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

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Civil Monetary Penalty Inflation Adjustment

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: This final rule adjusts the level of civil monetary penalties (CMPs) in regulations maintained and enforced by the Merit Systems Protection Board (MSPB) with an annual adjustment under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) and Office of Management and Budget (OMB) guidance.

DATES: This final rule is effective on February 14, 2024.

FOR FURTHER INFORMATION CONTACT: Gina K. Grippando, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW, Washington, DC 20419; phone: (202) 653–7200; fax: (202) 653–7130; or email: *mspb@mspb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Public Law 101–410, provided for the regular evaluation of CMPs by Federal agencies. Periodic inflationary adjustments of CMPs ensure that the consequences of statutory violations adequately reflect the gravity of such offenses and that CMPs are properly accounted for and collected by the Federal Government. In April 1996, the 1990 Act was amended by the Debt Collection Improvement Act of 1996 (the 1996 Act), Public Law 104–134, requiring Federal agencies to adjust their CMPs at least once every four years. However, because inflationary adjustments to CMPs were statutorily capped at ten percent of the maximum penalty amount, but only required to be calculated every four years, CMPs in many cases did not correspond with the true measure of inflation over the preceding four-year period, leading to a decline in the real value of the penalty. To remedy this decline, the 2015 Act (section 701 of Pub. L. 114–74) requires agencies to adjust CMP amounts with annual inflationary adjustments through a rulemaking using a methodology mandated by the legislation. The purpose of these adjustments is to maintain the deterrent effect of civil penalties.

A civil monetary penalty is ''any penalty, fine, or other sanction'' that: (1) ''is for a specific amount'' or ''has a maximum amount'' under Federal law; and (2) a Federal agency assesses or enforces ''pursuant to an administrative proceeding or a civil action in the Federal courts.'' 28 U.S.C. 2461 note.

The MSPB is authorized to assess CMPs pursuant to 5 U.S.C. 1215(a)(3) and 5 U.S.C. 7326 in disciplinary actions brought by the Special Counsel. The corresponding MSPB regulation for both CMPs is 5 CFR 1201.126(a). As required by the 2015 Act, and pursuant to guidance issued by OMB, MSPB is now making an annual adjustment for 2024, according to the prescribed formulas.

II. Calculation of Adjustment

The CMP listed in 5 U.S.C. 1215(a)(3) was established in 1978 with the enactment of the Civil Service Reform Act of 1978 (CSRA), Public Law 95–454, section 202(a), 92 Stat. 1121–30 (Oct. 13, 1978), and originally codified at 5 U.S.C. 1207(b). That CMP was last amended by section 106 of the Whistleblower Protection Enhancement Act of 2012, Public Law 112–199, 12 Stat. 1468 (Nov. 27, 2012), now codified at 5 U.S.C. 1215(a)(3), which provided for a CMP ''not to exceed $1,000.'' The CMP authorized in 5 U.S.C. 7326 was established in 2012 by section 4 of the Hatch Act Modernization Act of 2012 (Hatch Act), Public Law 112–230, 126 Stat. 1617 (Dec. 28, 2012), which provided for a CMP ''not to exceed $1,000.'' On January 24, 2023, MSPB issued a final rule which increased the maximum CMP allowed under both 5 U.S.C. 1215(a)(3) and 5 U.S.C. 7326 to $1,288 for the year 2023. *See* 88 FR 4079 (Jan. 24, 2023). This increase reflected the annual increase for the year 2023 mandated by the 2015 Act.

On December 19, 2023, OMB issued guidance on calculating the annual inflationary adjustment for 2024. *See* Memorandum from Shalanda D. Young, Director, OMB, to Heads of Executive Departments and Agencies re: Implementation of Penalty Inflation Adjustments for 2024, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M–24–07 (Dec. 19, 2023). Therein, OMB notified agencies that the annual adjustment multiplier for 2024, based on the Consumer Price Index for All Urban Consumers (CPI–U), is 1.03241 and that the 2024 annual adjustment amount is obtained by multiplying the 2023 penalty amount by the 2024 annual adjustment multiplier, and rounding to the nearest dollar. Therefore, the new maximum penalty under the CSRA and the Hatch Act is $\$1{,}288 \times 1.03241 = \$1{,}330.00$.

III. Effective Date of Penalties

The revised CMP amounts will go into effect on February 14, 2024. All violations for which CMPs are assessed after the effective date of this rule will be assessed at the adjusted penalty level regardless of whether the violation occurred before the effective date.

IV. Procedural Requirements

A. Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b), MSPB has determined 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 Congress has specifically exempted agencies from these requirements when implementing the 2015 Act. The 2015 Act explicitly requires the agency to make subsequent annual adjustments notwithstanding 5 U.S.C. 553, the section of the Administrative Procedure Act that normally requires agencies to engage in notice and comment. It is also in the public interest that the adjusted rates for CMPs under the CSRA and the Hatch Act become effective as soon as possible to maintain their effective deterrent effect.

B. Regulatory Impact Analysis: Executive Order 12866

The MSPB has determined that this is not a significant regulatory action under

E.O. 12866. Therefore, no regulatory impact analysis is required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a regulatory flexibility analysis for rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. *See* 5 U.S.C. 603(a) and 604(a). As discussed above, the 2015 Act does not require agencies to first publish a proposed rule when adjusting CMPs within their jurisdiction. Thus, the RFA does not apply to this final rule.

D. Paperwork Reduction Act

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. Chapter 35).

E. Congressional Review Act

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

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

For the reasons set forth above, 5 CFR part 1201 is amended as follows:

PART 1201—PRACTICES AND PROCEDURES

■ 1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

§ 1201.126 [Amended]

■ 2. Section 1201.126 is amended in paragraph (a) by removing ''$1,288'' and adding in its place ''$1,330.''

Jennifer Everling,

Deputy Clerk of the Board.

[FR Doc. 2024–03015 Filed 2–13–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1219; Project Identifier MCAI–2023–00004–T; Amendment 39–22651; AD 2023–26–08]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bombardier, Inc., Model CL–600–2B16 (604 Variant) airplanes. This AD was prompted by a determination that a combination of system faults and procedural actions will cause the ground spoilers to deploy in the air. This AD requires revising the existing airplane flight manual (AFM) to add revised procedures. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective March 20, 2024.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 20, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1219; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email: *ac.yul@aero.bombardier.com;* website: *bombardier.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2023–1219.

FOR FURTHER INFORMATION CONTACT: William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc., Model CL–600–2B16 (604 Variant) airplanes. The NPRM published in the **Federal Register** on July 5, 2023 (88 FR 42886). The NPRM was prompted by AD CF–2023–01, dated January 4, 2023, issued by Transport Canada (hereafter referred to as the MCAI), which is the aviation authority for Canada. The MCAI states that, during an in-service event, a combination of system faults and procedural actions caused the ground spoilers to deploy in the air. During this event, the WOW [weight-on-wheels] INPUT Caution message had posted on the engine indication and crew alerting system (EICSA) after takeoff. The WOW INPUT message persisted, even after the flightcrew executed the WOW INPUT Quick Reference Handbook (QRH) procedure. During this time, the GND SPLRS [ground spoilers] NOT ARMED message also posted, and the flightcrew consequently manually armed the ground spoilers as required by procedure. An investigation by Bombardier, Inc., revealed that a fault occurred in the proximity sensor electronic unit (PSEU), which erroneously indicated ON GROUND while the airplane was in the air.

In the NPRM, the FAA proposed to require revision of the existing AFM to add revised procedures. The FAA is issuing this AD to address possible ground spoiler deployment leading to reduced controllability of the airplane, or excessive loss of altitude on final approach.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1219.

Discussion of Final Airworthiness Directive

Comments

The FAA received one comment from a commenter who supported the NPRM without change.

The FAA received additional comments from Bombardier. The following presents the comments received and the FAA's responses.

Request for Later-Approved Service Information

Bombardier requested that the FAA change the AD to allow the use of the AFM revisions specified ''or later revisions approved by the FAA, TCCA [Transport Canada Civil Aviation], or the Bombardier DAO [Design Approval Organization].''

The FAA disagrees with the commenter's request. The FAA may not refer to any future document that does not yet exist in an AD because 1 CFR 51.1(f) states a publication's incorporation by reference is limited to its approved edition; future publication amendments or revisions are outside this inclusion.

Further, paragraph (g) of this AD requires operators to incorporate ''the information specified in'' the specified AFM documents. If operators incorporate a later revision of an AFM document that contains the same information as the specified AFM document, then they are in compliance with paragraph (g) of this AD. However, if there are changes to procedures in later revisions, operators may request an alternative method of compliance with this AD under the provisions of paragraph (h)(1) of this AD.

Additional Changes Made to This Final Rule

In the NPRM, the FAA inadvertently referred to Sub-sub-section K, ''Ground Spoilers Unsafe,'' of Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, Revision 125, dated March 14, 2022. The ''Ground Spoilers Unsafe,'' procedure of that document is actually ''Sub-sub-section L.'' Therefore, the FAA has revised all references of ''Sub-sub-section K'' to ''Sub-sub-section L.''

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed the following service information, which specifies revised Abnormal Procedures of the AFM for Ground Spoilers Unsafe and Weight-on-Wheels Input Fault procedures. These documents are distinct since they apply to different airplane models and configurations.

- Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, Revision 125, dated March 14, 2022. (For obtaining Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, use Document Identification No. CH 604 AFM.)
- Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, Revision 125, dated March 14, 2022. (For obtaining Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, use Document Identification No. CH 604 AFM.)
- Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, Revision 63, dated March 14, 2022. (For obtaining Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, use Document Identification No. CH 605 AFM.)
- Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, Revision 63, dated March 14, 2022. (For obtaining Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, use Document Identification No. CH 605 AFM.)
- Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, Revision 28, dated March 14, 2022. (For obtaining Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, use Document Identification No. CH 650 AFM.)
- Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, Revision 28, dated March 14, 2022. (For obtaining Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, use Document Identification No. CH 650 AFM.)

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 44 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hour × $85 per hour = $85	$0	$85	$3,740

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2023–26–08 Bombardier, Inc.: Amendment 39–22651; Docket No. FAA–2023–1219; Project Identifier MCAI–2023–00004–T.

(a) Effective Date

This airworthiness directive (AD) is effective March 20, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model CL–600–2B16 (604 Variant) airplanes, certificated in any category, serial numbers (S/N) 5301 through 5665 inclusive, 5701 through 5988 inclusive, and 6050 through 6174 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code: 27, Flight Controls.

(e) Unsafe Condition

This AD was prompted by a determination that a combination of system faults and procedural actions will cause the ground spoilers to deploy in the air. The FAA is issuing this AD to address possible ground spoiler deployment in the air leading to reduced controllability of the airplane, or excessive loss of altitude on final approach.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Revision of Existing AFM

Within 60 days after the effective date of this AD: Do the applicable actions specified in paragraphs (g)(1) through (3) of this AD.

(1) For Model CL–600–2B16 (604 variant) airplanes, S/N 5301 through 5665 inclusive: Revise the existing airplane flight manual (AFM) to incorporate the information specified in paragraphs (g)(1)(i) and (ii) of this AD.

(i) Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, Revision 125, dated March 14, 2022.

(ii) Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, Revision 125, dated March 14, 2022.

Note 1 to paragraph (g)(1): For obtaining Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, use Document Identification No. CH 604 AFM.

(2) For Model CL–600–2B16 (604 variant) airplanes, S/N 5701 through 5988 inclusive: Revise the existing AFM to incorporate the information specified in paragraphs (g)(2)(i) and (ii) of this AD.

(i) Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, Revision 63, dated March 14, 2022.

(ii) Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, Revision 63, dated March 14, 2022.

Note 2 to paragraph (g)(2): For obtaining Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, use Document Identification No. CH 605 AFM.

(3) For Model CL–600–2B16 (604 variant) airplanes, S/N 6050 through 6174 inclusive: Revise the existing AFM to incorporate the information specified in paragraphs (g)(3)(i) and (ii) of this AD.

(i) Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, Revision 28, dated March 14, 2022.

(ii) Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, Revision 28, dated March 14, 2022.

Note 3 to paragraph (g)(3): For obtaining Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, use Document Identification No. CH 650 AFM.

(h) Additional AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (i)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada; or Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(i) Additional Information

(1) Refer to Transport Canada AD CF–2023–01, dated January 4, 2023, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1219.

(2) For more information about this AD, contact William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, Revision 125, dated March 14, 2022.

Note 4 to paragraph (j)(2)(i): This note applies to paragraphs (j)(2)(i) and (ii) of this AD. For obtaining Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, use Document Identification No. CH 604 AFM.

(ii) Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 604 Airplane Flight Manual, Publication No. PSP 604–1, Revision 125, dated March 14, 2022.

(iii) Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, Revision 63, dated March 14, 2022.

Note 5 to paragraph (j)(2)(iii): This note applies to paragraphs (j)(2)(iii) and (iv) of this AD. For obtaining Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, use Document Identification No. CH 605 AFM.

(iv) Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 605 Airplane Flight Manual, Publication No. PSP 605–1, Revision 63, dated March 14, 2022.

(v) Sub-sub-section L, ''Ground Spoilers Unsafe,'' of sub-section 1, ''Flight Controls,'' of Section 05–11, ''Flight Controls,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, Revision 28, dated March 14, 2022.

Note 6 to paragraph (j)(2)(v): This note applies to paragraphs (j)(2)(v) and (vi) of this AD. For obtaining Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, use Document Identification No. CH 650 AFM.

(vi) Sub-sub-section H, ''Weight-on-Wheels Input Fault,'' of sub-section 1, ''Landing Gear, Wheel and Brake System,'' of Section 05–16, ''Landing Gear, Wheel and Brake System,'' of Chapter 5, ABNORMAL PROCEDURES, of Bombardier Challenger 650 Airplane Flight Manual, Publication No. PSP 650–1, Revision 28, dated March 14, 2022.

(3) For service information identified in this AD, contact Bombardier, Inc., Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email: *ac.yul@aero.bombardier.com;* website: *bombardier.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Issued on January 2, 2024.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–02998 Filed 2–13–24; 8:45 am

BILLING CODE 4910–13–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 1601, 1602, 1603, 1610, 1611, 1614, and 1626

RIN 3046–AB31

Amendment of Procedural and Administrative Regulations To Include the Pregnant Workers Fairness Act (PWFA)

AGENCY: Equal Employment Opportunity Commission.

ACTION: Interim final rule; request for comments.

SUMMARY: The Equal Employment Opportunity Commission (''EEOC'' or ''Commission'') is issuing an interim final rule to amend some of its existing procedural regulations to include references to the Pregnant Workers Fairness Act (''PWFA''), which requires covered employers to provide reasonable accommodations to a qualified applicant's or employee's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship. As an interim final rule, this will become effective on the date of publication but also is subject to change based on the public comments the EEOC receives during a subsequent 60-day comment period.

DATES: This interim final rule is effective on February 14, 2024. Comments on this rule must be submitted on or before April 15, 2024.

ADDRESSES: You may submit comments, identified by RIN Number 3046–AB31, by any of the following methods—please use only one method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on the website for submitting comments.
- *Fax:* Comments totaling six or fewer pages may be sent by fax machine to (202) 663–4114. Receipt of fax transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 921–2815 (voice), (800) 669–6820 (TTY), or (844) 234–5122 (ASL Video Phone).
- *Mail:* Comments may be submitted by mail to Raymond Windmiller, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.
- *Hand Delivery/Courier:* Raymond Windmiller, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.

Instructions: The Commission invites comments from all interested parties. All comment submissions must include the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information you provide. However, the EEOC reserves the right to refrain from posting libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race; color; sex; national origin; age; religion; disability; or genetic information; or that promote or endorse services or products.

Docket: For access to comments received, go to *https://www.regulations.gov.* Copies of the received comments also will be available for review at the Commission's library, 131 M Street NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5:00 p.m., from April 15, 2024. You must make an appointment with library staff to review the comments in the Commission's library.

FOR FURTHER INFORMATION CONTACT: Kathleen Oram, Assistant Legal Counsel, (202–900–8652 (voice); 1–800–669–6820 (TTY)), Office of Legal Counsel, 131 M Street NE, Washington, DC 20507. Requests for this notice in an

alternative format should be made to the Office of Communications and Legislative Affairs at (202) 921–3191 (voice), (800) 669–6820 (TTY), or (844) 234–5122 (ASL).

SUPPLEMENTARY INFORMATION: [1]

The Pregnant Workers Fairness Act (''PWFA'') became law on December 29, 2022, and became effective on June 27, 2023. The PWFA requires a covered employer to provide reasonable accommodations for a qualified employee's or applicant's known limitations related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer's operation of the business. In crafting the PWFA enforcement section, Congress recognized the advisability of using the existing mechanisms and procedures in place for redress of other forms of employment discrimination. Specifically, under 42 U.S.C. 2000gg–2(a) of the PWFA, the enforcement mechanisms and procedures set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4, *et seq.,* as amended, apply to employees defined in section 701(f) of Title VII, 42 U.S.C. 2000e(f), (non-federal sector employees) (except as provided in 42 U.S.C. 2000gg–2(a)(2) & (3)). Under 42 U.S.C. 2000gg–2(d), the enforcement mechanisms and procedures set forth in the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. 2000e–16b and 16c, apply to employees covered by GERA (except as provided in 42 U.S.C. 2000gg–2(d)(2) & (3)). Finally, under 42 U.S.C. 2000gg–2(e), the enforcement mechanisms and procedures set forth in section 717 of Title VII the Civil Rights Act of 1964, 42 U.S.C. 2000e–16, apply to employees covered by section 717 (federal-sector employees) (except as provided in 42 U.S.C. 2000gg–2(e)(2) & (3)).

Based on the PWFA's adoption of the enforcement mechanisms and procedures of Title VII and GERA, the procedures implementing those statutory provisions in the EEOC's regulations also will apply to the PWFA. Specifically, the EEOC's procedures for the PWFA will follow the rules found at 29 CFR parts 1601 (procedural regulations), 1602 (recordkeeping and reporting requirements under Title VII, the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act (GINA)), 1603 (procedures for previously exempt state and local government employee complaints of employment discrimination under section 304 of the Government Employee Rights Act of 1991), and 1614 (federal sector equal employment opportunity). Thus, employees covered by the PWFA will file charges or complaints and the EEOC will investigate or otherwise process them using the same procedures as set out in Title VII or GERA. In this interim final rule, therefore, the EEOC is amending its procedural and administrative regulations to add references in these rules to the PWFA.

Likewise, this interim final rule amends 29 CFR parts 1610 (availability of records), 1611 (Privacy Act regulations), and 1626 (procedures—Age Discrimination in Employment Act) to include references to the PWFA in the lists of laws enforced by the EEOC. All EEOC records involving the PWFA are covered by the key privacy and government records provisions in the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a). In addition, because 29 CFR 1626.17(a)(2), part of the EEOC's ADEA regulation, references the full universe of EEOC enforced laws, it must be supplemented to add the PWFA.

Finally, in the amendment of the procedural regulations after the passage of GINA, reference to GINA was inadvertently omitted from the list of statutes enforced by the EEOC in 29 CFR 1614.503. Thus, the proposed interim final rule adds GINA to 29 CFR 1614.503 in the list of statutes enforced by the EEOC. This change is a ministerial correction of a technical oversight.

The Administrative Procedure Act requires in section 553 that rulemaking start with public notice and an invitation for comments on the proposed rule, except when statutory exceptions apply. When an agency determines that there is ''good cause'' to find that public notice and comment is ''impracticable, unnecessary, or contrary to the public interest,'' public comments prior to the effectiveness of a final rule are not required as long as the agency ''incorporates the finding and a brief statement'' of its reasons in the rule itself. 5 U.S.C. 553(b)(B).

Under 5 U.S.C. 553(b)(B), there is ''good cause'' to find that notice and comment ''are impracticable, unnecessary, or contrary to the public interest'' for this rulemaking, such that it is appropriate to issue this regulation as an interim final rule. The types of rules that satisfy the ''unnecessary'' prong of this standard due to their administrative or insignificant nature include nondiscretionary changes required by statute and technical changes that do not impact rights or responsibilities.

Public comment is ''unnecessary'' under this standard because by its express statutory terms the PWFA requires the EEOC to follow existing procedures originally established by Congress in earlier EEOC-enforced laws and already implemented by the agency in long-standing EEOC procedural regulations. This interim final regulation simply adds reference to the PWFA in the lists of EEOC-enforced statutes subject to these procedures. The statutory terms of the PWFA do not give the EEOC any discretion to change these established procedures for the enforcement of the PWFA or to make exceptions from the established procedures for the PWFA. Therefore, the EEOC has determined that an interim final rule is appropriate. The EEOC will accept comments on this rule and will consider such comments to the extent that the changes can be made within the statutory framework of the PWFA.

In addition, as a purely ministerial change, this interim final rule adds the PWFA to the lists of the statutes the EEOC enforces—and therefore now creates records about—in its Public Records regulation (29 CFR part 1610) and its Privacy Act regulation (29 CFR part 1611). EEOC records concerning enforcement of the PWFA are government records and therefore are subject to the Freedom of Information Act and the Privacy Act. Accordingly, the EEOC will process public records requests for PWFA-related documents pursuant to its Freedom of Information Act procedures at 29 CFR part 1610 and will protect information in those records pursuant to its Privacy Act procedures at 29 CFR part 1611.

Finally, the ADEA regulation includes a list of EEOC statutes enforced at 29 CFR 1626.17(a)(2). To make this list complete, this rulemaking adds a reference to the PWFA in this list. This is a ministerial change making it express that the PWFA is a law the EEOC now enforces.

Under 5 U.S.C. 553(b)(B), a rulemaking can be exempt from prior notice and comment if an agency finds good cause that the notice and comment would be ''contrary to the public interest.'' The absence of this rule, or significant delay in its promulgation, could result in public confusion concerning the EEOC's procedures for administering the PWFA to the detriment of the public, and would therefore be ''contrary to the public interest.''

[1] On August 11, 2023, the EEOC issued a Notice of Proposed Rule Making regarding the substantive provisions of the PWFA. *Regulations to Implement the Pregnant Workers Fairness Act,* 88 FR 54714 (August 11, 2023).

Because these changes to the EEOC's existing regulations all are either statutorily required in their terms or are purely ministerial in the interest of completeness, there is ''good cause'' for this interim final rule to become effective immediately upon publication under 5 U.S.C. 553(b)(B), with provision for post-promulgation public comment and the possibility for the Commission to change the Interim Final Rule at a later date. For the same reasons, there is good cause to provide for an immediate effective date. *See* 5 U.S.C. 553(d)(3).

Regulatory Procedures

Executive Order 12866 (as Amended by Executive Order 14094)

The Commission has complied with the principles in section 1(b) of Executive Order 12866, as amended by Executive Order 14094, Regulatory Planning and Review. This rule is not a ''significant regulatory action'' under section 3(f) of the Executive Order and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Executive Order.

Paperwork Reduction Act

This regulation contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 604, requires a final regulatory flexibility analysis only for rules ''after being required to publish a general notice of proposed rulemaking'' or for interpretive internal revenue laws. The EEOC's interim final rule amending the EEOC's procedural regulations to include references to the PWFA is being promulgated without a notice of proposed rulemaking for the reasons described above. Further, it does not concern internal revenue matters. Therefore, no regulatory flexibility analysis is required.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, in 1995 dollars, updated annually for inflation. In 2023, that threshold is approximately $177 million. 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, 2 U.S.C. 1501 *et seq.*

List of Subjects in 29 CFR Parts 1601, 1602, 1603, 1610, 1611, 1614, and 1626

Administrative practice and procedure, Equal employment opportunity.

For the Commission.

Dated: February 6, 2024.

Charlotte A. Burrows,

Chair, U.S. Equal Employment Opportunity Commission.

Accordingly, the U.S. Equal Employment Opportunity Commission amends 29 CFR parts 1601, 1602, 1603, 1610, 1611, 1614, and 1626 as follows:

PART 1601—PROCEDURAL REGULATIONS

■ 1. The authority citation for part 1601 is revised to read as follows:

Authority: 42 U.S.C. 2000e to 2000e–17; 42 U.S.C. 12111 to 12117; 42 U.S.C. 2000ff to 2000ff–11; 42 U.S.C. 2000gg to 2000gg–6; 28 U.S.C. 2461 note, as amended; Pub. L. 104–134, Sec. 31001(s)(1), 110 Stat. 1373.

■ 2. Section 1601.1 is revised to read as follows:

§ 1601.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Genetic Information Nondiscrimination Act of 2008, and the Pregnant Workers Fairness Act. Section 107 of the Americans with Disabilities Act, section 207 of the Genetic Information Nondiscrimination Act, and section 104 of the Pregnant Workers Fairness Act incorporate the powers, remedies and procedures set forth in sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964. Based on its experience in the enforcement of title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the Pregnant Workers Fairness Act, and upon its evaluation of suggestions and petitions for amendments submitted by interested persons, the Commission may from time to time amend and revise these procedures.

■ 3. Revise the heading of § 1601.2 to read as follows:

§ 1601.2 Terms defined in title VII of the Civil Rights Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the Pregnant Workers Fairness Act.

■ 4. Section 1601.3 is amended by revising paragraph (a) to read as follows:

§ 1601.3 Other definitions.

(a) For the purposes of this part, the term *title VII* shall mean title VII of the Civil Rights Act of 1964; the term *ADA* shall mean the Americans with Disabilities Act of 1990; the term *GINA* shall mean the Genetic Information Nondiscrimination Act of 2008; the term *PWFA* shall mean the Pregnant Workers Fairness Act; the terms *EEOC* or *Commission* shall mean the Equal Employment Opportunity Commission or any of its designated representatives; the term *Washington Field Office* shall mean the Commission's primary non-Headquarters office serving the District of Columbia and Virginia suburban counties and jurisdictions; the term *FEP agency* shall mean a State or local agency which the Commission has determined satisfies the criteria stated in section 706(c) of title VII; and the term *verified* shall mean sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements, or supported by an unsworn declaration in writing under penalty of perjury.

