § 570.507

HUD proposes to add a requirement at § 570.507(d) to require a recipient to collect and report data on its use of CDBG funds in the Integrated Disbursement and Information System (IDIS). HUD has required recipients to report program activity and expenditure data in IDIS since 1996, but part 570 requires only that recipients must generally ''submit such other reports and information as HUD determines are necessary.'' The revision would make it clear to recipients that they must use IDIS to submit such reports as required by § 570.507.

Conflict of Interest Public Disclosure Requirements §§ 570.489, 570.611

Currently, §§ 570.489(h)(4)(i) (for State recipients) and 570.611(d)(1)(i) (for entitlement recipients) require that when recipients request that HUD consider an exception to the conflict-of-interest requirements, recipients must have documentation of disclosure of the nature of the conflict accompanied by an assurance that there has been a public disclosure of the conflict and a description of how the public disclosure was made. The regulations do not make clear what ''public disclosure'' means. Some recipients define public disclosure as public hearings or publication in a newspaper of general local circulation; others believe that posting it on the recipient's website is sufficient. To clarify and make standard what public disclosure means, HUD proposes to add language to §§ 570.489(h)(4)(i) and 570.611(d)(1)(i) that would define public disclosure as disclosure through any of the following media: publication on the recipient's website, including social media; electronic mailings; media advertisements; public service announcements; and display in public areas such as libraries, grocery store bulletin boards, and neighborhood centers. HUD also clarifies the existing requirement to make it explicit that grantees must provide HUD evidence of the public disclosure.

Section 108 Loan Guarantees §§ 570.704, 570.705

Application Requirements

The Section 108 application submission requirements at § 570.704(b) state that an applicant should provide the application ''to the appropriate HUD Office,'' but do not distinguish whether the application should go to the applicant's local HUD Field office or Headquarters. The proposed rule would explicitly state that applicants should submit applications for Section 108 loan guarantee assistance to HUD Headquarters, ensuring that HUD Headquarters can promptly review such applications concurrently with HUD Field office staff.

Prior to 2015, the regulations implied, but did not clearly state, that HUD Field offices reviewed applications first and then forwarded the application together with its recommendation for approval or disapproval to HUD Headquarters. HUD removed this provision in a 2015 rulemaking, leaving the rule silent as to which HUD office(s) applicants should submit an application. In concert with the 2015 rulemaking, CPD's Financial Management Division (FMD) at HUD Headquarters (which administers the Section 108 program) implemented a concurrent review process with CPD Field office staff. However, some applicants have continued to submit applications only to HUD Field offices. HUD Field office staff are responsible for many CPD programs and may not review a submitted application as promptly as FMD or notify FMD that they have received a new application. Applications submitted only to HUD Field offices may therefore result in a delay in the start of the concurrent review process.

The submission requirements also do not clearly reiterate the basic information an applicant needs to include in an application: specifically, the proposed eligible activity under § 570.703 and the source of the payment of fees under § 570.712 (in addition to the national objectives criteria at § 570.208, which is already identified in the current program regulation at § 570.704(b)(1)). Other parts of subpart M include these requirements, but the proposed rule would reiterate those requirements to clearly identify what information the Section 108 application must contain. HUD proposes to add these references to § 570.704(b)(1) and (2), respectively.

Finally, HUD proposes to better organize the submission requirements at

§ 570.704(b) pertaining to necessary certifications. The proposed revisions would reorganize the required certifications in a format better suited for applicants to understand. HUD believes such clarity will help applicants prepare an application correctly and ensure that requests for missing certifications do not delay HUD's review. Another revision would correct an error in the current regulation and would require Section 108 applicants to certify that they must impose assessments on properties owned and occupied by moderate-income persons, to recover the *non*-guaranteed loan funded portion of the capital cost without paying such assessments on their behalf from guaranteed loan funds, instead of the current language which discusses only the ''guaranteed'' loan funded portion of the capital cost.

Loan Requirements

The limitations on commitments at § 570.705(a)(1)(iii) permit HUD to place a higher priority on applications containing activities to be carried out in areas designated as empowerment zones/enterprise communities by the Federal Government or a State. Statutory authorization for such activities has lapsed, removing the need to place a higher priority on activities carried out in such areas. Therefore, HUD proposes to delete the language in § 570.705(a)(1)(iii) referring to empowerment zones/enterprise communities and replace it with language describing areas designated as economically distressed by the Federal Government or by any State.

Security Requirements

Security requirements outlined in § 570.705(b) list examples of acceptable forms of additional security (other than CDBG funds) for loan guarantees that the loan guarantee contract between HUD and a borrower will specify. However, the limited examples of security may mislead potential applicants into believing that the regulations limit the security pledged for loan guarantees to the listed types of security. Publishing such information through guidance documents and marketing materials and engaging in direct outreach to potential applicants are clearer and more effective ways to communicate the types of security that a borrower may pledge. Therefore, HUD proposes to remove and reserve the examples of security HUD may accept at § 570.705(b)(3)(i) through (iv).

Additionally, HUD proposes to delete subsections that are unnecessary or inconsistent with other provisions. Section 570.705(a)(2)(iii)(A) through (C) appear to provide three methods of calculating limitations on commitments to guarantee loans for recipients that receive grants under subpart F. However, paragraph (a)(2)(iii)(A) is duplicative of 570.705(a)(2)(iii), and paragraphs (a)(2)(iii)(B) and (C), which allow for using an average of the three most recent grants, are inconsistent with § 570.705(a)(2)(iii).

F. ICDBG Program

HUD also proposes certain corresponding changes to Part 1003, where appropriate, that are intended to align the ICDBG program with the CDBG program.

Definitions § 1003.4

HUD proposes amending the Definitions section to include ''activity delivery costs.'' Similar to CDBG recipients and subrecipients, ICDBG recipients and subrecipients may incur costs typically referred to as ''activity delivery costs'' related to carrying out specific ICDBG eligible activities. The ICDBG regulations do not specifically define this term; therefore, HUD proposes to add a definition at § 1003.4. This addition makes clear that recipients and subrecipients must use the cost principles at 2 CFR part 200, subpart E, in determining the allowability of the costs. In particular, recipients and subrecipients must ensure that activity delivery costs consisting of staff salaries are allocable to the specific activity and adequately documented.

Eligible Activities §§ 1003.201, 1003.202, 1003.203

Basic Eligible Activities

HUD proposes to add a new § 1003.201(r) to clarify that recipients can assist eligible activities if they are part of mixed-use properties that also contain ineligible uses, so long as the recipient expends ICDBG funds only on the eligible use. The proposed rule also would add a definition of ''mixed-use property'' to the new § 1003.201(r). This is a conforming change to the ICDBG regulations to align them with the proposed changes to the CDBG regulations in this proposed rule.

Additionally, the Tornado Shelters Act (Pub. L. 108–146; 117 Stat. 1883, enacted December 3, 2003) (42 U.S.C. 5301, note), authorized the construction or improvement of tornado shelters in certain neighborhoods and manufactured housing communities as an eligible activity under the CDBG program. Consistent with the change to § 570.201, HUD proposes to insert a provision at § 1003.201(p) that would codify the use of ICDBG funds for tornado safe shelters as an eligible activity under certain conditions. As discussed above with respect to CDBG, this activity is already eligible under ICDBG. HUD is simply codifying in regulations a statutory change that has been codified in law for many years.

Finally, consistent with CDBG, HUD proposes to add a new paragraph (q) to clarify that essential repairs and operating expenses necessary to maintain the habitability of housing units acquired through tax foreclosures is also an eligible activity.

Eligible Rehabilitation and Preservation Activities

HUD proposes to amend § 1003.202(a) to clarify that reconstruction of housing is an eligible ICDBG activity. Reconstruction of buildings or structures, including housing, has been an eligible ICDBG activity since 1996. However, the program regulations do not clearly and expressly identify reconstruction as an eligible activity related to housing. To make clear that reconstruction is an eligible activity under § 1003.202(a), HUD proposes to add the words ''and reconstruction'' to the introductory language at § 1003.202(a). This update will be a conforming change for the ICDBG regulations to align them with the same proposed changes to the CDBG regulations in this proposed rule.

Special Economic Development Activities

HUD proposes to amend § 1003.203(b) governing special economic development activities. Section 1003.203 governs the use of ICDBG funds for special economic development activities and includes an illustrative list of eligible forms of assistance to private for-profit businesses. The ICDBG regulations already list forms of support by which recipients can provide assistance to private, for-profit businesses where the assistance is appropriate to carry out an economic development project. HUD has previously interpreted this provision to allow ICDBG assistance to New Markets Tax Credit (NMTC) investment vehicles. The proposed revisions would explicitly indicate that ICDBG recipients are allowed to provide assistance to an economic development project through a for-profit entity that passes the funds through a financing mechanism (*e.g.,* Qualified Opportunity Funds and NMTC investment vehicles). This update is a conforming change to the ICDBG regulations to align them with the same proposed changes to the CDBG regulations in this proposed rule.

Program Administration Costs § 1003.206

HUD proposes to amend § 1003.206 to add a reference to the new proposed definition of ''activity delivery costs'' in § 1003.4 to help ICDBG recipients distinguish between administrative costs and activity delivery costs. This update is a conforming change to the ICDBG regulations to align them with the proposed changes to the CDBG regulations in this proposed rule.

Criteria for Compliance With the Primary Objective § 1003.208

HUD's regulation at § 1003.208 provides the criteria for determining whether an ICDBG-assisted activity complies with one or more of the national objectives. HUD proposes conforming changes to paragraphs (b), (c), and (d) Limited Clientele activities, Low- and Moderate-Income Housing Activities, and Job creation or retention activities. This update is a conforming change to the ICDBG regulations to align them with the proposed changes to the CDBG regulations in this proposed rule.

With respect to Limited Clientele activities, HUD proposes revisions to paragraph (b) to clarify requirements and provide better guidance to recipients. Consistent with the reasons stated above in section III.E with respect to the CDBG program, HUD proposes to clarify in the ICDBG program that the presumed LMI group of ''illiterate adults'' means adults unable to read and write in English and in their first language, if the adult's first language is not English. HUD also proposes to broaden the application of the presumed LMI group of ''battered spouses'' to cover all survivors of domestic violence. The current category of ''battered spouses'' limits the presumption to spouses. However, unmarried survivors of violence may be presumed to be LMI. Therefore, HUD proposes to remove ''battered spouses'' from the presumed categories of LMI persons and replace it with ''survivors of domestic violence.'' HUD interprets ''battered spouses'' to be a subcategory of ''survivors of domestic violence'' still presumed to be LMI under the ICDBG regulations. As stated earlier, HUD also proposes to interpret survivors of human trafficking to be a subcategory of homeless persons, which is presumed to be LMI under these provisions, in order to ensure that they have access to the benefits and services necessary for their safety, protection, and basic wellbeing.

Finally, HUD proposes to add categories of groups of persons at § 1003.208(b)(1)(i) that, when served exclusively or in combination with groups of persons in other listed categories, may be presumed to benefit persons, 51 percent of whom are LMI, barring any evidence to the contrary: persons who meet the Federal poverty guidelines and persons who are insured by Medicaid. As stated in reference to the same changes being proposed in CDBG in §§ 570.208(a)(2) and 570.483(b)(2), the Federal poverty guidelines, established by the Department of Health and Human Services based on poverty thresholds published by the Census Bureau, estimate the minimum amount of income needed to cover basic needs. Medicaid coverage varies by State and other eligibility requirements, but income qualification is generally less than four times the Federal poverty guidelines. Further, while nearly all jurisdictions in the U.S. have more LMI persons than persons in poverty, in a small number of jurisdictions more persons are in poverty than are LMI. Allowing ICDBG grantees to presume that persons in poverty are LMI will address such anomalies and simplify requirements across other Federal programs that also provide benefits to persons who meet the Federal poverty guidelines.

With respect to the Low- and Moderate-Income Housing activities in paragraph (c), to demonstrate compliance with the LMI housing national objective, an ICDBG-assisted residential structure must be occupied by LMI households. Meeting the LMI housing national objective is based on households rather than individuals or families. A household is all the persons that occupy a housing unit, whether related or unrelated. Meeting the LMI housing national objectives criteria is also based on the number of housing units. Generally, ICDBG funds may only be used to assist housing units occupied by LMI households. Accordingly, in order for an activity to meet the LMI housing national objective, each single-unit structure that is assisted with ICDBG funds must be occupied by an LMI household. When ICDBG funds are used to assist a two-unit structure, to meet the LMI housing national objective, at least one unit must be so occupied. Where there are three or more units in a structure, a minimum of 51 percent of the units must be occupied by LMI households. ICDBG-assisted activities that may meet this national objective include homeownership assistance, housing rehabilitation (single and multifamily), and acquisition of real property where a recipient or subrecipient will construct housing units using another funding source.

Some exceptions permit eligible activities to meet the LMI housing national objective where less than 51 percent of multifamily units are occupied by LMI households. Such activities include assistance for an eligible activity to reduce the development cost of the new construction of a multifamily, non-elderly rental housing project where not less than 20 percent of the units will be occupied by LMI households at affordable rents. In addition, the proportion of the total cost of developing the project to be paid with ICDBG funds must be no more than the proportion of units in the project that will be occupied by LMI households. The proposed rule would add as additional exceptions substantial rehabilitation and conversion of a nonresidential structure to a multifamily, non-elderly rental housing project. This change would align treatment of substantial rehabilitation with new construction, as is also proposed in the CDBG section 24 CFR 570.208(a)(3)(i) and 570.483(b)(3) of this rule for purposes of meeting the national objectives criteria for housing activities.

Finally, with respect to job creation or retention activities in paragraph (d), documenting whether a job is held by or made available to an LMI person can present a financial and administrative burden on ICDBG recipients due to the data that recipients must gather and collect from assisted businesses. This aligns with changes proposed in CDBG regulations at 24 CFR 570.208(a)(4) and 570.483(b)(4) above. As noted there, to help alleviate this burden, HUD is proposing to revise the regulations to add a presumption based on the location of an assisted business and based on where the person holding the job resides. The revised regulation would provide that, for purposes of determining whether a job is held by or made available to a low or moderate income person, the person may be presumed to be a low or moderate income person if: he/she resides within a census tract where not less than 70 percent of the residents have incomes at or below 80 percent of the area median; or, if he/she resides in a census tract designated as economically distressed by the Federal Government; or, if the assisted business is located in and the job under consideration is to be located in such a tract or area. Revising the criteria for the presumption would significantly clarify the standards for recipients and encourage greater use of ICDBG funds for job creation and

retention activities in many Tribal communities.

Reports § 1003.506

HUD is proposing to amend the due dates for annual status and evaluation reports (ASERs) in § 1003.506(a) to accommodate ICDBG grantees that have a Tribal program year different than the Federal Fiscal year. The term ''Tribal program year'' is defined in the Indian Housing Block Grant (IHBG) regulations at § 1000.10 as the fiscal year of the IHBG recipient. Under the proposed rule, ASERs would be due 90, rather than 45 days, after the end of the grantee's Tribal program year, or after the end of the Federal fiscal year if the grantee has a Tribal program year that ends on the same date the Federal fiscal year ends. The amendment would align the ASER due dates with the due dates for Annual Performance Reports under the IHBG program to assist grantees of both programs to more easily track and schedule submission of reports due to HUD. ASERs would also continue to be required at grant close-out in accordance with the requirements of § 1003.508.

HUD also proposes to revise the language in § 1003.506(a) with respect to the form of ASER reports. The current regulation requires a narrative for the ASER which has resulted in significant variations in the reports submitted as well as difficulty in capturing relevant and useful data. HUD intends in the future, through the PRA process, to develop and promulgate a standardized ASER form with drop down boxes and set data points to assist recipients in meeting the reporting requirements in a consistent manner, which will both improve the usefulness of the data received and facilitate data retention and analysis. The proposed revision to the current language will make it easier for HUD to implement such a form in the future.

Conflict of Interest § 1003.606

To clarify and standardize the meaning of the term ''public disclosure,'' HUD proposes to add language to § 1003.606 that would define public disclosure as disclosure through any of the following media: publication on the recipient's website, including social media; electronic mailings; media advertisements; public service announcements; and display in public areas such as libraries, grocery store bulletin boards, and neighborhood centers. Currently, § 1003.606 requires that when recipients request that HUD consider an exception to the conflict-of-interest requirements, recipients must have documentation of disclosure of the nature of the conflict accompanied by an assurance that there has been a public disclosure of the conflict and a description of how the public disclosure was made. The regulations do not make clear what ''public disclosure'' means. Some recipients define public disclosure as public hearings or publication in a newspaper of general local circulation; others believe that posting it on the recipient's website is sufficient. This update will clarify the meaning of the term and is a conforming change for the ICDBG regulations to align them with the proposed changes to the CDBG regulations in this proposed rule. HUD also clarifies the existing requirement to make it explicit that grantees must provide HUD evidence of the public disclosure.