§§ 1601.6, 1601.7, 1601.10, 1601.11, 1601.13, 1601.17, 1601.18, 1601.21, 1601.22, 1601.24, 1601.25, 1601.26, 1601.28, 1601.30, 1601.70, and 1601.79 [Amended]

■ 5. Remove the words ''title VII, the ADA, or GINA'' and add in their place the words ''title VII, the ADA, GINA, or the PWFA'' wherever they appear in the following places:
- a. § 1601.6(a);
- b. § 1601.7(a);
- c. § 1601.10;
- d. § 1601.11(b);
- e. § 1601.13(a)(3)(i), (a)(4)(i);
- f. § 1601.17(a);
- g. § 1601.18(a);
- h. § 1601.21(a), (e)(2)(iii);
- i. § 1601.22;
- j. § 1601.24(c);
- k. § 1601.25;
- l. § 1601.26(a);
- m. § 1601.28(a)(3), (b)(1);
- n. § 1601.30(a);
- o. § 1601.70(d);
- p. § 1601.79.

§§ 1601.16, 1601.30, and 1601.34 [Amended]

■ 6. Remove the words ''title VII, the ADA, and GINA'' and add in their place the words ''title VII, the ADA, GINA, and the PWFA'' wherever they appear in the following places:
- a. § 1601.16(a);
- b. § 1601.30(a);
- c. § 1601.34.

■ 7. Section 1601.28(e)(1) is revised to read as follows:

§ 1601.28 Notice of Right to Sue: Procedure and Authority.

(e) * * *

(1) Authorization to the aggrieved person to bring a civil action under title VII, the ADA, GINA, or the PWFA pursuant to section 706(f)(1) of title VII, section 107 of the ADA, section 207 of GINA, or section 104 of the PWFA within 90 days from receipt of such authorization;

■ 8. Section 1601.70(a)(1) is revised to read as follows:

§ 1601.70 FEP agency qualifications.

(a) * * *

(1) That the state or political subdivision has a fair employment practice law which makes unlawful employment practices based upon race; color; religion; sex; national origin; disability; genetic information; or pregnancy, childbirth, or related medical conditions; and

PART 1602—RECORDKEEPING AND REPORTING REQUIREMENTS UNDER TITLE VII, THE ADA, GINA, AND THE PWFA

■ 9. The heading for part 1602 is revised to read as set forth above.

■ 10. The authority citation for part 1602 is revised to read as follows:

Authority: 42 U.S.C. 2000e–8, 2000e–12; 44 U.S.C. 3501 *et seq.;* 42 U.S.C. 12117; 42 U.S.C. 2000ff–6; 42 U.S.C. 2000gg–2.

■ 11. Section 1602.1 is revised to read as follows:

§ 1602.1 Purpose and scope.

Section 709 of title VII (42 U.S.C. 2000e–8), section 107 of the Americans with Disabilities Act (ADA) (42 U.S.C. 12117), section 207(a) of the Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. 2000ff–6), and section 104 of the Pregnant Workers Fairness Act (PWFA) (42 U.S.C 2000gg–2) require the Commission to establish regulations pursuant to which employers, labor organizations, joint labor-management committees, and employment agencies subject to those Acts shall make and preserve certain records and shall furnish specified information to aid in the administration and enforcement of the Acts.

§§ 1602.11, 1602.12, 1602.14, 1602.19, 1602.21(b), 1602.26, 1602.28, 1602.31, 1602.37, 1602.45, and 1602.54 [Amended]

■ 12. Remove the words ''title VII, the ADA, or GINA'' and add in their place the words ''title VII, the ADA, GINA, or the PWFA''; and remove the words ''section 709(c) of title VII, section 107 of the ADA, or section 207(a) of GINA'' and add in their place the words ''section 709(c) of title VII, section 107 of the ADA, section 207(a) of GINA, or section 104 of the PWFA'' wherever they appear in the following places:

■ a. § 1602.11;
■ b. § 1602.12;
■ c. § 1602.14;
■ d. § 1602.19;
■ e. § 1602.21(b);
■ f. § 1602.26;
■ g. § 1602.28(a);
■ h. § 1602.31;
■ i. § 1602.37;
■ j. § 1602.45;
■ k. § 1602.54.

PART 1603—PROCEDURES FOR PREVIOUSLY EXEMPT STATE AND LOCAL GOVERNMENT EMPLOYEE COMPLAINTS OF EMPLOYMENT DISCRIMINATION UNDER SECTION 304 OF THE GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991

■ 13. The authority citation for part 1603 is revised to read as follows:

Authority: 42 U.S.C. 2000e–16c; 42 U.S.C. 2000ff–6(b); 42 U.S.C 2000gg–2.

■ 14. Section 1603.102(a) is revised to read as follows:

§ 1603.102 Filing a complaint.

(a) *Who may make a complaint.* Individuals referred to in § 1603.101 who believe they have been discriminated against on the basis of race; color; religion; sex; national origin; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions; or retaliated against for opposing any practice made unlawful by federal laws protecting equal employment opportunity or for participating in any stage of administrative or judicial proceedings under federal laws protecting equal employment opportunity may file a complaint not later than 180 days after the occurrence of the alleged discrimination.

* * * * *

PART 1610—AVAILABILITY OF RECORDS

■ 15. The authority citation for part 1610 continues to read as follows:

Authority: 42 U.S.C. 2000e–12(a), 5 U.S.C. 552 as amended by Pub. L. 93–502, Pub. L. 99–570, and Pub. L. 105–231; for § 1610.15, non-search or copy portions are issued under 31 U.S.C. 9701.

■ 16. Section 1610.7(a)(4) is revised to read as follows:

§ 1610.7 Where to make request; form.

(a) * * *

(4) Materials in office investigative files related to charges under: Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206(d)); the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*); the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*); the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff *et seq.*); or the Pregnant Workers Fairness Act (42 U.S.C. 2000gg *et seq.*).

* * * * *

■ 17. Section 1610.17(i) is revised to read as follows:

§ 1610.17 Exemptions.

* * * * *

(i) Section 107 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117); section 207(a) of the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff–6); and section 104 of the Pregnant Workers Fairness Act (42 U.S.C. 2000gg–2) explicitly adopt the powers, remedies, and procedures set forth in sections 706 and 709 of title VII. Accordingly, the prohibitions on disclosure contained in sections 706 and 709 of title VII as outlined in paragraphs (b), (c), (d), and (e) of this section, apply with equal force to requests for information related to charges and executed statistical reporting forms filed with the Commission under the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Pregnant Workers Fairness Act.

* * * * *

PART 1611—PRIVACY ACT REGULATIONS

■ 18. The authority citation for part 1611 continues to read as follows:

Authority: 5 U.S.C. 552a.

■ 19. Section 1611.13 is amended by revising the introductory text, paragraph (a), and the first sentence of paragraph (c) to read as follows:

§ 1611.13 Specific Exemptions—Charge and complaint files.

Pursuant to subsection (k)(2) of the Act, 5 U.S.C. 552a(k)(2), systems EEOC–1 (Age and Equal Pay Act Discrimination Case Files), EEOC–3 (Title VII, Americans with Disabilities Act, GINA, and PWFA Discrimination Case Files), EEOC–15 (Internal Harassment Inquiries) and EEOC/GOVT–1 (Equal Employment Opportunity Complaint Records and Appeal Records) are exempt from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act. The Commission has determined to exempt these systems from the above-

named provisions of the Privacy Act for the following reasons:

(a) The files in these systems contain information obtained by the Commission and other Federal agencies in the course of harassment inquiries, and investigations of charges and complaints that violations of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans with Disabilities Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, and the Pregnant Workers Fairness Act have occurred. It would impede the law enforcement activities of the Commission and other agencies if these provisions of the Act applied to such records.

* * * * *

(c) Subject individuals of the files in EEOC–1 (Age and Equal Pay Act Discrimination Case Files), EEOC–3 (Title VII, Americans with Disabilities Act, GINA, and PWFA Discrimination Case Files), and EEOC/GOVT–1 (Equal Employment Opportunity Complaint Records and Appeal Records) have been provided a means of access to their records by the Freedom of Information Act. * * *

* * * * *

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

■ 20. The authority citation for part 1614 is revised to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e–16, 2000ff–6(e), and 2000gg–2(e); E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964–1965 Comp., p. 306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

■ 21. Section 1614.101 is revised to read as follows:

§ 1614.101 General policy.

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race; color; religion; sex; national origin; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions; and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)), the Rehabilitation Act (29 U.S.C. 791 *et seq.*), the Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. 2000ff *et seq.*), or the Pregnant Workers Fairness Act (PWFA) (42 U.S.C. 2000gg *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

■ 22. Section 1614.102(a)(4) is revised to read as follows:

§ 1614.102 Agency program.

(a) * * *

(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race; color; religion; sex; national origin; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions; and solicit their recruitment assistance on a continuing basis;

* * * * *

■ 23. Section 1614.103(a) is revised to read as follows:

§ 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of disability), the Equal Pay Act (sex-based wage discrimination), GINA (discrimination on the basis of genetic information), or the PWFA (discrimination on the basis of pregnancy, childbirth, or related medical conditions) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

* * * * *

■ 24. Amend § 1614.105 by revising paragraph (a) introductory text to read as follows:

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race; color; religion; sex; national origin; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

* * * * *

■ 25. Section 1614.204(a)(1) is revised to read as follows:

§ 1614.204 Class complaints.

(a) * * *

(1) A *class* is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race; color; religion; sex; national origin; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions.

* * * * *

■ 26. Amend § 1614.302 by revising paragraphs (a)(1) and (2) to read as follows:

§ 1614.302 Mixed case complaints.

(a) * * *

(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race; color; religion; sex; national origin; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race; color; religion; sex; national origin; disability; age; genetic information; or pregnancy, childbirth, or related medical conditions.

* * * * *

■ 27. Section 1614.304(b)(3) is revised to read as follows:

§ 1614.304 Contents of petition.

* * * * *

(b) * * *

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race; color; religion; sex; national origin; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions;

* * * * *

■ 28. Amend § 1614.407 by revising the introductory text to read as follows:

§ 1614.407 Civil action: Title VII, Age Discrimination in Employment Act, Rehabilitation Act, Genetic Information Nondiscrimination Act, and Pregnant Workers Fairness Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA, the Rehabilitation Act, Genetic Information Nondiscrimination Act, and the Pregnant Workers Fairness Act to file a civil action in an appropriate United States District Court:

* * * * *

■ 29. Section § 1614.503(g) is revised to read as follows:

§ 1614.503 Enforcement of final Commission decisions.

* * * * *

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, or the Pregnant Workers Fairness Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.,* and the mandamus statute, 28 U.S.C. 1361, or to commence de novo proceedings pursuant to the appropriate statutes.

■ 30. Section § 1614.702(j) is revised to read as follows:

§ 1614.702 Definitions.

* * * * *

(j) The term basis of alleged discrimination refers to the individual's protected status (*i.e.,* race; color; religion; reprisal; sex; national origin; Equal Pay Act; age; disability; genetic information; or pregnancy, childbirth, or related medical conditions). Only those bases protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.,* the Equal Pay Act of 1963, 29 U.S.C. 206(d), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.,* the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 *et seq.,* the Genetic Information Nondiscrimination Act, 42 U.S.C. 2000ff *et seq.,* and the Pregnant Workers Fairness Act, 42 U.S.C. 2000gg *et seq.,* are covered by the Federal EEO process.

* * * * *

PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT

■ 31. The authority citation for part 1626 continues to read as follows:

Authority: Sec. 9, 81 Stat. 605, 29 U.S.C. 628; sec. 2, Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

■ 32. Section 1626.17(a)(2) is revised to read as follows:

§ 1626.17 Notice of dismissal or termination.

(a) * * *

(2) Where the charge has been filed under the ADEA and title VII, the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), or the Pregnant Workers Fairness Act (PWFA), the Commission will issue a Notice of Dismissal or Termination under the ADEA at the same time it issues the Notice of Right to Sue under title VII, the ADA, GINA, or the PWFA, in accordance with 29 CFR 1601.28.

* * * * *

[FR Doc. 2024–02764 Filed 2–13–24; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 161

[Docket ID: DOD–2015–OS–0069]

RIN 0790–AJ37

Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is finalizing eligibility requirements for ID cards issued to uniformed service members, their dependents, and other DoD individuals. These cards are used for proof of identity, DoD affiliation, and to facilitate accessing DoD benefits. This rule includes documentation requirements to address the modification of gender in a record consistent with the requirements of Executive Orders ''Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,'' and ''Enabling All Qualified Americans To Serve Their Country In Uniform.'' The rule also updates the CFR to match the revised contents of various internal DoD policy issuances and National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS).

DATES: This rule is effective on March 15, 2024.

FOR FURTHER INFORMATION CONTACT: Robert Eves at 571–372–1956; email: *robert.c.eves.civ@mail.mil.*

SUPPLEMENTARY INFORMATION:

Authority

Authorities for this rule include 5 United States Code (U.S.C.) 5703 and 10 U.S.C. 1044a, 1061–1064, 1072–1074, 1074a–1074c, 1076, 1076a, 1077, 1095 (k) (2), 1408(H), and chapter 1223. These authorities provide members of the Uniformed Services (active duty, Reserve, or retired members) and their spouses and dependents certain benefits and privileges. Title 18 U.S.C. 499, 506, 509, 701, and 1001 address penalties, fines and imprisonment for unauthorized reproduction of ID cards. ID cards authorize eligible individuals (to include specific categories of civilians and contractors) certain benefits and privileges to include health care; use of commissary; exchange; and morale, welfare, and recreation facilities.

Background

On January 6, 2014, the DoD published an interim final rule (79 FR 708–747) on the policies and procedures for issuing DoD ID cards based on a proposed rule which published on August 6, 2010 (75 FR 47515–47519) and received no public comment. In addition, because of the June 26, 2013, U.S. Supreme Court decision that held section 3 of the Defense of Marriage Act unconstitutional, the rule also extended benefits to same sex spouses of Uniformed Service members and DoD civilians. As a result of an August 13, 2013, Secretary of Defense Memorandum, ''Extending Benefits to Same-Sex Spouses of Military Members,'' the Secretary of Defense directed that, ''. . . spousal and family benefits, including identification cards, will be made available to same-sex spouses no later than September 3, 2013.'' [1]

[1] Secretary of Defense Memorandum, ''Extending Benefits to Same-Sex Spouses of Military Members,'' available upon email request to: *dodhra.mc-alex.dmdc.mbx.dod-id-card-policy@mail.mil.*

The Department now construes the words ''spouse'' and ''marriage'' to include same-sex spouses and marriages, eliminating the need for the proposed addition of same sex partners to the larger population of individuals who could receive ID cards. Five comments were received on the 2014 interim final rule.

A second interim final rule was published on October 27, 2016 (81 FR 74874–74916) amending the rule published on January 6, 2014. In the second rule, DoD amended its ID card policy to include documentation needed for the modification of gender in a record for retirees and family members.

The second rule also made changes due to revisions of several internal DoD policy issuances and NIST FIPS. These revisions included.

- Aligning policy for the implementation of Homeland Security Presidential Directive (HSPD) 12 within DoD with the most current version of FIPS 201–3, ''Personal Identity Verification (PIV) of Federal Employees and Contractors'' (available at *https://dx.doi.org/10.6028/NIST.FIPS.201-3*).
- Aligning the benefits for commissary, exchange, and morale, welfare, and recreation (MWR) with the current versions of the following:

1. DoD Instruction 1015.10, ''Military Morale, Welfare, and Recreation (MWR) Programs'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/101510p.pdf*),

2. DoD Instruction 1330.17, ''Armed Services Commissary Operations'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133017p.pdf*), and

3. DoD Instruction 1330.21, ''Armed Services Exchange Regulations'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133021p.pdf*).

- Providing procedures and defined acceptable documentation for enrollment and eligibility verification, as necessary, for DoD ID card issuance as described in DoD Manual 1000.13 Volume 3, which will be published and made available at *https://www.esd.whs.mil/Directives/issuances/dodm/. This manual will identify:*

1. The eligibility documentation requirements for all DoD ID card eligible populations, and

2. Documentation requirements for the correction of Defense Enrollment Eligibility Reporting System (DEERS) records, to include changing one's gender marker as reflected in DEERS.

Thirty comments were received on the second interim final rule. This final rule responds to all comments received on both interim final rules. Responses are as follows.

Comment: One commenter applauded the Department's willingness to implement changes to DoD identification cards so promptly following the Supreme Court's decision in *United States* v. *Windsor.*

Response: DoD appreciates the comment.

Comment: One commenter urged the Department to expand its definition of ''child'' at 32 CFR 161.3 to include a child of a parent standing *in loco parentis,* where *in loco parentis* means a parent with day-to-day responsibilities to care for and financially support a child, but without a legal or biological relationship to the child. The commenter argued that including *in loco parentis* language within the definition of ''child'' would ensure children of all Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) parents can access dependent benefits, even in states where the LGBTQ parent and child cannot create a legally recognized relationship. The commenter proposed draft language to that effect.

Response: Because DoD's definition of ''child'' reflects the definition provided by 10 U.S.C. 1072, DoD declines to adopt the suggestion.

Comment: One commenter argued that the interim final rule issued by the DoD regarding spousal identification cards ignored the authority of states to define and regulate marriage. Specifically, by determining the marital status of service members based on the laws of the place a marriage took place (''state of celebration'') rather than the laws of service members' legal residency (''state of domicile'') (§ 161.3 Definitions; p.713), the commenter noted that DoD created a situation in which certain same-sex couples would be deemed ''married'' for some federal purposes but unmarried under state law (if they are domiciled in one of thirty-three states that do not recognize such unions). The commenter argued that this approach effectively imposed a new federal definition of marriage on the super-majority of states, undermining state laws on marriage and violating the principles of Executive Order 13132, ''Federalism'' (64 FR 43255; Aug. 4, 1999). That Executive order requires any Federal agency considering a regulation with considerable impact on the policy making authority of the states to consider the constitutional relationship between levels of government and to defer to the powers reserved to the states and the people. The commenter urged DoD to revise its final rule to connect determinations of marital status to the laws of a service member's state of domicile.

Response: Subsequent to the U.S. Supreme Court decision in *United States* v. *Windsor,* 133 S. Ct. 2675 (2013), which the commenter cited, the U.S. Supreme Court issued another decision on June 26, 2015, *Obergefell* v. *Hodges,* 135 S. Ct. 2584 (2015), which held that States must license and recognize marriages between two people of the same sex on the same terms and conditions as marriages between two people of the opposite sex. Thus, all states are required to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. The definition of spouse as it appears in this rule complies with current law and will not be revised.

Comment: One commenter addressed the following seven aspects of the proposed interim final rule:

1. The definition of the United States did not include American Samoa, American Formosa, the U.S. Virgin Islands, the Commonwealth of the Northern Marianas, or the Compact territories for which the United States has defense duties (Palau, Marshall Islands, Micronesia) and the treaty territories for which the United States has defense duties (Tuvalu, Kiribati, Tokelau, Banaba)

2. ''Married'' was not defined, nor was ''marriage''.

3. ''Gender'' was not defined, and the commenter believed that the phrase ''regardless of gender'' could refer to gender as conventionally understood, being a reciprocating legal fact under state common law. Also, the commenter argued that ''bona fide'' should be added before legally married to make clear that the jurisdictional requirements for a legal marriage need to be satisfied before one could meet that definition.

4. State was not defined to include American Samoa, American Formosa, the U.S. Virgin Islands, the Commonwealth of the Northern Marianas, or the Compact territories for which the United States has defense duties (Palau, Marshall Islands, Micronesia) and the treaty territories for which the United States has defense duties (Tuvalu, Kiribati, Tokelau, Banaba).

5. State in the definition of ''Spouse'' excluded foreign territory, which the commenter argued was done without rational basis.

6. The rule had significant federalism implications beyond those necessitated by *United States* v. *Windsor.*

7. The definitions of unmarried did not include never married.

Response: Responses to each individual point above follow:

1. The definition of U.S. territories and possessions found in 8 U.S.C. 1101(a)(38) (*https://uscode.house.gov/view.xhtml?req=granuleid:U.S.C.-prelim-title8-section1101&num=0&edition=prelim*), and this rule includes Puerto Rico, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands. It does not include independent countries or nations, nor territories of other countries.

2. The definitions of ''married'' and ''marriage'' are defined in a standard dictionary; DoD does not view it as necessary to adopt definitions of these words in this rule.

3. DoD included the phrase ''regardless of gender'' in the definition of spouse to reflect the Supreme Court's decisions in *United States* v. *Windsor* and *Obergefell* v. *Hodges.* This ensured that the same benefits are available to all spouses, regardless of whether they are in same-sex or opposite-sex marriages. DoD recognizes all marriages that are valid in the place of celebration. Documentation requirements necessary to enroll a spouse in DEERS identified in § 161.23(b)(2) of Subpart D provide jurisdictional certification of a legal marriage, making it unnecessary to modify legally married with ''bona fide.''

4. DoD used the definition of State found in 10 U.S.C. 10001, which includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

5. ''State of residence'' as used in the context of DoD's definition of ''spouse''—''A person legally married to a current, former, or retired uniformed service member, eligible civilian employee, or other eligible individual in accordance with subpart C of this part, regardless of gender or State of residence,'' ensures that DoD recognizes all marriages that are valid in the place of celebration. This precludes denying DEERS enrollment of a spouse based on current residency, to include residents of foreign territories and countries, when the location where the spouse resides does not recognize a legal marriage from another jurisdiction.

6. The Supreme Court decision in *Obergefell* v. *Hodges* of June 26, 2015, requires all States to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

7. For the purpose of extending benefits to widows, widowers, and former spouses of sponsors, the Department relies on its definitions of ''unremarried'' and ''unmarried.'' The Department does not need to include ''never married'' in its definitions as an individual who has never been married to a sponsor would not be eligible for a DoD ID card or benefits.

Comment: One commenter urged DoD to identify DoD military and civilian law enforcement personnel as law enforcement officers on their DoD issued ID cards, which it contended was required by the law enforcement officer's safety act.

Response: The military ID cards issued by the Department to service members comply with requirements established by Federal Law, the Geneva Conventions, and HSPD–12/Federal Information Processing Standards (FIPS) Publication (Pub) 201–3. Displaying an individual's law enforcement status on a DoD issued ID Card is not supported by the information currently retained in the Defense Enrollment Eligibility Reporting System database. Compliance with the Law Enforcement Officers Safety Act is addressed by DoD Instruction 5525.12, ''Implementation of the Amended Law Enforcement Officers Safety Act of 2004 (LEOSA),'' (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/552512p.pdf,* which requires that a qualified law enforcement officer or qualified retired law enforcement officer carry photographic identification issued by the DoD Component for which the individual is employed or from which the individual separated from service as a law enforcement officer.

Comment: One commenter urged DoD to ensure consistent definitions are being used across all ID card parts and subparts.

Response: Consistent with that comment, DoD deleted the definition of ''Foreign national civilians and contractors'' in the rule; the existing definition of ''Foreign affiliate'' will suffice.

Comment: One comment noted that the rule uses ''in the United States'' and ''outside the United States'' and not CONUS, OCONUS, asking whether such usage should be incorporated into the interim final rule.

Response: DoD changed references from ''CONUS'' to ''United States and U.S. territories and possessions'' in: (1) § 161.7(d)(1)(ii) of Subpart B; (2) Appendix 1 to § 161.7 of Subpart B paragraphs (d)(2)(i) and (vi); and (3) paragraph (c)(2) of Appendix 2 to § 161.7 of Subpart B. Paragraphs (d)(2)(i) and (vi) of Appendix 1 to § 161.7 of Subpart B have been deleted in response to a subsequent public comment and the remaining paragraphs have been renumbered. Deletion of paragraph (d)(2)(vi) requires deletion of § 161.20 Benefits for civilian personnel Table 35 to Subpart C of Part 161.

Comment: One comment urged DOD to ensure the updated rule removed all references to Form I–9.

Response: The Department replaced the Form I–9 List of Acceptable Documents with the FIPS 201–3 list of primary and secondary identity documents for the purposes of identity vetting for ID card issuance in the amended interim final version of this rule. That version did not replace all references to the Form I–9. DoD has revised Table 36 to Subpart D of Part 161 and Table 37 to Subpart D of Part 161, replacing ''U.S. Citizenship and Immigration Services Form I–9, (Lists of Acceptable Documents)'' with ''Federal Information Processing Standards (FIPS) Publication (Pub) 201–3, Personal Identity Verification (PIV) of Federal Employees and Contractors, Identity Proofing and Registration Requirements primary and secondary identity source documentation.''

Comment: One comment asked DoD to clarify whether foreign born individuals should be allowed to use an ID card issued by their Federal, state, or local government.

Response: DoD believes that such an ID card may be used as secondary identification and accordingly inserted in § 161.7(d)(1)(ii) of Subpart B the following sentence: ''A foreign government issued ID with photograph may be used as a secondary identity document for ID card issuance.''

Comment: One comment said that section 161.7(e)(2)(ii)(B) does not read well and suggested changing the language to ''issued to the dependents of retired Service members who are either 75 years of age . . .''

Response: DoD changed § 161.7(e)(2)(ii)(B) to read ''issued to the dependents of retired Service members who are either 65 years of age . . .,'' which implements a recently approved policy change to the age at which DoD will issue an indefinite ID to the dependents of retirees.

Comment: One comment asked whether expired DoD ID cards are allowable forms of ID for ID card renewal and urged DoD to accept them.

Response: DoD revised § 161.7(e)(3) of Subpart B to add ''An expired DoD ID card is an acceptable secondary form of ID for non- Common Access Card (CAC) ID card renewal or reissuance if identity document verification is required''

following the first sentence in the paragraph.

Comment: One comment asked DoD to clarify what happens if biometric information cannot be verified for ID card renewal.

Response: DoD added the following sentence to the end of § 161.7(e)(3) of Subpart B: ''If biometric information cannot be verified, the requirements for initial issuance shall apply or a temporary card may be issued in accordance with paragraph (e)(4) of this subpart.''

Comment: One comment urged DoD to consider allowing civilians to retain their card when transferring from one agency to another to ensure optimization and cost savings.

Response: DoD agrees with this suggestion. To make this clear, DoD added, ''with exception of transferring DoD civilian employees'' to the end of the first sentence of § 161.7(g)(2) of Subpart B. DoD also added the following immediately after the amended first sentence in paragraph 161.7(g)(2): ''Civilian employees transferring from one DoD Component to another as civilian employees (*e.g.,* Army civilian to Air Force civilian) will be permitted to retain their CAC during their transition for up to 30 days in accordance with DoD Chief Information Officer and Acting USD(P&R) joint memorandum, ''Common Access Card Retention for Department of Defense Civilian Employees when Transferring Between Department of Defense Components.''

Comment: One comment asked whether there is any difference between non-DoD federal employees and non-DoD government agency civilians and, if there is, for any additional requirements for non-DoD civilian personnel to be minimized.

Response: There is no difference between non-DoD Federal employees and non-DoD government agency civilians. To eliminate confusion, DoD changed all references to ''non-DoD Federal employees'' in Subparts C and D to read ''Non-DoD Government Agency Civilian Personnel.'' DoD has also revised paragraph (c)(2)(ii)(A)(*3*) of Appendix 1 to § 161.7, replacing ''Non-DoD Federal employees'' with ''Non-DoD Government Agency Civilian Personnel'' in the first sentence. The second sentence requiring DoD components to obtain Defense Human Resources Activity approval prior to sponsorship of Non-DoD Government Agency Civilian Personnel remains a necessary requirement.

Comment: One comment noted that the interim final rule stated, ''Individuals who have a established relationship between the U.S. Government and a State, a local government, or other recipient as specified in sections 6303, 6304, and 6305 of title 31, U.S.C.'' and suggested that it should say ''an established'' instead.

Response: DoD replaced ''a'' with ''an'' prior to ''established'' in paragraph (c)(2)(ii)(D)(*3*) of Appendix 1 to § 161.7 of Subpart B.

Comment: One comment asked whether, in Subpart C, Table 30, civilians residing on an installation should receive an ID and privilege card if there are no benefits printed on the card.

Response: Civilian personnel residing on an installation in the United States eligible for the benefits identified in Table 30 to Subpart C of Part 161 will only receive an Identification card. Table 30 is correct as written, but DoD removed paragraph (d)(2)(i) of Appendix 1 to § 161.7, which stated: ''DoD and uniformed services civilian employees (both appropriated and non-appropriated) when required to reside in a household on a military installation within the CONUS, Hawaii, Alaska, Puerto Rico, and Guam.'' DoD has redesignated the remaining paragraphs in the final rule.

Comment: Noting a reference to overstamps in the interim final rule, one commenter asked whether DoD continues to issue ID cards with overstamps.

Response: DoD no longer issues ID cards with overstamps, so it removed ''(with a ''TA'' overstamp)'' from paragraph (l)(2)(iii) of Appendix 1 to § 161.7 of Subpart B.

Comment: One commenter asked whether only former spouses who qualify as DoD beneficiaries receive a DD Form 2765 or other DoD beneficiaries do as well.

Response: Because other beneficiaries also receive a DD Form 2765, DoD revised paragraph (l)(2)(vi) of Appendix 1 to § 161.7 of Subpart B from ''Former spouse (that qualify as a DoD beneficiary)'' to ''DoD beneficiaries (eligible former spouses, widows, widowers, and abused dependents).''

Comment: One comment asked DoD to clarify whether any striping is used on the CAC besides blue for foreign national and green for contractor. The commenter remembered a red stripe being used for first responders and asked whether it was still in use.

Response: FIPS 201–3 requires white striping for government employees, blue for foreign nationals, and green for contractors for the background color behind the name on the PIV. FIPS 201–3 provides for identification of an emergency response official through the use of an optional footer on the face of the PIV. Previous versions of paragraph (b) of Appendix 2 to § 161.7 reflected the reservation of the red stripe for emergency response officials, but also indicated a red stripe would be used to denote non-U.S. personnel, just as a blue stripe does. To align DoD policy with FIPS 201–3, DoD removed paragraph (b)(2) of Appendix 2 to § 161.7. Paragraph (b)(1) has been re-designated as the second sentence of paragraph (b) introductory text.

Comment: The United Service Organizations, Inc. (''USO'') submitted several comments concerning proposed changes to 32 CFR part 161 as follows. First, the USO recommended changing the title of Table 37 to Subpart C of Part 161 from ''Benefits for Full-Time Paid Personnel of the USO and Accompanying Dependents Serving Outside the United States'' to ''Benefits for Paid Personnel of the USO and Accompanying Dependents Serving Outside the United States'' (striking ''Full-Time'') because the USO employs several part-time employees, particularly in the European and Pacific Areas of operation, and the current wording excludes those individuals from receiving the proper credentials. Second, the USO recommended changing the title of Table 25 to Subpart D of Part 161 from ''Eligibility Documentation Required for USO Area Executives, Center Directors, and Assistant Directors and Accompanying Dependents'' to ''Eligibility Documentation Required for Paid Personnel of the USO and Accompanying Dependents'' because the current wording is obsolete and does not reflect titles or positions used by the USO.

Response: DoD chose to retain the ''full-time'' requirement in paragraph (l)(2)(vii)(B) of Appendix 1 to § 161.7 of Subpart B, § 161.23(g)(4) of Subpart D, and Table 25 to Subpart D of Part 161 since benefits are not provided to part-time employees of the USO. But DoD agrees with the USO's second comment about obsolete wording and has corrected the instance in Subpart D cited in the comment, as well as one additional instance of this outdated wording. Specifically, DoD revised paragraph (l)(2)(vii)(B) of Appendix 1 to § 161.7 of Subpart B from ''Area executives, center directors, and assistant directors of the United Service Organization, when serving in foreign countries.'' to ''Full-time paid personnel of the United Service Organization, when serving in foreign countries;'' § 161.23(g)(4) of Subpart D from ''USO area executives, center directors, and

assistant directors serving outside the United States and outside U.S. territories and possessions and accompanying dependents, must have eligibility verified by documentation shown in Table 25 to this subpart'' to ''Full-time paid personnel of the USO serving outside the United States and outside U.S. territories and possessions and accompanying dependents must have eligibility verified by documentation shown in Table 25 to this subpart'' and Table 25 to Subpart D of Part 161 from ''Eligibility Documentation Required for USO Area Executives, Center Directors, and Assistant Directors and Accompanying Dependents'' to ''Eligibility Documentation Required for full-time paid personnel of the USO and Accompanying Dependents.''

Comment: Another commenter asked whether the rule applied only to area directors and asked DoD to ensure that the final rule accurately reflects USO personnel titles and categories.

Response: See previous comment.

Comment: One comment asked DoD to ensure the consistent use of ''spouse'' throughout the tables in Subpart C.

Response: DoD changed ''Lawful spouse'' to ''Spouse'' in 21 tables in Subpart C.

Comment: Another comment asked DoD to ensure that dependency (50% support) is used consistently throughout Subpart C.

Response: DoD added the 50% support requirement to pre-adoptive child for commissary, exchange, and MWR in Tables 2, 5, 6, and 12 through 20 to Subpart C of Part 161.

Comment: One comment asked whether the phrase ''including orphans'' should be used in Subpart C, Tables 16–20.

Response: A surviving dependent child's eligibility for benefits is determined by their relationship to, and the support being provided by, the sponsor at the time of the sponsor's death. A child's status as an orphan has no bearing on their benefit eligibility. The phrase ''including orphans'' is inaccurate and is not supported by Title 10 U.S.C. or DoD policy. DoD removed ''(Including Orphans)'' from Tables 16 through 19 to Subpart C of Part 161. Table 20 to Subpart C of Part 161 does not contain that terminology.

Comment: One comment asked DoD to remove ''or members who died while in a retired with pay status'' from § 161.17(a) ''Surviving dependents of active duty deceased members'' of Subpart C.

Response: DoD agrees that the phrase ''or members who died while in a retired with pay status,'' which was found in § 161.17(a) of Subpart C, is not applicable to active duty deceased members, and removed it.

Comment: One comment disagreed with the choice of words ''whose death is unrelated to their military service'' in § 161.17(d) and Table 19 to Subpart C of part 161. The commenter noted that it is not an official term and arguably blurs the line between reportable status and a line of duty determination. According to the commenter, the dependents of a soldier who dies in a reportable status, even if not in the line of duty, would retain eligibility for a tan teslin ID for the purpose of TRICARE, commissary, Post Exchange (PX), and MWR. But dependents of soldiers who died in a non-reportable status and previously had to turn in their pink teslin ID cards, regardless of the line of duty determination, would now be able to keep the same privileges they had when their Reserve/Guard soldier was alive: PX, Commissary, and MWR only.

Response: DoD agrees with this comment and changed § 161.17(d) of Subpart C and Table 19 to Subpart C of Part 161 from ''whose death is unrelated to his/her service'' to ''who died in a non-reportable status'' to clarify that line of duty is not relevant to the determination.

Comment: One comment suggested that in Subpart C, Table 20, Widow or Widower, DoD should change the DC note from 2, 3 to 2, 4.

Response: No change is required as Table 20 to Subpart C of Part 161 of the amended interim final rule has ''2, 4'' in the DC column.

Comment: One comment opined that the medical benefits for ''Parent, Parent-in-law'' in Subpart C, Table 20 are incorrect and asked DoD to ensure that all tables have notes for the appropriate beneficiary.

Response: DoD changed note 1 of Table 5 to Subpart C of Part 161 to read ''the eligibility for CHC and DC for eligible dependents begins on the same day the sponsor becomes eligible for active duty benefits'' rather than ''the eligibility for CHC and DC for eligible dependents begins on the first day of the active duty period.'' DoD also made the following changes to Tables:

Table 13 to Subpart C of Part 161—Notes for children missing from rule text published in **Federal Register** but included in this version.

Table 15 to Subpart C of Part 161—DoD added note 2, 3 for Commissary, MWR and Exchange to children over 21.

Table 20 to Subpart C of Part 161—DoD changed note 4 to 3 for children commissary.

Table 31 to Subpart C of Part 161—DoD changed note 5 to read ''individual'' rather than ''child''.

Table 32 to Subpart C of Part 161—DoD amended note 6 to include ''and dependent on an authorized sponsor for over 50 percent of the child's support''.

Table 33 to Subpart C of Part 161—DoD amended note 7 to include ''and dependent on an authorized sponsor for over 50 percent of the child's support''.

Table 35 to Subpart C of Part 161—DoD added Foster Child with MWR and Exchange benefits with note 3 for MWR and Notes 1, 3 for Exchange.

Table 36 to Subpart C of Part 161—DoD added pre-adoptive child with notes 1, 6 for direct care and note 6 for Commissary, Exchange, and MWR. Add note 6 with language for pre-adoptive child and renumber remaining notes and table.

Table 36 to Subpart C of Part 161—DoD added medical for Ward with notes, 1, 5.

Comment: One comment asked whether, in Subpart C, Table 22, pre-adoptive children should be receiving benefits for abused dependents.

Response: DoD retained ''pre-adoptive'' in Table 22 and added ''pre-adoptive'' to Table 23 to Subpart C of Part 161. Pursuant to 10 U.S.C. 1059, dependent children residing with the member at the time of the dependent abuse are eligible for transitional compensation, to include pre-adoptive children.

Comment: One comment urged DoD to ensure all titles in Subpart C, Table 31, are accurate.

Response: In Table 31 to Subpart C of Part 161, DoD added ''or Employed'' after ''Stationed,'' and DoD renamed Table 32 to Subpart C of Part 161, from ''Benefits For Non-DoD Government Agencies Civilian Personnel Stationed or Employed Outside the United States and Outside U.S. Territories and Possessions and Accompanying Dependents'' to ''Benefits For Non-DoD Government Agency Civilian Personnel Stationed or Employed Outside the United States and Outside U.S. Territories and Possessions and Accompanying Dependents.'' In Table 32 to Subpart C of Part 161, DoD revised the row from ''Non-DoD Civilian Personnel'' to ''Non-DoD Government Agency Civilian Personnel'' and revised the row in Table 33 to Subpart C of Part 161 from ''Non-DoD Civilian employee'' to ''Non-DoD Government Agency Civilian Personnel'' for the sake of clarity.

Comment: One comment suggested that DoD delete the phrase ''local hire'' in Subpart C, Table 31 Note 3, because

it is not applicable. A U.S. citizen assigned overseas cannot be a local hire.

Response: DoD agrees and amended the Tables as follows: In Table 31 to Subpart C of Part 161, DoD amended note 3 to remove ''(not a local hire).''

In Table 32 to Subpart C of Part 161, DoD amended note 2 to remove ''excluding local hires.''

In Table 33 to Subpart C of Part 161, DoD amended note 2 to remove ''excluding local hires.''

In Table 36 to Subpart C of Part 161, DoD amended note 2 to remove, ''(not a local hire).''

In Table 37 to Subpart C of Part 161, DoD amended note 2 to remove, ''(not a local hire).''

Comment: DoD received a question about whether, in Subpart D, Table 11, there are other means to report the death of an individual besides a death certificate.

Response: To answer this question, DoD added the DD Form 1300, ''Report of Casualty,'' as an option to report a sponsor's death to Table 11 to Subpart D of Part 161.

Comment: One commenter asked whether, in Subpart D, Table 17, a notice of eligibility should be an acceptable eligibility document for a sponsor.

Response: DoD removed notice of eligibility (NOE) from Table 17 to Subpart D of Part 161, and the Table Notes.

Comment: One comment supported DoD revising its ID policies to allow transgender civilians to change their gender record in DEERS. The commenter noted that the new provision would be similar to numerous existing federal and state policies for updating official records and identification documents, help protect individuals' privacy, and avoid unnecessary confusion, embarrassment, and harassment that can be caused when an individual's record does not match their gender identity and the way they live their everyday life. The commenter recommended three revisions to Table 33 to clarify and simplify the process: (1) replace the term ''appropriate clinical treatment'' with ''gender identity'' to clarify the standard for health care provider certifications; (2) accept certifications from the full range of licensed health care providers who are qualified to assess and provide treatment to meet the World Professional Association for Transgender Health's *Standards of Care;* and (3) omit the requirement for an applicant seeking to update gender identity to justify submission of a healthcare provider certification instead of a court order or updated legal document reflecting gender identity.

Response: DoD appreciates this comment. DoD did not explain its requirement for a justification statement when submitting a health care provider letter as the alternative to any of the three primary documentation options to support a gender marker change for retirees, dependents, and contractors in the 2016 interim rule. The intent was to mitigate the difference with other Departmental policy issuances addressing gender transition which did not provide an alternative to the three primary documentation options: a State birth certificate reflecting the preferred gender; a certified true copy of a court order reflecting the preferred gender; or a United States passport reflecting the preferred gender. The Department has reviewed the requirement for the health care provider letter with justification statement alternative, as well as whether retention or revision of the requirement to provide documentation to support a gender marker change request, specifically submission of one of the three primary documentation options or the health care provider letter alternative, is compatible with Executive Orders 13988, ''Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,'' and 14004, ''Enabling All Qualified Americans To Serve Their Country In Uniform,'' and the purpose of DEERS. That review included Federal Agencies' responses to the intent of Executive Order 13988, noting that among others, the Department of State permits an individual to self-select the gender marker to be printed on their passport, and the Social Security Administration permits an individual to self-select their sex on their Social Security number (SSN) record. The Department respects an individual's right to self-assert their gender identity and is replacing the documentation requirements in Subpart D to support a retiree's, dependent's, or contractor's request to update their gender marker in their DEERS record with a written statement signed by the individual indicating their preferred gender identity. Section 161.23(k) and Table 33 have been revised to reflect this change, eliminating the need to address the commenter's specific recommendations concerning the health care provider letter. Executive Order 14004 concerns service in the Armed Forces of the United States and is not applicable to the gender marker change process in subpart D, which only applies to retirees, dependents, and contractor employees.

Comment: One civilian commenter wrote in to support the addition of a rule handling transgender service members' and veterans' ability to change their gender marker on military or veteran ID and other documents, as a means of accessing appropriate other IDs (State, local, and Federal in the case of passports and U.S. Citizenship and Immigration Services documents), being recognized as the appropriate gender in daily life and on record, and demonstrating that the military supports its transgender troops and veterans fully. The commenter said that surgery, hormones, or other medical interventions may not be available or applicable to every transgender person, and DoD should not require genital surgery for an ID change. The commenter also said that most transgender people, including those who do plan on genital or other surgery, need to change their ID documents much earlier than surgery can be accomplished (medical clearance, health insurance pre-approval, and money issues being what they are.) Allowing them to change their ID documents as soon as is practical is, again, an act of kindness, justice, and fundamental respect.

Response: DoD maintains an individual's preferred gender identity (gender marker) in their DEERS record but does not print the preferred gender identity (gender marker) on any ID card it issues. Section 161.23(k) and Table 33 to Subpart D of Part 161 support the ability of retirees, dependents, and contractors to change their preferred gender identity. A separate DoD policy issuance, DoD Instruction 1300.28, In-Service Transition for Transgender Service Members (*https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130028p.pdf?ver=7d9-DSsprs-s7NwgJFSmDw%3d%3d*), supports the process by which Service members may change their gender marker (preferred gender identity) in their DEERS record. DoD Instruction 1336.01, Certificate of Uniformed Service (DD Form 214/5 Series) (*https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133601p.pdf?ver=5GyE0Rw0EgwwsXAPZe1tzA%3d%3d*), provides the process for an individual to correct information entered on their DD Form 214, Certificate of Release or Discharge From Active Duty. Section 161.23(k) and Table 33 to Subpart D of Part 161 have been revised to allow retiree, dependent, or contractor to submit a written statement identifying their preferred gender identity. All other

documentation requirements have been removed. DoD policy and processes are not applicable to ID credentials and documents issued by the Department of Veterans' Affairs.

Expected Impact of the Final Rule

DoD issues approximately four and one-half million ID cards each year to uniformed service members, civilian employees, contractors, foreign nationals, and, where applicable, family members. The Department estimates the ID cards issued to same-sex spouses represent less than one percent of the total ID cards issued in a year. The gender marker changes that have been made in DEERS due to changes in gender represent less than .002 percent of the total population.

This final rule benefits the Department and the public by strengthening the identity proofing requirements for ID card issuance. FIPS PUB 201–3 mandates changes to the acceptable forms of identification for the PIV identity proofing and registration requirements, providing lists of acceptable primary and secondary identity source documents. These revisions ensure DoD policy is compliant with the current Federal standard for identity proofing and registration requirements, the required identity source documents are provided by the ID card applicant during the actual ID card issuance process, and the individual receiving an ID card has verified his or her identity.

The rule also benefits members of the public by ensuring those eligible for DoD benefits will be issued an ID card in a timely manner. It also eliminates confusion for those seeking enrollment and benefit eligibility about the documentation requirements necessary to update a record to reflect an individual's personal information.

Finally, the incorporation of the revised Commissary, Exchange, and Morale, Welfare and Recreation policy issuances provide additional clarity concerning who is eligible to receive their respective benefits and the circumstances under which they are eligible for those benefits. The revisions to the benefits tables in Subpart C capture the changes to the updated benefits policy issuances and correct previously identified discrepancies, ensuring that those who are eligible for these benefits are provided timely access to those benefits.

Regulatory Procedures

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094, although not significant under section 3(f)(1) of Executive Order 12866.

Congressional Review Act (5 U.S.C. 801, et seq.)

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

Title 2 U.S.C. Ch. 25, ''Unfunded Mandates Reform Act''

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

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

The Under Secretary of Defense for Personnel and Readiness certified that this final rule is not subject to the Regulatory Flexibility Act because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

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

This rule imposes requirements under the Paperwork Reduction Act of 1995 which are approved by the Office of Management and Budget (OMB) and assigned OMB Control Number 0704–0415, ''Application for Department of Defense Common Access Card—DEERS Enrollment.'' This information collection is used to validate eligibility for all individuals applying for DoD benefits and privileges which include but are not limited to, medical coverage, DoD identification cards, access to DoD installations, buildings or facilities, and access to DoD computer systems and networks. The Department did not receive any comments associated with this collection and does not believe the changes finalized in this rule will require any changes to the cost or burden currently associated with this information collection. Additional information regarding this collection of information—including all current background materials—can be found at *https://www.reginfo.gov/public/do/PRAMain* by using the search function to enter either the tile of the collection or the OMB Control Number.

Executive Order 13132, ''Federalism''

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

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

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or effects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 161

Administrative practice and procedure, Armed forces, Military personnel, National defense, Privacy, Security measures.

Accordingly, the interim final rule that published at 79 FR 708–747 on January 6, 2014, and the interim final rule that published at 81 FR 74874–74916 on October 27, 2016, are adopted as a final rule with the following changes made in response to public comments received:

PART 161—IDENTIFICATION (ID) CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS

■ 1. The authority citation for 32 CFR part 161 is revised to read as follows:

Authority: 5 U.S.C. 5703, 10 U.S.C. 1061–1064, 1072–1074, 1074a–1074c, 1076, 1076a, 1077, and 1095(k)(2), and 18 U.S.C. 499, 506, 509, 701, and 1001; 10 U.S.C. 1408(h), 10 U.S.C. 1044a, 10 U.S.C. chapter 1223.

§ 161.3 [Amended]

■ 2. Amend § 161.3 by:
■ a. Deleting the duplicate definition of ''Foreign affiliate.''
■ b. Removing ''official visit,'' before the word ''assignment'' in the definition of ''Foreign affiliate'' and
■ c. Deleting the definition of ''Foreign national civilians and contractors.''

§ 161.4 [Amended]

■ 3. Amend § 161.4 by:
■ a. In paragraph (e):
■ i. Removing the words ''FIPS Publication 201–2'' and adding in its place the words ''FIPS Publication 201–3'' and
■ ii. Removing the words ''(available at *https://dx.doi.org/10.6028/NIST.FIPS.201-2*)'' and adding in its place the words ''(available at *https://dx.doi.org/10.6028/NIST.FIPS.201-3*)''.

§ 161.5 [Amended]

■ 4. Amend § 161.5 by:
■ a. In paragraphs (a)(7) and (a)(8), removing the words ''FIPS Publication 201–2'' and adding in its place the words ''FIPS Publication 201–3''.

§ 161.6 [Amended]

■ 5. Amend § 161.6 by removing the words ''FIPS Publication 201–2'' and adding in its place the words ''FIPS Publication 201–3'' everywhere they occur.

■ 6. Amend § 161.7 by:
■ a. Removing the words ''FIPS Publication 201–2'' and adding in its place the words ''FIPS Publication 201–3'' everywhere they occur.
■ b. In paragraph (d)(1)(ii):
■ i. Removing the words ''continental United States (CONUS)'' and adding in its place the words ''United States and U.S. territories and possessions'' and by removing the word ''CONUS'' and adding in its place the words ''United States and U.S. territories and possessions'' and
■ ii. Adding the sentence ''A foreign government issued ID with photograph may be used as a secondary document for ID card issuance.'', following the sixth sentence.
■ c. In paragraph (e)(2)(ii)(B), removing the words ''a dependent of retired Service members who are either 75 years of age'' and adding in its place the words ''the dependents of retired Service members who are either 65 years of age''.
■ d. Revising paragraph (e)(3) introductory text; and
■ e. Revising paragraph (g)(2).
The revisions read as follows:

§ 161.7 ID card life-cycle procedures.

* * * * *

(e) * * *

(3) *Renewal and reissuance.* Consistent with applicable law, the applicant for ID renewal or reissuance shall be required to surrender the current DoD ID card that is up for renewal or reissuance except as indicated for lost and stolen ID cards in paragraph (e)(3)(iii) of this section. An expired DoD ID card is an acceptable secondary form of ID for non-CAC ID card renewal or reissuance if identity document verification is required. To authenticate renewal or reissuance applicants, the VO shall visually compare the applicant against the facial image stored in DEERS. For applicants who have fingerprint biometrics stored in DEERS, live fingerprint biometrics samples shall be checked against the applicant's DEERS record. If the biometric check confirms the identity of the renewal or reissuance applicant then no additional documentation is required to verify identity other than the ID card that is being renewed or reissued (documentation may still be required to verify or re-verify eligibility as described in paragraph (d)(2) of this section). As a general practice for renewal or re-issuance, two fresh fingerprint biometric captures may be stored for applicable personnel through the initial procedures in paragraph (d)(4)(ii) of this section to support DMDC's biometric update schedule. If biometric information cannot be verified, the requirements for initial issuance shall apply or a temporary card may be issued in accordance with paragraph (e)(4) of this subpart.

* * * * *

(g) * * *

(2) The DoD sponsor or sponsoring organization is ultimately responsible for retrieving CACs from their personnel who are no longer supporting their organization or activity with the exception of transferring DoD civilian employees. Civilian employees transferring from one DoD Component to another as civilian employees (*e.g.,* Army civilian to Air Force civilian) will be permitted to retain their CAC during their transition for up to 30 days in accordance with the DoD CIO and USD(P&R) joint memorandum, ''Common Access Card Retention for Department of Defense Civilian Employees when Transferring Between Department of Defense Components.'' CAC retrieval will be documented and treated as personally identifiable information, in accordance with DoD Regulation 5200.1–R, and 32 CFR part 310 and receipted to a RAPIDS site for disposition in a timely manner. * * *

■ 7. Amend Appendix 1 to § 161.7 by:
■ a. Revising paragraph (c)(2)(ii)(A)(*3*),
■ b. Revising paragraphs (d)(2)(i) through (d)(2)(vii),
■ c. Removing paragraph (d)(2)(viii),
■ d. Revising paragraphs (l)(2)(iii), (l)(2)(vi), and (l)(2)(vii)(B); and
■ e. Revising paragraph (m)(1).
The revisions read as follows:

Appendix 1 to § 161.7—ID Card Descriptions and Population Eligibility Categories

* * * * *

(c) * * *

(ii) * * *

(2) * * *

(A) * * *

(*3*) Non-DoD Government Agency Civilian Personnel that are working in support of DoD but do not possess a Federal PIV card that is accepted by the sponsoring DoD Component. * * *

* * * * *

(d) * * *

(2) * * *

(i) DoD and uniformed services civilian employees when stationed or employed and residing in foreign countries for a period of at least 365 days.