G. Technical Corrections and Outdated Provisions

HUD proposes the following technical corrections:

Sections 91.225(b)(2) (for entitlement recipients) and 91.325(b)(3) (for State recipients) refer to § 570.2 in certifying the consolidated housing and community development plan; however, § 570.2 was removed from the regulations in 1996. The provisions should instead refer to implementing the primary objective of the Act at § 570.200(a)(3). Therefore, HUD proposes to replace the citation to § 570.2 with a citation to § 570.200(a)(3).

HUD proposes to correct a typographical error in § 570.201(k), which refers to section 105(a)(21) of the Act concerning assistance to institutions of higher education but should instead refer to housing services activities under section 105(a)(20) of the Act.

HUD proposes to redesignate § 570.205(a)(6) as § 570.205(b), as HUD originally intended policy, planning, management, and capacity building activities to be a subheader for the activities below and separate from paragraph (a).

HUD proposes to correct a reference in § 570.207 to a non-existent section of § 570.3. The definitions in section 570.3 are undesignated; however, § 570.207(a)(1) contains a reference to § 570.3(d), which does not exist.

HUD proposes to correct § 570.208(d)(5), which refers to § 91.215(e) in discussing area revitalization strategy areas, but should refer to § 91.215(g), which discusses neighborhood revitalization.

HUD proposes to correct references in § 570.307 to non-existent sections of § 570.3. The definitions in section 570.3 are undesignated; however, § 570.307(b)(1) and (d)(1) both contain references to § 570.3(3), which does not exist.

HUD proposes to correct §§ 570.482(c)(1) and 570.482(c)(2)(i), which cite to section 105(a)(23) of the Act, which concerns treatment of property acquired in tax foreclosure proceedings; but should instead cite to section 105(a)(22) of the Act, which discusses microenterprise assistance activities.

HUD proposes to restore § 570.489(e)(3)(ii)(C), which was mistakenly omitted from the Code of Federal Regulations in 2015.

HUD proposes to correct the citation in § 570.490(a)(2) to § 91.320(j)(1), which should instead be to CDBG requirements in the action plan at § 91.320(k)(1).

HUD proposes to correct § 570.504(c) regarding the disposition of program income by subrecipients, which states that subrecipients holding program income after the expiration of a subrecipient agreement shall pay such funds to the recipient as required by § 570.503(b)(8). However, the correct citation is to § 570.503(b)(7).

The proposed rule would delete subparts E and G of part 570. Subpart E governs a variety of special purpose grants that no longer exist. Subpart G governs Urban Development Action Grants, which likewise no longer exist. In concert, HUD proposes revisions to remove references to subparts E and G in the definition of ''CDBG funds'' at § 570.3; the conflict-of-interest requirements at § 570.611(a)(2); and subpart K applicability at § 570.600(a).

The proposed rule would also remove § 570.613, ''Eligibility restrictions for certain resident aliens.'' This section provides restrictions for ''certain newly legalized aliens'' as they were described in 24 CFR part 49, which no longer exists. The rule was intended to address the 1986 amendments to the Immigration and Naturalization Act of 1952, which prohibited certain noncitizens from receiving Federal financial assistance furnished on the basis of financial need for a period of five years. (Section 245A(h) of the Immigration and Nationality Act, 8 U.S.C. 1255a(h)). As this provision applied to newly legalized aliens that entered the country before January 1, 1982, and admitted for lawful residence in accordance with the 1986 amendments, HUD has removed 24 CFR part 49, which described this population, and is now removing the regulation that referenced this statutory requirement.

HUD proposes to revise Uniform Relocation Act (URA) citations in the CDBG and ICDBG program regulations

(§§ 570.606 and 1003.602) to update an outdated URA regulatory citation (49 CFR 24.2(g)(2)). The URA regulatory citation changed to 49 CFR 24.2(a)(9)(ii) in the 2005 URA final rule but was never updated in the CDBG and ICDBG program regulations.

H. Interaction of This Proposed Rule With HUD's Proposed Rule on Affirmatively Furthering Fair Housing

HUD acknowledges that this proposed rule proposes to amend sections of the Code of Federal Regulations that HUD has also previously proposed to amend in its Affirmatively Furthering Fair Housing (AFFH NPRM), published February 9, 2023 (88 FR 8516). Both rules propose amendments to §§ 91.105(b)(2) and (c) and 91.115(b)(2). The AFFH NPRM and this NPRM propose to amend these provisions in different ways that do not conflict with each other.

HUD will consider public comments received on each proposed rule. The public comment period on the AFFH NPRM closed on April 24, 2023, and HUD is considering the public comments received on the AFFH NPRM's proposed changes to the referenced provisions as part of that rulemaking. HUD invites the public to comment on the revisions and additions proposed as part of this rulemaking.

Although the proposed regulatory amendments in this NPRM do not reflect the amendments proposed in the AFFH NPRM, HUD intends this rule to ultimately be consistent with a final AFFH rule. HUD will consider all relevant comments received on the AFFH NPRM, as well as on this NPRM. HUD will reconcile the regulatory language in its final rules, ensuring that the final version of this rule, if published after a final AFFH rule is codified, is consistent with all changes made in that published final AFFH rule.

For example, both NPRMs propose to add new language to 24 CFR 91.115(b)(2). The AFFH NPRM proposes to apply certain requirements of this provision to the Equity Plans that could be established by an AFFH final rule. The proposed language in this NPRM does not account for such Equity Plan requirements since that is not the subject of this rulemaking. However, if HUD adds Equity Plan requirements to 24 CFR 91.115(b)(2) in its AFFH final rule, a subsequent final rule published as part of this rulemaking will include that change, and appropriately reconcile the additions made in each rule.

IV. Findings and Certifications

Regulatory Review (Executive Orders 12866, 13563, and 14094)

Pursuant to Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant, and therefore, subject to review by OMB in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 entitled ''Modernizing Regulatory Review'' (hereinafter referred to as the ''Modernizing E.O.'') amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

HUD believes that this proposed rule, by revising the Community Development Block Grant (CDBG) and related Section 108 loan guarantee program regulations to make it easier for recipients to promote economic development and recovery in low- and moderate-income communities and support investments in underserved areas, together with corresponding changes in the ICDBG program, will increase the effectiveness of these grant programs. The proposed rule has been determined to be a ''significant regulatory action,'' as defined in section 3(f) of Executive Order 12866, but not economically significant under section 3(f)(1) of the Order. The docket file is available for public inspection online at *www.regulations.gov.*

Paperwork Reduction Act

The information collection requirements contained in this rule are currently approved by OMB and have been given OMB Control Numbers 2506–0077, 2506–0085, and 2577–0191. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This analysis also considers the potential impact on Indian Tribes.

As discussed in the preamble, the proposed rule would update CDBG's and ICDBG's economic development regulations to make it easier for recipients to promote economic development and recovery in low- and moderate-income communities and support investments in underserved areas. Because the CDBG economic development regulations and standards have not been updated since 1995, the proposed rule would provide a much-needed update to ease the expenditure of funds for economic development activities. The proposed rule would lessen the economic impact on grantees, small entities and recipients by reducing eligibility and recordkeeping burdens. This would likely result in increased economic development activities and the associated creation of economic opportunities principally for low- and moderate-income persons.

The proposed rule would primarily impact CDBG, Section 108 borrowers, and ICDBG grantees. CDBG grantees and section 108 borrowers are State and local governments, some of which are small government entities, and ICDBG grantees are Indian Tribes and Tribal organizations which are eligible under Title I of the Indian Self-Determination and Education Assistance Act. These grantees administer the CDBG, section 108, and ICDBG programs, are familiar with the regulatory requirements, and are ultimately responsible for program compliance. While some impacts may filter down to smaller governmental and non-governmental entities, the expected impact would be a decrease in economic burden, as discussed above. As such, the proposed rule would likely have a positive impact on small businesses and entities. The purpose of the proposed rule would be to make more funding available for all types of economic development projects. For small entities, including small governments, the lessening of regulatory burden would likely benefit those that receive CDBG, ICDBG, and section 108 funds.

Accordingly, it is HUD's determination that this proposed rule will not have a significant economic impact on a substantial number of small

entities. Notwithstanding HUD's determination that this proposed rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this proposed rule that will meet HUD's objectives as described in this preamble.

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410–0500. The FONSI is also available through the Federal eRulemaking Portal at *http://www.regulations.gov.*

Federalism (Executive Order 13132)

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: imposes substantial direct compliance costs on State and local governments and the Act does not require those costs; or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments, and on the private sector. This proposed rule does not impose any Federal mandates on any State, local, or Tribal governments, or on the private sector, within the meaning of UMRA.

Consultation With Indian Tribes (Executive Order 13175)

HUD strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. HUD has evaluated this proposed rule under the Department's consultation policy and under the criteria in Executive Order 13175 and has determined that Tribal consultation is necessary regarding the proposed changes. A Dear Tribal Leader was sent out to Indian Tribes on November 15, 2021, seeking comments on the proposed changes to the ICDBG regulations in this proposed rule. HUD received comments from two Tribes and one grant writer with experience providing grant writing services to Tribes under the ICDBG program. The three Tribal commenters were generally supportive of the proposed rule. Two of the three commenters did suggest additional areas for expansion of the proposed rule and/or areas that may be appropriate for separate rulemaking. Among the suggestions were clarification of the term ''economically distressed'' as it relates to census tracts and overall improvements to the ICDBG application process. One Tribal commenter expressed general agreement with the proposed changes but went on to comment that the entire ICDBG regulation is overdue for an overhaul. Among this commenter's specific concerns were rules governing the use of ICDBG funds for new housing construction and rehabilitation, as well as HUD's weighting of criteria in Notices of Funding Opportunity. In developing this proposed rule, HUD considered all Tribal feedback provided and HUD will conduct additional consultation before issuing a final rule.

List of Subjects

24 CFR Part 91

Aged, Grant programs—housing and community development, Homeless, Individuals with disabilities, Low- and moderate-income housing, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure; American Samoa; Community development block grants; Grant programs—education; Grant programs—housing and community development; Guam; Indians; Loan programs—housing and community development; Low- and moderate-income housing; Northern Mariana Islands; Pacific Islands Trust Territory; Puerto Rico; Reporting and recordkeeping requirements; Student aid; Virgin Islands.

24 CFR Part 1003

Alaska; Community development block grants; Grant programs—housing and community development; Grant programs—Indians; Indians; Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR parts 91, 570, and 1003 as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

■ 2. Amend § 91.105 by revising paragraphs (b)(2) and (c)(1) to read as follows:

§ 91.105 Citizen participation plan; local governments.

* * * * *

(b) * * *

(2) The citizen participation plan must require the jurisdiction to publish the proposed consolidated plan in a manner that affords its residents, public agencies, and other interested parties a reasonable opportunity to examine its content and to submit comments. The citizen participation plan must set forth how the jurisdiction will publish the proposed consolidated plan and give reasonable opportunity to examine the document's content. The requirement for publishing may be met by publication of a summary of the document in one or more newspapers of general circulation or on the jurisdiction's official government website. The summary must describe the content and purpose of the consolidated plan and must include a list of the locations where copies of the entire proposed document may be examined. Such listings of locations shall include libraries and government offices. A jurisdiction is encouraged to use all available social media and electronic communication at its disposal to make citizens and residents aware of the availability of the proposed consolidated plan for comment and to include such methods in its citizen participation plan, as appropriate. This includes but is not limited to: emails; text messaging (SMS); media advertisements; public service announcements made through broadcast media or through a pre-recorded message delivered by using an automatic telephone dialing system; and electronic notifications to public and private agencies identified in accordance with § 91.100. A jurisdiction may also make citizens and residents

aware of the availability of the proposed consolidated plan for comment through postings in public places, such as grocery store bulletin boards and neighborhood centers. Publications must be accessible to persons with disabilities. Publications must also provide meaningful access to limited English proficient persons as more fully described in paragraph (a)(4) of this section. In addition, the jurisdiction must provide a reasonable number of free hardcopies of the plan to residents and groups that request it.

* * * * *

(c) * * *

(1) The citizen participation plan must specify the criteria the jurisdiction will use for determining what changes in the jurisdiction's planned or actual activities constitute a substantial amendment to the consolidated plan. (See § 91.505.) The citizen participation plan must include, among the criteria for a substantial amendment, changes in the use of CDBG funds from one eligible activity to another and adding an activity not previously identified in the Consolidated Plan or Action Plan.

* * * * *

■ 3. Amend § 91.115 by revising paragraph (b)(2) to read as follows:

§ 91.115 Citizen participation plan; States.

* * * * *

(b) * * *

(2) The citizen participation plan must require the State to publish the proposed consolidated plan in a manner that affords residents, units of general local governments, public agencies, and other interested parties a reasonable opportunity to examine the document's content and to submit comments. The citizen participation plan must set forth how the State will make publicly available the proposed consolidated plan and give reasonable opportunity to examine the document's content. To ensure that the consolidated plan and the PHA plan are informed by meaningful community participation, program participants should employ communications means designed to reach the broadest audience. The requirement for publishing may be met by publication of a summary of the document in one or more newspapers of general circulation or on the State's official government website. The summary must describe the content and purpose of the consolidated plan and must include a list of the locations where copies of the entire proposed document may be examined. Such listings of locations shall include libraries and government offices. A State is encouraged to use all available social media and electronic communication at its disposal to make citizens and residents aware of the availability of the proposed consolidated plan for comment and to include such methods in its citizen participation plan, as appropriate. This includes but is not limited to, emails, text messaging (SMS); media advertisements, public service announcements made through broadcast media or through a pre-recorded message delivered by using an automatic telephone dialing system, and electronic notifications to public and private agencies identified in accordance with § 91.100. A State may also make citizens and residents aware of the availability of the proposed consolidated plan for comment through postings in public places such as grocery store bulletin boards and neighborhood centers. Publications must be accessible to persons with disabilities. Publications must also provide meaningful access to limited English proficient persons as more fully described in paragraph (a)(4) of this section. In addition, the State must provide a reasonable number of free copies of the plan to its residents and groups that request a copy of the plan.

* * * * *

■ 4. Amend § 91.205 by revising paragraph (a) to read as follows:

§ 91.205 Housing and homeless needs assessment.

(a) *General.* The consolidated plan must provide a concise summary of the jurisdiction's estimated housing needs (including manufactured housing) projected for the ensuing five-year period. Housing data included in this portion of the plan shall be based on U.S. Census data, as provided by HUD, as updated by any properly conducted local study, or any other reliable source that the jurisdiction clearly identifies and should reflect the consultation with social service agencies and other entities conducted in accordance with § 91.100 and the citizen participation process conducted in accordance with § 91.105. For a jurisdiction seeking funding on behalf of an eligible metropolitan statistical area under the HOPWA program, the needs described for housing and supportive services must address the unmet needs of low-income persons with HIV/AIDS and their families throughout the eligible metropolitan statistical area.

* * * * *

■ 5. Amend § 91.210 by revising paragraph (a)(1) to read as follows:

§ 91.210 Housing market analysis.

(a) * * *

(1) Based on information available to the jurisdiction, the plan must describe the significant characteristics of the jurisdiction's housing market, including the supply, demand, and condition and cost of housing and the housing stock (including manufactured housing) available to serve persons with disabilities, and to serve other low-income persons with special needs, including persons with HIV/AIDS and their families.

* * * * *

■ 6. Amend § 91.215 by revising paragraphs (a)(1) and (g) to read as follows:

§ 91.215 Strategic plan.

(a) * * *

(1) Indicate the general priorities for allocating investment geographically within the jurisdiction and among different eligible activities and needs. Also provide quantitative, neighborhood-level outcome goal accomplishments in the performance report as required at § 91.520.

* * * * *

(g) *Neighborhood revitalization.* Jurisdictions are encouraged to identify locally designated areas where geographically targeted revitalization efforts are carried out through multiple activities in a concentrated and coordinated manner. Such areas may include those designated as economically distressed by the Federal Government or by the State that exhibit significantly high levels of poverty or low median income. In addition, a jurisdiction may elect to carry out a HUD-approved neighborhood revitalization strategy that includes the economic empowerment of low-income residents with respect to one or more of its areas. If HUD approves such a strategy, the jurisdiction can obtain greater flexibility in the use of the CDBG funds in the revitalization area(s) as described in 24 CFR part 570, subpart C. This strategy must identify long-term and short-term objectives (*e.g.,* physical improvements, social initiatives and economic empowerment), expressing them in terms of measures of outputs and outcomes the jurisdiction expects to achieve in the neighborhood through the use of HUD programs.

* * * * *

§ 91.225 [Amended]

■ 7. Amend § 91.225 in paragraph (b)(2) by removing ''24 CFR 570.2'' and adding in its place ''24 CFR 570.200(a)(3)''.

■ 8. Amend § 91.305 by revising paragraph (a) to read as follows:

§ 91.305 Housing and homeless needs assessment.

(a) *General.* The consolidated plan must provide a concise summary of the State's estimated housing needs (including manufactured housing) projected for the ensuing five-year period. Housing data included in this portion of the plan shall be based on U.S. Census data, as provided by HUD, as updated by any properly conducted local study, or any other reliable source that the State clearly identifies and should reflect the consultation with social service agencies and other entities conducted in accordance with § 91.110 and the citizen participation process conducted in accordance with § 91.115. For a State seeking funding under the HOPWA program, the needs described for housing and supportive services must address the unmet needs of low-income persons with HIV/AIDS and their families in areas outside of eligible metropolitan statistical areas.