(ii) DoD contractors when stationed or employed and residing in foreign countries for a period of at least 365 days.

(iii) DoD Presidential appointees who have been appointed with the advice and consent of the Senate.

(iv) Civilian employees of the Army and Air Force Exchange System, Navy Exchange System, and Marine Corps Exchange System and NAF activity employees of the Coast Guard Exchange Service.

(v) Uniformed and non-uniformed full-time paid personnel of the Red Cross assigned to duty with the uniformed services within the United States and U.S. territories and possessions, when required to reside in a household on a military installation.

(vi) Uniformed and non-uniformed, full-time, paid personnel of the Red Cross assigned to duty with the uniformed services in foreign countries.

(vii) Foreign military who meet the eligibility requirement of paragraph (a)(2) of § 161.7 and are in one of the categories in paragraphs (d)(2)(viii)(A) through (C) of this appendix. Those foreign military not meeting the eligibility requirements for CAC as described in paragraph (a)(2) of § 161.7 shall be issued a DD Form 2765 as described in paragraph (l) of this appendix.

* * * * *

(l) * * *

(2) * * *

(iii) Members eligible for transitional health care (THC). These individuals shall be eligible for DD Form 2765 showing expiration date for each benefit, as shown on the reverse of the card.

* * * * *

(vi) DoD beneficiaries (eligible former spouses, widows, widowers, and abused dependents)

(vii) * * *

(B) Full-time paid personnel of the United Service Organization, when serving in foreign countries.

* * * * *

(m) * * *

(1) *Description.* This ID shall only be used to establish DoD civilian retiree identity and previous affiliation with the DoD.

* * * * *

■ 8. Amend Appendix 2 to § 161.7 by:

■ a. Revising paragraph (b) introductory text and

■ b. In paragraph (c)(2), removing the word ''CONUS'' and adding the words ''the United States and U.S. territories and possessions'' in its place.

The revisions read as follows:

Appendix 2 to § 161.7—Topology Specifications

* * * * *

(b) *CAC stripe color coding.* The CAC shall be color-coded as indicated in the Table to reflect the status of the holder of the card. If a person meets more than one condition as shown in the Table, priority will be given to the blue stripe to denote a non-U.S. citizen unless the card serves as a Geneva Conventions card.

* * * * *

■ 9. Amend § 161.10 by revising Table 2 to Subpart C of Part 161 to read as follows:

§ 161.10 Benefits for active duty members of the uniformed services.

* * * * *

TABLE 2 TO SUBPART C OF PART 161—BENEFITS FOR DEPENDENTS OF ACTIVE DUTY MEMBERS

	CHC	DC	C	MWR	E
Spouse	Yes	Yes	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	Yes	Yes	1	1	1.
Ward	3	3	3	3	3.
Pre-adoptive Child	4	4	1, 4	1, 4	1, 4.
Foster Child	No	No	1	1	1.
Children, Unmarried, 21 Years and Over	5	5	6	6	6.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	2	2	2	2.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
2. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
   a. Is dependent on the member for over 50 percent support.
   b. Resides with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary or Director may, by regulation, prescribe.
4. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another organization authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member.
5. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary and is dependent on the member for over 50 percent of the child's support; or
   b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member and is dependent on the member for over 50 percent of the child's support.
6. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary and is dependent on the member for over 50 percent of the child's support; or
   b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the member for over 50 percent of the child's support.

■ 10. Amend § 161.11 by revising Table 5 to Subpart C of Part 161 to read as follows:

§ 161.11 Benefits for National Guard and Reserve members of the uniformed services.

* * * * *

TABLE 5 TO SUBPART C OF PART 161—BENEFITS FOR DEPENDENTS OF NATIONAL GUARD OR RESERVE MEMBERS

	CHC	DC	C	MWR	E
Spouse	1	1	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	1	2	2	2.
Ward	1, 4	1, 4	4	4	4.

TABLE 5 TO SUBPART C OF PART 161—BENEFITS FOR DEPENDENTS OF NATIONAL GUARD OR RESERVE MEMBERS—Continued

	CHC	DC	C	MWR	E
Pre-adoptive Child	1, 5	1, 5	2, 5	2, 5	2, 5.
Foster Child	No	No	2	2	2.
Children, Unmarried, 21 Years and Over	1, 6	1, 6	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	1, 3	3	3	3.

Notes:

1. Yes, if the sponsor is on active duty greater than 30 days. When the order to active duty period is greater than 30 days the eligibility for CHC and DC for eligible dependents begins on the same day the sponsor becomes eligible for active duty benefits.
2. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
3. Yes, if dependent on an authorized sponsor for over 50 percent support of the parent's support and residing in the sponsor's household.
4. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
   a. Is dependent on the member for over 50 percent support.
   b. Resides with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
5. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member.
6. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the member for over 50 percent of the child's support; or
   b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member and is dependent on the member for over 50 percent of the child's support.
7. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the member for over 50 percent of the child's support; or
   b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the member for over 50 percent of the child's support.

* * * * *

■ 11. Amend § 161.12 by revising Table 6 to Subpart C of Part 161 to read as follows:

§ 161.12 Benefits for former uniformed services members.

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TABLE 6 TO SUBPART C OF PART 161—BENEFITS FOR FORMER MEMBERS AND DEPENDENTS

	CHC	DC	C	MWR	E
Former Member (Self)	1	1	Yes	Yes	Yes.
Spouse	1	2	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	2	3	3	3.
Ward	1, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 6	2, 6	3, 6	3, 6	3, 6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	1, 7	2, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	2, 4	4	4	4.

Notes:

1. Yes, if the former member is age 60 or over and in receipt of retired pay for non-regular service; and is:
   a. Not entitled to Medicare Part A hospital insurance through the SSA, or
   b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84, ''National Defense Authorization Act for Fiscal Year 2010.''
2. Yes, if former member is age 60 or over and in receipt of retired pay for non-regular service.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
   a. Is dependent on the member for over 50 percent support.
   b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
7. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support; or
   b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member or former member, and is dependent on the member or former member for over 50 percent of the child's support.
8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the former member for over 50 percent of the child's support.

* * * * *

■ 12. Amend § 161.13 by revising Table 12 to Subpart C of Part 161 to read as follows:

§ 161.13 Benefits for retired members of the uniformed services.

* * * * *

TABLE 12 TO SUBPART C OF PART 161—BENEFITS FOR DEPENDENTS OF RETIRED UNIFORMED SERVICES MEMBERS

	CHC	DC	C	MWR	E
Spouse	1	2	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	2	3	3	3.
Ward	1, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 6	2, 6	3, 6	3, 6	3, 6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	1, 7	2, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	2, 4	4	4	4.

Notes:

1. Yes, if the sponsor is:

a. Retired (as shown in Tables 7 and 8 to this subpart) and the dependent is not entitled to Medicare Part A hospital insurance through the SSA; or if entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84;

b. A National Guard or Reserve member on a period of active duty in excess of 30 days (as shown in Table 10 to this subpart). When the ordered to active duty period is greater than 30 days the eligibility for CHC and DC for the eligible dependents begins on the first day of the active duty period; or

c. A medically eligible non-regular Service Reserve Retiree, age 60 or over, as shown in Table 11 of this subpart.

2. Yes, if the sponsor is:

a. Retired (as shown in Tables 7 and 8 to this subpart);

b. A National Guard or Reserve member on a period of active duty in excess of 30 days (as shown in Table 10 to this subpart). When the ordered to active duty period is greater than 30 days the eligibility for CHC and DC for the eligible dependents begins on the first day of the active duty period; or

c. A medically eligible non-regular Service Reserve Retiree, age 60 or over, as seen in Table 11 to this subpart.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.

4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.

5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:

a. Is dependent on the member for over 50 percent support.

b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.

7. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member or former member, and is dependent on the member or former member for over 50 percent of the child's support.

8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the retired member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the retired member for over 50 percent of child's support.

■ 13. Amend § 161.14 by revising Table 13 to Subpart C of Part 161 to read as follows:

§ 161.14 Benefits for MOH recipients.

* * * * *

TABLE 13 TO SUBPART C OF PART 161—BENEFITS FOR MOH RECIPIENTS AND DEPENDENTS

	CHC	DC	C	MWR	E
Self	1	2	Yes	Yes	Yes.
Spouse	1	2	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	2	3	3	3.

TABLE 13 TO SUBPART C OF PART 161—BENEFITS FOR MOH RECIPIENTS AND DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Ward	1, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 6	2, 6	3, 6	3, 6	3, 6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	1, 7	2, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	2, 4	4	4	4.

Notes:

1. Yes, if the sponsor is a MOH recipient and is not otherwise entitled to medical care as of or after October 30, 2000 pursuant to section 706 of Public Law 106–398 and:
   a. Is not entitled to Medicare Part A hospital insurance through the SSA or
   b. Is entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. Yes, if the sponsor is a MOH recipient and is not otherwise entitled to medical care as of or after October 30, 2000 pursuant to section 706 of Public Law 106–398.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
   a. Is dependent on the member for over 50 percent support.
   b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
7. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support or
   b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member or former member, and is dependent on the member or former member for over 50 percent of the child's support.
8. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the MOH recipient for over 50 percent of the child's support; or
   b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the MOH recipient for over 50 percent of the child's support.

■ 14. Amend § 161.15 by revising Table 14 to Subpart C of Part 161 to read as follows:

§ 161.15 Benefits for Disabled American Veterans (DAV).

* * * * *

TABLE 14 TO SUBPART C OF PART 161—BENEFITS FOR 100 PERCENT DAVS AND DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	No	Yes	Yes	Yes.
Spouse	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	No	No	1	1	1.
Ward	No	No	3	3	3.
Pre-adoptive Child	No	No	1, 4	1, 4	1, 4.
Foster Child	No	No	1	1	1.
Children, Unmarried, 21 Years and Over	No	No	5	5	5.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption	No	No	2	2	2.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
2. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
   a. Is dependent on the member for over 50 percent support.
   b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
4. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
5. Yes, if the child:
   a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the authorized sponsor for over 50 percent of the child's support or
   b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the authorized sponsor for over 50 percent of the child's support.

■ 15. Amend § 161.16 by revising Table 15 to Subpart C of Part 161 to read as follows:

§ 161.16 Benefits for transitional health care members and dependents.

* * * * *

TABLE 15 TO SUBPART C OF PART 161—BENEFITS FOR THC MEMBERS AND DEPENDENTS

	CHC	DC	C	MWR	E
THC Member (Self)	1	1	2, 3	2, 3	2, 3.
Spouse	1	1	2, 3	2, 3	2, 3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	1	2, 3, 4	2, 3, 4	2, 3, 4.
Ward	1, 6	1, 6	2, 3, 6	2, 3, 6	2, 3, 6.
Pre-adoptive Child	1, 7	1, 7	2, 3, 4, 7	2, 3, 4, 7	2, 3, 4, 7.
Foster Child	No	No	2, 3, 4	2, 3, 4	2, 3, 4.
Children, Unmarried, 21 Years and Over	1, 8	1, 8	2, 3, 9	2, 3, 9	2, 3, 9.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption	No	1, 5	2, 3, 5	2, 3, 5	2, 3, 5.

Notes:

1. Yes, medical entitlement for 180 days beginning on the date after the member separated from the qualifying active duty period. There is no exception based on entitlement to Medicare Part A. The THC eligible sponsor and eligible dependents receive the medical benefits as if they were active duty eligible dependents.
2. No, if the member:
a. Separated on or after January 1, 2001, but before October 1, 2007.
b. Separated in accordance with 10 U.S.C. 1145(a)(2)(F).
c. Separated from active duty to join the SelRes or the Ready Reserve of a Reserve Component.
3. Yes, if the member was separated during the period beginning on October 1, 1990, through December 31, 2001, or after October 1, 2007. Entitlement shall be for 2 years, beginning on the date the member separated.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
5. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
6. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
a. Is dependent on the member for over 50 percent support.
b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
7. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the authorized sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member or former member, and is dependent on the authorized sponsor for over 50 percent of the child's support.
9. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the authorized sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the authorized sponsor for over 50 percent of the child's support.

■ 16. Amend § 161.17 by:
■ a. Revising Tables 16, 17, 18, 19, and 20 to Subpart C of Part 161 and
■ b. In the heading of paragraph (d), removing ''whose death is unrelated to the member's service'' and adding in its place ''who died in a non-reportable status''.

The revisions read as follows:

§ 161.17 Benefits for surviving dependents.

* * * * *

TABLE 16 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF ACTIVE DUTY DECEASED MEMBERS

	CHC	DC	C	MWR	E
Widow or widower:					
Unremarried	1	Yes	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, or Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	Yes	2	2	2.
Ward	1, 4	1, 4	4	4	4.
Pre-adoptive Child	1, 5	1, 5	2, 5	2, 5	2, 5.
Foster Child	No	No	2	2	2.
Children, Unmarried, 21 Years and Over	1, 6	6	7	7	7.

TABLE 16 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF ACTIVE DUTY DECEASED MEMBERS—Continued

	CHC	DC	C	MWR	E
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	3	3	3	3.

Notes:

1. Yes, if the sponsor died on active duty (for dependents of National Guard or Reserve members or Retired Reserve members the period of active duty must be in excess of 30 days in order to qualify for the benefits in this table) and:

a. If claims are filed less than 3 years from the date of death, there is no Medicare exception for the widow. After 3 years from the date of death, the widow is eligible if,

(1) Not entitled to Medicare Part A hospital insurance through the SSA.

(2) Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

b. Yes, for children regardless of the number of years from the date of death or entitlement to Medicare they are entitled.

2. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household at the time of the sponsor's death.

4. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

5. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member.

6. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is or was at the time of the member's death dependent on the member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member or former member and is or was at the time of the member's death dependent on the member for over 50 percent of the child's support.

7. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

* * * * *

TABLE 17 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF DECEASED NATIONAL GUARD AND RESERVE MEMBERS NOT ON ACTIVE DUTY FOR A PERIOD GREATER THAN 30 DAYS

	CHC	DC	C	MWR	E
Widow or Widower:					
Unremarried	1, 2	2	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1, 2	2	3	3	3.
Ward	1, 2, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 2, 6	2, 6	3, 6	3, 6	3, 6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	1, 2, 7	2, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	2, 4	4	4	4.

Notes:

1. Yes, if:

a. Not entitled to Medicare Part A hospital insurance through the SSA.

b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

2. Yes, only if death occurred on or after 1 October 1985 in accordance with the provisions of 10 U.S.C. 1076, or on or after November 15, 1986, in accordance with the provisions of 10 U.S.C. 1074a.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.

4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household at the time of the sponsor's death.

5. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

6. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is or was at the time of the member's death dependent on the member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member and is or was at the time of the member's or former member's death dependent on the member for over 50 percent of the child's support.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.
b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

* * * * *

TABLE 18 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF NATIONAL GUARD AND RESERVE MEMBERS WHO HAVE DIED BEFORE AGE 60

	CHC	DC	C	MWR	E
Widow or Widower:					
Unremarried	1, 2	1	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1, 2	1	3	3	3.
Ward	1, 2, 5	1, 5	5	5	5.
Pre-adoptive Child	1, 2, 6	1, 6	3, 6	3, 6	3, 6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	1, 2, 7	1, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	1, 4	4	4	4.

Notes:
1. Yes, on or after the date the member would have become age 60.
2. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA or
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household at the time of the sponsor's death.
5. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and was at the time of the sponsor's death:
a. Dependent on the member for over 50 percent support.
b. Residing with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
6. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is or was at the time of the member's or former member's death dependent on the former member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member or former member and is, or was at the time of the member's or former member's death, dependent on the member or former member for over 50 percent of the child's support.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.
b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

* * * * *

(d) *Surviving dependents of deceased National Guard and Reserve members who died in a non-reportable status.** *:

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TABLE 19 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF NATIONAL GUARD AND RESERVE MEMBERS WHO DIED IN A NON-REPORTABLE STATUS

Widow or Widower:					
Unremarried	No	No	Yes	Yes	Yes.

TABLE 19 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF NATIONAL GUARD AND RESERVE MEMBERS WHO DIED IN A NON-REPORTABLE STATUS—Continued

Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged, foster child.	No	No	1	1	1.
Ward	No	No	2	2	2.
Pre-adoptive Child	No	No	1, 3	1, 3	1, 3.
Children, Unmarried, 21 Years and Over	No	No	4	4	4.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	No	5	5	5.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.
2. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months and was at the time of the sponsor's death:
a. Dependent on the member for over 50 percent support.
b. Residing with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
3. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.
4. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.
b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.
5. Yes, if dependent on that sponsor for over 50 percent of the child's support and residing in the sponsor's household at the time of the sponsor's death.

* * * * *

TABLE 20 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF DECEASED UNIFORMED SERVICES RETIREES AND DECEASED MOH RECIPIENTS

	CHC	DC	C	MWR	E
Widow or Widower:					
Unremarried	1, 2	2, 4	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, illegitimate child of spouse.	1, 2	2, 4	3	3	3.
Ward	1, 2, 6	2, 3, 6	6	6	6.
Pre-adoptive Child	1, 2, 7	2, 3, 7	3, 7	3, 7	3, 7.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	1, 2, 8	2, 8	9	9	9.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption	No	5	5	5	5.

Notes:

1. Yes, if the:
a. Deceased uniformed service member was a retired uniformed service member entitled to retired pay, including TDRL or PDRL, or a non-regular Service retiree, age 60 or over, in receipt of retired pay, and if the person is:
(1) Not entitled to Medicare Part A hospital insurance through the SSA; or,
(2) Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
b. Deceased MOH recipient was not otherwise entitled to medical care as of, or after October 30, 2000 in accordance with section 706 of Public Law 106–398 and if the person is:
(1) Not entitled to Medicare Part A hospital insurance through the SSA; or,
(2) Entitled to Medicare Part A, hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. No, if the deceased uniformed service member was a non-regular Service Retiree in accordance with the provision of 10 U.S.C. 12731 after the enactment of Public Law 110–181, sections 647 and 1106. The eligible surviving dependents will become eligible for CHC and DC on the anniversary of the 60th birthday of the deceased uniformed service member. Eligibility for CHC also requires that the person is:
a. Not entitled to Medicare Part A hospital insurance through the SSA; or,
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support at the time of the sponsor's death.
4. Yes, if the deceased was a retired uniformed services member entitled to retired pay, including TDRL or PDRL, or a non-regular Service retiree, age 60 or over, in receipt of retired pay, or a deceased MOH recipient not otherwise entitled to medical care as of or after, October 30, 2000, or a deceased non-regular Service retiree entitled in accordance with the provisions of 10 U.S.C. 12731 after the enactment of Public Law 110–181, sections 647 and 1106 on the anniversary of the 60th birthday of the deceased uniformed Service member.
5. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household at the time of the sponsor's death.

6. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and was at the time of the sponsor's death:
a. Dependent on the member for over 50 percent support.
b. Residing with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
7. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is or was at the time of the member's or former member's death dependent on the former member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a member or former member and is or was at the time of the member's or former member's death dependent on the member or former member for over 50 percent of the child's support.
9. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.
b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

* * * * *

■ 17. Amend § 161.18 by revising Tables 22 and 23 to Subpart C of Part 161 to read as follows:

§ 161.18 Benefits for abused dependents.

* * * * *

TABLE 22 TO SUBPART C OF PART 161—BENEFITS FOR ABUSED DEPENDENTS OF RETIREMENT ELIGIBLE UNIFORMED SERVICES MEMBERS

	CHC	DC	C	MWR	E
Spouse	1, 2, 6	2, 6	Yes	Yes	Yes.
Children, Unmarried, Under 18 Years:					
Legitimate, adopted, stepchild, pre-adoptive	1, 3	3	4	4	4.
Children, Unmarried, 18 Years and Over (If entitled above)	1, 4, 5	4, 5	7	7	7.

Notes:
1. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA.
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. Yes, if a court order provides for an annuity for the spouse.
3. Yes, if a member of the household where the abuse occurred.
4. Yes, if dependent on an authorized sponsor for over 50 percent of child's support at the time the abuse occurred.
5. Yes, if the child:
a. Is older than 18 years old and is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 18, or occurred before the age of 23 while a full-time student.
6. The spouse must have been married to the uniformed service member for at least 10 years, the uniformed service member must have completed 20 creditable years for retired pay, and they must have been married at least 10 years during the 20 years of creditable service (see § 161.19). The uniformed services shall prescribe specific procedures to verify the eligibility of an applicant.
7. Yes, if the child:
a. Is older than 18 years old but has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and was dependent on the sponsor for over 50 percent the child's support at the time the abuse occurred; or
b. Is incapable of self-support because of a mental or physical incapacity and was dependent on the sponsor for over 50 percent of the child's support at the time the abuse occurred.

* * * * *

TABLE 23 TO SUBPART C OF PART 161—BENEFITS FOR ABUSED DEPENDENTS OF NON-RETIREMENT ELIGIBLE UNIFORMED SERVICES MEMBERS

	CHC	DC	C	MWR	E
Spouse	1, 2	2	4	4	4.
Children, Unmarried, Under 18 Years					
Legitimate, adopted, stepchild, pre-adoptive	1, 2	2	4	4	4.
Children, Unmarried, 18 Years and Over (If entitled above)	1, 2, 3	2, 3	4	4	4.

Notes:
1. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA.
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. Yes, if
a. Residing with the member at the time of the dependent-abuse offense and not residing with the member while receiving transitional compensation for abused dependents.

b. Married to and residing with the member at the time of the dependent-abuse offense and while receiving transitional compensation for abused dependents.

3. Yes, if:

a. 18 years of age or older and incapable of self-support because of a mental or physical incapacity that existed before the age of 18 and who is (or was when a punitive or other adverse action was carried out on the member) dependent on the member for over one-half of the child's support; or

b. 18 years of age or older, but less than 23 years of age, is enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense and who is (or was when a punitive or other adverse action was carried out on the member) dependent on the member for over one-half of the child's support.

4. Yes, if receiving transitional compensation.

■ 18. Amend § 161.20 by revising Tables 29, 31, 32, 33, 35, 36, 37, 38, and 40 to Subpart C of Part 161 to read as follows:

§ 161.20 Benefits for civilian personnel.

* * * * *

TABLE 29 TO SUBPART C OF PART 161—BENEFITS FOR CIVILIAN PERSONNEL IN THE UNITED STATES

	CHC	DC	C	MWR	E
Self:					
DoD Civilian Employees, IPA Personnel	No	No	No	1	No.
Non-DoD Government Agency Civilian Personnel	No	No	No	2	No.
DoD Contractors	No	No	No	2	No.

Note:

1. Yes, but the benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.

2. Yes, if working full-time on the installation in accordance with DoD Instruction 1015.10. Benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.

* * * * *

TABLE 31 TO SUBPART C OF PART 161—BENEFITS FOR DOD CIVILIAN PERSONNEL STATIONED OR EMPLOYED OUTSIDE THE UNITED STATES AND OUTSIDE U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self:					
DoD Civilian Employee, IPA Personnel	No	1	Yes	Yes	Yes.
DoD Contractor	No	1	2	Yes	3.
Spouse	No	1	4	Yes	4.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee, or Illegitimate child of spouse.	No	1, 5	5	5	5.
Ward	No	1, 6	6	6	6.
Pre-adoptive	No	1, 7	7	7	7.
Foster Child	No	No	5	5	5.
Children, Unmarried, 21 Years and Over	No	1, 8	9	9	9.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption	No	1, 5	1, 5	5	5.

Notes:

1. Yes, on a space-available, fully reimbursable basis. Medical care at uniformed services facilities shall be rendered in accordance with Service instructions. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.

2. Yes, if a U.S. citizen and on a fully-reimbursable basis in accordance with DoD Instruction 1330.17 (not a local hire).

3. Yes, if a U.S. citizen assigned overseas.

4. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.

5. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.

6. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.

7. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.

8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor and is, dependent on the sponsor for over 50 percent of the child's support.

9. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 32 TO SUBPART C OF PART 161—BENEFITS FOR NON-DOD GOVERNMENT AGENCY CIVILIAN PERSONNEL STATIONED OR EMPLOYED OUTSIDE THE UNITED STATES AND OUTSIDE U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self:					
Non-DoD Government Agency Civilian Personnel	No	1	2	Yes	2.
Spouse	No	1	3	Yes	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee, or Illegitimate child of spouse.	No	1, 4	4	4	4.
Ward	No	1, 5	5	5	5.
Pre-adoptive	No	1, 6	6	6	6.
Foster Child	No	No	4	4	4.
Children, Unmarried, 21 Years and Over	No	1, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, Parent-by-Adoption	No	1, 4	4	4	4.

Notes:

1. Yes, on a space-available, fully reimbursable basis. Medical care at uniformed services facilities shall be rendered in accordance with Service instructions. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, in accordance with DoD Instruction 1330.17 and DoD Instruction 1330.21.
3. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the dependent's support, and residing in the sponsor's household.
6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor and dependent on an authorized sponsor for over 50 percent of the child's support.
7. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor and is, dependent on the member or former member for over 50 percent of the child's support.

8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 33 TO SUBPART C OF PART 161—BENEFITS FOR CIVILIAN PERSONNEL STATIONED OR EMPLOYED IN U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self:					
DoD Civilian employee, IPA personnel	No	1	2	Yes	2.
Non-DoD Government Agency Civilian Personnel; DoD contractor.	No	1	No	3	No.
Spouse	No	1	4	4	4.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of employee or illegitimate child of spouse.	No	1, 5	5	5	5.
Ward	No	1, 6	6	6	6.
Pre-adoptive	No	1, 7	7	7	7.
Foster Child	No	No	5	5	5.
Children, Unmarried, 21 Years and Over	No	1, 8	9	9	9.
Parent, Parent-in-Law, Stepparent, Parent-by-Adoption	No	1, 5	No	5	5.

Notes:

1. Yes, on a space-available, fully reimbursable basis only if residing in a household on a military installation. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, in accordance with DoD Instruction 1330.17 and DoD Instruction 1330.21.
3. Yes, if working full-time on the installation in accordance with DoD Instruction 1015.10. Benefit will not be printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.
4. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
5. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
6. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
7. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor and dependent on an authorized sponsor for over 50 percent of the child's support.
8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

9. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 35 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE RED CROSS ASSIGNED TO DUTY WITH THE UNIFORMED SERVICES IN THE UNITED STATES AND RESIDING ON A MILITARY INSTALLATION AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	No	No	Yes	1.
Spouse	No	No	No	Yes	1, 2.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee, illegitimate child of spouse, or foster child.	No	No	No	3	1, 3.
Ward	No	No	No	4	1, 4.
Pre-adoptive	No	No	No	5	1, 5.
Foster Child	No	No	No	3	1, 3.
Children, Unmarried, 21 Years and Over	No	No	No	6	1, 6.
Parent, Parent-in-Law, Stepparent, Parent-by-Adoption	No	No	No	3	1, 3.

Notes:

1. Yes, but subject to purchase restrictions in accordance with DoDI 1330.21.

2. Yes, if a dependent of an authorized sponsor, and residing in the sponsor's household.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.

4. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.

5. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.

6. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 36 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE RED CROSS ASSIGNED TO DUTY WITH THE UNIFORMED SERVICES OUTSIDE THE UNITED STATES AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	2	Yes	2.
Spouse	No	1	3	Yes	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee or illegitimate child of spouse.	No	1, 4	4	4	4.
Ward	No	1, 5	5	5	5.
Pre-adoptive	No	1, 6	6	6	6.
Foster Child	No	No	4	4	4.
Children, Unmarried, 21 Years and Over	No	1, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption	No	1, 4	4	4	4.

Notes:

1. Yes, on a space-available basis at rates specified in uniformed services instructions. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.

2. Yes, if U.S. citizen assigned overseas.

3. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.

4. Yes, if a dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.

5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.

6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor and dependent on an authorized sponsor for over 50 percent of the child's support.

7. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 37 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE USO AND ACCOMPANYING DEPENDENTS SERVING OUTSIDE THE UNITED STATES

	CHC	DC	C	MWR	E
Self	No	1	2	Yes	2.
Spouse	No	1	3	Yes	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of employee, or illegitimate child of spouse.	No	1, 4	4	4	4.
Ward	No	No	5	5	5.
Foster child	No	No	4	4	4.
Children, Unmarried, 21 Years and Over	No	1, 5	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption	No	1, 4	4	4	4.

Notes:
1. Yes, on a space-available, fully reimbursable basis. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, if U.S. citizens assigned overseas.
3. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
6. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the member sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 38 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE USS SERVING OUTSIDE THE UNITED STATES AND OUTSIDE U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	No	Yes	No.
Spouse	No	1	No	Yes	No.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of employee, or illegitimate child of spouse.	No	1, 2	No	2	No.
Ward	No	No	No	3	No.
Foster Child	No	No	No	2	No.
Children, Unmarried, 21 Years and Over	No	1, 4	No	5	No.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption	No	1, 2	No	2	No.

Notes:
1. Yes, on a space-available, fully reimbursable basis. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support and residing in the sponsor's household.
3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
4. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
5. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 40 TO SUBPART C OF PART 161—BENEFITS FOR SHIP'S OFFICERS AND MEMBERS OF THE CREWS OF NOAA VESSELS (NOAA WAGE MARINER EMPLOYEES)

	CHC	DC	C	MWR	E
Self	No	No	Yes	Yes	Yes.
Spouse	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee, Illegitimate child of spouse, or Foster Child.	No	No	1	1	1.
Ward	No	No	2	2	2.
Pre-adoptive	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	No	No	4	4	4.
Parent, Parent-in-Law, Stepparent, Parent-by-Adoption	No	No	1	1	1.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
2. Yes if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
3. Yes if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.
4. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

■ 19. Amend § 161.21 by revising Table 46 to Subpart C of Part 161 to read as follows:

§ 161.21 Benefits for retired civilian personnel.

* * * * *

TABLE 46 TO SUBPART C OF PART 161—BENEFITS FOR RETIRED NOAA WAGE MARINER EMPLOYEES AND THEIR ELIGIBLE DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	No	Yes	Yes	Yes.
Spouse	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, illegitimate child of male member, whose paternity has been judicially determined, or foster child.	No	No	1	1	1.
Ward	No	No	2	2	2.
Pre-adoptive Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	No	No	4	4	4.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support and residing in the sponsor's household.
2. Yes, if, for determinations of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
3. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.
4. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

■ 20. Amend § 161.22 by revising Tables 47, 48, 49, 50, and 54 to Subpart C of Part 161 to read as follows:

§ 161.22 Benefits for foreign affiliates.

* * * * *

TABLE 47 TO SUBPART C OF PART 161—BENEFITS FOR SPONSORED NATO AND PFP PERSONNEL AND ACCOMPANYING DEPENDENTS IN THE UNITED STATES

	CHC	DC	C	MWR	E
Self	No	1	2	2	2.
Spouse	3	1	4	4	4.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of member, or Illegitimate child of spouse.	3, 4	1, 4	4	4	4.
Ward	No	No	5	5	5.
Children, Unmarried, 21 Years and Over	3, 6	1, 6	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	No	4	4	4.

Notes:
1. Yes, for outpatient care no charge and for inpatient care at full reimbursable rate.
2. Yes, if:
a. Under orders issued by a U.S. Military Service; or
b. Assigned military attaché duties in the United States and designated on reciprocal agreements with the Department of State.
3. Yes, for outpatient care only.
4. Yes, if residing in the household of the authorized sponsor in the United States.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if residing in the authorized sponsor's household.
6. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 48 TO SUBPART C OF PART 161—BENEFITS FOR SPONSORED NON-NATO PERSONNEL AND ACCOMPANYING DEPENDENTS IN THE UNITED STATES

	CHC	DC	C	MWR	E
Self	No	1	2	2	2.
Spouse	No	1	3	3	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	No	1, 4	3	3	3.
Ward	No	No	4	4	4.
Children, Unmarried, 21 Years and Over	No	1, 5	6	6	6.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	No	3	3	3.

Notes:
1. Yes, for outpatient care only on a reimbursable basis.
2. Yes, if under orders issued by a U.S. Military Service.
3. Yes, if residing in the household of the authorized sponsor in the United States.
4. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if residing in the authorized sponsor's household.
5. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
6. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 49 TO SUBPART C OF PART 161—BENEFITS FOR NON-SPONSORED NATO AND PFP PERSONNEL IN THE UNITED STATES AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	No	No	No.
Spouse	2	1	No	No	No.
Children, Unmarried, Under 21 Years:					

TABLE 49 TO SUBPART C OF PART 161—BENEFITS FOR NON-SPONSORED NATO AND PFP PERSONNEL IN THE UNITED STATES AND ACCOMPANYING DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	2, 3	1, 3	No	No	No.
Ward	No	No	No	No	No.
Children, Unmarried, 21 Years and Over	2, 3, 4	1, 3, 4	No	No	No.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	No	No	No	No.

Notes:
1. Yes, for outpatient care no charge and for inpatient care at full reimbursable rate.
2. Yes, for outpatient care only.
3. Yes, if residing in the household of the authorized sponsor in the United States.
4. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 50 TO SUBPART C OF PART 161—BENEFITS FOR NATO, PFP, AND NON-NATO PERSONNEL OUTSIDE THE UNITED STATES AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	Yes	Yes	Yes.
Spouse	No	1	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	No	1, 2	2	2	2.
Ward	No	No	3	3	3.
Children, Unmarried, 21 Years and Over	No	1, 4	5	5	5.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	No	2	2	2.

Notes:
1. Yes, for outpatient care only on a reimbursable basis.
2. Yes, if residing in the household of the authorized sponsor and dependent on over 50 percent support.
3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
4. Yes, if residing in the household of the authorized sponsor and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
5. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical, and is dependent on the sponsor for over 50 percent of the child's support.

* * * * *

TABLE 54 TO SUBPART C OF PART 161—BENEFITS FOR FOREIGN FORCE MEMBERS AND ELIGIBLE DEPENDENTS RESIDING IN THE UNITED STATES WHO ARE COVERED BY AN RHCA

	CHC	DC	C	MWR	E
Self	No	1	No	No	No.
Spouse	No	1	No	No	No.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	No	1, 2	No	No	No.
Ward	No	No	No	No	No.
Children, Unmarried, 21 Years and Over	No	1, 2, 3	No	No	No.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption	No	No	No	No	No.

Notes:
1. As determined by the appropriate RHCA.
2. Yes, if residing in the household of the authorized sponsor in the United States.
3. Yes, if residing in the household of the authorized sponsor in the United States, the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

■ 21. Amend § 161.23 by:
■ a. Revising Tables 11, 17, 22, 23, 25, 36, and 37 to Subpart D of Part 161;
■ b. In paragraph (g)(4), adding ''Full-time paid personnel of the'' before ''USO serving outside the United States.'' and
■ c. Revising paragraph (k) introductory text and paragraph (k)(2).

The revisions read as follows:

§ 161.23 Procedures.

* * * * *

TABLE 11 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A SURVIVING DEPENDENT

Status	Eligibility documentation
Widow or Widower:	
Unremarried	Marriage certificate to sponsor (Note 1) and Death certificate of sponsor or DD Form 1300, ''Report of Casualty,'' (for sponsor only).
Unmarried	Marriage certificate to sponsor (Note 1) and Death certificate of sponsor or DD Form 1300, ''Report of Casualty,'' (for sponsor only) and Marriage certificate from subsequent marriage (Note 1) and Divorce decree from subsequent marriage (Note 2) or Death certificate from subsequent marriage.
Dependent	Dependent documentation (Note 3).

Notes:
1. A common law marriage certificate, a court order, or a written SJA opinion that a common law marriage is recognized by the relevant State or U.S. jurisdiction is also accepted.
2. A dissolution decree or annulment decree is also accepted.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

* * * * *

TABLE 17 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A RETIRED RESERVE MEMBER AND DEPENDENTS

Status	Eligibility documentation
Retired Reserve Member	Retired pay orders (Note 1) or DD Form 214 (Note 2).
Retired Reserve Member ordered to active duty.	DD Form 214 (Note 2) or Military order (Note 3) or Commissioning oath (Note 3) or Enlistment contract (Note 3).
Dependent	Dependent documentation (Note 4).

Notes:
1. Retired pay orders, establishing the uniformed service member's eligibility for retired pay at age 60.
2. A DD Form 214 that establishes the uniformed service member's service can be used when DEERS verification is not available. A statement of service or dates of inclusive service for servicing personnel may be used in lieu of the DD Form 214.
3. Documentation establishing the uniformed service member being ordered to active duty for greater than 30 days.
4. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

* * * * * (g) * * *

TABLE 22 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR CIVILIAN PERSONNEL RESIDING ON A MILITARY INSTALLATION IN THE UNITED STATES AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
Civilian: DoD civilian employee, DoD contractor, Intergovernmental Personnel Act personnel, non-DoD government agency civilian personnel under DoD sponsorship.	Travel authorization (Note 1).
Dependent	Travel authorization (Note 2) and Dependent documentation (Note 3).

Notes:
1. A travel authorization produced by the sponsoring DoD Component authorizing the sponsor to reside on a military installation.
2. A travel authorization produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 12 of this subpart, if the relationship has not previously been established.

* * * * *

TABLE 23 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR CIVILIAN PERSONNEL STATIONED OUTSIDE THE UNITED STATES AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
Civilian: DoD civilian employee, DoD contractor, Intergovernmental Personnel Act personnel, non-DoD government agency civilian personnel under DoD sponsorship, DoD contractor authorized to accompany the Armed Forces (CAAF).	Travel authorization (Note 1) and SPOT LOA (Note 2, 3).
Dependent	Dependent documentation (Note 4) and Travel authorization (Note 5) or SPOT LOA (Note 5).

Notes:
1. A travel authorization produced by the sponsoring DoD Component, indicating an assignment outside the United States.
2. A SPOT LOA that designates the contractor as CAAF, if a CAAF in accordance with DoD Instruction 3020.41, ''Operational Contract Support (OCS)'' (available at: *http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf*).
3. A SPOT LOA, if applicable in accordance with Combatant Command guidance.
4. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.
5. A travel authorization produced by the sponsoring DoD Component or SPOT LOA authorizing eligible dependents to accompany the sponsor.

* * * * *

(4) *United Service Organizations (USO) personnel.* Full-time paid personnel of the USO serving outside the United States and outside U.S. territories and possessions and accompanying dependents must have eligibility verified by documentation shown in Table 25 to this subpart.

TABLE 25 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR FULL-TIME PAID PERSONNEL OF THE USO AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
USO Employee	Travel authorization (Note 1).
Dependent	Travel authorization (Note 2) and Dependent documentation (Note 3).

Notes:
1. A travel authorization produced by the sponsoring DoD Component.
2. A travel authorization produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

* * * * *

(k) Documentation required to change a gender marker in DEERS. This paragraph (k) describes documentation required to request a change to a retiree's, a dependent's, or a contractor employee's gender marker in DEERS. Requests to change a gender marker require submission of documentation listed in Table 33 to this subpart. All requests by retirees, dependents, and contractor employees to change gender markers must be submitted by the sponsor's responsible uniformed service project office or sponsoring agency to DoDHRA.

* * * * *

(2) These documentation requirements do not apply nor can they be used to change the gender marker of a military Service member.

* * * * *

TABLE 33 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO CHANGE A GENDER MARKER IN DEERS

Status	Documentation
Retiree, Dependent, or Contractor (Note 1).	Written statement signed by the individual indicating their preferred gender identity.

Note:
1. Includes other ID card eligible populations managed by the Trusted Associate Sponsorship System for which DEERS is the authoritative source.

* * * * *

TABLE 36 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO MODIFY A NAME OR DATE OF BIRTH IN DEERS TO CORRECT AN ADMINISTRATIVE ERROR

Status	Documentation
Sponsor or Dependent	Federal Information Processing Standards (FIPS) Publication (Pub) 201–3, ''Personal Identity Verification (PIV) of Federal Employees and Contractors,'' Identity Proofing and Registration Requirements primary and secondary identity source documentation (Note).

Note: Documentation from the FIPS Pub 201–3, PIV Identity Proofing and Registration Requirements primary and secondary identity source document lists that establishes name or date of birth.

* * * * *

TABLE 37 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO MODIFY A GENDER MARKER IN DEERS TO CORRECT AN ADMINISTRATIVE ERROR

Status	Documentation
Sponsor or Dependent	Birth certificate and FIPS Pub 201–3 ''Personal Identity Verification (PIV) of Federal Employees and Contractors,'' Identity Proofing and Registration Requirements primary and secondary identity source documentation (Note).

Note: Documentation from the FIPS Pub 201–3, PIV Identity Proofing and Registration Requirements primary and secondary identity source document lists that establishes gender.

* * * * *

Dated: February 5, 2024.

Patricia Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–02621 Filed 2–13–24; 8:45 am]

BILLING CODE 6001–FR–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2002–0049; FRL–8150.1–03–OAR]

New Source Performance Standards Review for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels; Corrections

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule; request for comment.

SUMMARY: The Environmental Protection Agency (EPA) is taking interim final action on corrections and clarifications to the new source performance standards (NSPS) for electric arc furnaces and argon-oxygen decarburization vessels in the steel industry. The corrections and clarifications are being made to address unintended and inadvertent errors in the recently finalized standards.

DATES: This interim final rule is effective on February 14, 2024. Comments on this rule must be received on or before March 15, 2024.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2002–0049 by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2002–0049 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2002–0049.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2002–0049, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments, see the ''*Public Participation*'' heading of the General Information section of this document under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Donna Lee Jones, Sector Policies and Programs Division (D243–02), 109 T.W. Alexander Drive, P.O. Box 12055, Office of Air Quality Planning and Standards, United States Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5251; email address: *jones.donnalee@epa.gov.*

Preamble acronyms and abbreviations. Throughout this document the use of ''we,'' ''us,'' or ''our'' is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AOD argon-oxygen decarburization
APA Administrative Procedure Act
BLDS bag leak detection system
CAA Clean Air Act
CBI confidential business information
CFR Code of Federal Regulations
CRA Congressional Review Act
DCOT during the digital camera opacity technique
DEC direct shell evacuation control
EAF electric arc furnace
EPA Environmental Protection Agency
FR Federal Register
FTP File Transfer Protocol
NAICS North American Industry Classification System
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
PM particulate matter
PRA Paperwork Reduction Act
RFA Regulatory Flexibility Act
UMRA Unfunded Mandates Reform Act of 1995
U.S. United States of America
U.S.C. United States Code

Organization of this document. The information in this preamble is organized as follows:

SUPPLEMENTARY INFORMATION:

I. General Information

A. Public Participation

Submit your written comments, identified by Docket ID No. EPA–HQ–OAR–2002–0049, at *https://www.regulations.gov* (our preferred method), or by the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to the EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed in the *Submitting CBI* section of this document. 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). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI or multimedia submissions; and general guidance on making effective comments.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov.* Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in the *Public Participation* section of this document. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address *oaqpscbi@epa.gov,* and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, 109 T.W. Alexander Drive, P.O. Box 12055 RTP, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2002–0049. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

B. Potentially Affected Entities

The source category that is the subject of this interim final action is composed of steel manufacturing facilities that operate electric arc furnaces (EAF) and argon-oxygen decarburization (AOD) vessels regulated under CAA section 111 New Source Performance Standards (NSPS). The 2022 North American Industry Classification System (NAICS) code for the source category is 331110 for ''Iron and Steel Mills and Ferroalloy Manufacturing'' processes. The NAICS code serves as a guide for readers outlining the type of entities that this interim final action is likely to affect.

There are approximately 88 EAF facilities in the United States of America (U.S.), with most (>95 percent) EAF facilities subject to one of the EAF NSPS that are described below.

The information provided in this section on potentially affected entities is not intended to be exhaustive. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

C. Statutory Authority

Statutory authority to issue the amendments finalized in this action is provided by the same Clean Air Act (CAA) provisions that provided authority to issue the regulations being amended: CAA section 111(b)(1)(B) (requirement to review, and if appropriate, revise, NSPS standards at least every 8 years), and CAA section 301, 42 U.S.C. 7601 (general rulemaking authority). Statutory authority for the rulemaking procedures followed in this action is provided by Administrative Procedure Act (APA) section 553, 5 U.S.C. 553.

D. Judicial Review and Administrative Review

Under CAA section 307(b)(1), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by April 15, 2024. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

II. Regulatory Revisions

A. Background and Summary

In 1975, the EPA first promulgated the EAF NSPS (subpart AA) to regulate emissions of particulate matter (PM) from new, reconstructed or modified EAF that produce steel. These standards apply to sources that commenced construction, modification, or reconstruction after October 21, 1974, and on or before August 17, 1983. In 1984, the EPA promulgated an updated EAF NSPS as subpart AAa, which revised the standards for EAF and also addressed AOD units. These standards apply to sources that commenced construction, modification or reconstruction after August 17, 1983, and on or before May 16, 2022. On August 25, 2023, the EPA promulgated amendments to the EAF NSPS (88 FR 58459), including a new NSPS subpart AAb that establishes standards applicable to units that are new, modified, or reconstructed after May 16, 2022, as well as certain amendments to NSPS subparts AA and AAa that are applicable to units that began construction or reconstruction by the earlier dates specified in those two subparts.

Relevant to this action, the 2023 final rule included the following: (1) a new NSPS subpart AAb which maintained the requirement for facilities to meet a shop opacity of six percent during charging [1]—the same as is required

[1] There are three stages of EAF operation, where one of the three stages is charging of raw materials (metal scrap) into the EAF. Charging typically occurs in periods of less than 1 minute to up to 3

Continued

under subparts AA and AAa; and required opacity testing to be performed once a day during charging for 3 minutes using EPA Method 9 in appendix A to part 60 of this chapter, from the average of 12 consecutive observations recorded at 15-second intervals; (2) a provision under subparts AA, AAa, and AAb that permits EAF, AOD, or both facilities with direct shell evacuation control (DEC) that want to avoid the requirement to use a furnace static pressure monitoring device to, as an alternative, perform observations of shop opacity no less than once per week from the end of one EAF heat cycle to the end of the following heat cycle (a heat cycle means the period beginning when scrap is charged to an EAF shell and ending when the EAF tap is completed or beginning when molten steel is charged to an AOD vessel and ending when the AOD vessel tap is completed); and (3) a compliance date for provisions applicable to facilities subject to subpart AA or AAa of February 21, 2024. The standards and requirements under subpart AAb were effective immediately upon publication of the final rule on August 25, 2023.

Following issuance of the final rule, the EPA was notified by industry representatives of several errors in the final regulatory text for subparts AA, AAa, and AAb. The American Iron and Steel Institute (''AISI''), the Steel Manufacturers Association (''SMA''), and the Specialty Steel Industry of North America (''SSINA'') (collectively, ''the Steel Associations'') submitted letters on August 17 and September 29, 2023, detailing concerns with the final rule, including certain new requirements in the final regulatory text, and requested corrections. In addition, on October 24, 2023, the Steel Associations submitted a petition for reconsideration and a request for an administrative stay pursuant to CAA section 307(d)(7)(B), identifying, among other issues, concerns with new requirements in the final regulatory text.[2]

This action addresses errors identified by the Steel Associations, which are described in the following paragraphs, as well as errors identified by the EPA. This action does not attempt to address all issues identified in the Steel Associations communications, as the EPA continues to review the other issues not directly addressed in this action. To the extent the EPA determines that additional action is appropriate to address these other issues, we will initiate a separate rulemaking action.

In the 2023 final rule, the EPA inadvertently included a requirement under subparts AA, AAa and AAb for observations of shop opacity to be performed by a certified visible emission observer no less than once per week for all EAF facilities subject to subparts AA, AAa or AAb, starting at the end of one EAF heat cycle and stopping at the end of the following heat cycle. The EPA never proposed nor intended to include such a requirement in the final rule. Because this requirement had not been included in the 2022 EAF NSPS proposed rule (87 FR 29710), the public did not have an opportunity to comment on this requirement, and the effects of the requirement were not included in the EPA's cost estimates or economic impact analysis for the 2023 final rule (88 FR 58459).

In addition, after the 2023 final rule was promulgated, the EPA discovered that the charging period associated with the finalized opacity testing requirement in NSPS subpart AAb, despite being the shortest operational period for an EAF, AOD or both, could be broken up into multiple discrete time periods at some EAF, AOD, or both and that the opacity plume for charging sometimes lasts after charging has stopped. Therefore, testing opacity ''during charging'' for a continuous 3-minute period, as the final EAF NSPS rule required, would not be possible in the case of multiple discrete charges or if the charging plume continues to be observable after charging of materials ceases.

We also discovered a typographical error in the standards section of subpart AAb for measurement of shop opacity, where charging was mentioned twice instead of once and with two different sets of requirements. The duplicative references to ''charging'' would require testing both for 3 minutes and 6 minutes, and require no testing for tapping. This was inconsistent with other provisions of the rule that accurately described the testing requirements and with the EPA's clearly stated intent in the preamble that the 6-minute opacity testing was intended for tapping and the 3-minute testing was intended for charging. (88 FR 58459).

Additional errors we are addressing in this action include: (1) correcting in 40 CFR 60.273(d)(2), 60.273a(d)(2), and 60.273b(d)(2) the omitted timing of the requirement to conduct shop opacity monitoring when more than one EAF are located in a shop; and (2) correcting in 40 CFR 60.273(c), 60.273a(c), and 60.273b(e) the erroneous requirement included in the final rule that all fabric filters must have a continuous opacity monitoring system (COMS) or bag leak detection system (BLDS) by renumbering the regulatory text as 40 CFR 60.273(c)(1)–(c)(3)/60.273a(c)(1)–(c)(3) and removing the phrase ''on all fabric filters'' in 40 CFR 60.273b(e); and (3) renumbering rule text in 40 CFR 60.274b(c)(1)–(c)(5) to clarify that the requirements in paragraphs (c)(1)–(c)(3) of §§ 60.274, 60.274a, and 60.274b are a choice, and that (c)(4) and (c)(5) apply to any of the choices made in (c)(1)–(c)(3).

We also discovered that several paragraphs under ''Monitoring of operations'' in subpart AA § 60.274(b), (c), and (i), subpart AAa § 60.274a(b), (c), and (h), and subpart AAb § 60.274b(b), (c), and (h) do not reflect what we plainly stated in the preamble (88 FR 58465, 58466, 58484), in response to comments, that we were not adopting the proposed rule provisions that would have required continuously monitoring of volumetric flow rate at each separately ducted hood and furnace static pressure, and instead were finalizing provisions that require recording these parameters as no greater than 15-minute integrated block averages. Relatedly, the 2023 final regulatory text was ambiguous as to whether facilities needed to monitor 15-minute rolling averages or integrated block averages. Our stated intent in the preamble to the final rule was to require 15-minute integrated block averages; therefore, in this action, in §§ 60.274 and 60.274a, we are clarifying that volumetric flow rates and furnace static pressure are to be recorded as no greater than 15-minute integrated block averages.

Finally, we also discovered a phrase under ''Recordkeeping and reporting'' in subparts AA, AAa, and AAb under 40 CFR 60.276(a)/60.276a(c)/60.276b(c) that was unintentionally and inadvertently deleted in the final regulations in regard to operation of fan motors for owners and operators that elect to install a furnace static pressure monitoring device. Specifically, the regulatory text inadvertently omitted a provision stating that ''operation of control system fan motor amperes at values exceeding ±15 percent of the value established under 40 CFR 60.274(c)/60.274a(c)/60.274b(c)'' also constitutes unacceptable operation and maintenance of the affected facility. Therefore, we are restoring this phrase

minutes. Steel is produced in batches, where a single batch can last from 1 hour to 10 hours, where 5 hours is a typical batch time period. Charging, therefore, is a small subset of the time that an EAF is operating.