* * * * *

■ 9. Amend § 91.310 by revising paragraph (a)(1) to read as follows:

§ 91.310 Housing market analysis.

(a) * * *

(1) Based on data available to the State, the plan must describe the significant characteristics of the State's housing markets (including such aspects as the supply, demand, condition, cost, and type of housing, including manufactured housing).

* * * * *

§ 91.325 [Amended]

■ 10. Amend § 91.325 in paragraph (b)(3) by removing ''24 CFR 570.2'' and adding in its place ''24 CFR 570.200(a)(3)''.

■ 11. Amend § 91.500 by revising the section heading and adding a sentence at the end of paragraph (a) to read as follows:

§ 91.500 HUD Review of consolidated plan.

(a) * * * The fact that HUD has not disapproved the plan does not constitute approval of the activities identified therein as meeting the applicable statutory and regulatory requirements.

* * * * *

■ 12. Amend § 91.520 by adding a sentence at the end of paragraph (d) to read as follows:

§ 91.520 Performance reports.

* * * * *

(d) * * * Except for States, the report shall also identify quantitative, neighborhood-level outcome goal accomplishments related to one or more non-jurisdiction-wide activities.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 13. The authority citation for part 570 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 3535(d) and 5301–5320.

■ 14. Amend § 570.3 as follows:
■ a. Add in alphabetical order a definition for ''Activity delivery costs'';
■ b. Revise the definition of ''CDBG funds'';
■ c. Add in alphabetical order a definition for ''Elderly'';
■ d. Revise the definition for ''Entitlement amount''; and
■ e. Add in alphabetical order definitions for ''Mixed-use property'' and ''Period of performance''.

The additions and revisions read as follows:

§ 570.3 Definitions.

* * * * *

Activity delivery costs means the allowable costs of work performed by a recipient or subrecipient in carrying out specific activities eligible under §§ 570.201 through 570.204 and 570.703. The cost principles at 2 CFR part 200, subpart E, must be used in determining the allowability of the costs.

* * * * *

CDBG funds means Community Development Block Grant funds, including funds received in the form of grants under subpart D or F of this part, funds awarded under section 108(q) of the Housing and Community Development Act of 1974, guaranteed loan funds under subpart M of this part, urban renewal surplus grant funds, and program income as defined in § 570.500(a).

* * * * *

Elderly means, for activities pursuant to § 570.202, a person 62 years of age or older. For all other activities, CDBG recipients and subrecipients are permitted to define ''elderly'' consistent with State law.

Entitlement amount means the amount of funds which a metropolitan city, urban county, or principal city as designated by OMB is entitled to receive under the Entitlement grant program, as determined by formula set forth in section 106 of the Act.

* * * * *

Mixed-use property means a property containing multiple uses, at least one of which must be eligible to be assisted with CDBG funds.

* * * * *

Period of performance means the time period beginning on HUD's approval of a grant agreement for a given grant and ending six years from that date. For loan guarantees issued pursuant to subpart M of this part, the period of performance means the time period beginning on the date of HUD's guarantee of a promissory note or other obligation and ending six years from that date.

* * * * *

■ 15. Amend § 570.200 by revising paragraphs (a)(2) and (3), (b)(1), and (h)(1)(iii) to read as follows:

§ 570.200 General policies.

(a) * * *

(2) *Compliance with national objectives.* Grant recipients under the Entitlement and HUD-administered Small Cities programs and recipients of insular area funds under section 106 of the Act must certify that their projected use of funds has been developed so as to give maximum feasible priority to activities which will carry out one of the national objectives of benefit to low- and moderate-income families or aid in the prevention or elimination of slums or blight. The projected use of funds may also include activities that the recipient certifies are designed to meet other community development needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community where other financial resources are not available to meet such needs. Consistent with the foregoing, each recipient under the Entitlement or HUD-administered Small Cities programs, and each recipient of insular area funds under section 106 of the Act must ensure and maintain evidence that each of its activities assisted with CDBG funds meets one of the three national objectives contained in its certification. A recipient must demonstrate that each activity meets a national objective within six years of the date of the initial drawdown of CDBG funds for that activity or the length of the period of performance and any extension permitted under § 570.509, whichever is shorter. Criteria for determining whether an activity addresses one or more of these objectives are found in § 570.208.

(3) *Compliance with the primary objective.* The primary objective of the Act is described in section 101(c) of the Act. Consistent with this objective, entitlement recipients, non-entitlement CDBG grantees in Hawaii, and recipients of insular area funds under section 106 of the Act must ensure that, over a period of time specified in their certification not to exceed three years, not less than 70 percent of the aggregate

of CDBG fund expenditures shall be for activities meeting the criteria under § 570.208(a) or (d)(5) or (6) for benefiting low- and moderate-income persons. Grantees are not permitted to expend more CDBG funds for activities that benefit low- and moderate-income persons during the following certification period to meet this requirement. For grants under section 107 of the Act, insular area recipients must meet this requirement for each separate grant. See § 570.420(d)(3) for additional discussion of the primary objective requirement for insular areas funded under section 106 of the Act. The requirements for the HUD-administered Small Cities program in New York are at § 570.420(d)(2). In determining the percentage of funds expended for such activities:

* * * * *

(b) * * *

(1) *Mixed-use properties containing both eligible and ineligible uses.* CDBG funds may be used to assist eligible activities even if the assisted activity is part of a multiple-use property containing one or more ineligible uses, if:

(i) The assisted activity is eligible and will occupy a designated and discrete area within the larger property; and

(ii) The recipient can determine the costs attributable to the eligible activity as separate and distinct from the overall costs of the multiple-use property.

(iii) Allowable costs are limited to those allocable to the eligible activity.

* * * * *

(h) * * *

(1) * * *

(iii) The costs and activities funded are in compliance with the requirements of this part and with applicable Environmental Review Procedures in 24 CFR part 58.

* * * * *

■ 16. Amend § 570.201 as follows:

■ a. Revise paragraph (a) and paragraph (e) introductory text;

■ b. Redesignate paragraphs (e)(1) and (2) as (e)(2)(i) and (ii), paragraphs (e)(2)(i) and (ii) as (e)(2)(ii)(A) and (B); and paragraphs (e)(2)(ii)(A) through (D) as (e)(2)(ii)(B)(*1*) through (*4*);

■ c. Add new paragraph (e)(1) and new paragraph (e)(2) introductory text;

■ d. Remove the ''(a)(21)'' and add in its place ''(a)(20)'' in paragraph (k);

■ e. Remove and reserve paragraph (m);

■ f. Revise paragraph (p); and

■ g. Add paragraphs (r) and (s);

The revisions and additions to read as follows:

§ 570.201 Basic eligible activities.

* * * * *

(a) *Acquisition.* Acquisition in whole or in part by the recipient, or other public or private nonprofit entity, by purchase, long-term lease (defined as a lease with a term of 15 years or more), donation, or otherwise, of real property (including air rights, water rights, rights-of-way, easements, and other interests therein) for any public purpose, subject to the limitations of § 570.207.

* * * * *

(e) *Public services.* Provision of public services (including labor, supplies, and materials) including but not limited to those concerned with employment, crime prevention, child care, health, drug abuse, education, fair housing counseling, energy conservation, welfare (but excluding the provision of income payments identified under § 570.207(b)(4)), homebuyer downpayment assistance, or recreational needs. If housing counseling, as defined in 24 CFR 5.100, is provided, it must be carried out in accordance with 24 CFR 5.111.

(1) To be eligible for CDBG assistance, a public service must either be a new service or provide a quantifiable increase in the level of an existing service above that which has been provided by or on behalf of the unit of general local government (through funds raised by the unit or received by the unit from the State in which it is located) in the 12 calendar months before the submission of the action plan. (An exception to this requirement may be made if HUD determines that any decrease in the level of a service was the result of events not within the control of the unit of general local government.)

(2) The amount of CDBG funds used for public services shall not exceed the amounts outlined in paragraph (e)(2)(i) or (ii) of this section, as applicable:

* * * * *

(p) *Technical assistance.* Provision of technical assistance to public or nonprofit entities to increase the capacity of such entities to carry out specific eligible neighborhood revitalization or economic development activities. (The recipient must determine, prior to the provision of the assistance, that the activity for which it is attempting to build capacity would be eligible for assistance under this subpart C, and that the national objective claimed by the grantee for this assistance can reasonably be expected to be met within six years of the date of the initial drawdown of CDBG funds for the purpose of the entity receiving the technical assistance and undertaking the activity.) General administrative and operating costs of a public or nonprofit entity are not eligible under this paragraph. Capacity building for private or public entities (including grantees) for other purposes may be eligible under § 570.205.

* * * * *

(r) *Tornado-safe shelters.* CDBG funds may be used by the recipient or provided as loans or grants to non-profit and for-profit entities, including owners of manufactured housing communities, for the construction or improvement of tornado-safe shelters for manufactured housing residents in accordance with section 105(a) of the Act. Activities pursuant to this paragraph may be located only in a neighborhood (including a manufactured housing community) that—

(1) Contains at least 20 manufactured housing units within such proximity to the shelter that the shelter is available to the resident in the event of a tornado,

(2) Consists predominantly of persons of low and moderate income

(3) Is located within a State in which a tornado has occurred during the fiscal year for which with amounts to be used were made available or the preceding 3 fiscal years, as determined by the Secretary in consultation with the Administrator of the Federal Emergency Management Agency.

(s) *Use of grants for loan repayment, issuance, underwriting, servicing, and other costs.* CDBG funds may be used for payment of costs pursuant to § 570.705(c), including the payment of fees in accordance with § 570.712, for loan guarantees issued pursuant to subpart M of this part.

■ 17. Amend § 570.202 by revising paragraph (a) introductory text to read as follows:

§ 570.202 Eligible rehabilitation and preservation activities.

(a) *Types of buildings and improvements eligible for rehabilitation and reconstruction assistance.* CDBG funds may be used to finance the rehabilitation and reconstruction of:

* * * * *

■ 18. Amend § 570.203 by revising paragraphs (b) and (c) to read as follows:

§ 570.203 Special economic development activities.

* * * * *

(b) The provision of assistance to a private for-profit business, including, but not limited to, grants, loans, loan guarantees, interest supplements, loan participations, technical assistance, and other forms of support (including use of pass-through financing structures), for any activity where the assistance is appropriate to carry out an economic development project, excluding those described as ineligible in § 570.207(a).

In selecting businesses to assist under this authority, the recipient shall minimize, to the extent practicable, displacement of existing housing, community amenities, businesses, and jobs in neighborhoods.

(c) Economic development services in connection with activities eligible under this section, including, but not limited to, outreach efforts to market available forms of assistance; screening of applicants; reviewing and underwriting applications for assistance; preparation of all necessary agreements; management of assisted activities; the screening, referral, and placement of applicants for employment opportunities generated by CDBG-eligible economic development activities and the costs of providing necessary training for persons filling those specific positions. Training connected with job placement in specific businesses is considered an economic development activity and not a public service under § 570.201(e). If individuals are not receiving training for specific positions at a specific business, general employment readiness programs or trainings for individuals in career fields are only eligible as public service activities under § 570.201(e) or, in limited cases, as part of a community economic development project under § 570.204.

§ 570.205 [Amended]

■ 19. Amend § 570.205 by redesignating paragraph (a)(6) as paragraph (b) introductory text.

■ 20. Amend § 570.206 by revising the introductory text and paragraph (g) introductory text and removing paragraphs (h) and (i).

The revisions read as follows:

§ 570.206 Program administrative costs.

Payment of reasonable program administrative costs and carrying charges related to the planning and execution of community development activities assisted in whole or in part with funds provided under this part. This does not include activity delivery costs as defined at § 570.3.

* * * * *

(g) *HOME Program.* Whether or not such activities are otherwise assisted by funds provided under this part, reasonable costs equivalent to those described in paragraphs (a), (b), (e), and (f) of this section for overall program management of the HOME program under title II of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12701, *et seq.*) if those costs are allowable costs under 24 CFR part 92.

* * * * *

■ 17. Amend § 570.207 as follows:

■ a. Remove in paragraph (a)(1) ''§ 570.3(d)'' and add in its place ''§ 570.3'';

■ b. Add paragraph (a)(4); and

■ c. Remove in paragraph (b)(3)(ii) ''§ 570.201 (m) or (n)'' and add in its place ''§ 570.201(n)''.

The addition reads as follows:

§ 570.207 Ineligible activities.

* * * * *

(a) * * *

(4) *Operating expenses.* General administrative costs and operating expenses of public or nonprofit entities are ineligible except where such costs represent general administrative costs pursuant to § 570.206 or activity delivery costs of carrying out specific eligible activities under §§ 570.201 through 570.204.

* * * * *

■ 18. Revise and republish § 570.208 to read as follows:

§ 570.208 Criteria for national objectives.

The following criteria shall be used to determine whether a CDBG-assisted activity complies with one or more of the national objectives as required under § 570.200(a)(2):

(a) *Activities benefiting low- and moderate-income persons.* Activities meeting the criteria in this paragraph (a) will be considered to benefit low-and moderate-income persons unless there is substantial evidence to the contrary. In assessing any such evidence, the full range of direct effects of the assisted activity will be considered. (The recipient shall appropriately ensure that activities that meet these criteria do not benefit moderate-income persons to the exclusion of low-income persons.)

(1) *Area benefit activities.* (i) An activity, the benefits of which are available to all the residents in a primarily residential area, where at least 51 percent of the residents are low- and moderate-income persons. The activity must serve the entire area, but the area served need not be coterminous with census tracts or other officially recognized boundaries.

(ii) For metropolitan cities and urban counties, an activity, the benefits of which are available to all the residents in a primarily residential area, where less than 51 percent of the residents are low- and moderate-income persons, but where the proportion of such low- and moderate-income persons residing in the area is within the highest quartile of all areas in the recipient's jurisdiction in terms of the degree of concentration of residents who are low- and moderate-income persons. In applying this exception, HUD will determine the lowest proportion a recipient may use to qualify an area for this purpose, as follows:

(A) All census block groups in the recipient's jurisdiction shall be rank ordered from the block group of highest proportion of low and moderate income persons to the block group with the lowest. For urban counties, the rank ordering shall cover the entire area constituting the urban county and shall not be done separately for each participating unit of general local government.

(B) In any case where the total number of a recipient's block groups does not divide evenly by four, the block group which would be fractionally divided between the highest and second quartiles shall be considered to be part of the highest quartile.

(C) The proportion of low- and moderate-income persons in the last census block group in the highest quartile shall be identified. Any service area located within the recipient's jurisdiction and having a proportion of low- and moderate-income persons at or above this level shall be considered to be within the highest quartile.

(D) If block group data are not available for the entire jurisdiction, other data acceptable to the Secretary may be used in the above calculations.

(iii) An activity to develop, establish, and operate for up to two years after the establishment of, a uniform emergency telephone number system serving an area having less than the percentage of low- and moderate-income residents required under paragraph (a)(1)(i) or (as applicable) paragraph (a)(1)(ii) of this section, provided the recipient obtains prior HUD approval. To obtain such approval, the recipient must:

(A) Demonstrate that the system will contribute significantly to the safety of the residents of the area. The request for approval must include a list of the emergency services that will participate in the emergency telephone number system;

(B) Submit information that serves as a basis for HUD to determine whether at least 51 percent of the use of the system will be by residents who are low- and moderate-income persons. As available, the recipient must provide information that identifies the total number of calls actually received over the preceding 12-month period for each of the emergency services to be covered by the emergency telephone number system and relates those calls to the geographic segment (expressed as nearly as possible in terms of census tracts, block groups, or combinations thereof that are contained within the segment) of the service area from which the calls were generated. In analyzing this data to meet the

requirements of this section, HUD will assume that the distribution of income among the callers generally reflects the income characteristics of the general population residing in the same geographic area where the callers reside. If HUD can conclude that the users have primarily consisted of low- and moderate-income persons, no further submission is needed by the recipient. If a recipient plans to make other submissions for this purpose, it may request that HUD review its planned methodology before expending the effort to acquire the information it expects to use to make its case;

(C) Demonstrate that other Federal funds received by the recipient are insufficient or unavailable for a uniform emergency telephone number system. For this purpose, the recipient must submit a statement explaining whether the lack of funds is due to the insufficiency of the amount of the available funds, restrictions on the use of such funds, or the prior commitment of funds by the recipient for other purposes; and

(D) Demonstrate that the percentage of the total costs of the system paid for by CDBG funds does not exceed the percentage of low- and moderate-income persons residing in the service area of the system. For this purpose, the recipient must include a description of the boundaries of the service area of the emergency telephone number system, the census divisions that fall within the boundaries of the service area (census tracts or block groups), the total number of persons and the total number of low- and moderate-income persons residing within each census division, the percentage of low- and moderate-income persons residing within the service area, and the total cost of the system.

(iv) An activity for which the assistance to a public improvement that provides benefits to all the residents of an area is limited to paying special assessments (as defined in § 570.200(c)) levied against residential properties owned and occupied by persons of low- and moderate-income.