[2] On the same day, the Steel Associations filed a petition for review of the 2023 final rule in the D.C. Circuit. *Am. Iron & Steel Institute* v. *EPA,* No. 23–1292. The litigation is presently in abeyance while the EPA undertakes this action.

in subparts AA, AAa, and AAb under 40 CFR 60.276(a)/60.276a(c)/60.276b(c).

The EPA is issuing this interim final rule to correct these errors included in the EAF NSPS 2023 final rule.

B. Specific Regulatory Revisions

The regulatory revisions to 40 CFR part 60, subparts AA, AAa, and AAb that are being revised in this action include the following:

1. Corrections to 40 CFR Part 60, Subparts AA and AAa

In this action, we are removing the inadvertently included requirement in 40 CFR 60.273(d)(2) and 60.273a(d)(2) ''Emission monitoring'' for lengthy, conflicting, and costly weekly opacity monitoring from the end of one EAF, AOD, or both heat cycles to the end of the following heat cycle, a time period that lasts from 1 to 10 hours, with an estimated average of 5 hours. As written, the promulgated 2023 final rule erroneously required hours-long testing that would have significant cost impacts, which are estimated to be approximately $6 million per year. This requirement was not proposed and was inadvertently added into the final rule, without appropriate analysis and opportunity for public comment. Moreover, this requirement is not necessary to ensure compliance with the standard and would cause a significant unintended financial impact on the EAF, AOD, or both currently subject to NSPS subpart AA and AAa.

We are also clarifying when to conduct the weekly shop opacity monitoring when there is more than one EAF located in a shop by adding ''during the heat cycle as defined in 40 CFR 60.271,'' which was inadvertently omitted from the final rule. As written in the 2023 final rule 40 CFR 60.273(d)(2) and 60.273a(d)(2), the regulations are unclear as to when opacity monitoring should be completed. The clarification being finalized in this interim final current rule will require that once a week, facility shops with more than one EAF are to perform the required daily opacity monitoring when all EAF in the shop are operating. Following these corrections, subparts AA and AAa retain the requirement for daily opacity testing during melting and refining, tapping, and charging for time periods of 6, 6, and 3 minutes, respectively, as well as the requirement that facilities with more than one EAF in a shop test opacity once a week with all EAF in operation.

In this action, we are also correcting errors in 40 CFR 60.273(c) and 60.273a(c) by removing the erroneous requirement included in the final rule that all fabric filters would need to install COMS or BLDS. As written, the promulgated 2023 final rule required a large capital investment for existing facilities with multi-stack fabric filters to install COMS or BLDS on each fabric filter. This erroneous requirement in the final rule is in direct conflict with both the preamble text (88 FR 58465) and our finalized regulations in 40 CFR 60.273(e) and 60.273a(e), which only require BLDS for single stack fabric filters that do not have COMS. Therefore, by adding in paragraph and subparagraph numbers (1)(i), (1)(ii), (2), and (3) in 40 CFR 60.273(c) and 60.273a(c) to make clear that multi-stack fabric filters are not required to install COMS or BLDS if observations of the opacity of the visible emission from the control device are performed by a certified visible emission observer, we will align § 60.273(c) and § 60.273a(c) with § 60.273(e) and § 60.273a(e), respectively, and eliminate the requirement for existing facilities to install COMS or BLDS by February 21, 2024.

We are clarifying 40 CFR 60.274(c)(1)–(5) and 60.274a(c)(1)–(5), which, as written in the final regulations, could be interpreted to allow the owner or operator to choose from one of five ways to monitor EAF operation when demonstrating compliance with the shop opacity standards in 40 CFR 60.272(a)(3) and 60.272a(a)(3) where a hood is used for capture, as described in paragraphs 40 CFR 60.274 and 60.274a in subparagraphs (c)(1), (c)(2), (c)(3), (c)(4), and (c)(5). This was an error. We are correcting the requirements, as intended, to clearly allow three choices of subparagraphs (c)(1), (c)(2), or (c)(3) to demonstrate compliance, but also to require a demonstration of compliance with both subparagraphs (c)(4) and (c)(5). These three choices of monitoring in subparagraphs (c)(1), (c)(2), and (c)(3) are choices between (c)(1), monitoring fan motor amperes at each damper position; (c)(2), monitoring volumetric flow rate through each hood; or (c)(3), monitoring volumetric flow rate at the control device inlet and with damper position. The last two subparagraphs of 40 CFR 60.274 and 60.274a, specifically, (c)(4) and (c)(5), were intended to apply to any of the three monitoring choices in (c)(1), (c)(2), or (c)(3), where (c)(4) sets the time requirement for the monitoring as a rolling averaging period not to exceed 15 minutes, and (c)(5) describes how facilities can petition the Administrator to change any of the operating conditions that they had previously chosen among (c)(1), (c)(2), or (c)(3). Without this correction, the regulations do not clearly indicate how facilities are to appropriately monitor EAF, AOD, or both when demonstrating compliance with the shop opacity standard in 40 CFR 60.272(a)(3) and 60.272a(a)(3) where a hood is used for capture. Therefore, as written in the 2023 final rule, facilities already subject to the applicable standards could inadvertently become noncompliant.

We also are correcting subparts AA and AAa, ''Monitoring of operations'' in 40 CFR 60.274(b), (c), and (i) and 60.274a(b), (c), and (h) for the parameters of volumetric flow rate through each separately ducted hood and furnace static pressure by removing the requirements to record a rolling 15-minute average on a continuous basis. As stated in the final rule preamble (88 FR 58465, 58466), we intended to change this proposed provision in response to comments and replace it with the requirement to record as no greater than 15-minute integrated block averages. Without these corrections, the regulations would be inconsistent with our intended final action as described in the 2023 final rule preamble, would not clearly indicate how facilities are to appropriately monitor EAF, AOD, or both, and facilities already subject to the applicable standards could inadvertently become noncompliant.

Finally, we are correcting a requirement that was unintentionally and inadvertently deleted in subparts AA and AAa, ''Recordkeeping and reporting'' in 40 CFR 60.276(a)/60.276a(c)/60.276b(c), regarding the operation of fan motors for owners and operators that elect to install a furnace static pressure monitoring device under 40 CFR 60.274(f)/60.274a(f)/60.274b(f). We are restoring the provision specifying that ''operation of control system fan motor amperes at values exceeding ±15 percent of the value established under 40 CFR 60.274(c)/60.274a(c)/60.274b(c)'' also constitutes unacceptable operation and maintenance of the affected facility in addition to operation at flow rates lower than those established under 40 CFR 60.274(c)/60.274a(c)/60.274b(c). We never proposed to modify this provision and its deletion in the final rule was unintended. As written in the final regulations, facilities already subject to the applicable standards could inadvertently become noncompliant if we do not make this correction.

2. Corrections to Subpart AAb

We are making the same correction to subpart AAb as described in in II.B.1 for subparts AA and AAa because the requirement for lengthy, conflicting, and

costly weekly opacity monitoring from the end of one EAF, AOD, or both heat cycles to the end of the following heat cycle'' in 40 CFR 60.273b(d)(2) ''Emission monitoring'' was not proposed in 2022 (87 FR 29710), was not intended to be included in the promulgated 2023 final rule (88 FR 58459), and is not necessary to ensure compliance with the standards. In addition, this provision was not included in the cost estimates for the final rule or economic impact analysis. The correction for subpart AAb in this action returns the requirement in 40 CFR 60.273b(d)(2) to what had been proposed (87 FR 29710), where opacity testing was required to be performed at least once per day when the furnace is operating. This correction is consistent with the requirements in the standards section of the rule, at 40 CFR 60.272b(a)(3), which were unchanged between the proposed rule (87 FR 29710) and promulgated final rule (88 FR 58459).

We are also clarifying, as we are in subparts AA and AAa, when to conduct the weekly shop opacity monitoring when there is more than one EAF located in a shop, by adding ''during the heat cycle as defined in 40 CFR 60.271b.'' This clarification requires that once a week, facility shops with more than one EAF perform the required daily opacity monitoring when all EAFs are operating.

Additionally in this action, we are correcting procedures for opacity testing of shop emissions under Method 9 in subpart AAb at 40 CFR 60.271b ''Definitions,'' 40 CFR 60.272b(a)(3) ''Standard for particulate matter,'' and 40 CFR 60.273b(d)(3) ''Emission monitoring,'' to address the situation where charging periods at some EAF, AOD, or both may be broken into multiple, shorter periods of charging rather than one continuous charge, and for delayed plumes from charging. The final rule promulgated in 2023 (88 FR 58442) defined the charging testing period in subpart AAb as ''12 15-second *continuous* opacity observations'' (a total of 3 minutes) to accommodate the shorter periods of charging that are less than the 6 minutes required for melting and refining, and for tapping. However, as promulgated in the 2023 final rule, this requirement may not always be technically feasible for a facility to meet. In this interim final rule, we are clarifying that the 3 minutes of opacity observation does not need to be continuous (although the observation periods should still total 3 minutes), to accommodate EAF, AOD, or both that are charged in multiple short batches of less than a duration of 3 minutes each.

In some instances, the opacity due to charging can continue to be observable after the charging activity has stopped, but before melting and refining begins. As provided in the 2023 final rule, the compliance testing requirements cannot be accurately completed at some facilities due to short charging periods and the requirement to only test opacity during charging. In this action, we are thus clarifying that the charging opacity observations can continue after the activity of charging ceases, up until melting and refining begins, which is necessary when opacity observations during charging have not yet reached 3 minutes in total and the charging opacity continues up until melting and refining begins.

Therefore, this action corrects the charging opacity measurement regulatory text to remove ''continuous,'' and define the opacity measurement period as beginning when charging is first initiated and continuing until melting and refining begins, for a minimum of three minutes of total opacity readings. The result of this change is that the opacity test result for charging should be calculated from the average of the highest twelve 15-second opacity observations (total of 3 minutes) during the charging period that is defined as beginning when charging is first initiated and continuing until melting and refining begins, to produce a 3-minute opacity average in an integrated sample, as permitted under section 2.5 of Method 9.

We are correcting in this interim final rule a typographic error in 40 CFR 60.272b(a)(3) ''Standard for particulate matter'' promulgated in the final rule in 2023 (88 FR 58459), where charging was required to be tested both *without modification* of the 6-minute observation time period as well as *with modification* to reduce the observation time period to 3 minutes. The former time period of 6 minutes should have been attributed to tapping and not charging, as is done in two other places in the 2023 final rule (*i.e.,* in 40 CFR 60.271b ''Definitions'' and 40 CFR 60.273b(d)(3) ''Emission monitoring''). Therefore, we are correcting the first mention in 40 CFR 60.272b(a)(3) from ''charging'' to ''tapping''.

Additionally in this action, we are making the same correction to subpart AAb, as described in in II.B.1, for subparts AA and AAa, by removing the requirement erroneously included in the final regulations in 40 CFR 60.273b(e) that all fabric filters need to have COMS or BLDS installed. By removing the phrase ''on all fabric filters'' to make clear that multi-stack fabric filters are not required to install COMS or BLDS if observations of the opacity of the visible emission from the control device are performed by a certified visible emission observer, we will align 40 CFR 60.273b(e) with 40 CFR 60.273b(c) and eliminate the need for all new, modified or reconstructed facilities to install COMS or BLDS upon startup. We are also making the same correction to subpart AAb, as described in II.B.1 for subparts AA and AAa, to allow a choice between 40 CFR 60.274b(c)(1), (c)(2), or (c)(3) to demonstrate compliance, but then also require a demonstration of compliance with both subparagraphs (c)(4) and (c)(5). Without this edit, the regulations do not clearly indicate how facilities are to appropriately monitor EAF, AOD or both when demonstrating compliance with the shop opacity standard in 40 CFR 60.272b(a)(3) where a hood is used for capture. Therefore, as written in our final rule, facilities could inadvertently become noncompliant.

We are making the same correction to subpart AAb under ''Monitoring of operations'' in 40 CFR 60.274b(b), (c), and (h), as described in II.B.1 for subparts AA and AAa, for the parameters of volumetric flow rate through each separately ducted hood and furnace static pressure. We are removing the requirements to record ''rolling 15-minute averages on a continuous basis'' for the values for these parameters and replacing with the requirement to ''record as no greater than 15-minute integrated block averages.''

Finally, we are making the same corrections to subpart AAb under ''Recordkeeping and reporting requirements,'' as described in II.B.1 for subparts AA and AAa, for a requirement that was unintentionally and inadvertently deleted in the final rule for subpart AAb under 40 CFR 60.276b(c), in regard to operation of fan motor for owners and operators that elect to install a furnace static pressure monitoring device under 40 CFR 60.274b(f). We are restoring the provision specifying that ''operation of control system fan motor amperes at values exceeding ±15 percent of the value established under 40 CFR 60.274b(c)'' also constitutes unacceptable operation and maintenance of the affected facility in addition to operation at flow rates lower than those established under 40 CFR 60.274b(c).

III. Rulemaking Procedures

As noted in section I.C. of this document, the EPA's authority for the rulemaking procedures followed in this

action is provided by APA section 553.[3] In general, an agency issuing a rule under the procedures in APA section 553 must provide prior notice and an opportunity for public comment, but APA section 553(b)(B) includes an exemption from notice-and-comment requirements ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons, therefore, in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' This action is being issued without prior notice or opportunity for public comment because the EPA finds that the APA ''good cause'' exemption from notice-and-comment requirements applies here.

Following notice-and-comment procedures is impracticable and unnecessary for this action. The costly, conflicting, and burdensome opacity emissions monitoring requirements inadvertently included in subparts AA, AAa, and AAb were not proposed and were never intended to become part of the regulatory text of the 2023 final rule. These opacity monitoring requirements, as described in section II. of this action, would add significant cost impacts to new and currently operating sources that were not considered or included in the 2023 final rule because the EPA neither intended nor anticipated finalizing such a provision. These erroneous requirements are already in effect with respect to facilities subject to subpart AAb and will apply to facilities subject to NSPS subparts AA and AAa on February 21, 2024. Thus, it is critical to timely avoid this unintended and significant burden.

Regarding the correction to subpart AAb for procedures for opacity testing of shop emissions under Method 9, the regulations as finalized are technically impossible for some facilities to meet due to opacity plumes that could be delayed after charging stops, but before melting and refining begins. Accordingly, a new facility that is constructed, modified, or reconstructed would be subject to compliance assurance provisions in subpart AAb with which the facility may not be able to comply. This would create an unreasonable situation where a facility could be considered to be in violation because it cannot comply with these compliance assurance requirements, even though it would be able to technically meet the applicable performance standard. Therefore, it is imperative that the EPA make this correction to ensure new, modified, and reconstructed are subject to opacity testing requirements that are achievable.

Finally, this action is correcting several inadvertent errors in the regulatory text of the final rule. First, this action is removing a duplicative and contradictory reference in 40 CFR 60.272b(a)(3) to the charging requirement, which does not change the substance of the testing requirements. Second, this action is correcting regulatory text in subparts AA, AAa, and AAb that accidentally retained certain proposed language, contrary to the EPA's expressly stated intent in the final rule preamble. And third, the EPA is restoring provisions that were unintentionally deleted without prior notice or explanation and which should have been retained. This action corrects these oversights which, as described in section II., could cause some facilities to become inadvertently noncompliant with the standards and subject to potential enforcement action if not expeditiously corrected.

This action is effective immediately upon publication. Section 553(d) of the APA requires publication of the final rule to precede the effective date by at least 30 days unless, as relevant here, the rule relieves a restriction (40 CFR 553(d)(1)) or the agency finds good cause to make the rule effective sooner (40 CFR 553(d)(3)). Under APA section 553(d)(1), an exception applies to a rule that ''grants or recognizes an exemption or relieves a restriction.'' Because the corrections in this action relieve restrictions placed on facilities from the 2023 final rule (*e.g.,* removing an unintended, burdensome and costly opacity monitoring requirement and relaxing unachievable testing requirements), the normal 30-day minimum period between this action's dates of publication and effectiveness is not required. Additionally, as explained throughout this action, because the corrections to the final rule relieve impracticable regulatory burdens and make ministerial clarifications, there is a secondary good cause basis for immediate effectiveness under APA section 553(d)(3). See *Omnipoint Corp.* v. *Fed. Commc'n Comm'n,* 78 F.3d 620, 630 (D.C. Cir. 1996) (in determining whether good cause exists to make a rule immediately effective, an agency should ''balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling''). Because the rule does not impose any new regulatory requirements, the regulated community does not need time to prepare for the rule to come into effect.

IV. Request for Comment

As explained in section III. of this document, the EPA finds good cause to take this interim final action without prior notice or opportunity for public comment. However, the EPA is providing an opportunity for comment on the content of the amendments and, thus, requests comment on the corrections described in this rule. The EPA is not reopening for comment any provisions of the 2023 final rule other than the specific provisions that are expressly amended in this interim final rule.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review, as Amended by Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. The Office of Management and Budget (OMB) has previously approved the information collection activities that apply to the EAF facilities affected by this action and has assigned OMB control number 2060–0038. This action does not change the information collection requirements.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or

[3] Under CAA section 307(d)(1)(C), the EPA's promulgation or revision of any standard of performance under CAA section 111 would normally be subject to the rulemaking procedural requirements of CAA section 307(d), including notice-and-comment procedures, but CAA section 307(d) does not apply ''in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of [APA section 553(b)].'' CAA section 307(d)(1).

uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. This rule corrects unintended errors in previous rule.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have Tribal implications as specified in Executive Order 13175. This rule will implement corrections and clarifications to rule text applicable directly to the regulated industry that needed clarification or that were erroneously included in final rule. Thus, Executive Order 13175 does not apply to this action.

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

Executive Order 13045 directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 because it is not a significant regulatory action under section 3(f)(1) of Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The EPA does not believe there are disproportionate risks to children because of this action since it will not result in any changes to the control of air pollutants.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This action does not involve technical standards; therefore, the NTTAA does not apply.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

The EPA believes that this type of action does not concern human health or environmental conditions and, therefore, cannot be evaluated with respect to potentially disproportionate and adverse effects on communities with environmental justice concerns.

K. Congressional Review Act (CRA)

This action is subject to the Congressional Review Act (CRA), 5 U.S.C. 801–808, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in section III. of this document, including the basis for that finding.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedures, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the EPA amends 40 CFR part 60 as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart AA—Standards of Performance for Steel Plants: Electric Arc Furnaces Constructed After October 21, 1974, and On or Before August 17, 1983

■ 2. Amend § 60.273 by revising paragraphs (c) and (d)(2) to read as follows:

§ 60.273 Emission monitoring.

* * * * *

(c)(1) A continuous monitoring system for the measurement of the opacity of emissions discharged into the atmosphere from the control device(s) is not required:

(i) On any modular, multistack, negative-pressure or positive-pressure fabric filter if observations of the opacity of the visible emission from the control device are performed by a certified visible emission observer; or

(ii) On any single-stack fabric filter if observations of the opacity of the visible emissions from the control device are performed by a certified visible emission observer and the owner installs and operates a bag leak detection system according to paragraph (e) of this section whenever the control device is being used to remove particulate matter from the EAF.

(2) Visible emission observations shall be conducted at least once per day of the control device for at least three 6-minute periods when the furnace is operating in the melting and refining period. All visible emissions observations shall be conducted in accordance with EPA Method 9 of appendix A to this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

(3) If visible emissions occur from more than one point, the opacity shall be recorded for any points where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In that case, EPA Method 9 observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272(a)(2).

(d) * * *

(2) No less than once per week, during a heat time as defined in § 60.271, a melt shop with more than one EAF shall conduct these readings while all EAFs are in operation. All EAFs are not required to be on the same schedule for tapping.

* * * * *

■ 3. Amend § 60.274 by revising paragraphs (b)(1), (b)(3), (c), and (i)(9) to read as follows:

§ 60.274 Monitoring of operations.

* * * * *

(b) * * *

(1) Monitor and record once per shift the block 15-minute average furnace static pressure (if a DEC system is in

use, and a furnace static pressure gauge is installed according to paragraph (f) of this section) and either:

(i) Install, calibrate, and maintain a monitoring device that continuously records the capture system fan motor amperes and damper position(s); or

(ii) Monitor and record as no greater than 15-minute integrated block average basis the volumetric flow rate through each separately ducted hood; or

(iii) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and record damper position(s).

* * * * *

(3) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded as integrated block averages not to exceed 15 minutes.

(c)(1) When the owner or operator of an affected facility is required to demonstrate compliance with the standards under § 60.272(a)(3) and at any other time that the Administrator may require (under section 114 of the CAA, as amended), the owner or operator shall, during periods in which a hood is operated for the purpose of capturing emissions from the affected facility subject to paragraph (b) of this section, either:

(i) Monitor and record the fan motor amperes at each damper position, and damper position consistent with paragraph (i)(5) of this section; or

(ii) Monitor and record as no greater than 15-minute integrated block average basis the volumetric flow rate through each separately ducted hood; or

(iii) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and monitor and record the damper position consistent with paragraph (i)(5) of this section.

(2) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded as integrated block averages not to exceed 15 minutes.

(3) The owner or operator may petition the Administrator or delegated authority for reestablishment of these parameters whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the EAF operating conditions upon which the parameters were previously established are no longer applicable. The values of the parameters as determined during the most recent demonstration of compliance shall be the appropriate operational range or control set point throughout each applicable period. Operation at values beyond the accepted operational range or control set point may be subject to the requirements of § 60.276(a).

* * * * *

(i) * * *

(9) Parameters monitored pursuant to paragraphs (i)(6) through (8) of this section shall be recorded as integrated block averages not to exceed 15 minutes.

■ 4. Amend § 60.276 by revising paragraph (a) to read as follows:

§ 60.276 Recordkeeping and reporting requirements.

(a) Continuous operation at a furnace static pressure that exceeds the operational range or control setting under § 60.274(g), for owners and operators that elect to install a furnace static pressure monitoring device under § 60.274(f) and either operation of control system motor amperes at values exceeding ±15 percent of the value established under § 60.274(c) or operation at flow rates lower than those established under § 60.274(c) may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility. Operation at such values shall be reported to the Administrator or delegated authority semiannually.

* * * * *

■ 5. Amend the subpart AAa heading by revising it to read as follows:

Subpart AAa—Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarbonization Vessels Constructed After August 17, 1983, and On or Before May 16, 2022

* * * * *

■ 6. Amend § 60.273a by revising paragraphs (c) and (d)(2) to read as follows:

§ 60.273a Emission monitoring.

* * * * *

(c)(1) A continuous monitoring system for the measurement of the opacity of emissions discharged into the atmosphere from the control device(s) is not required:

(i) On any modular, multistack, negative-pressure or positive-pressure fabric filter if observations of the opacity of the visible emission from the control device are performed by a certified visible emission observer; or

(ii) On any single-stack fabric filter if observations of the opacity of the visible emissions from the control device are performed by a certified visible emission observer and the owner installs and operates a bag leak detection system according to paragraph (e) of this section whenever the control device is being used to remove particulate matter from the EAF or AOD.

(2) Visible emission observations shall be conducted at least once per day of the control device for at least three 6-minute periods when the furnace is operating in the melting and refining period. All visible emissions observations shall be conducted in accordance with EPA Method 9 of appendix A to this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

(3) If visible emissions occur from more than one point, the opacity shall be recorded for any points where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In that case, EPA Method 9 observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272(a)(2).

(d) * * *

(2) No less than once per week, during the heat cycle as defined in § 60.271a, melt shop with more than one EAF shall conduct these readings while all EAFs are in operation. All EAFs are not required to be on the same schedule for tapping.

* * * * *

■ 7. Amend § 60.274a by revising paragraphs (b)(1), (b)(3), (c), and (h)(9) to read as follows:

§ 60.274a Monitoring of operations.

* * * * *

(b) * * *

(1) Monitor and record once per shift the block 15-minute average furnace static pressure (if a DEC system is in use, and a furnace static pressure gauge is installed according to paragraph (f) of this section) and either:

(i) Install, calibrate, and maintain a monitoring device that continuously records the capture system fan motor amperes and damper position(s);

(ii) Monitor and record as no greater than 15-minute integrated block average basis the volumetric flow rate through each separately ducted hood; or

(iii) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the

control device inlet and record damper positions(s).

* * * * *

(3) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded as integrated block averages not to exceed 15 minutes.

(c)(1) When the owner or operator of an affected facility is required to demonstrate compliance with the standards under § 60.272a(a)(3) and at any other time that the Administrator may require (under section 114 of the CAA, as amended), the owner or operator shall, during periods in which a hood is operated for the purpose of capturing emissions from the affected facility subject to paragraph (b) of this section, either:

(i) Install, calibrate, and maintain a monitoring device that continuously records the fan motor amperes at each damper position, and damper position consistent with paragraph (h)(5) of this section; or

(ii) Monitor and record as no greater than 15-minute integrated block average basis the volumetric flow rate through each separately ducted hood; or

(iii) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and monitor and record the damper position consistent with paragraph (h)(5) of this section.

(2) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded as integrated block averages not to exceed 15 minutes.

(3) The owner or operator may petition the Administrator or delegated authority for reestablishment of these parameters whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the affected facility operating conditions upon which the parameters were previously established are no longer applicable. The values of the parameters as determined during the most recent demonstration of compliance shall be the appropriate operational range or control set point throughout each applicable period. Operation at values beyond the accepted operational range or control set point may be subject to the requirements of § 60.276a(c).

* * * * *

(h) * * *

(9) Parameters monitored pursuant to paragraphs (h)(6) through (8) of this section shall be recorded as integrated block averages not to exceed 15 minutes.

■ 8. Amend § 60.276a by revising paragraph (c) to read as follows:

§ 60.276a Recordkeeping and reporting requirements.