(v) For purposes of determining qualification under this criterion, activities of the same type that serve different areas will be considered separately on the basis of their individual service area.

(vi) In determining whether there is a sufficiently large percentage of low- and moderate-income persons residing in the area served by an activity to qualify under paragraph (a)(1)(i), (ii), or (vii) of this section, the most recently available Census Bureau data provided by HUD must be used to the fullest extent feasible, together with the section 8 income limits that would have applied at the time the income information was collected by the Census Bureau. Recipients that believe that the census data does not reflect current relative income levels in an area, or where census boundaries do not coincide sufficiently well with the service area of an activity, may conduct (or have conducted) a current survey of the residents of the area to determine the percent of such persons that are low- and moderate-income. HUD will accept information obtained through such surveys, to be used in lieu of the census data, where it determines that the survey was conducted in such a manner that the results meet standards of statistical reliability that are comparable to that of census data for areas of similar size. Where there is substantial evidence that provides a clear basis to believe that the use of the census data would substantially overstate the proportion of persons residing there that are low and moderate income, HUD may require that the recipient rebut such evidence in order to demonstrate compliance with section 105(c)(2) of the Act.

(vii) Activities meeting the requirements of paragraph (d)(5)(i) of this section may be considered to qualify under this paragraph, provided that the area covered by the strategy is either a Federally-designated Empowerment Zone or Enterprise Community or primarily residential and contains a percentage of low- and moderate-income residents that is no less than the percentage computed by HUD pursuant to paragraph (a)(1)(ii) of this section or 70 percent, whichever is less, but in no event less than 51 percent. Activities meeting the requirements of paragraph (d)(6)(i) of this section may also be considered to qualify under this paragraph (a)(1).

(2) *Limited clientele activities.* (i) An activity which benefits a limited clientele, at least 51 percent of whom are low- or moderate-income persons. The activity must meet one of the following tests:

(A) Benefit at least one of the following clientele, which are presumed to be low- and moderate-income persons: abused children; survivors of domestic violence; elderly persons (see 570.3 for definition of elderly); adults meeting the Bureau of the Census' Current Population Reports definition of ''severely disabled;'' homeless persons; illiterate adults (adults unable to read and write in English and in their first language, if their first language is not English); persons living with AIDS; migrant farm workers; persons who meet the Federal poverty guidelines; persons insured by Medicaid; or

(B) Require information on family size and income that demonstrates that at least 51 percent of the clientele are persons whose family income does not exceed the low- and moderate-income limit; or

(C) Have income eligibility requirements which limit the activity exclusively to low- and moderate-income persons; or

(D) Be of such nature and be in such location that it may be concluded that the activity's clientele will primarily be low- and moderate-income persons.

(ii) An activity that serves to remove material or architectural barriers to the mobility or accessibility of elderly persons or of adults meeting the Bureau of the Census' Current Population Reports definition of ''severely disabled'' will be presumed to qualify under this criterion if it is restricted, to the extent practicable, to the removal of such barriers by assisting:

(A) The reconstruction of a public facility or improvement, or portion thereof, that does not qualify under paragraph (a)(1) of this section;

(B) The rehabilitation of a privately owned nonresidential building or improvement that does not qualify under paragraph (a)(1) or (4) of this section; or

(C) The rehabilitation of the common areas of a residential structure that contains more than one dwelling unit and that does not qualify under paragraph (a)(3) of this section.

(iii) A microenterprise assistance activity carried out in accordance with the provisions of § 570.201(o) with respect to those owners of microenterprises and persons developing microenterprises assisted under the activity during each program year who are low- and moderate-income persons. For purposes of this paragraph, persons determined to be low and moderate income may be presumed to continue to qualify as such for up to a three-year period.

(iv) An activity designed to provide job training and placement and/or other employment support services, including, but not limited to, peer support programs, counseling, child care, transportation, and other similar services, in which the percentage of low- and moderate-income persons assisted is less than 51 percent may qualify under this paragraph in the following limited circumstance:

(A) In such cases where such training or provision of supportive services assists business(es), the only use of CDBG assistance for the project is to

provide the job training and/or supportive services; and

(B) The proportion of the total cost of the project borne by CDBG funds is no greater than the proportion of the total number of persons assisted who are low or moderate income.

(v) The following kinds of activities may not qualify under this paragraph (a)(2): activities that provide benefits to all the residents of an area; activities involving the acquisition, construction or rehabilitation of property for housing; or activities where the benefit to low- and moderate-income persons to be considered is the creation or retention of jobs, except as provided in paragraph (a)(2)(iv) of this section.

(3) *Housing activities.* An eligible activity carried out for the purpose of providing or improving permanent residential structures which will be occupied by low- and moderate-income households. This would include, but not necessarily be limited to, the acquisition or rehabilitation of property by the recipient, a subrecipient, a developer, an individual homebuyer, or an individual homeowner; conversion of nonresidential structures; and new housing construction. If the structure contains two dwelling units, at least one must be so occupied, and if the structure contains more than two dwelling units, at least 51 percent of the units must be so occupied. Where two or more rental buildings being assisted are or will be located on the same or contiguous properties, and the buildings will be under common ownership and management, the grouped buildings may be considered for this purpose as a single structure. Where housing activities being assisted meet the requirements of paragraph (d)(5)(ii) or (d)(6)(ii) of this section, all such housing may also be considered for this purpose as a single structure. For rental housing, occupancy by low- and moderate-income households must be at affordable rents to qualify under this criterion. The recipient shall adopt and make public its standards for determining ''affordable rents'' for this purpose. The following shall also qualify under this criterion:

(i) When less than 51 percent of the units in a structure will be occupied by low- and moderate- income households:

(A) The assistance is for an eligible activity to reduce the development cost of the substantial rehabilitation or conversion of a nonresidential structure to a multifamily, non-elderly rental housing project, or the new construction of a multifamily, non-elderly rental housing project;

(B) At least 20 percent of the units will be occupied by low- and moderate-income households at affordable rents; and

(C) The proportion of the total cost of developing the project to be borne by CDBG funds is no greater than the proportion of units in the project that will be occupied by low and moderate income households.

(ii) When CDBG funds are used to assist rehabilitation eligible under § 570.202(b)(9) or (10) in direct support of the recipient's Rental Rehabilitation program authorized under 24 CFR part 511, such funds shall be considered to benefit low and moderate income persons where not less than 51 percent of the units assisted, or to be assisted, by the recipient's Rental Rehabilitation program overall are for low and moderate income persons.

(iii) When CDBG funds are used for housing services eligible under § 570.201(k), such funds shall be considered to benefit low- and moderate-income persons if the housing units for which the services are provided are HOME-assisted and the requirements at 24 CFR 92.252 or 92.254 are met.

(4) *Job creation or retention activities.* An activity designed to create or retain permanent jobs where at least 51 percent of the full-time equivalent jobs involve the employment of low- and moderate-income persons. Poverty rates used in this paragraph shall be determined by Census Bureau data provided by HUD. To qualify under this paragraph, the activity must meet the following criteria:

(i) For an activity that creates jobs, the recipient must document that at least 51 percent of the jobs will be held by, or will be available to, low- and moderate-income persons.

(ii) For an activity that retains jobs, the recipient must document that the jobs would actually be lost without the CDBG assistance and that either or both of the following conditions apply with respect to at least 51 percent of the jobs at the time the CDBG assistance is provided:

(A) The job is known to be held by a low- or moderate-income person; or

(B) The job can reasonably be expected to turn over within the following two years and that steps will be taken to ensure that it will be filled by, or made available to, a low- or moderate-income person upon turnover.

(iii) Jobs that are not held or filled by a low- or moderate-income person may be considered to be available to low- and moderate-income persons if:

(A) The assisted business does not require as a prerequisite special skill that can only be acquired with substantial training or work experience or education beyond high school, or the business agrees to hire unqualified persons and provide training; and

(B) The recipient and the assisted business take actions to ensure that low- and moderate-income persons receive first consideration for filling such jobs.

(iv) For purposes of determining whether a job is held by or made available to a low- or moderate-income person, the person may be presumed to be a low- or moderate-income person if:

(A) The person resides, or the assisted business through which the person is employed is located, within a census tract that meets the requirements of paragraph (a)(4)(v) of this section; or

(B) The person resides within a census tract that has at least 70 percent of its population who are low- and moderate-income persons.

(v) A census tract qualifies for the presumptions permitted under paragraph (a)(4)(iv)(A) of this section if it has a poverty rate of at least 20 percent and meets at least one of the following standards:

(A) The specific activity being undertaken is located in a block group that has a poverty rate of at least 20 percent; or

(B) Upon the written request by the recipient, HUD determines that the census tract exhibits other objectively determinable signs of general distress such as high incidence of crime, narcotics use, homelessness, abandoned housing, deteriorated infrastructure, or substantial population decline.

(vi) Each assisted business shall be considered to be a separate activity for purposes of determining whether the activity qualifies under this paragraph, except:

(A) In certain cases such as where CDBG funds are used to acquire, develop or improve a real property (*e.g.,* a business incubator or an industrial park) the requirement may be met by measuring jobs in the aggregate for all the businesses which locate on the property, provided such businesses are not otherwise assisted by CDBG funds.

(B) Where CDBG funds are used to pay for the staff and overhead costs of an entity making loans to businesses exclusively from non-CDBG funds, this requirement may be met by aggregating the jobs created by all of the businesses receiving loans during each program year.

(C) Where CDBG funds are used by a recipient or subrecipient to provide technical assistance to businesses, this requirement may be met by aggregating the jobs created or retained by all of the businesses receiving technical assistance during each program year.

(D) Where CDBG funds are used for activities meeting the criteria listed at § 570.209(b)(2)(v), this requirement may be met by aggregating the jobs created or retained by all businesses for which CDBG assistance is obligated for such activities during the program year, except as provided at paragraph (d)(7) of this section.

(E) Where CDBG funds are used by a Community Development Financial Institution to carry out activities for the purpose of creating or retaining jobs, this requirement may be met by aggregating the jobs created or retained by all businesses for which CDBG assistance is obligated for such activities during the program year, except as provided at paragraph (d)(7) of this section.

(F) Where CDBG funds are used for public facilities or improvements which will result in the creation or retention of jobs by more than one business, this requirement may be met by aggregating the jobs created or retained by all such businesses as a result of the public facility or improvement.

(*1*) Where the public facility or improvement is undertaken principally for the benefit of one or more particular businesses, but where other businesses might also benefit from the assisted activity, the requirement may be met by aggregating only the jobs created or retained by those businesses for which the facility/improvement is principally undertaken, provided that the cost (in CDBG funds) for the facility/improvement is less than $10,000 per permanent full-time equivalent job to be created or retained by those businesses.

(*2*) In any case where the cost per job to be created or retained (as determined under paragraph (a)(4)(vi)(F)(*1*) of this section) is $10,000 or more, the requirement must be met by aggregating the jobs created or retained as a result of the public facility or improvement by all businesses in the service area of the facility/improvement. This aggregation must include businesses which, as a result of the public facility/improvement, locate or expand in the service area of the facility/improvement between the date the recipient identifies the activity in its action plan under part 91 of this title and the date one year after the physical completion of the facility/improvement. In addition, the assisted activity must comply with the public benefit standards at § 570.209(b).

(b) *Activities which aid in the prevention or elimination of slums or blight.* Activities meeting one or more of the following criteria, in the absence of substantial evidence to the contrary, will be considered to aid in the prevention or elimination of slums or blight:

(1) *Activities to address slums or blight on an area basis.* An activity will be considered to address prevention or elimination of slums or blight in an area if:

(i) The area, delineated by the recipient, meets a definition of a slum, blighted, deteriorated or deteriorating area under State or local law;

(ii) The recipient demonstrates, supported by quantifiable data, that at least 25 percent of properties throughout the area experience a condition relating to physical or economic distress, such as abandoned or vacant properties, and/or known or suspected environmental contamination.

(iii) The assisted activity addresses one or more of the conditions which contributed to the deterioration of the area. Rehabilitation of residential buildings carried out in an area meeting the above requirements will be considered to address the area's deterioration only where each such building rehabilitated is considered substandard under local definition before rehabilitation, and all deficiencies making a building substandard have been eliminated if less critical work on the building is undertaken. At a minimum, the local definition for this purpose must be such that buildings that it would render substandard would also fail to meet the Housing Quality Standards (24 CFR 982.401).

(2) *Activities to address slums or blight on a spot basis.* The following activities may be undertaken on a spot basis to eliminate specific conditions of blight, physical decay, or environmental contamination that are not located in a slum or blighted area: acquisition; clearance; relocation; historic preservation; remediation of environmentally contaminated properties; or rehabilitation of buildings or improvements. If acquisition or relocation is undertaken, it must be a precursor to another eligible activity (funded with CDBG or other resources) that directly eliminates the specific conditions of blight or physical decay, or environmental contamination.

Note 1 to paragraph (b). Activities which aid in the prevention or elimination of slums or blight: Despite the restrictions in paragraphs (b)(1) and (2) of this section, any rehabilitation activity which benefits low- and moderate-income persons pursuant to paragraph (a)(3) of this section can be undertaken without regard to the area in which it is located or the extent or nature of rehabilitation assisted.

(c) *Activities designed to meet community development needs having a particular urgency.* In the absence of substantial evidence to the contrary, an activity will be considered to address this objective if the recipient certifies that the activity is designed to alleviate existing conditions which pose a serious and immediate threat to the health or welfare of the community which are of recent origin or which recently became urgent, that the recipient is unable to finance the activity on its own, and that other sources of funding are not available. A condition will generally be considered to be of recent origin if it developed or became critical within 18 months preceding the certification by the recipient.

(d) *Additional criteria.* (1) Where the assisted activity is acquisition of real property, a preliminary determination of whether the activity addresses a national objective may be based on the planned use of the property after acquisition. A final determination shall be based on the actual use of the property, excluding any short-term, temporary use. Where the acquisition is for the purpose of clearance which will eliminate specific conditions of blight or physical decay, the clearance activity shall be considered the actual use of the property. However, any subsequent use or disposition of the cleared property shall be treated as a ''change of use'' under § 570.505.

(2) Where the assisted activity is relocation assistance that the recipient is required to provide, such relocation assistance shall be considered to address the same national objective as is addressed by the displacing activity. Where the relocation assistance is voluntary on the part of the grantee the recipient may qualify the assistance either on the basis of the national objective addressed by the displacing activity or on the basis that the recipients of the relocation assistance are low and moderate income persons.

(3) In any case where the activity undertaken for the purpose of creating or retaining jobs is a public improvement and the area served is primarily residential, the activity must meet the requirements of paragraph (a)(1) of this section as well as those of paragraph (a)(4) of this section in order to qualify as benefiting low and moderate income persons.

(4) CDBG funds expended for planning and administrative costs under § 570.205 and § 570.206 will be considered to address the national objectives.

(5) Where the grantee has elected to prepare an area revitalization strategy pursuant to the authority of 24 CFR

91.215(g) and HUD has approved the strategy, the grantee may also elect the following options:

(i) Activities undertaken pursuant to the strategy for the purpose of creating or retaining jobs may, at the option of the grantee, be considered to meet the requirements of this paragraph under the criteria at paragraph (a)(1)(vii) of this section in lieu of the criteria at paragraph (a)(4) of this section; and

(ii) All housing activities in the area for which, pursuant to the strategy, CDBG assistance is obligated during the program year may be considered to be a single structure for purposes of applying the criteria at paragraph (a)(3) of this section.

(6) Where CDBG-assisted activities are carried out by a Community Development Financial Institution whose charter limits its investment area to a primarily residential area consisting of at least 51 percent low- and moderate-income persons, the grantee may also elect the following options:

(i) Activities carried out by the Community Development Financial Institution for the purpose of creating or retaining jobs may, at the option of the grantee, be considered to meet the requirements of this paragraph under the criteria at paragraph (a)(1)(vii) of this section in lieu of the criteria at paragraph (a)(4) of this section; and

(ii) All housing activities for which the Community Development Financial Institution obligates CDBG assistance during the program year may be considered to be a single structure for purposes of applying the criteria at paragraph (a)(3) of this section.

(7) Where an activity meeting the criteria at § 570.209(b)(2)(v) may also meet the requirements of either paragraph (d)(5)(i) or (d)(6)(i) of this section, the grantee may elect to qualify the activity under either the area benefit criteria at paragraph (a)(1)(vii) of this section or the job aggregation criteria at paragraph (a)(4)(vi)(D) of this section, but not both. Where an activity may meet the job aggregation criteria at both paragraphs (a)(4)(vi)(D) and (E) of this section, the grantee may elect to qualify the activity under either criterion, but not both.

(e) *Timeframe to meet a national objective.* Recipients are required to demonstrate that activities carried out under this subpart meet a national objective within six years of the date of the initial drawdown of CDBG funds for that activity or the length of the period of performance and any extension permitted under § 570.509, whichever is shorter.

■ 19. Amend §570.209 as follows:

■ a. Remove and reserve paragraphs (b)(1) and (2);

■ b. Revise paragraph (b)(3);

■ c. Remove in paragraph (b)(4) wherever it appears the reference ''(b)(3)(i)'' and add in its place ''(b)(3)(i) or (ii)''; and

■ d. Add paragraphs (b)(4)(iv) and (b)(5);

The revision and additions read as follows:

§ 570.209 Guidelines for evaluating and selecting economic development projects.

* * * * *

(b) * * *

(3) *Standards for individual activities.* (i) Any activity subject to these guidelines which falls into one or more of the following categories may be assisted with CDBG funds if the amount of CDBG assistance is equal to or less than either of the following:

(A) $100,000 per full-time equivalent, permanent job created or retained; or

(B) $2,000 per low- and moderate-income person to which goods or services are provided by the activity.

(ii) Any activity subject to these guidelines carried out pursuant to subpart M may be assisted with CDBG funds if HUD, through written approval, calculates that the cost of the activity on a net present value basis does not exceed the following amount of CDBG assistance:

(A) $50,000 per full-time equivalent, permanent job created or retained; or

(B) $1,000 per low- and moderate-income person to which goods or services are provided by the activity.

(iii) An activity subject to these guidelines may be assisted with CDBG funds, if HUD determines in writing, based upon the written request of the recipient, that the recipient has demonstrated that the activity would result in a significant contribution to the goals and purposes of the CDBG program and the activity:

(A) Would not result in a violation of a statutory provision or any other regulatory provision; and

(B) Would not result in undue hardship to the recipient or beneficiaries of the activity.

(iv) Any activity which consists of or includes any of the following will be considered by HUD to provide insufficient public benefit and may not be assisted with CDBG funds:

(A) General promotion of the community as a whole (as opposed to the promotion of specific areas and programs);

(B) Assistance to professional sports teams;

(C) Assistance to privately-owned recreational facilities that serve a predominantly higher-income clientele, where the recreational benefit to users or members clearly outweighs employment or other benefits to low- and moderate-income persons;

(D) Acquisition of land for which the specific proposed use has not yet been identified; and

(E) Assistance to a for-profit business while that business or any other business owned by the same person(s) or entity(ies) is the subject of unresolved findings of noncompliance relating to previous CDBG assistance provided by the recipient.

* * * * *

(4) * * *

(iv) The cost of an activity pursuant to (b)(3)(ii) of this section shall be determined by applying the procedures described in a notice issued by HUD.

(5) *Updating the individual activity standards.* The standards in paragraphs (b)(3)(i) and (ii) of this section may be updated by issuance of a document in the **Federal Register** specifying the revised standards.

* * * * *

■ 20. Amend § 570.210 by revising paragraph (b)(2) to read as follows:

§ 570.210 Prohibition on use of assistance for employment relocation activities.

* * * * *

(b) * * *

(2) *Labor market area (LMA).* For metropolitan areas, an LMA is an area defined as such by the BLS. An LMA is an economically integrated geographic area within which individuals can live and find employment within a reasonable distance or can readily change employment without changing their place of residence. In addition, LMAs are nonoverlapping and geographically exhaustive. For metropolitan areas, grantees must use employment data, as defined by the BLS, for the LMA in which the affected business is currently located and from which current jobs may be lost. For non-metropolitan areas, an LMA is either an area defined by the BLS as an LMA, or a State may choose to combine non-metropolitan LMAs. States are required to define or reaffirm prior definitions of their LMAs on an annual basis and retain records to substantiate such areas prior to any business relocation that would be impacted by this rule. Metropolitan LMAs cannot be combined. However, a non-metropolitan LMA can be combined with a metropolitan LMA if it is for business reasons such as code enforcement compliance, necessary for expansion, necessary for transportation or supply chain access. Grantees must document the business reason for the combination

of a non-metropolitan LMA with a metropolitan LMA. For the HUD-administered Small Cities Program, each of the three participating counties in Hawaii will be considered to be its own LMA. Recipients of Fiscal Year 1999 Small Cities Program funding in New York will follow the requirements for State CDBG recipients.

* * * * *

■ 21. Amend § 570.307 as follows:

■ a. Remove in paragraphs (b)(1) and (d)(1) ''§ 570.3(3)'' and add in its place ''§ 570.3''; and

■ b. Add paragraph (h);

The addition reads as follows:

§ 570.307 Urban counties.

* * * * *

(h) *Timeline.* Urban counties are required to complete the qualification or requalification process to qualify as an urban county no later than September 30 of the year of qualification or requalification.

Subpart E [Removed and Reserved]

■ 22. Remove and reserve subpart E, consisting of §§ 570.400 through 570.416.

Subpart G [Removed and Reserved]

■ 23. Remove and reserve subpart G, consisting of §§ 570.450 through 570.466.

■ 24. Amend § 570.481 by adding paragraph (a)(4) to read as follows:

§ 570.481 Definitions.

(a) * * *

(4) *Period of performance* means the time period beginning on HUD's approval of a grant agreement for a given grant and ending six years from that date. For loan guarantees issued pursuant to subpart M of this part, the period of performance means the time period beginning on the date of HUD's guarantee of a promissory note or other obligation and ending six years from that date.

* * * * *

■ 25. Amend § 570.482 as follows:

■ a. Remove in paragraphs (c)(1) and (c)(2)(i) the text ''section 105(a)(23)'' and add in their places ''section 105(a)(22)'';

■ b. Remove and reserve paragraphs (f)(2) and (3);

■ c. Revise paragraph (f)(4);

■ d. Remove in paragraph (f)(5)(i) the reference ''(f)(4)(i)'' and add in its place ''(f)(4)(i) or (ii)'';

■ e. Remove in paragraphs (f)(5)(ii) and (iii) the reference ''(f)(4)(i)'' and adding in their places ''(f)(4)(i) and (ii)'';

■ f. Add paragraph (f)(5)(iv);

■ g. Redesignate paragraph (f)(6) as paragraph (f)(7);

■ h. Add new paragraph (f)(6); and

■ i. Revise paragraph (h)(2)(ii);

The revisions and additions read as follows:

§ 570.482 Eligible activities.

* * * * *

(f) * * *

(4) *Standards for individual activities.* (i) Any activity subject to these standards which falls into one or more of the following categories may be assisted with CDBG funds if the amount of CDBG assistance is equal to or less than either of the following:

(A) $100,000 per full-time equivalent, permanent job created or retained; or

(B) $2,000 per low- and moderate-income person to which goods or services are provided by the activity.

(ii) Any activity subject to these standards carried out pursuant to subpart M may be assisted with CDBG funds if HUD, through written approval, calculates that the cost of the activity on a net present value basis does not exceed the following amount of CDBG assistance:

(A) $50,000 per full-time equivalent, permanent job created or retained; or

(B) $1,000 per low- and moderate-income person to which goods or services are provided by the activity.

(iii) An activity subject to these standards may be assisted with CDBG funds, if HUD determines in writing, based upon the written request of the recipient, that the recipient has demonstrated that the activity would result in a significant contribution to the goals and purposes of the CDBG program and the activity:

(A) Would not result in a violation of a statutory provision or any other regulatory provision; and

(B) Would not result in undue hardship to the recipient or beneficiaries of the activity.

(iv) Any activity which consists of or includes any of the following will be considered by HUD to provide insufficient public benefit and may not be assisted with CDBG funds:

(A) General promotion of the community as a whole (as opposed to the promotion of specific areas and programs);

(B) Assistance to professional sports teams;

(C) Assistance to privately-owned recreational facilities that serve a predominantly higher-income clientele, where the recreational benefit to users or members clearly outweighs employment or other benefits to low- and moderate-income persons;

(D) Acquisition of land for which the specific proposed use has not yet been identified; and

(E) Assistance to a for-profit business while that business or any other business owned by the same person(s) or entity(ies) is the subject of unresolved findings of noncompliance relating to previous CDBG assistance provided by the recipient.

* * * * *

(5) * * *

(iv) The cost of an activity pursuant to paragraph (b)(3)(ii) of this section shall be determined by applying the procedures described in a notice issued by HUD.

(6) *Updating the individual activity standards.* The standards in paragraphs (b)(3)(i) and (ii) of this subsection may be updated by issuance of a document in the **Federal Register** specifying the revised standards.

* * * * *

(h) * * *

(2) * * *

(ii) *Labor market area (LMA).* For metropolitan areas, an LMA is an area defined as such by the U.S. Bureau of Labor Statistics (BLS). An LMA is an economically integrated geographic area within which individuals can live and find employment within a reasonable distance or can readily change employment without changing their place of residence. In addition, LMAs are nonoverlapping and geographically exhaustive. For metropolitan areas, grantees must use employment data, as defined by the BLS, for the LMA in which the affected business is currently located and from which current jobs may be lost. For non-metropolitan areas, grantees must use employment data, as defined by the BLS, for the LMA in which the assisted business is currently located and from which current jobs may be lost. For non-metropolitan areas, a LMA is either an area defined by the BLS as an LMA, or a State may choose to combine non-metropolitan LMAs. States are required to define or reaffirm prior definitions of their LMAs on an annual basis and retain records to substantiate such areas prior to any business relocation that would be impacted by this rule. Metropolitan LMAs cannot be combined. However, a non-metropolitan LMA can be combined with a metropolitan LMA if it is for business reasons such as code enforcement compliance, necessary for expansion, necessary for transportation or supply chain access. Grantees must document the business reason for the combination of a non-metropolitan LMA with a metropolitan LMA. For the Insular Areas, each jurisdiction will be considered to be an LMA. For the HUD-administered Small Cities Program, each of the three participating counties in

Hawaii will be considered to be its own LMA. Recipients of Fiscal Year 1999 Small Cities Program funding in New York will follow the requirements for State CDBG recipients.

* * * * *

■ 26. Revise and republish § 570.483 to read as follows:

§ 570.483 Criteria for national objectives.

(a) *General.* The following criteria shall be used to determine whether a CDBG assisted activity complies with one or more of the national objectives as required to section 104(b)(3) of the Act. (HUD is willing to consider a waiver of these requirements in accordance with § 570.480(b)).

(b) *Activities benefiting low- and moderate-income persons.* Activities meeting the criteria in this paragraph (b) will be considered to benefit low- and moderate-income persons unless there is substantial evidence to the contrary. In assessing any such evidence, the full range of direct effects of the assisted activity will be considered. (The recipient shall appropriately ensure that activities that meet these criteria do not benefit moderate-income persons to the exclusion of low-income persons.)

(1) *Area benefit activities.* (i) An activity, the benefits of which are available to all the residents in a primarily residential area, where at least 51 percent of the residents are low- and moderate-income persons. The activity must serve the entire area, but the area served need not be coterminous with census tracts or other officially recognized boundaries.

(ii) An activity, where the assistance is to a public improvement that provides benefits to all the residents of an area, that is limited to paying special assessments levied against residential properties owned and occupied by persons of low and moderate income.

(iii)(A) An activity to develop, establish and operate (not to exceed two years after establishment), a uniform emergency telephone number system serving an area having less than 51 percent of low and moderate income residents, when the system has not been made operational before the receipt of CDBG funds, provided a prior written determination is obtained from HUD. HUD's determination will be based upon certifications by the State that:

(*1*) The system will contribute significantly to the safety of the residents of the area. The unit of general local government must provide the State a list of jurisdictions and unincorporated areas to be served by the system and a list of the emergency services that will participate in the emergency telephone number system;

(*2*) At least 51 percent of the use of the system will be by low- and moderate-income persons. The State's certification may be based upon information which identifies the total number of calls actually received over the preceding twelve-month period for each of the emergency services to be covered by the emergency telephone number system and relates those calls to the geographic segment (expressed as nearly as possible in terms of census tracts, enumeration districts, block groups, or combinations thereof that are contained within the segment) of the service area from which the calls were generated. In analyzing this data to meet the requirements of this section, the State will assume that the distribution of income among callers generally reflects the income characteristics of the general population residing in the same geographic area where the callers reside. Alternatively, the State's certification may be based upon other data, agreed to by HUD and the State, which shows that over the preceding twelve-month period the users of all the services to be included in the emergency telephone number system consisted of at least 51 percent low- and moderate-income persons.

(*3*) Other Federal funds received by the unit of general local government are insufficient or unavailable for a uniform emergency telephone number system. The unit of general local government must submit a statement explaining whether the problem is caused by the insufficiency of the amount of such funds, the restrictions on the use of such funds, or the prior commitment of such funds for other purposes by the unit of general local government.

(*4*) Demonstrate that the percentage of the total costs of the system paid for by CDBG funds does not exceed the percentage of low- and moderate-income persons residing in the service area of the system. For this purpose, the recipient must include a description of the boundaries of the service area of the emergency telephone number system, the census divisions that fall within the boundaries of the service area (census tracts or block groups), the total number of persons and the total number of low- and moderate-income persons residing within each census division, the percentage of low- and moderate-income persons residing within the service area, and the total cost of the system.

(B) The certifications of the State must be submitted along with a brief statement describing the factual basis upon which the certifications were made.

(iv) Activities meeting the requirements of paragraph (e)(4)(i) of this section may be considered to qualify under this paragraph (b)(1).

(v) HUD will consider activities meeting the requirements of paragraph (e)(5)(i) of this section to qualify under paragraph (b)(1) of this section, provided that the area covered by the strategy meets one of the following criteria:

(A) The area is in a federally designated Empowerment Zone or Enterprise Community;

(B) The area is primarily residential and contains a percentage of low and moderate income residents that is no less than 70 percent;

(C) All of the census tracts (or block numbering areas) in the area have poverty rates of at least 20 percent, at least 90 percent of the census tracts (or block numbering areas) in the area have poverty rates of at least 25 percent, and the area is primarily residential. (If only part of a census tract or block numbering area is included in a strategy area, the poverty rate shall be computed for those block groups (or any part thereof) which are included in the strategy area.)

(D) Upon request by the State, HUD may grant exceptions to the 70 percent low and moderate income or 25 percent poverty minimum thresholds on a case-by-case basis. In no case, however, may a strategy area have both a percentage of low and moderate income residents less than 51 percent and a poverty rate less than 20 percent.

(2) *Limited clientele activities.* (i) An activity which benefits a limited clientele, at least 51 percent of whom are low- or moderate-income persons.

(ii) To qualify under this paragraph (b)(2), the activity must meet one or the following tests:

(A) Benefit at least one of the following clientele, which are presumed to be low- and moderate-income persons: abused children; survivors of domestic violence; elderly persons (see 570.3 for definition of elderly); adults meeting the Bureau of the Census' Current Population Reports definition of ''severely disabled;'' homeless persons; illiterate adults (adults unable to read and write in English and in their first languages if their first language is not English); persons living with AIDS; migrant farm workers; persons who meet the Federal poverty guidelines; persons insured by Medicaid; or

(B) Require information on family size and income that demonstrates that at least 51 percent of the clientele are persons whose family income does not exceed the low- and moderate-income limit; or

(C) It must have income eligibility requirements which limit the activity exclusively to low and moderate income persons; or

(D) It must be of such a nature, and be in such a location, that it may be concluded that the activity's clientele will primarily be low and moderate income persons.

(iii) An activity that serves to remove material or architectural barriers to the mobility or accessibility of elderly persons or of adults meeting the Bureau of the Census' Current Population Reports definition of ''severely disabled'' will be presumed to qualify under this criterion if it is restricted, to the extent practicable, to the removal of such barriers by assisting:

(A) The reconstruction of a public facility or improvement, or portion thereof, that does not qualify under paragraph (b)(1) of this section;

(B) The rehabilitation of a privately owned nonresidential building or improvement that does not qualify under paragraph (b)(1) or (4) of this section; or

(C) The rehabilitation of the common areas of a residential structure that contains more than one dwelling unit and that does not qualify under paragraph (b)(3) of this section.

(iv) A microenterprise assistance activity (carried out in accordance with the provisions of section 105(a)(23) of the Act or § 570.482(c) and limited to microenterprises) with respect to those owners of microenterprises and persons developing microenterprises assisted under the activity who are low- and moderate-income persons. For purposes of this paragraph, persons determined to be low and moderate income may be presumed to continue to qualify as such for up to a three-year period.

(v) An activity designed to provide job training and placement and/or other employment support services, including, but not limited to, peer support programs, counseling, child care, transportation, and other similar services, in which the percentage of low- and moderate-income persons assisted is less than 51 percent may qualify under this paragraph in the following limited circumstances:

(A) In such cases where such training or provision of supportive services is an integrally-related component of a larger project, the only use of CDBG assistance for the project is to provide the job training and/or supportive services; and

(B) The proportion of the total cost of the project borne by CDBG funds is no greater than the proportion of the total number of persons assisted who are low or moderate income.

(vi) The following kinds of activities may not qualify under paragraph this (b)(2): activities that provide benefits to all the residents of an area; activities involving the acquisition, construction or rehabilitation of property for housing; or activities where the benefit to low- and moderate-income persons to be considered is the creation or retention of jobs, except as provided in paragraph (b)(2)(iv) of this section.