* * * * *

(c) Continuous operation at a furnace static pressure that exceeds the operational range or control setting under § 60.274a(g), for owners and operators that elect to install a furnace static pressure monitoring device under § 60.274a(f) and either operation of control system fan motor amperes at values exceeding ±15 percent of the value established under § 60.274a(c) or operation at flow rates lower than those established under § 60.274a(c) may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility. Operation at such values shall be reported to the Administrator or delegated authority semiannually.

* * * * *

Subpart AAb—Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarbonization Vessels Constructed After May 16, 2022

■ 9. Amend § 60.271b by revising the definition ''Shop opacity'' to read as follows:

§ 60.271b Definitions.

* * * * *

Shop opacity means the arithmetic average of 24 observations of the opacity of any EAF or AOD emissions emanating from, and not within, the shop, during melting and refining, and during tapping, taken in accordance with Method 9 of appendix A of this part; and during charging, according to the procedures in section 2.5 of Method 9 in appendix A to part 60 of this chapter, with the following modifications: begin reading opacity when charging is first initiated and continue reading until melting and refining begins, or for a minimum of 3 minutes total. From the readings collected, take the average of the highest 12 15-second opacity observations (total of 3 minutes) during this period to determine the 3-minute opacity average associated with charging. For the daily opacity observation during melting and refining, facilities may measure opacity by EPA Method 22 of appendix A of this part, modified to require the recording of the aggregate duration of visible emissions at 15-second intervals. Alternatively, ASTM D7520–16 (incorporated by reference, see § 60.17), may be used with the following five conditions:

(1) During the digital camera opacity technique (DCOT) certification procedure outlined in section 9.2 of ASTM D7520–16 (incorporated by reference, see § 60.17), the owner or operator or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand);

(2) The owner or operator must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in section 8.1 of ASTM D7520–16 (incorporated by reference, see § 60.17);

(3) The owner or operator must follow the recordkeeping procedures outlined in § 60.7(f) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination;

(4) The owner or operator or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one reading and the average error must not exceed 7.5 percent opacity;

(5) Use of this approved alternative does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software, and operator in accordance with ASTM D7520–16 (incorporated by reference, see § 60.17) and these requirements is on the facility, DCOT operator, and DCOT vendor.

* * * * *

■ 10. Amend § 60.272b by revising paragraph (a)(3) to read as follows:

§ 60.272b Standard for particulate matter.

(a) * * *

(3) Exit from a shop and, due solely to the operations of any affected EAF(s) or AOD vessel(s) during melting and refining exhibit greater than 0 percent opacity, and during tapping exhibit greater than 6 percent opacity, as measured in accordance with Method 9 of appendix A of this part; and during charging, exhibit greater than 6 percent opacity, as measured according to the procedures in section 2.5 of Method 9 in appendix A to part 60 of this chapter, with the modification of this section of Method 9, as follows: begin reading opacity when charging is first initiated and continue reading until melting and refining begins, or for a minimum of 3 minutes total. From the readings

collected, take the average of the highest 12 15-second opacity observations (total of 3 minutes) during this period to determine the 3-minute opacity average associated with charging. For the daily opacity observation during melting and refining, facilities may measure opacity by EPA Method 22 of appendix A of this part, modified to require the recording of the aggregate duration of visible emissions at 15-second intervals. As an alternative, facilities may measure opacity according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271 or, for the daily opacity observations during melting and refining, exhibit 0 seconds of visible emissions as measured by EPA Method 22 of appendix A of this part, modified to require the recording of the aggregate duration of visible emissions at 15-second intervals. Shop opacity shall be recorded for any point(s) during melting and refining, during charging, and during tapping where visible emissions are observed. Where it is possible to determine that a number of visible emission sites relate to only one incident of visible emissions during melting and refining, during charging, or during tapping, only one observation of shop opacity or visible emissions will be required during melting and refining, during charging, or during tapping. In this case, the shop opacity or visible emissions observations must be made for the point of highest emissions during melting and refining, during charging, or during tapping that directly relates to the cause (or location) of visible emissions observed during a single incident.

* * * * *

■ 11. Amend § 60.273b by revising paragraphs (c), (d)(2), (d)(3), and (e) introductory text to read as follows:

§ 60.273b Emission monitoring.

* * * * *

(c)(1) A continuous monitoring system for the measurement of the opacity of emissions discharged into the atmosphere from the control device(s) is not required:

(i) On any modular, multistack, negative-pressure or positive-pressure fabric filter if observations of the opacity of the visible emission from the control device are performed by a certified visible emission observer; or

(ii) On any single-stack fabric filter if observations of the opacity of the visible emissions from the control device are performed by a certified visible emission observer and the owner installs and operates a bag leak detection system according to paragraph (e) of this section whenever the control device is being used to remove particulate matter from the EAF or AOD.

(2) Visible emission observations shall be conducted at least once per day of the control device for at least three 6-minute periods when the furnace is operating in the melting and refining period. All visible emissions observations shall be conducted in accordance with EPA Method 9 of appendix A to this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

(3) If visible emissions occur from more than one point, the opacity shall be recorded for any points where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In that case, EPA Method 9 observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272b(a)(2).

(d) * * *

(2) No less than once per week, during the heat cycle as defined in § 60.271b, a melt shop with more than one EAF shall conduct these readings while all EAFs are in operation. All EAFs are not required to be on the same schedule for tapping.

(3) Shop opacity shall be determined as the arithmetic average of 24 consecutive 15-second opacity observations of emissions from the shop taken in accordance with Method 9 during melting and refining and during tapping; and during charging determined according to the procedures in section 2.5 of Method 9 in appendix A to part 60 of this chapter, with the modification as follows: begin reading opacity when charging is first initiated and continue reading until melting and refining begins, or for a minimum of 3 minutes total. From the readings collected, take the average of the highest 12 15-second opacity observations (total of 3 minutes) during this period to determine the 3-minute opacity average associated with charging. For the daily opacity observation during melting and refining, facilities may measure opacity by EPA Method 22 of appendix A of this part, modified to require the recording of the aggregate duration of visible emissions at 15-second intervals. As an alternative, facilities may measure the opacity according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271, or, during melting and refining, as the total duration of visible emissions measured according to EPA Method 22 over a 6-minute period, modified to require the recording of the aggregate duration of visible emissions at 15-second intervals. Shop opacity shall be recorded for any point(s) where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of visible emissions, only one observation of shop opacity will be required. In this case, the shop opacity observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Shop opacity shall be determined daily during melting and refining, during charging, and during tapping.

(e) A bag leak detection system must be installed and operated on all single-stack fabric filters whenever the control device is being used to remove particulate matter from the EAF or AOD vessel if the owner or operator elects not to install and operate a continuous opacity monitoring system as provided for under paragraph (c) of this section. In addition, the owner or operator shall meet the visible emissions observation requirements in paragraph (c) of this section. The bag leak detection system must meet the specifications and requirements of paragraphs (e)(1) through (8) of this section.

* * * * *

■ 12. Amend § 60.274b by revising paragraphs (b), (c), and (h)(9) to read as follows:

§ 60.274b Monitoring of operations.

* * * * *

(b) Except as provided under paragraph (e) of this section, the owner or operator subject to the provisions of this subpart shall conduct the following monitoring of the capture system to demonstrate continuous compliance:

(1) If a DEC system is in use, according to paragraph (f) of this section, monitor and record once per shift the block 15-minute average furnace static pressure and any one of (2) through (4) in this paragraph:

(2) Install, calibrate, and maintain a monitoring device that continuously records the fan motor amperes at each damper position, and damper position consistent with paragraph (h)(5) of this section; or

(3) Monitor and record as no greater than 15-minute integrated block average basis the volumetric air flow rate at each separately ducted hood; or

(4) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and monitor and record the damper position consistent with paragraph (h)(5) of this section.

(5) The furnace static pressure monitoring device(s) shall be installed in an EAF or DEC duct prior to combining with other ducts and prior to the introduction of ambient air, at a location that has no flow disturbance due to the junctions.

(6) The volumetric flow monitoring device(s) may be installed in any appropriate location in the capture system such that reproducible flow rate monitoring will result. The flow rate monitoring device(s) shall have an accuracy of ±10 percent over its normal operating range and shall be calibrated according to the manufacturer's instructions. The Administrator may require the owner or operator to demonstrate the accuracy of the monitoring device(s) relative to EPA Methods 1 and 2 of appendix A of this part.

(7) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded as integrated block averages not to exceed 15 minutes.

(c)(1) When the owner or operator of an affected facility is required to demonstrate compliance with the standards under § 60.272b(a)(3) and at any other time that the Administrator may require (under section 114 of the CAA, as amended), the owner or operator shall, during all periods in which a hood is operated for the purpose of capturing emissions from the affected facility subject to paragraph (b) of this section, either:

(i) Install, calibrate, and maintain a monitoring device that continuously records the fan motor amperes at each damper position, and damper position consistent with paragraph (h)(5) of this section;

(ii) Monitor and record as no greater than 15-minute integrated block average basis the volumetric flow rate through each separately ducted hood; or

(iii) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet, and monitor and record the damper position consistent with paragraph (h)(5) of this section.

(2) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded as integrated block averages not to exceed 15 minutes.

(3) The owner or operator may petition the Administrator or delegated authority for reestablishment of these parameters whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the affected facility operating conditions upon which the parameters were previously established are no longer applicable. The values of the parameters as determined during the most recent demonstration of compliance shall be the appropriate operational range or control set point throughout each applicable period. Operation at values beyond the accepted operational range or control set point may be subject to the requirements of § 60.276b(c).

* * * * *

(h) * * *

(9) Parameters monitored pursuant to paragraphs (h)(6) through (8) of this section shall be recorded as integrated block averages not to exceed 15 minutes.

■ 13. Amend § 60.276b by revising paragraph (c) to read as follows:

§ 60.276b Recordkeeping and reporting requirements.

* * * * *

(c) Operation at a furnace static pressure that exceeds the operational range or control setting under § 60.274b(g), for owners and operators that elect to install a furnace static pressure monitoring device under § 60.274b(f) and either operation of control system fan motor amperes at values exceeding ±15 percent of the value established under § 60.274b(c) or operation ranges or control settings outside of those established under § 60.274b(c) may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility. Operation at such values shall be reported to the Administrator or delegated authority semiannually.

* * * * *

[FR Doc. 2024–02634 Filed 2–13–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 240208–0042; RTID 0648–XR071]

Endangered and Threatened Wildlife and Plants: Listing the Queen Conch as Threatened Under the Endangered Species Act (ESA)

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

ACTION: Final rule.

SUMMARY: We, NMFS, are listing the queen conch (*Aliger gigas,* formerly known as *Strombus gigas*) as a threatened species under the Endangered Species Act (ESA). We have completed a review of the status of queen conch, including efforts being made to protect the species, and considered public comments submitted on the proposed listing rule as well as new information received since the publication of the proposed rule. Based on all of this information, we have determined that the queen conch is not currently in danger of extinction throughout all or a significant portion of its range, but is likely to become so within the foreseeable future. Thus, we are listing the queen conch as a threatened species under the ESA. At this time, we conclude that critical habitat is not yet determinable because data sufficient to perform the required analysis are lacking; any critical habitat designation would be proposed in a separate, future rulemaking.

DATES: This final rule is effective on March 15, 2024.

ADDRESSES: Public comments that were submitted on the proposed rule to list queen conch are available at *https://www.regulations.gov* identified by docket number NOAA–NMFS–2019–0141. A list of references cited in this final rule and other supporting materials are available at: *https://www.fisheries.noaa.gov/species/queen-conch,* or by submitting a request to the National Marine Fisheries Service, Southeast Regional Office, Protected Resources Division, 263 13th Avenue South, St. Petersburg, Florida 33701. Information relevant to inform separate rulemakings to designate critical habitat for queen conch or issue protective regulations for queen conch may be submitted to this mailing address or to the email address indicated below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Orian Tzadik, NMFS Southeast Regional Office, (813) 906–0353–C; or *Orian.Tzadik@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On February 27, 2012, we received a petition from WildEarth Guardians to list the queen conch as threatened or endangered throughout all or a significant portion of its range under the ESA. We determined that the petitioned action may be warranted and published a positive 90-day finding in the **Federal**

Register (77 FR 51763, August 27, 2012). After conducting a status review, we determined that listing queen conch as threatened or endangered under the ESA was not warranted and published our determination in the **Federal Register** (79 FR 65628, November 5, 2014). In making that determination, we first concluded that queen conch was not presently in danger of extinction, nor was it likely to become so in the foreseeable future. We also evaluated whether the species warranted listing based on its status in a ''significant portion of its range'' by applying the joint U.S. Fish and Wildlife Service (USFWS) and NMFS Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' (SPR Policy; 79 FR 37580, July 1, 2014). We concluded that available information did not indicate any ''portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.'' Therefore, we concluded that the species did not warrant listing based on its status in a significant portion of its range.

On July 27, 2016, WildEarth Guardians and Friends of Animals filed suit in the U.S. District Court for the District of Columbia, challenging our decision not to list queen conch as threatened or endangered under the ESA. On August 26, 2019, the Court vacated our determination that listing queen conch under the ESA was not warranted and remanded the determination back to the NMFS based on our reliance on the SPR Policy's particular threshold for defining ''significant,'' which was vacated nationwide in 2018 (though other aspects of the policy remain in effect). See *Desert Survivors* v. *U.S. Dep't of Interior,* 321 F. Supp. 3d 1011 (N.D. Cal. 2018).

On December 6, 2019, we announced the initiation of a new status review of queen conch and requested scientific and commercial information from the public (84 FR 66885, December 6, 2019). We also provided notice and requested information from jurisdictions through the Western Central Atlantic Fishery Commission (WECAFC), Caribbean Regional Fisheries Mechanism (CRFM), and the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) Authorities. We received 12 public comments in response to this request.

In May 2022, we completed a status review that considered all relevant new information regarding the status of the species. The status review report incorporated information received in response to our request for information (84 FR 66885, December 6, 2019), and was peer reviewed by three independent specialists selected from the scientific community with expertise in queen conch biology and ecology, conservation and management, and specific knowledge of threats to queen conch. Peer reviewer comments were addressed and incorporated, as appropriate, prior to dissemination of the final status review report (Horn *et al.* 2022).

On September 8, 2022, we published a proposed rule to list the queen conch as threatened (87 FR 55200, September 8, 2022). We solicited comments on our proposed rule from the public for 95 days (87 FR 55200, September 8, 2022; 87 FR 67853, November 11, 2022) and held a virtual public hearing on November 21, 2022 (87 FR 67853, November 11, 2022), at which time we also accepted public comments. We are basing our listing determination on information in the status review report, information received from the public, and additional materials cited in this final rule, which comprise the best available scientific and commercial information.

Listing Determinations Under the ESA

We are responsible for determining whether the queen conch is threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). Section 4(b)(1)(A) of the ESA requires us to make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and after taking into account efforts being made by any state or foreign nation to protect the species. To be considered for listing under the ESA, a group of organisms must constitute a ''species,'' which is defined in section 3 of the ESA to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' Because the queen conch is an invertebrate, we do not have the authority to list individual populations as distinct population segments.

Section 3 of the ESA defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as one ''which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Thus, in the context of the ESA, we interpret an ''endangered species'' to be one that is presently at risk of extinction. A ''threatened species,'' on the other hand, is not currently at risk of extinction, but is likely to become so in the foreseeable future. In other words, a key statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either now (endangered) or in the foreseeable future (threatened). Additionally, as the definition of ''endangered species'' and ''threatened species'' makes clear, the determination of extinction risk can be based on either the range-wide status of the species, or the status of the species in a ''significant portion of its range.'' A species may be endangered or threatened throughout all of its range or a species may be endangered or threatened within a significant portion of its range (SPR).

Section 4(a)(1) of the ESA requires us to determine whether any species is endangered or threatened as a result of any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence (16 U.S.C. 1533(a)(1)(A)–(E)). We considered the nature of the threats and the species' response to those threats. We also considered each threat identified, both individually and cumulatively. Once we evaluated the threats, we assessed the efforts being made to protect the species to determine if these conservation efforts were adequate to mitigate the existing threats and alter extinction risk. Finally, we considered the public comments and additional information received in response to the proposed rule. In making this finding, we have relied on the best scientific and commercial data available.

Public Comments and Our Responses

We requested comments on the proposed rule to list the queen conch as threatened during a 60-day comment period. In response to requests for a public hearing, we re-opened the public comment period for an additional 35 days (87 FR 67853, November 10, 2022) and held a virtual public hearing on November 21, 2022 (87 FR 67853, November 10, 2022).

Public comments were accepted via standard mail, at the public hearing, and through the Federal eRulemaking portal. To facilitate access to the proposed rule, we provided English, Spanish, French, Dutch, and Creole versions of the proposed rule, as well as English and Spanish versions of Frequently Asked

Questions on our website in advance of the public hearing. All individuals who requested a public hearing along with representatives from over 30 state, Federal, and international organizations were contacted to provide direct notification of the public hearing. We also directly contacted and solicited comments from a variety of stakeholder groups and fisheries management organizations through avenues such as the CITES, WECAFC, CRFM, the Caribbean Fishery Management Council (CFMC), the United States State Department, the United States Congress, State/Territorial partners, over 6,000 subscribers to our Fishery Bulletin, and others.

The virtual public hearing included live Spanish-language interpretation services and closed captioning translation options for English, French, German, Spanish, and Italian. A total of 137 people attended the virtual public hearing, 10 of whom provided oral public comment. Overall, we received 154 public comments on the proposed rule and supporting documents. Of these public comments, 56 opposed the listing, with 44 providing new information that informed our final determination. We received five comments that were neither supportive nor unsupportive of the listing determination, but provided additional data that were not included in the status review report or the proposed rule. The remaining 93 comments agreed with our proposed determination; many of these supportive comments presented general information on threats and provided supplementary data that were already considered or cited, and consequently discussed in the proposed rule. Of the comments that were supportive of the listing, 50 provided documentation, such as data or work cited, that reinforced the demographic factors and threats identified in the proposed rule, including population declines, smaller maturation sizes, degraded habitats, declining population connectivity, and declining fecundity estimates.

The comments we received concerning critical habitat and protective regulations were not directly related to this action. However, such comments will be considered and addressed during subsequent rulemakings on critical habitat and protective regulations under section 4(d) of the ESA. Due to the direct threat of overutilization throughout the range of queen conch, we intend to promulgate protective regulations pursuant to section 4(d) for queen conch in a future rulemaking. We solicit further public comment to inform future rulemakings on critical habitat and development of protective regulations for the queen conch (see **ADDRESSES** below). All relevant public comments on the proposed rule to list queen conch are addressed in the following summary below. We have categorized comments by topic. Where appropriate, we have combined similar comments from multiple groups or members of the public and addressed them together.

Comments on Available Data, Trends, and Analyses

Comment 1: Several commenters provided new, peer-reviewed or agency-produced empirical data on queen conch abundance, density, and landings that were not included in the status review report (Horn *et al.* 2022). New data were provided for the following jurisdictions: Antigua and Barbuda, The Bahamas, Belize, Florida, Nicaragua, Puerto Rico, San Andres Islands in Colombia, St. Vincent and the Grenadines, and the U.S. Virgin Islands. Some commenters suggested that the data provided were indicative of healthier queen conch populations in their particular jurisdiction than indicated by the status review report.

Response: We thank these commenters for the submission of additional data to inform status of the species and this final rule. The new abundance and adult density estimates provided by commenters for Antigua and Barbuda, The Bahamas, Belize, Florida, Nicaragua, San Andres Islands in Colombia, St. Vincent and the Grenadines, and the U.S. Virgin Islands are within the range of previously reported abundance and adult density estimates summarized in the status review report for those jurisdictions (see figure 7 in Horn *et al.* 2022). The new data provided for Florida were highly variable but indicated that high densities of individuals occur in specific locations at different times and that seasonal shifts in adult densities may be occurring (Delgado and Glazer 2020). Overall, these data were still within the adult density estimates that were presented in the status review report for Florida. Similarly, the new commercial landings data provided by Belize and the new commercial export data provided by St. Vincent and the Grenadines were not substantially different from the data considered in the status review report as the values were within the range previously considered (see figure 16 in Horn *et al.* 2022). Therefore, although we considered these additional data sources, these data did not alter the previous conclusions presented in the status review report or the decision to list this species as threatened.

The new density estimates provided for Puerto Rico were derived from Cruz-Marrero *et al.* (2020), who used video sled sampling to estimate conch population densities in Southwestern Puerto Rico. Cruz-Marrero *et al.*'s (2020) estimates of adult densities are higher than those considered in the status review report for Puerto Rico; however, the methodology used to generate these estimates did not include visual inspection to distinguish between live conch and empty shells, potentially leading to overestimation of density, particularly in heavily fished areas where shells are discarded. We determined the video sled sampling method requires additional calibration and validation prior to its inclusion in our analyses.

Therefore, we conclude the Cruz-Marrero *et al.* (2020) publication does not represent the best scientific and commercial data available due to concerns with the methodology used to estimate conch population densities in Southwestern Puerto Rico.

Comment 2: Many commenters, including commercial fishers and local scientists, stated that local stakeholder knowledge should have been solicited prior to the publication of the proposed rule.

Response: We announced the initiation of a status review for queen conch in the **Federal Register** (84 FR 66885, December 6, 2019). At that time, we asked the public to provide information on the queen conch that would inform our status review and opened a 60-day public comment period. We also directly contacted and solicited comments from a variety of stakeholder groups and fisheries management organizations through avenues such as the CITES, WECAFC, CRFM, CFMC, the United States State Department, State/Territorial partners, and others. The CFMC further solicited comments from stakeholders via written comments, District Advisory Panel (DAP) meetings, and oral comments. Comments were initially solicited at the CFMC meeting in December 2019. NMFS staff attended the WECAFC meeting in Puerto Rico in December 2019 to notify members of the opportunity for public comment to inform the status review. General updates on the queen conch status review were provided during the CFMC's regular meetings held in June, August, September, and December of 2020; April, July, August, and December of 2021; February, April, and August of 2022. General updates on the status of the queen conch rulemaking were provided during the CFMC's regular meetings held in December of 2022; and

April, August, and December of 2023. We also directly contacted and solicited information from numerous scientific experts on conch fisheries biology. All information received, including 12 formal public comments, was considered, and relevant information was incorporated into the status review report and the proposed rule.

Comment 3: Several commenters provided anecdotal observations of queen conch densities and one fisher provided underwater videos in Puerto Rico, suggesting that these observations were indicative of healthier queen conch populations in their jurisdictions than indicated by the status review report.

Response: We thank these commenters for submitting their videos and sharing their knowledge of the queen conch population in their particular jurisdictions. While these data are indeed encouraging, they remain difficult to incorporate into the status review report as they cannot be readily converted into estimates of population densities. We acknowledge that the available density data can be difficult to interpret for several reasons, including the fact that survey methods varied, surveys were lacking from many areas and, in some cases, surveys were decades old. In addition, the connectivity modeling scenario provided density estimates that represent jurisdiction-wide medians, and the status review team (SRT) acknowledges that conch are not distributed evenly across space. Even in jurisdictions with very low densities, there likely exist some areas above the critical density threshold where reproduction continues to take place (Horn *et al.* 2022). However, cross-shelf surveys likely generate the most reliable estimates of overall queen conch populations, and cross-shelf surveys are a widely used monitoring method for queen conch stocks (Vaz *et al.* 2022). By contrast, the videos and observations provided are limited in their spatial inference because they represent a relatively small fraction of the overall range of the species. As described in the proposed rule, there is a clear need to improve data collection on this species throughout its range, and NMFS looks forward to working with all stakeholders to improve and standardize data collection to promote the recovery of the species.

Comment 4: We received several comments requesting that NMFS acquire new, additional, or better data prior to making a listing determination. These commenters suggested that the available data and scientific studies do not provide sufficient evidence to support listing queen conch as a threatened species under the ESA.

Response: As stated above, and as described in the proposed rule, NMFS acknowledges the need for further research and additional and uniform data. However, we disagree with the commenters' assertion that the best scientific studies available do not provide sufficient evidence to support our listing determination. As detailed in the Listing Determinations under the ESA section above, we evaluated all five factors under section 4(a)(1) of the ESA and concluded the best scientific and commercial data available indicate that, while the queen conch is not currently in danger of extinction, it will likely become so in the foreseeable future, therefore warranting listing as a threatened species under the ESA. In the proposed rule, we concluded that the species does not currently have a high risk of extinction due to the following: the species has a broad distribution and still occurs throughout its geographic range and is not confined or limited to a small geographic area; the species does not appear to have been extirpated from any jurisdiction and can still be found, albeit at low densities in most cases, throughout its geographic range; and there are several jurisdictions that have queen conch populations that are currently disproportionately contributing to the viability of the species, such that the species is not presently at risk of extinction. There are 9 jurisdictions that are estimated to have adult queen conch densities greater than 100 conch/ha, and together these 9 jurisdictions comprise about 61 percent of the estimated queen conch habitat. Several of these locations have high connectivity values (see figure 13 in Horn *et al.* 2022), indicating that these areas facilitate the flow of queen conch larvae, allowing for some exchange of larvae and maintenance of some genetic diversity.

In addition, we note that the ESA requires that we base our listing determinations on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A) and does not require, nor necessarily allow time for, additional studies to gather more data. *Am. Wildlands* v. *Kempthorne,* 530 F.3d 991, 998 (D.C. Cir. 2008) (finding that the ''best available data'' requirement in section 1533(b)(1)(A) requires not only that data be attainable, but that researchers in fact have conducted the tests); *Southwest Ctr. for Biological Diversity* v. *Babbitt,* 215 F.3d 58, 60 (D.C. Cir. 2000) (''The 'best available data' requirement makes it clear that the Secretary has no obligation to conduct independent studies.''); see also, *Oceana, Inc.* v. *Ross,* 321 F. Supp. 3d 128, 142 (D.D.C. 2018) (interpreting analogous language in section 1536(a)(2)) (citations omitted); *San Luis & Delta-Mendota Water Auth.* v. *Locke,* 776 F.3d 971, 995 (9th Cir. 2014) (holding that the best available science standard ''does not require an agency to conduct new tests or make decisions on data that does not yet exist.''). The ESA's emphasis on the best available information thus requires us to make listing determinations based upon what is sometimes incomplete information. Provided that the best available information is sufficient to enable us to make a determination as required under the ESA, as is the case here, we must rely on it even though there is some degree of imperfection or uncertainty. *Defenders of Wildlife* v. *Babbitt,* 958 F. Supp. 670, 679–81 (D.D.C. 1997) (explaining that courts have consistently held that the statutory standard requiring that listing decisions be made on the ''best scientific and commercial data available,'' is less stringent than a standard requiring ''conclusive evidence'' or ''absolute scientific certainty'').