(3) *Housing activities.* An eligible activity carried out for the purpose of providing or improving permanent residential structures that, upon completion, will be occupied by low and moderate income households. This would include, but not necessarily be limited to, the acquisition or rehabilitation of property by the unit of general local government, a subrecipient, an entity eligible to receive assistance under section 105(a)(15) of the Act, a developer, an individual homebuyer, or an individual homeowner; conversion of nonresidential structures; and new housing construction. If the structure contains two dwelling units, at least one must be so occupied, and if the structure contains more than two dwelling units, at least 51 percent of the units must be so occupied. If two or more rental buildings being assisted are or will be located on the same or contiguous properties, and the buildings will be under common ownership and management, the grouped buildings may be considered for this purpose as a single structure. If housing activities being assisted meet the requirements of paragraph (e)(4)(ii) or (e)(5)(ii) of this section, all such housing may also be considered for this purpose as a single structure. For rental housing, occupancy by low and moderate income households must be at affordable rents to qualify under this criterion. The unit of general local government shall adopt and make public its standards for determining ''affordable rents'' for this purpose. The following shall also qualify under this criterion:

(i) When less than 51 percent of the units in a structure will be occupied by low- and moderate-income households, CDBG assistance may be provided in the following limited circumstances:

(A) The assistance is for an eligible activity to reduce the development cost of the substantial rehabilitation or conversion of a nonresidential structure to a multifamily, non-elderly rental housing project, or the new construction of a multifamily, non-elderly rental housing project;

(B) At least 20 percent of the units will be occupied by low- and moderate-income households at affordable rents; and

(C) The proportion of the total cost of developing the project to be borne by CDBG funds is no greater than the proportion of units in the project that will be occupied by low and moderate income households.

(ii) Where CDBG funds are used to assist rehabilitation delivery services or in direct support of the unit of general local government's Rental Rehabilitation Program authorized under 24 CFR part 511, the funds shall be considered to benefit low and moderate income persons where not less than 51 percent of the units assisted, or to be assisted, by the Rental Rehabilitation Program overall are for low and moderate income persons.

(iii) When CDBG funds are used for housing services eligible under section 105(a)(21) of the Act, if the housing units for which the services are provided are HOME-assisted and the requirements at 24 CFR 92.252 or 92.254 are met.

(4) *Job creation or retention activities.* (i) An activity designed to create or retain permanent jobs where at least 51 percent of the full-time equivalent jobs involve the employment of low- and moderate-income persons. Poverty rates used in this paragraph shall be determined by Census Bureau data provided by HUD.

(ii) For an activity that retains jobs, the unit of general local government must document that the jobs would actually be lost without the CDBG assistance and that either or both of the following conditions apply with respect to at least 51 percent of the jobs at the time the CDBG assistance is provided: The job is known to be held by a low or moderate income person; or the job can reasonably be expected to turn over within the following two years and that it will be filled by, or that steps will be taken to ensure that it is made available to, a low or moderate income person upon turnover.

(iii) Jobs that are not held or filled by a low- or moderate-income persons may be considered to be available to low- and moderate-income persons if:

(A) The assisted business does not require as a prerequisite special skills that can only be acquired with substantial training or work experience or education beyond high school, or the business agrees to hire unqualified persons and provide training; and

(B) The unit of general local government and the assisted business take actions to ensure that low and moderate income persons receive first consideration for filling such jobs.

(iv) For purposes of determining whether a job is held by or made available to a low- or moderate-income person, the person may be presumed to be a low- or moderate-income person if:

(A) The person resides, or the assisted business through which the person is employed is located, within a census tract that meets the requirements of paragraph (b)(4)(v) of this section; or

(B) The person resides within a census tract that has a population of low- and moderate-income persons of at least 70 percent of the block group.

(v) A census tract qualifies for the presumptions permitted under paragraph (b)(4)(iv)(A) of this section if it has a poverty rate of at least 20 percent and meets at least one of the following standards:

(A) The specific activity being undertaken is located in a block group that has a poverty rate of at least 20 percent; or

(B) Upon the written request by the recipient, HUD determines that the census tract exhibits other objectively determinable signs of general distress such as high incidence of crime, narcotics use, homelessness, abandoned housing, deteriorated infrastructure, or substantial population decline.

(vi) Each assisted business shall be considered to be a separate activity for purposes of determining whether the activity qualifies under this paragraph, except:

(A) In certain cases such as where CDBG funds are used to acquire, develop or improve a real property (*e.g.,* a business incubator or an industrial park) the requirement may be met by measuring jobs in the aggregate for all the businesses that locate on the property, provided the businesses are not otherwise assisted by CDBG funds.

(B) Where CDBG funds are used to pay for the staff and overhead costs of an entity specified in section 105(a)(15) of the Act making loans to businesses exclusively from non-CDBG funds, this requirement may be met by aggregating the jobs created by all of the businesses receiving loans during any one-year period.

(C) Where CDBG funds are used by a recipient or subrecipient to provide technical assistance to businesses, this requirement may be met by aggregating the jobs created or retained by all of the businesses receiving technical assistance during any one-year period.

(D) Where CDBG funds are used for activities meeting the criteria listed at § 570.482(f)(3)(v), this requirement may be met by aggregating the jobs created or retained by all businesses for which CDBG assistance is obligated for such activities during any one-year period, except as provided at paragraph (e)(6) of this section.

(E) Where CDBG funds are used by a Community Development Financial Institution to carry out activities for the purpose of creating or retaining jobs, this requirement may be met by aggregating the jobs created or retained by all businesses for which CDBG assistance is obligated for such activities during any one-year period, except as provided at paragraph (e)(6) of this section.

(F) Where CDBG funds are used for public facilities or improvements which will result in the creation or retention of jobs by more than one business, this requirement may be met by aggregating the jobs created or retained by all such businesses as a result of the public facility or improvement.

(*1*) Where the public facility or improvement is undertaken principally for the benefit of one or more particular businesses, but where other businesses might also benefit from the assisted activity, the requirement may be met by aggregating only the jobs created or retained by those businesses for which the facility/improvement is principally undertaken, provided that the cost (in CDBG funds) for the facility/improvement is less than $10,000 per permanent full-time equivalent job to be created or retained by those businesses.

(*2*) In any case where the cost per job to be created or retained (as determined under paragraph (b)(4)(vi)(F)(*1*) of this section) is $10,000 or more, the requirement must be met by aggregating the jobs created or retained as a result of the public facility or improvement by all businesses in the service area of the facility/improvement. This aggregation must include businesses which, as a result of the public facility/improvement, locate or expand in the service area of the public facility/improvement between the date the State awards the CDBG funds to the recipient and the date one year after the physical completion of the public facility/improvement. In addition, the assisted activity must comply with the public benefit standards at § 570.482(f).

(5) *Planning-only activities.* An activity involving planning (when such activity is the only activity for which the grant to the unit of general local government is given, or if the planning activity is unrelated to any other activity assisted by the grant) if it can be documented that at least 51 percent of the persons who would benefit from implementation of the plan are low and moderate income persons. Any such planning activity for an area or a community composed of persons of whom at least 51 percent are low and moderate income shall be considered to meet this national objective.

(c) *Activities which aid in the prevention or elimination of slums or blight.* Activities meeting one or more of the following criteria, in the absence of substantial evidence to the contrary, will be considered to aid in the prevention or elimination of slums or blight:

(1) *Activities to address slums or blight on an area basis.* An activity will be considered to address prevention or elimination of slums or blight in an area if the State can determine that:

(i) The area, delineated by the unit of general local government, meets a definition of a slum, blighted, deteriorated or deteriorating area under State or local law;

(ii) The unit of general local government demonstrates, supported by quantifiable data, that at least 25 percent of properties throughout the area experience a condition relating to physical or economic distress, such as abandoned or vacant properties, and/or known or suspected environmental contamination.

(iii) The assisted activity addresses one or more of the conditions which contributed to the deterioration of the area. Rehabilitation of residential buildings carried out in an area meeting the above requirements will be considered to address the area's deterioration only where each such building rehabilitated is considered substandard under local definition before rehabilitation, and all deficiencies making a building substandard have been eliminated if less critical work on the building is undertaken. At a minimum, the local definition for this purpose must be such that buildings that it would render substandard would also fail to meet the Housing Quality Standards (24 CFR 982.401).

Note 1 to paragraph (c)(1). Documentation is to be maintained by the unit of general local government on the boundaries of the area and the conditions and standards used that qualified the area at the time of its designation. The unit of general local government shall maintain records to substantiate how the area met the slums or blighted criteria. The designation of an area as slum or blighted under this section is required to have been determined within the last 10 years. Documentation must be retained pursuant to the recordkeeping requirements contained at § 570.506(b)(8)(ii).

(2) *Activities to address slums or blight on a spot basis.* The following activities may be undertaken on a spot basis to eliminate specific conditions of blight, physical decay, or environmental contamination that are not located in a

slum or blighted area: acquisition; clearance; relocation; historic preservation; remediation of environmentally contaminated properties; or rehabilitation of buildings or improvements. If acquisition or relocation is undertaken, it must be a precursor to another eligible activity (funded with CDBG or other resources) that directly eliminates the specific conditions of blight or physical decay, or environmental contamination.

Note 2 to paragraph (c): Activities which aid in the prevention or elimination of slums or blight: Despite the restrictions in paragraphs (c)(1) and (2) of this section, any rehabilitation activity which benefits low and moderate income persons pursuant to paragraph (a)(3) of this section can be undertaken without regard to the area in which it is located or the extent or nature of rehabilitation assisted.

(d) *Activities designed to meet community development needs having a particular urgency.* In the absence of substantial evidence to the contrary, an activity will be considered to address this objective if the unit of general local government certifies, and the State determines, that the activity is designed to alleviate existing conditions which pose a serious and immediate threat to the health or welfare of the community which are of recent origin or which recently became urgent, that the unit of general local government is unable to finance the activity on its own, and that other sources of funding are not available. A condition will generally be considered to be of recent origin if it developed or became urgent within 18 months preceding the certification by the unit of general local government.

(e) *Additional criteria.* (1) In any case where the activity undertaken is a public improvement and the activity is clearly designed to serve a primarily residential area, the activity must meet the requirements of paragraph (b)(1) of this section whether or not the requirements of paragraph (b)(4) of this section are met in order to qualify as benefiting low- and moderate-income persons.

(2) Where the assisted activity is acquisition of real property, a preliminary determination of whether the activity addresses a national objective may be based on the planned use of the property after acquisition. A final determination shall be based on the actual use of the property, excluding any short-term, temporary use. Where the acquisition is for the purpose of clearance which will eliminate specific conditions of blight or physical decay, the clearance activity shall be considered the actual use of the property. However, any subsequent use or disposition of the cleared property shall be treated as a ''change of use'' under § 570.489(j).

(3) Where the assisted activity is relocation assistance that the unit of general local government is required to provide, the relocation assistance shall be considered to address the same national objective as is addressed by the displacing activity. Where the relocation assistance is voluntary, the unit of general local government may qualify the assistance either on the basis of the national objective addressed by the displacing activity or, if the relocation assistance is to low and moderate income persons, on the basis of the national objective of benefiting low and moderate income persons.

(4) Where CDBG-assisted activities are carried out by a Community Development Financial Institution whose charter limits its investment area to a primarily residential area consisting of at least 51 percent low- and moderate-income persons, the unit of general local government may also elect the following options:

(i) Activities carried out by the Community Development Financial Institution for the purpose of creating or retaining jobs may, at the option of the unit of general local government, be considered to meet the requirements of this paragraph under the criteria at paragraph (b)(1)(iv) of this section in lieu of the criteria at paragraph (b)(4) of this section; and

(ii) All housing activities for which the Community Development Financial Institution obligates CDBG assistance during any one-year period may be considered to be a single structure for purposes of applying the criteria at paragraph (b)(3) of this section.

(5) If the unit of general local government has elected to prepare a community revitalization strategy pursuant to the authority of 24 CFR 91.315(e)(2), and the State has approved the strategy, the unit of general local government may also elect the following options:

(i) Activities undertaken pursuant to the strategy for the purpose of creating or retaining jobs may, at the option of the grantee, be considered to meet the requirements of paragraph (b) of this section under the criteria at paragraph (b)(1)(v) of this section instead of the criteria at paragraph (b)(4) of this section; and

(ii) All housing activities in the area undertaken pursuant to the strategy may be considered to be a single structure for purposes of applying the criteria at paragraph (b)(3) of this section.

(6) If an activity meeting the criteria in § 570.482(f)(3)(v) also meets the requirements of either paragraph (e)(4)(i) or (e)(5)(i) of this section, the unit of general local government may elect to qualify the activity either under the area benefit criteria at paragraph (b)(1)(iv) or (v) of this section or under the job aggregation criteria at paragraph (b)(4)(vi)(D) of this section, but not under both. Where an activity may meet the job aggregation criteria at both paragraphs (b)(4)(vi)(D) and (E) of this section, the unit of general local government may elect to qualify the activity under either criterion, but not both.

(f) *Planning and administrative costs.* CDBG funds expended for eligible planning and administrative costs by units of general local government in conjunction with other CDBG assisted activities will be considered to address the national objectives.

(g) *Timeline to meet a national objective.* Recipients are required to demonstrate that activities carried out under section 105(a) of the Act meet a national objective within six years of the date of the initial drawdown of CDBG funds for that activity or the length of the period of performance and any extension permitted, whichever is shorter.

■ 27. Amend § 570.489 as follows:

■ a. Revise paragraph (e)(2)(iv)(C);

■ b. Add paragraphs (e)(3)(ii)(C) and (f)(4); and

■ c. Revise paragraph (h)(4)(i);

The revisions and additions read as follows:

§ 570.489 Program administrative requirements.

* * * * *

(e) * * *

(2) * * *

(iv) * * *

(C) Interest income received by units of general local government on deposits of grant funds before disbursement of the funds for activities, except that the unit of general local government may keep interest payments in an amount not to exceed the amount provided by 2 CFR 200.305(b)(9) per year for administrative expenses otherwise permitted to be paid with CDBG funds.

* * * * *

(3) * * *

(ii) * * *

(C) The State must require units of general local government, to the maximum extent feasible, to disburse program income that is subject to the requirements of this subpart before requesting additional funds from the State for activities, except as provided in paragraph (f) of this section.

* * * * *

(f) * * *

(4) A State is responsible for ensuring that funds in a revolving loan fund are being used to continue the activity which generated the program income.

* * * * *

(h) * * *

(4) * * *

(i) A disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict (public disclosure is considered a combination of any of the following: publication on the recipient's website, including social media; electronic mailings; media advertisements; public service announcements; and display in public areas such as libraries, grocery store bulletin boards, and neighborhood centers), evidence of the public disclosure, and a description of how the public disclosure was made;

* * * * *

§ 570.490 [Amended]

■ 28. Amend § 570.490 in paragraph (a)(2) by removing ''24 CFR 91.320(j)(1)'' and adding in its place ''24 CFR 91.320(k)(1)''.

■ 29. Amend § 570.495 by revising paragraph (a)(4) to read as follows:

§ 570.495 Reviews and audits response.

(a) * * *

(4) Advise the State to reimburse its grant in any amounts improperly expended, using non-Federal funds. In lieu of reimbursing its grant, the State may elect to request a voluntary grant reduction from a current or future year's allocation of funds. A request for a voluntary grant reduction must be signed by the State's chief elected official. In its request, the State must waive its right to a hearing pursuant to § 570.496;

* * * * *

§ 570.500 [Amended]

■ 30. Amend § 570.500 by removing and reserving paragraph (a)(4)(ii).

■ 31. Amend § 570.503 by revising paragraph (b)(7)(i) to read as follows:

§ 570.503 Agreements with subrecipients.

* * * * *

(b) * * *

(7) * * *

(i) Used to meet one of the national objectives in § 570.208 until six years after expiration of the agreement, or for such longer period of time as determined to be appropriate by the recipient; or

* * * * *

■ 32. Amend § 570.504 as follows:

■ a. Revise paragraph (b)(2)(iii);

■ b. Remove in paragraph (c) ''§ 570.503(b)(8)'' and add in its place ''§ 570.503(b)(7)''; and

■ c. Add paragraph (f).

The revision and addition read as follows:

§ 570.504 Program income.

* * * * *

(b) * * *

(2) * * *

(iii) At the end of each program year, the aggregate amount of program income cash balances and any investment thereof (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump-sum drawdown, or cash or investments held for section 108 loan guarantee security needs) that, as of the last day of the program year, exceeds one-twelfth of the most recent grant made pursuant to § 570.304 shall be remitted to HUD as soon as practicable thereafter and sent to the United States Treasury FRB New York, New York, NY, U.S. Department of Housing and Urban Development, ABA Routing Number 021030004, Account Number 86010300. The memorandum section should read: Recipient Name (*e.g.,* city of Apple), Attention: HUD CPD/CDBG, Account Code 86X6760, $(dollar amount), ''Returning Excess Program Income.'' This provision applies to program income cash balances and investments thereof held by the grantee and its subrecipients. (This provision shall be applied for the first time at the end of the program year for which Federal Fiscal Year 1996 funds are provided.)

* * * * *

(f) *Transfer of revolving loan funds.* A grantee may elect to terminate or to reduce the balance of an existing revolving loan fund and reprogram some or all of the remaining funds to other activities. The process of reprogramming funds out of a revolving loan fund shall be governed by 24 CFR 91.505; once transferred out of the revolving loan fund, the program income is subject to the requirements of paragraphs (a) through (d) of this section. If HUD determines that a revolving loan fund no longer meets the definition of a revolving loan fund under § 570.500(b) because of a lack of loan activity or because loan fund balances significantly exceed the amount necessary to support loan activity, HUD may take corrective actions.

■ 33. Amend § 570.506 by adding a sentence to the end of paragraph (b)(5)(ii)(C) and revising paragraphs (b)(7) and (8), (c)(1), (d), and (e) to read as follows:

§ 570.506 Records to be maintained.

* * * * *

(b) * * *

(5) * * *

(ii) * * *

(C) * * * For each such low- and moderate-income person hired, the size and annual income of the person's family prior to the person being hired for the job. In lieu of businesses obtaining information regarding the size and annual income of the person's family, the recipient may obtain and maintain such information.

* * * * *

(7) For purposes of documenting, pursuant to paragraph (b)(5)(i)(B), (b)(5)(ii)(C), or (b)(6)(iii) or (v) of this section that the person for whom a job was either filled by or made available to a low- or moderate-income person:

(i) In lieu of maintaining records showing the person's family size and income, the recipient may substitute records showing for each person employed, the name of the business, type of job, and the annual wages or salary of the job. HUD will consider the person income-qualified if the annual wages or salary of the job is at or under the HUD-established income limit for a one-person family.

(ii) Based upon the census tract where the person resides or in which the business is located, the recipient, in lieu of maintaining records showing the person's family size and income, may substitute records showing either the person's address at the time the determination of income status was made or the address of the business providing the job, as applicable, the census tract in which that address was located, the percent of persons residing in that tract who either are in poverty or who are low- and moderate-income, as applicable, the data source used for determining the percentage, and a description of the pervasive poverty and general distress in the census tract in sufficient detail to demonstrate how the census tract met the criteria in § 570.208(a)(4)(v), as applicable.

(8) For each activity determined to aid in the prevention or elimination of slums or blight based on addressing one or more of the conditions which qualified an area as a slum or blighted area:

(i) The boundaries of the area;

(ii) A designation, within the last 10 years, of the area as slum or blighted; and

(iii) Quantifiable data substantiating the conditions and standards that qualified the area at the time of its designation.

* * * * *

(c) * * *

(1) Records that demonstrate that the recipient has made the determinations required as a condition of eligibility of certain activities, as prescribed in §§ 570.201(e)(1), (f), (i)(2), (p), and (q), 570.202(b)(3), 570.206(f), 570.209, 570.210, and 570.309.

* * * * *

(d) Records which demonstrate compliance with § 570.503(b)(7) and (8) or § 570.505 regarding maintenance of property condition and change of use of real property acquired or improved with CDBG assistance.

(e) Records that demonstrate compliance with the citizen participation requirements prescribed in 24 CFR part 91, subpart B, for entitlement recipients, or in 24 CFR part 91, subpart C, for HUD-administered small cities recipients, and subpart F for all recipients.

* * * * *

■ 34. Amend § 570.507 by revising paragraph (d) to read as follows:

§ 570.507 Reports.

* * * * *

(d) *Reports*—(1) *Reporting of CDBG funds.* Recipients must collect and report data on their use of CDBG funds in the Integrated Disbursement and Information System (IDIS), or any successor reporting system, as specified by HUD.

(2) *Other reports.* Recipients may be required to submit such other reports and information as HUD determines are necessary to carry out its responsibilities under the Act or other applicable laws.

■ 35. Revise § 570.509 to read as follows:

§ 570.509 Grant closeout procedures.

This section implements 2 CFR 200.344 as applicable in the context of the CDBG program. This section specifies the actions a grantee and HUD must take to complete the closeout process.

(a) *Final financial, performance and other reports.* In general, no later than 90 days after the end of the period of performance or no later than 90 days after the end of the program year in which the grantee expends all funds from the origin year grant (whichever comes first), the grantee must submit all financial, performance, and other reports as required by 24 CFR 91.520.

(b) *Liquidation of obligations.* In general, a grantee must liquidate all obligations incurred under the origin year grant not later than 90 calendar days after the end date of the period of performance as specified in § 570.3.

(c) *Closeout phases.* Closeout of an origin year grant may occur in two phases if the Grant funds were expended to assist an activity(ies) that is incomplete at the time the final report is due to HUD. The two phases are:

(1) Account closeout, in which HUD removes the recipient's access to grant funds and removes the grant from the grantee's line of credit.

(2) Programmatic closeout, which marks completion of all programmatic requirements associated with a grant. Programmatic requirements include but are not limited to: physical completion of all activities for which funds were expended from the original year grant; all activities have met a national objective under § 570.208; and the grantee has reported on all accomplishments resulting from the activities.

(d) *Extensions.* (1) Extension to allow for programmatic closeout for activities for which funds have been disbursed but which have not been completed:

(i) If the grantee has expended all grant funds at the time the final reports are due to HUD, but has not yet completed one or more activities to meet programmatic requirements, as defined in paragraph (c)(2) of this section, HUD may authorize an extension of the end date of the period of performance by up to two years for completion of an activity(ies) and up to the time period allowed at § 570.208 to meet a national objective.

(ii) However, this extension does not apply to the availability of any funds remaining in a grant's line of credit and HUD will initiate account closeout.

(iii) The recipient must submit an interim version of the final reports in accordance with and as required in paragraph (a) of this section, specifically noting any incomplete assisted activity. At the end of the extension period, or when the activity(ies) is completed, whichever is earlier, the grantee must submit the final reports including any required information regarding that activity(ies).

(2) Specific extensions for good cause. A grantee may request, and HUD may provide, an extension of the period of performance, deadlines for reporting, or deadline for obligation liquidation for a grant provided good cause is demonstrated.

(e) *Refund of unobligated balances.* At account closeout, the grantee must promptly refund any balances of unobligated cash paid in advance or paid and that is not authorized to be retained by the grantee. All such refunds must be completed prior to submission of the reports required in paragraph (a) of this section.

(f) *Accounting for real property.* In the reports required under paragraph (a) of this section, the grantee must account for any real property acquired with grant funds.

(g) *Closeout actions.* In general, HUD will complete all closeout actions for a grant no later than one year after receipt and acceptance of all required final reports. In completing closeout actions, HUD will review the responsibilities and performance of the recipient under the grant agreement, applicable laws and regulations. HUD may delay programmatic closeout if it finds a further Federal interest in keeping the grant agreement open for the purpose of securing performance.

(1) HUD will cancel any unused portion of the awarded grant, as shown in the executed grant closeout agreement. Any unused grant funds disbursed from the U.S. Treasury which are in the possession of the recipient shall be refunded to HUD. Any funds which have exceeded the statutory time limit on the use of funds will be recaptured by the U.S. Treasury pursuant to 24 CFR 570.200(k).

(2) Any costs paid with CDBG funds which were not audited previously shall be subject to coverage in the recipient's next single audit performed in accordance with HUD regulations implementing the Single Audit Act requirements at 2 CFR part 200. The recipient may be required to repay HUD any disallowed costs based on the results of the audit, or on additional HUD reviews provided for in the closeout agreement.

(3) Prior to completing account closeout, HUD will identify for the grant recipient any unused grant funds to be canceled by HUD and provide the grant recipient an opportunity to respond.

(h) *After closeout.* (1) HUD may monitor the recipient's compliance and performance after the closeout of the award with respect to the following actions, and HUD may take findings of noncompliance into account, as unsatisfactory performance of the recipient, in the consideration of any future grant award under this part:

(i) Closeout costs (*e.g.,* audit costs) and costs resulting from contingent liabilities described in the closeout agreement pursuant to paragraph (g)(1) of this section. Contingent liabilities include, but are not limited to, third-party claims against the recipient, as well as related administrative costs;

(ii) Use of real property assisted with CDBG funds in accordance with the principles described in §§ 570.503(b)(7) and 570.505;

(iii) Compliance with requirements governing future program income or

receivables generated from activities funded from the origin year grant, as described in § 570.504(b)(4) and (5);

(iv) Ensuring that flood insurance coverage for affected property owners is maintained for the mandatory period; and

(v) Other provisions appropriate to any special circumstances of the grant closeout, in modification of or in addition to the obligations of this section.

(2) The recipient is responsible for:

(i) Compliance with all program requirements, certifications, and assurances in using any remaining CDBG funds available for closeout costs and contingent liabilities;

(ii) Use of real property assisted with CDBG funds in accordance with the principles described in §§ 570.503(b)(7) and 570.505;

(iii) Compliance with requirements governing future program income or receivables generated from activities funded from the origin year grant, as described in § 570.504(b)(4) and (5);

(iv) Ensuring that flood insurance coverage for affected property owners is maintained for the mandatory period; and

(v) Other provisions appropriate to any special circumstances of the grant closeout, in modification of or in addition to the obligations of this section.

(i) Status of consolidated plan after closeout. The Consolidated Plan will remain in effect after closeout until the expiration of the program year covered by the last approved consolidated plan pursuant to 24 CFR 91.520.

(j) *Termination of grant*—(1) *For convenience.* Grant assistance provided under this part may be terminated for convenience in whole or in part before the completion of the assisted activities, in accordance with the provisions of 2 CFR 200.340. The recipient shall not incur new obligations for the terminated portions after the effective date and shall cancel as many outstanding obligations as possible. HUD shall allow full credit to the recipient for those portions of obligations which could not be canceled and which had been properly incurred by the recipient in carrying out the activities before the termination. The closeout policies contained in this section shall apply in such cases, except where the approved grant is terminated in its entirety. Responsibility for the environmental review to be performed under 24 CFR part 50 or 24 CFR part 58, as applicable, shall be determined as part of the closeout process.

(2) *For cause.* In cases in which the Secretary terminates the recipient's grant under the authority of subpart O of this part, or under the terms of the grant agreement, the closeout policies contained in this section shall apply, except where the approved grant is cancelled in its entirety. The provisions in 2 CFR 200.343 on the effects of termination shall also apply. HUD shall determine whether an environmental review is required, and if so, HUD shall perform it in accordance with 24 CFR part 50.

§ 570.600 [Amended]

■ 36. Amend § 570.600 in paragraph (a) by removing ''§ 570.405 and''.

§ 570.606 [Amended]

■ 37. Amend § 570.606 in paragraph (b)(2)(ii)(C) by removing ''49 CFR 24.2(g)(2)'' and adding in its place ''49 CFR 24.2(a)(9)(ii)''.

■ 38. Amend § 570.611 by revising paragraphs (a)(2) and (d)(1)(i) to read as follows:

§ 570.611 Conflict of interest.

(a) * * *

(2) In all cases not governed by 2 CFR 200.317 and 200.318, the provisions of this section shall apply. Such cases include the acquisition and disposition of real property and the provision of assistance by the recipient or by its subrecipients to individuals, businesses, and other private entities under eligible activities that authorize such assistance (*e.g.,* rehabilitation, preservation, and other improvements of private properties or facilities pursuant to § 570.202; or grants, loans, and other assistance to businesses, individuals, and other private entities pursuant to § 570.203, § 570.204, or § 570.703(i)).

* * * * *

(d) * * *

(1) * * *

(i) A disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict (public disclosure is considered a combination of any of the following: publication on the recipient's website, including social media; electronic mailings; media advertisements; public service announcements; and display in public areas such as libraries, grocery store bulletin boards, and neighborhood centers), evidence of the public disclosure, and a description of how the public disclosure was made; and

* * * * *

§ 570.613 [Removed and Reserved]

■ 39. Remove and reserve § 570.613.

■ 40. Amend § 570.703 by revising paragraph (f) and removing and reserving paragraph (j).

The revision reads as follows:

§ 570.703 Eligible activities.

* * * * *

(f) Site preparation either related to the redevelopment or use of the real property acquired or rehabilitated pursuant to paragraphs (a) and (b) of this section, or for an economic development purpose, including:

(1) Construction, reconstruction, installation of public and other site improvements, utilities or facilities (other than buildings); or

(2) Remediation of properties (remediation can include project-specific environmental assessment costs not otherwise eligible under § 570.205) with known or suspected environmental contamination.

* * * * *

■ 41. Amend § 570.704 as follows:

■ a. Revise paragraphs (a)(2)(i)(B), (b) introductory text, and (b)(1) and (2);

■ b. Remove and reserve paragraphs (b)(3) and (4);

■ c. Revise paragraphs (b)(8)(iii), (v), and (ix);

■ d. Add paragraphs (b)(8)(xi) and (xii) and (c)(3)(vii); and

■ e. Revise paragraph (c)(4).

The revisions and additions read as follows:

§ 570.704 Application requirements.

(a) * * *

(2) * * *

(i) * * *

(B) Activities that may be undertaken with guaranteed loan funds;

* * * * *

(b) *Submission requirements.* An application for loan guarantee assistance may be submitted at any time. The application (or plan submission described in paragraph (a)(1)(v) of this section) shall be submitted to the HUD headquarters office that administers loan guarantees under this subpart and shall include the following:

(1) A description of how each of the activities to be carried out with the guaranteed loan funds meets the eligible activity criteria in § 570.703 and the national objectives criteria in § 570.208 or § 570.483, as applicable.

(2) A schedule for repayment of the loan which identifies the sources of repayment, together with a statement identifying the entity that will act as borrower and issue the debt obligations, and the source of the payment of fees required by § 570.712.

* * * * *

(8) * * *

(iii) It has, prior to submission of its application to HUD: furnished citizens with information required by paragraph

(a)(2)(i) of this section; held at least one public hearing to obtain the views of citizens on community development needs; and prepared its application in accordance with paragraph (a)(1)(iv) or (v) of this section, as applicable, and made the application available to the public;

* * * * *

(v) It will affirmatively further fair housing, and the guaranteed loan funds will be administered in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and the Fair Housing Act (42 U.S.C. 3601–3619), and implementing regulations;

* * * * *

(ix) (Where applicable, the public entity may also include the following additional certification.) It lacks sufficient resources from funds provided under this subpart or program income to allow it to comply with the provisions of § 570.200(c)(2), and it must therefore assess properties owned and occupied by moderate income persons, to recover the non-guaranteed loan funded portion of the capital cost without paying such assessments on their behalf from guaranteed loan funds;

* * * * *

(xi) It possesses the legal authority to make the pledge of grants required under § 570.705(b)(2).

(xii) It has made efforts to obtain financing for activities described in the application without the use of the loan guarantee, the public entity will maintain documentation of such efforts for the term of the loan guarantee, and the public entity cannot complete such financing consistent with the timely execution of the program plans without such guarantee.

* * * * *

(c) * * *

(3) * * *

(vii) Activities to be undertaken with the guaranteed loan funds do not meet the public benefit standards under § 570.209.

(4) HUD will notify the public entity or State in writing that the loan guarantee request has either been approved (in the requested amount or a portion thereof) or disapproved. If the request is approved in an amount less than requested or disapproved, the public entity or State shall be informed of the specific reasons for disapproval or partial approval. If the request is approved, either in full or in part, HUD shall issue an offer of commitment to guarantee debt obligations of the borrower identified in the application subject to compliance with this part, including the requirements under § 570.705(b), (d), (g) and (h) for securing and issuing debt obligations, the conditions for release of funds described in paragraph (d) of this section, and such other conditions as HUD may specify in the commitment documents in a particular case.

* * * * *

■ 42. Amend § 570.705 as follows:

■ a. Revise paragraph (a)(1)(iii);

■ b. Remove paragraphs (a)(2)(iii)(A) through (C); and

■ c. Revise paragraph (b)(3).

The revisions read as follows:

§ 570.705 Loan requirements.

(a) * * *

(1) * * *

(iii) The amount any one public entity may receive may be limited to such amount as is necessary to allow HUD to give priority to applications containing activities to be carried out in areas designated as economically distressed by the Federal Government or by any State.

* * * * *

(b) * * *

(3) Furnish, at the discretion of HUD, such other security as may be deemed appropriate by HUD in making such guarantees. Such other security shall be specified in the contract entered into pursuant to paragraph (b)(1) of this section.

* * * * *

■ 43. Amend § 570.902 as follows:

■ a. Revise the section heading, the introductory text, and paragraph (a); and

■ b. Remove and reserve paragraph (b) and remove paragraph (c);

The revisions read as follows:

§ 570.902 Review for timely performance and continuing capacity for timely performance.

HUD will review the rate of disbursement of each entitlement, HUD-administered small cities, non-entitlement counties in the State of Hawaii, and Insular Areas grant quarterly to determine whether each recipient is carrying out its CDBG-assisted activities in a timely manner and whether it has the continuing capacity to do so.

(a) *Entitlement recipients, Insular Areas, and Non-entitlement CDBG grantees in Hawaii.* (1) The period of performance is defined at § 570.3.

(2) Based on the sum of draw vouchers both submitted and completed in the designated online system during the reporting quarter, HUD will identify each grant as:

(i) *Slow Spender.* Slow Spender means the grantee is disbursing ten percent less than the monthly pace required to fully expend the grant during the period of performance.

(ii) *On Pace.* On Pace means the grant's disbursement rate exceeds Slow Spender and may be a sufficient rate to fully disburse the grant during the period of performance.

(iii) *Ready to Close.* The grant has reached the end of the period of performance (phase 1).

(iv) *First Year.* This is a new grant and HUD will not report performance publicly for the origin year of a grant.

(3) If a grantee is not spending at a pace to disburse an entire grant during the period of performance (phase 1), HUD will evaluate the grantee's capacity and will provide technical assistance to improve timely performance.

(4) Absent contrary evidence satisfactory to HUD, HUD will consider an insular area, an entitlement recipient, or a non-entitlement CDBG grantee in Hawaii to be failing to carry out its CDBG activities in a timely manner and to lack continuing capacity to carry out activities in a timely manner if three or more of its grants are designated Slow Spender in each quarter during four consecutive calendar quarters.

(5) In determining appropriate corrective actions or sanctions, HUD will consider:

(i) A grantee's demonstration, to HUD's satisfaction, that the lack of timeliness or capacity has resulted from factors beyond the grantee's reasonable control.

(ii) The likelihood that the recipient will improve its disbursement rate for the majority of its non-First-Year open grants to On Pace within 120 days. For these purposes, HUD will take into account the extent to which funds on hand have been obligated by the recipient and its subrecipients for specific activities at the time the finding is made and other relevant information.

* * * * *

■ 44. Amend § 570.910 by revising paragraph (b)(5) and adding a paragraph (c) to read as follows:

§ 570.910 Corrective and remedial actions.

* * * * *

(b) * * *

(5) Advise the recipient to reimburse with non-Federal funds its program account or letter of credit in any amounts improperly expended and reprogram the use of the funds in accordance with applicable requirements;

* * * * *

(c) *Voluntary grant reductions.* A recipient may elect to request a voluntary grant reduction from a current or future year's allocation of funds in lieu of reimbursing its grant under paragraph (b)(5) of this section. A

request for a voluntary grant reduction must be signed by the jurisdiction's chief elected official. In its request, the recipient must waive its right to a hearing pursuant to § 570.913.

PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKA NATIVE VILLAGES

■ 45. The authority citation for part 1003 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301 *et seq.*

■ 46. Amend § 1003.4 by adding in alphabetical order a definition for ''Activity delivery costs'' to read as follows:

§ 1003.4 Definitions.

* * * * *

Activity delivery costs means the allowable costs of work performed by a recipient or subrecipient in carrying out specific activities eligible under §§ 1003.201 through 1003.204. The cost principles at 2 CFR part 200, subpart E, must be used in determining the allowability of the costs.

* * * * *

■ 47. Amend § 1003.201 by revising the section heading and paragraphs (a), (c) introductory text, and (m) and adding paragraphs (p), (q), and (r) to read as follows:

§ 1003.201 Eligible activities.

* * * * *

(a) *Acquisition.* Acquisition in whole or in part by the grantee, or other public or private nonprofit entity, by purchase, long-term lease (defined as 15 years or more), donation, or otherwise, of real property (including air rights, water rights, rights-of-way, easements, and other interests therein) for any public purpose, subject to the limitations of § 1003.207.

* * * * *

(c) *Public facilities and improvements.* Acquisition, construction, reconstruction, rehabilitation or installation of public facilities and improvements, except as provided in § 1003.207(a), carried out by the grantee or other public or private nonprofit entities. In undertaking such activities, design features and improvements which promote energy efficiency may be included. [However, activities under this paragraph may be directed to the removal of material and architectural barriers that restrict the mobility and accessibility of elderly or disabled persons to publicly owned and privately owned buildings, facilities, and improvements including those provided for in § 1003.207(a)(1).] Such activities may also include the execution of architectural design features, and similar treatments intended to enhance the aesthetic quality of facilities and improvements receiving ICDBG assistance. Facilities designed for use in providing shelter for persons having special needs are considered public facilities and not subject to the prohibition of new housing construction described in § 1003.207(b)(3). Such facilities include shelters for the homeless; convalescent homes; hospitals, nursing homes; domestic violence shelters; halfway houses for run-away children, drug offenders or parolees; group homes for individuals with intellectual disabilities and temporary housing for disaster survivors, including those impacted by climate-related events. In certain cases, nonprofit entities and subrecipients including those specified in § 1003.204 may acquire title to public facilities. When such facilities are owned by nonprofit entities or subrecipients, they shall be operated so as to be open for use by the general public during all normal hours of operation. Public facilities and improvements eligible for assistance under this paragraph (c) are subject to the following policies in paragraphs (c)(1) through (3) of this section:

* * * * *

(m) *Technical assistance.* Provision of technical assistance to public or nonprofit entities to increase the capacity of such entities to carry out specific eligible neighborhood revitalization or economic development activities. General administrative and operating costs of a public or nonprofit entity are not eligible under this paragraph. Capacity building for private or public entities (including grantees) for other purposes may be eligible as a planning cost under § 1003.205.

* * * * *

(p) *Tornado safe shelters.* ICDBG funds may be used by the recipient or provided as loans or grants to non-profit and for-profit entities, including owners of manufactured housing communities, for the construction or improvement of tornado-safe shelters for manufactured housing residents in accordance with section 105(a) of the Act. Activities pursuant to this paragraph may be located only in a neighborhood (including a manufactured housing community) that-

(1) Contains at least 20 manufactured housing units within such proximity to the shelter that the shelter is available to the resident in the event of a tornado,

(2) Consists predominantly of persons of low and moderate income

(3) Is located within a State in which a tornado has occurred during the fiscal year for which with amounts to be used were made available or the preceding 3 fiscal years, as determined by the Secretary in consultation with the Administrator of the Federal Emergency Management Agency.

(q) *Essential repairs and operating expenses.* ICDBG funds may be used for activities necessary to make essential repairs and pay operating expenses necessary to maintain the habitability of housing units (including abandoned or blighted properties) acquired through tax foreclosure proceedings (also known as In Rem) for up to five years to prevent abandonment or deterioration of housing units located in primarily low- and moderate-income neighborhoods.

(r) *Assistance to mixed-use property.* ICDBG funds may be used to carry out eligible activities in mixed-use properties so long as the ICDBG recipient expends funds only on the eligible use in that property. For purposes of this section, the term ''Mixed-use property'' means a property containing multiple uses, at least one of which must be eligible to be assisted with ICDBG funds.

■ 48. Amend § 1003.202 by revising paragraph (a) introductory text to read as follows:

§ 1003.202 Eligible rehabilitation and preservation activities.

(a) Types of buildings and improvements eligible for rehabilitation or reconstruction assistance. ICDBG funds may be used to finance the rehabilitation and reconstruction of:

* * * * *

■ 49. Amend § 1003.203 by revising paragraph (b) to read as follows:

§ 1003.203 Special economic development activities.

* * * * *

(b) The provision of assistance to a private for-profit business, including, but not limited to, grants, loans, loan guarantees, interest supplements, loan participations, technical assistance, and other forms of support (including use of pass-through financing structures), for any activity where the assistance is necessary or appropriate to carry out an economic development project, excluding those described as ineligible in § 1003.207(a). In order to ensure that any such assistance does not unduly enrich the for-profit business, the grantee shall conduct an analysis to determine that the amount of any financial assistance to be provided is not excessive, considering the actual needs of the business in making the project financially feasible and the

extent of public benefit expected to be derived from the economic development project. The grantee shall document the analysis as well as any factors it considered in making its determination that the assistance is necessary or appropriate to carry out the project. The requirement for making such a determination applies whether the business is to receive assistance from the grantee or through a subrecipient.

* * * * *

■ 50. Amend § 1003.206 by revising the section heading and the introductory text to read as follows:

§ 1003.206 Program administrative costs.

ICDBG funds may be used for the payment of reasonable administrative costs and carrying charges related to the planning and execution of community development activities assisted in whole or in part with funds provided under this part. No more than 20 percent of the sum of any grant plus program income received shall be expended for activities described in this section and in § 1003.205. This does not include staff and overhead costs directly related to carrying out activities eligible under §§ 1003.201 through 1003.204, since those costs are eligible as part of such activities. These costs are activity delivery costs as defined in § 1003.4. In addition, technical assistance costs associated with developing the capacity to undertake a specific funded activity are also not considered program administration costs. These costs must not, however, exceed 10 percent of the total grant award.

* * * * *

■ 51. Amend § 1003.208 as follows:

■ a. Revise paragraphs (b)(1) introductory text and (b)(1)(i) and (ii);

■ b. Remove the text ''Bureau of the Census'' and add in its place ''Census Bureau's'' in paragraph (b)(2) introductory text;

■ c. Add paragraph (b)(5);

■ d. Remove '', upon completion,'' from the first sentence of paragraph (c) introductory text; and

■ e. Revise paragraphs (c)(1)(i) and (ii), (c)(2), and (d).

The revisions and addition read as follows:

§ 1003.208 Criteria for compliance with the primary objective.

* * * * *

(b) * * *

(1) An activity which benefits a limited clientele, at least 51 percent of whom are low or moderate income persons. The activity must meet one of the following tests:

(i) Benefit at least one of the following clientele who are generally presumed to be principally low and moderate income persons: abused children, survivors of domestic violence, elderly persons, adults meeting the Census Bureau's Current Population Reports definition of ''severely disabled,'' homeless persons, illiterate adults (adults unable to read and write in English and in their first language, if their first language is not English), persons living with AIDS, migrant farm workers, persons who meet the Federal poverty guidelines, persons insured by Medicaid; or

(ii) Require information on family size and income that demonstrates that at least 51 percent of the clientele are persons whose family income does not exceed the low- and moderate-income limit; or

* * * * *

(5) The following kinds of activities may not qualify under this paragraph (b): activities that provide benefits to all the residents of an area; activities involving the acquisition, construction or rehabilitation of property for housing; or activities where the benefit to low- and moderate-income persons to be considered is the creation or retention of jobs, except as provided in paragraph (b)(4) of this section.

(c) * * *

(1) * * *

(i) The assistance is for an eligible activity to reduce the development cost of the substantial rehabilitation of (as defined at 24 CFR 5.100), conversion of a nonresidential structure to, or new construction of, a multifamily, non-elderly rental housing project;

(ii) At least 20 percent of the units will be occupied by low- and moderate-income households at affordable rents; and

* * * * *

(2) When ICDBG funds are used for housing services eligible under § 1003.201(j), if the housing for which the services are provided is to be occupied by low-and moderate-income households.

(d) *Job creation or retention activities.* An activity designed to create or retain permanent jobs where at least 51 percent of the full-time equivalent jobs will be held by, or made available to, low- and moderate-income persons. For purposes of determining whether a job is held by or made available to a low or moderate income person, the person may be presumed to be a low or moderate income person if: he/she resides within a census tract where not less than 70 percent of the residents have incomes at or below 80 percent of the area median; or, if he/she resides in a census tract designated as economically distressed by the Federal Government; or, if the assisted business is located in and the job under consideration is to be located in such a tract or area. As a general rule, each assisted business shall be considered to be a separate activity for purposes of determining whether the activity qualifies under this paragraph. However, in certain cases such as where ICDBG funds are used to acquire, develop or improve a real property (*e.g.,* a business incubator or an industrial park) the requirement may be met by measuring jobs in the aggregate for all the businesses which locate on the property, provided such businesses are not otherwise assisted by ICDBG funds. Where ICDBG funds are used to pay for the staff and overhead costs of a CBDO under the provisions of § 1003.204 making loans to businesses from non-ICDBG funds, this requirement may be met by aggregating the jobs created by all of the businesses receiving loans during any one-year period.

(1) For an activity that creates jobs, the grantee must document that at least 51 percent of the jobs will be held by, or made available to, low- and moderate-income persons.

(2) For an activity that retains jobs, the grantee must document that the jobs would be lost without the ICDBG assistance and that at least one of the following conditions applies with respect to at least 51 percent of the jobs at the time the ICDBG assistance is provided:

(i) The job is known to be held by a low- or moderate-income person; or

(ii) The job can reasonably be expected to turn over within the following two years and that steps will be taken to ensure that it will be filled by, or made available to, a low- or moderate-income person upon turnover.

(3) Jobs will be considered to be available to low- and moderate-income persons only if:

(i) The assisted business does not require as a prerequisite special skills that can only be acquired with substantial training or work experience or education beyond high school or the business agrees to hire unqualified persons and provide training; and

(ii) The grantee and the assisted business take actions to ensure that low- and moderate-income persons receive first consideration for filling such jobs.

* * * * *

■ 52. Amend § 1003.506 by revising paragraph (a) introductory text to read as follows:

§ 1003.506 Reports.

(a) *Status and evaluation report.* Grantees shall submit a status and evaluation report on previously funded

open grants 90 days after the end of the grantee's Tribal program year, or 90 days after the end of the Federal fiscal year if a grantee's Tribal program year is the same as the Federal fiscal year, and at the time of grant close-out. The report shall address the following areas:

* * * * *

§ 1003.602 [Amended]

■ 53. Amend § 1003.602 in paragraph (h)(2)(ii) by removing ''49 CFR 24.2(g)(2)'' and adding in its place ''49 CFR 24.2(a)(9)(ii)''.

■ 54. Amend § 1003.606 by revising paragraph (d)(1)(i) to read as follows:

§ 1003.606 Conflict of interest.

* * * * *

(d) * * *

(1) * * *

(i) A disclosure of the nature of the possible conflict, accompanied by an assurance that there has been public disclosure of the conflict (public disclosure is considered a combination of any of the following: publication on the grantee's website, including social media; electronic mailings; media advertisements; public service announcements; and display in public areas such as libraries, grocery store bulletin boards, and neighborhood centers), evidence of the public disclosure, and a description of how the public disclosure was made; and

* * * * *

Marion M. McFadden,

Principal Deputy Assistant Secretary for Community Planning and Development.

Dominique Blom,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 2024–00039 Filed 1–9–24; 8:45 am]

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Federal Register

Vol. 89, No. 7

Wednesday, January 10, 2024

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FEDERAL REGISTER PAGES AND DATE, JANUARY

1–222	2
223–436	3
437–696	4
697–858	5
859–1024	8
1025–1438	9
1439–1786	10

CFR PARTS AFFECTED DURING JANUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

Proposed Rules:
Chapter XVI 714

3 CFR

Proclamations:
9705 (amended by Proc. 10691) 227
10689 1
10690 223
10691 227
10692 437
10693 443
10694 445
10695 447

Administrative Orders:
Presidential Determinations:
No. 2024–03 of December 27, 2023 3

5 CFR

2634 1439
2636 1439

7 CFR

1207 859

Proposed Rules:
3560 892

10 CFR

20 5
207 1025
218 1025
429 1025
431 1025
490 1025
501 1025
601 1025
612 864
810 1025
820 1025
824 1025
851 1025
1013 1025
1017 1025
1050 1025

Proposed Rules:
50 895
52 895

11 CFR

1 196
4 196
5 196
6 196
100 196
102 196
103 196
104 196
105 196
106 196
108 196
109 196
110 196
111 ..... 196, 697
112 196
113 5
114 196
116 196
200 196
201 196
300 196
9003 196
9004 196
9007 196
9032 196
9033 196
9034 196
9035 196
9036 196
9038 196
9039 196

12 CFR

19 872
109 872
747 1441
1411 1445

14 CFR

39 ..... 14, 17, 21, 23, 233, 235, 237, 240, 242, 244, 246, 248, 251, 253, 256, 258, 1030
95 261

Proposed Rules:
21 37
39 1038

16 CFR

1 1445
463 590

Proposed Rules:
1 286
464 38

17 CFR

Proposed Rules:
39 286

18 CFR

381 1033

21 CFR

Proposed Rules:
1301 308

22 CFR

35 700
103 700
127 700
138 700

24 CFR

Proposed Rules:
91 1746
570 1746
1003 1746

26 CFR

Proposed Rules:
1 39
53 1042

27 CFR

Proposed Rules:
9 ..... 716, 721, 726, 730

28 CFR

16 1447

29 CFR

1952 702
780 1638
788 1638
795 1638

30 CFR

Proposed Rules:
285 309
585 309

33 CFR

165 ..... 449, 1457

37 CFR

384 267

Proposed Rules:
201 311
202 311

38 CFR

17 1034
36 1458
42 1458

39 CFR

233 1460
273 1460

40 CFR

52 ..... 874, 1461
55 451
147 703

Proposed Rules:
52 ..... 39, 178, 1479, 1482
70 1150
71 1150
131 896

42 CFR

Proposed Rules:
136 896

43 CFR

Proposed Rules:
2 1505
11 733

45 CFR

170 1192
171 1192

46 CFR

506 1464
520 25

47 CFR

1 1465
4 1465
15 874
64 269
73 1466

Proposed Rules:
25 740
76 740

48 CFR

Proposed Rules:
2 1043
3 1043
9 1043
22 1043
23 1043
25 1043
33 1043
52 1043

49 CFR

384 712
386 712
831 1035

Proposed Rules:
367 1053
571 830

50 CFR

223 126
226 126
622 ..... 271, 276
635 278
648 ..... 34, 284, 891, 1036

Proposed Rules:
217 504

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Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List December 28, 2023

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