Comment 5: Several commenters questioned what data were used to make the final listing determination. Specifically, commenters from Puerto Rico, U.S. Virgin Islands, and Nicaragua asked about the recency of the landings and adult density data and what studies had been used to make the listing determination.

Response: The data and research used to inform our listing decision were published online concurrently with the proposed rule and are summarized in the status review report (Horn *et al.* 2022). This report considered all relevant published and grey literature, databases, and reports, as well as any relevant information provided during the public comment period from our previous notice of initiation of a status review (84 FR 66885, December 6, 2019). The status review evaluated data from 47 countries and territories (*e.g.,* management jurisdictions), assimilating approximately 360 references. The status review considered the scientific literature to determine density thresholds for reproductive viability, then evaluated these thresholds by jurisdiction using the best scientific information available for density surveys from 2012–2020. Similarly, the status review considered fisheries landings data (1950–2018) from the Food and Agriculture Organization and reconstructed landing histories (1950–2016) from the Sea Around Us (SAU) project. It considered results from recent genetic structure studies (*e.g.,* Truelove

et al. 2017) and published results from simulations identifying limiting factors for conch reproductive dynamics (Farmer & Doerr 2022). It evaluated a novel hydrodynamic modeling approach to connectivity which provided insight into how exchange of larvae across the population range has been dramatically interrupted by overexploitation relative to virgin stock patterns (Vaz *et al.* 2022). The status review team organized this information and data by jurisdiction and searched systematically for information regarding conch densities, landings, and population trends. Additionally, the team systematically evaluated the threats to conch across management jurisdictions, including overutilization, inadequacy of regulations and enforcement, and climate change.

Upon its publication in May 2022, the status review report (Horn *et al.* 2022) provided a complete list of citations used as well as five supplemental files, including the most recently available fisheries data by jurisdiction, Food and Agriculture Organization (FAO) landings data, and population density estimates. This information is all publically available on our website. The landings data alluded to by commenters were included through 2018 (see figures 15, 16, 17, 19, and 20 in Horn *et al.* 2022), and all known fishery independent surveys were considered as well (see table 1 in Horn *et al.* 2022). Specific analyses regarding conch population connectivity and reproductive dynamics within the status review were also published in peer reviewed scientific journals (Vaz *et al.* 2022; Farmer and Doerr 2022).

Comment 6: Several commenters cited the presence of queen conch populations in deep-water habitats that act as refuges due to their inaccessibility to fishing. In particular, commenters from Belize, Jamaica, Puerto Rico, and Florida cited local ecological knowledge to support the presence of deep water populations within their jurisdictions. Other commenters suggested that deep water populations exist throughout the range of the species and that these deep-water populations regularly supply recruits to the shallow water populations, which are subject to fishing. The commenters suggest that the presence of these deep water populations negate the need for listing the species under the ESA, as the populations will always replenish themselves.

Response: The population dynamics of deep-water queen conch populations were evaluated and considered in the status review report. All published findings on deep-water populations were reported, including documentation of active fishing and depletion of some of these deep-water populations, such as those at Glover's atoll in Belize (Horn *et al.* 2022). The status review assessed all known deep-water populations, including several in the jurisdictions of The Bahamas, Belize, Florida, Jamaica, Puerto Rico, and St. Croix, and also considered other factors such as prevailing currents, and physical recruitment dynamics that can influence population connectivity (Horn *et al.* 2022). The commenters did not provide any new scientific information to support claims of deep-water populations beyond what was already considered in the status review, and we are unable to determine the direct contribution of additional populations to local queen conch populations without further research. The current state of research on deep water populations remains limited due to two major factors. The first is that in most locations, the deep water habitats do not seem to be the primary habitat for queen conch, and population densities are therefore limited. The second is that these populations occur at depths below safe recreational diving limits, therefore necessitating specialized technical training and equipment to access them. We agree with the commenters that there is a need to improve our understanding of the deep-water populations, and we look forward to working with stakeholders on this endeavor as we work to promote the recovery of the species.

Comment 7: One commenter stated that the proposed listing determination arbitrarily relied on reproductive capacity and total population to support its conclusions instead of density and adequacy of regulations, which the commenter asserted should be the driving metrics for the listing determination.

Response: We appropriately considered all relevant biological data when assessing extinction risk for those portions that warranted further investigation based on the initial assessment tool. Biological factors considered, such as reproductive capacity and productivity at viable spawning areas (*e.g.,* areas with sufficient adult density and total population), are directly relevant to assessing status of the species now and in the foreseeable future. We cannot ignore such factors and focus exclusively on the factors the commenter prefers.

Comment 8: One commenter stated we had erred by not having the SRT review the various spatial scales considered in the SPR analysis. Another commenter claimed that NMFS erred by not having the SRT review the eco-regional and macro-regional spatial scale approaches to evaluating SPR.

Response: We disagree. Our analysis of whether queen conch is endangered within a significant portion of its range was informed by the SRT's work, and we applied extensions of the SRT's population-scale approach to our SPR analysis. Specifically, we followed the SRT's approach, by applying the same quantitative assessment tool to screen for ''potentially high risk'' and ''potentially significant'' portions of the range. Furthermore, nothing in the ESA or our regulations requires that the SRT review the agency's listing decision, including its evaluation of potential SPRs.

Comment 9: One commenter stated that NMFS should list the queen conch as endangered in a significant portion of its range, asserting that the SPR analysis in the proposed rule was flawed because it arbitrarily divided the range of the queen conch instead of considering those portions where the species is in danger of extinction, and that the determination is contrary to the best available science because the queen conch is endangered in a significant portion of its range. The commenter concluded that our SPR analysis should have evaluated the total portion of the species' range where the species is below the critical density and in danger of extinction. The commenter asserted this ''portion'' is a significant portion of the range in which the species is endangered.

Response: We conducted a thorough and conservative screening of portions of the range as described in the proposed rule, assessing 50 different portions at 3 different geographic scales. Also as explained above, portions of the range below the critical density are not necessarily ''in danger of extinction.'' While we find that our previous analysis was adequate, we undertook the additional analysis sought by the commenter.

As suggested by the commenter, we identified 11 management jurisdictions with empirical measurements of adult conch densities (*e.g.,* not borrowed from nearest neighbor estimates of density) that were below ''critical density'' (*i.e.,* Anguilla, Antigua and Barbuda, Aruba, Bonaire, Dominican Republic, Guadeloupe, Haiti, Martinique, Panama, St. Vincent and Grenadines, and Venezuela). We further evaluated this portion of the species' range, comprised of these 11 jurisdictions, to determine whether this portion was, in our assessment, at a ''high risk'' of extinction and ''significant.'' Because

both of these conditions must be met, regardless of which question is addressed first, if a negative answer is reached with respect to the first question addressed, the other question does not need to be evaluated for that portion of the species' range. As with our SPR analysis in the proposed rule, we elected to address the ''high risk'' of extinction question first. The members of the species within the portion may be at ''high risk'' of extinction if the members are at or near a level of abundance, productivity, spatial structure, or diversity that places the members' continued persistence in question. Similarly, the members of the species within the portion may be at ''high risk'' of extinction if the members face clear and present threats (*e.g.,* confinement to a small geographic area; imminent destruction, modification, or curtailment of habitat; or disease epidemic) that are likely to create imminent and substantial demographic risks.

In evaluating whether this portion of the species' range is at high risk of extinction, we considered the portion's abundance, productivity, spatial structure, and diversity. Although the portion contains only 1 percent of the contemporary abundance for the species, that 1 percent represents nearly 7 million adult conch. Generally speaking, low abundance places a population at greater risk for perturbation or genetic bottlenecks; however, this portion is broadly distributed geographically, which provides a significant buffer against these threats. Although this portion comprises only 12 percent of the total available habitat for queen conch, it contains an estimated 8,753 km^2 of available habitat. The portion is also protected against genetic bottlenecks because although it contains 11 important connectivity nodes for the species throughout its range, 13 additional important connectivity nodes outside the portion supply areas within the portion with larvae (Vaz *et al.* 2022). For example, within the portion, Panama receives most of its conch larvae from Costa Rica. The Dominican Republic receives larvae from Puerto Rico, Cuba, Turks and Caicos, and possibly Saint Lucia. Haiti has limited connectivity with neighboring islands, but may receive some limited input from Jamaica and Cuba. Anguilla presently receives larvae from multiple Leeward Islands. In Venezuela, Martinique, Bonaire, and Guadeloupe, conch reproduction is thought to be nominal, and most upstream supply would originate from Saint Lucia. For the management jurisdictions of Aruba, St. Vincent and Grenadines, Antigua and Barbuda, contemporary reproductive output is thought to be nominal, with a small likelihood of receiving larval supply from other locations.

Although this portion has limited abundance and productivity is constrained by likely reproductive failures due to low adult densities leading to depensatory effects, the portion is distributed over a broad geographic area (*i.e.,* the Caribbean basin) and is not subject to disease or disproportionate habitat destruction relative to the species across its range. The spatial structure of the portion and diversity of the portion are partially protected by the remaining reproductively viable populations and connectivity nodes that exist outside the portion. We estimate 685 million adult conch in habitats with reproductively viable densities outside of this portion. A single female conch lays between 7–14 egg masses containing between 500,000–750,000 eggs during a single spawning season (Appeldoorn 2020). Assuming a 1:1 sex ratio, we estimate that the 342 million females in viable aggregation densities could produce up to 3,591 trillion eggs in a single spawning season. Our connectivity modeling suggests that a reasonable number of these eggs might successfully recruit to this portion during a given spawning season. Owing to the prolific reproductive output of viable conch spawning aggregations and the overall connectivity remaining within the system, including connectivity to this portion, we determine that, within this portion, queen conch is not currently in danger of extinction, but is likely to become so within the foreseeable future. This finding is consistent with the species' range wide determination, that queen conch is not currently in danger of extinction, but is likely to become so within the foreseeable future.

Comment 10: Several commenters noted that the adult densities described in the status review report as thresholds for reproduction of individual populations were evaluated against cross-shelf population densities instead of against spawning aggregation densities. These thresholds were therefore overly conservative estimates when discussing the likelihood of extinction because the aggregation-densities are far greater than cross-shelf densities due to the nature of the queen conch spawning aggregation strategies.

Response: As described in the status review report and proposed rule, the absence of reproduction in low density populations is primarily attributed to a low encounter rate and can contribute to Allee effects and localized extirpation due to reproductive failure. The cross-shelf density threshold of 50 adult conch/hectare is generally accepted as a minimum to achieve some level of reproductive success (Appeldoorn 1995; Gascoigne and Lipcius 2004; Stephens *et al.* 1999; Stoner and Ray-Culp 2000). While we acknowledge that many minimum density estimates have been suggested in the literature, the threshold of 50 adult conch per hectare is lower than most recommended thresholds. For example, CITES initially proposed a minimum threshold of 56 adult conch per hectare but then revised their threshold to 100 adults per hectare after further deliberation (Van Eijs 2014). An equivalent threshold of 100 adult conch per hectare has been proposed by the WECAFC queen conch working group and consequently adopted by the United Nations Environment Programme (UNEP 2012). The reference point used in the proposed rule is derived from cross shelf data from unfished areas in The Bahamas that show that mating and spawning plateau at approximately 100 adult queen conch per hectare (Stoner and Ray-Culp 2000; Stoner *et al.* 2012b). As discussed in the status review report (Horn *et al.* 2022), we agree that density thresholds may vary over both spatial scale and by location, as other studies have demonstrated higher thresholds needed to ensure reproductive success. For example, Delgado and Glazer (2020) identified a within-aggregation minimum of 204 adult conch/hectare.

The SRT conducted a comprehensive review of the best scientific and commercial information available, with the goal of compiling robust, cross-shelf adult conch density estimates for each jurisdiction. To the extent possible, the SRT focused on the most recent studies where randomized sampling was conducted across broad areas of the shelf, including a range of habitats and depths (see table 2 and file S5 in Horn *et al.* 2022). Given differences in survey methodologies and uncertainties in the reproductive threshold, the SRT evaluated current and temporal trends in likely reproductive status by jurisdictions under three categories: (1) densities greater than 100 adult conch/ha, a density considered to support reproductive activity and population growth (UNEP 2012); (2) densities of 50–99.9 adult conch/ha, a density associated with reduced reproduction (Appeldoorn 1988c; Stoner and Ray-Culp 2000); and (3) densities below 50 adult conch/ha, densities associated with likely Allee effects and limited viable reproduction (Stoner and Ray-

Culp 2000; Stoner *et al.* 2012b; UNEP 2012). The SRT considered these uncertainties in their Extinction Risk Analysis, and we considered them in the development of our proposed rule.

We acknowledge that the thresholds considered by the SRT and discussed in the proposed rule (<50 adult conch/ha, 50–99.9 adult conch/ha, and <100 adult conch/ha) may differ from thresholds identified by other regulatory agencies, regional working groups, or national-level policies for some countries within the range of the species. However, we relied on the best available scientific and commercial information, as described within the status review report, to identify appropriate thresholds and to interpret published density estimates relative to those thresholds, while accounting for differences in survey methodologies (see ''Density Estimates'' section in Horn *et al.* 2022). The commenters did not identify any scientifically-supported alternative estimates or thresholds. The commenters did not provide information on which to base a change to the adult density estimate we used in our analysis, other than they believe the 50 adult conch/ha threshold is overly conservative for assessing the likelihood of extinction of the species. We acknowledge that substantial variability in the collection of conch density estimates by different researchers in different jurisdictions through time has led to challenges in identifying reproductive thresholds and making appropriate comparisons to those thresholds; however, we feel that the best scientific and commercial information available supports our methods and determination.

Comment 11: Several commenters requested uncertainty estimates be provided for data that were used in the status review report and the proposed rule, particularly for those data pertaining to the levels of uncertainty for population model estimates and for the extinction risk analysis.

Response: Uncertainty in the estimates of population densities, adult population sizes, and exploitation rates derived from the best available scientific and commercial data available are all presented in the status review report (see figures 5, 9, 18, and 19 in Horn *et al.* 2022). Uncertainty in reproductive dynamics are presented in the status review report and described further in Farmer and Doerr (2022). Multiple scenarios of population connectivity are presented in the status review report and described further in Vaz *et al.* (2022). These scenarios contribute to the uncertainty of the population model due to the variability of values and of sampling methods at each of the different nodes in the model. Reported versus reconstructed landings are presented in figure 15 of Horn *et al.* (2022). Variability in the extinction risk analysis is captured in figures 22–24 of Horn *et al.* (2022). Finally, summary statistics and raw data associated with the extinction risk analysis and density estimates are presented in status review Supplementary Files 3 and 5, respectively.

Comment 12: One commenter noted that the variability in morphometric measures, specifically shell lip thickness, among locations suggests that determination of maturity in queen conch is not uniform and can vary by location, thereby limiting the utility of universal measures of maturity, and suggesting that such measures should not be applied to all locations equally.

Response: As described in the proposed rule and discussed in the status review report (Horn *et al.* 2022), we acknowledge that studies have suggested morphometric characteristics may differ among localized populations. Furthermore, age and size at maturity may differ among locations, such that morphometric measures, such as shell lip thickness, at maturity are not consistent among locations. Despite local variability, shell lip thickness is often used as an indicator of maturity in queen conch and in fishery management. Therefore, the status review report analyzes morphology and shell lip thickness carefully. As mentioned in the status review report, some of these differences (including variability in shell lip thickness in mature adults) may be driven by overutilization of the resource. Growth overfishing (*i.e.,* when conch are harvested at an average size that is smaller than the size that would produce the maximum yield per recruit) leads to smaller adults within fished stocks. In addition, the status review report recommends further research on the direct effects of environmental contaminants, such as heavy metals, pesticides, and other pollutants. Contaminants and lower quality habitats may impact growth, reproduction, and morphology. Other than the detrimental effects these pollutants are known to have on early life stages such as larvae, the effects of environmental contaminants on queen conch remain poorly understood (Horn *et al.* 2022).

Despite the variability in morphometric characteristics among localized population, shell lip thickness is the most reliable indicator for maturity in queen conch, as described in the proposed rule. The best available information indicates that shell lip thickness for mature queen conch ranges from 17.5 to 26.2 mm for females, and 13 to 24 mm for males (Stoner *et al.* 2012; Bissada 2011; Aldana-Aranda and Frenkiel 2007; Avila-Poveda and Barqueiro-Cardenas 2006). Boman *et al.* (2018) suggested that a 15 mm minimum lip thickness would be an appropriate threshold metric for most of the Caribbean region. The primary goal of a minimum lip thickness is as a fishery management metric to ensure that at least 50 percent of the queen conch population will reach maturity prior to being harvested (Boman *et al.* 2018).

While the relationships between shell lip thickness, age, and sexual maturity vary geographically, the best available information demonstrates that the value established for minimum shell lip thickness by most jurisdictions is inadequate to prevent immature conch from being harvested. Only six jurisdictions (*i.e.,* Colombia, Puerto Rico, Nicaragua, U.S. Virgin Islands, Cuba, and Honduras) have minimum shell lip thickness regulations. Only Honduras has a minimum shell lip thickness of at least 18 mm, which is likely the most effective criteria for prohibiting the harvest of immature conch; the other five jurisdictions require a minimum lip thickness well below reported minimum size at maturity (*i.e.,* 5 mm, Colombia; 9.5 mm, Puerto Rico; 9.5 mm, Nicaragua; and 10 mm, Cuba). Thus, although several jurisdictions have regulations that may prohibit harvest of immature conch and while measures of maturity may vary geographically, our review of minimum meat weight, shell length, and flared lip regulations indicates that immature queen conch are being legally harvested in 20 jurisdictions, which is partially responsible for observed low densities and declining populations. We also note that the majority of queen conch fisheries (except St. Lucia and the U.S. Virgin Islands) do not have requirements to land queen conch in the shell. Regulations that allow queen conch meat to be removed and the shell discarded at sea undermine enforcement and compliance with regulations for a minimum shell length, shell lip thickness, and flared shell lip.

Comment 13: Several commenters suggested that demographic and exploitation thresholds should not be equally applied across all jurisdictions due to the nuances of individual fisheries. The commenters argued that the differences among jurisdictions should be accounted for and therefore different thresholds should be considered for each individual jurisdiction.

Response: The status review report used threshold values of population densities associated with reproductive capacity and harvest levels that are generally considered sustainable. Those thresholds were compared against the available information on population density and harvest levels as a tool to evaluate the population in each jurisdiction; however, we did not use these thresholds as definitive measures of population status. Instead, thresholds were used to flag whether jurisdictions, eco-regions, or macro-regions merited further evaluation as being potentially at higher risk for viable queen conch populations. Flagged locations were subjected to additional scrutiny including evaluation of local and regional differences in data collection programs, population productivity, connectivity, and management regimes. In the status review report, the species was evaluated across four demographic factors for viability (*i.e.,* abundance, growth rate/productivity, spatial structure/connectivity, and diversity) and five major threat categories as identified in section 4(a)(1)(A)–(E) of the ESA (*i.e.,* present or threatened destruction, modification, or curtailment of its habitat or range; over-utilization of the species for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting its continued existence) across its entire range. We evaluated these factors and threats across the entire range of the species, then within individual jurisdictions, and ultimately across 10 distinct ecoregions within the range of the species. This approach ensured that all risk factors were evaluated at both small and large spatial scales, and no single factor was relied upon to determine the extinction risk at any one location.

Comment 14: One commenter noted that the cause of reproductive failure of queen conch in the Florida Keys is unknown, and cautioned NMFS to consider this issue in the derivation of future regulations.

Response: NMFS acknowledges this issue and discusses the phenomenon in the status review report and the proposed rule (87 FR 55220). Nearshore populations seem to be disproportionately affected by the described phenomenon. Given that heavy metals have been documented to impair egg-laying in gastropods, several experts in the field have speculated that the presence of ambient heavy metals in the Florida Keys is likely contributing to reproductive failure in the nearshore environment, however, further research is necessary to definitively determine causality. We look forward to working with stakeholders in the Florida Keys to address knowledge gaps and promote the recovery of regional queen conch populations.

Comment 15: One commenter noted that subpopulations of queen conch exist in Florida due to larval settlement patterns and barriers to connectivity. In particular, the commenter discussed the importance of the Hawk Channel in the Florida Keys as it represents a unique barrier that limits connectivity among inshore and offshore populations in the Keys that does not exist in other jurisdictions. The commenter stated that this barrier in the Keys limits the ability of individuals from inshore populations to migrate based on unfavorable environmental conditions.

Response: Queen conch require physical contact to procreate; however, their ability to move is hindered by various barriers throughout its range, such as deep water passages, physical features of insular shelves, and manmade structures. We agree with the commenter that the Hawk Channel is a particularly large barrier. The status review report and the proposed rule note the potential impacts of Hawk Channel on connectivity and that it may be limiting movement, thereby limiting the formation of spawning aggregations in the Florida Keys.

Comment 16: One commenter requested that NMFS contact one particular researcher that has an extensive knowledge of queen conch and the fishery throughout the region.

Response: The publications of the researcher in question were used to inform the status review. In addition, the researcher that was mentioned provided public comment on the proposed rule, and we have considered that comment, which was generally supportive of the proposed rule.

Comment 17: One commenter requested that NMFS summarize the uncertainty associated with the habitat model that was used in the status review to estimate total area of queen conch habitat throughout its range and provide uncertainty estimates.

Response: NMFS used a habitat model published in Vaz *et al.* (2022) to estimate the total area of queen conch habitat throughout its range. The habitat estimates presented in Vaz *et al.* (2022) were based on coral reef locations from the Millennium Coral Mapping Project (Spalding *et al.* 2001; IMaRS–USF 2005; IMaRS–USF and IRD 2005; Andréfouët 2008; UNEP–WCMC *et al.* 2021), and restricted to depths of less than 20 m (Salley 1986; Berg Jr. *et al.* 1992; Boidron-Metairon 1992; Stoner and Sandt 1992; Stoner and Schwarte 1994; Delgado and Glazer 2020). Vaz *et al.* (2022) also included known spawning sites, including putative deep-water spawning locations, in the habitat layer, by ground-truthing the habitat map with spawning sites reported in the literature (Randall 1964; D'Asaro 1965; Brownell 1977; Davis *et al.* 1984; Weil and Laughlin 1984; Coulston *et al.* 1987; Wilkins *et al.* 1987; Wicklund *et al.* 1991; Berg Jr. *et al.* 1992; García-Escobar *et al.* 1992; Stoner and Sandt 1992; Márquez-Pretel *et al.* 1994; Lagos-Bayona *et al.* 1996; Pérez-Pérez and Aldana-Aranda 2003; Garcia-Sais *et al.* 2012; Cala *et al.* 2013; de Graaf *et al.* 2014; Meijer zu Schlochtern 2014; Wynne *et al.* 2016; Truelove *et al.* 2017). This review led to the inclusion of 13 shallow-water polygons not initially present in the Coral Mapping Project-derived habitat layer. These areas were in St. Eustatius, U.S. Virgin Islands (USVI), Colombia, Florida, Mexico, Jamaica, Saba, Bonaire, and The Bahamas (Randall 1964; Coulston *et al.* 1987; García-Escobar *et al.* 1992; Márquez-Pretel *et al.* 1994; Meijer zu Schlochtern 2014; Truelove *et al.* 2017). Vaz *et al.* (2022) also included additional 14 polygons containing putative deep spawning sites in waters off of Venezuela, Cuba, The Bahamas, USVI, Turks and Caicos Islands (TCI), Saba, Colombia, Belize, Honduras, Puerto Rico and Jamaica (*i.e.,* Pedro Bank) (Randall 1964; Brownell 1977; Davis *et al.* 1984; Weil and Laughlin 1984; Wicklund *et al.* 1991; Stoner and Sandt 1992; Lagos-Bayona *et al.* 1996; Aiken *et al.* 2006; Garcia-Sais *et al.* 2012; Cala *et al.* 2013; de Graaf *et al.* 2014; Truelove *et al.* 2017).

Uncertainty associated with the habitat area estimates were not reported for the data sources used to derive the Vaz *et al.* (2022) habitat model. To evaluate uncertainty in their habitat categorizations, Vaz *et al.* (2022) compared their habitat model estimates to published seagrass habitat cover and conch fishing areas (supplemental information figure 3 in Vaz *et al.* 2022), including compilations of global geomorphic zones (UNEP–WCMC and Short 2021; Allen Coral Atlas 2020; McKenzie *et al.* 2020; Schill *et al.* 2021); studies focused on jurisdictions or regional levels (Wabnitz *et al.* 2008; Tewfik *et al.* 2017; León-Pérez *et al.* 2019); and documented fishing sites (compiled in Prada *et al.,* 2017). Overall, Vaz *et al.* (2022) found that estimates of seagrass area by jurisdiction were highly variable, and estimates of conch fishing areas were generally much lower than

the highest estimates of seagrass cover. Vaz *et al.* (2022) concluded that their final habitat model represented a conservative measurement of conch habitat throughout the Caribbean.

Comments on Existing Regulatory Mechanisms

Comment 18: Several commenters stated that local regulations are sufficient to recover the queen conch population, or that they were already effective in preventing the decline of the species in local jurisdictions.

Response: We disagree that existing regulatory mechanisms are adequate to prevent the decline of queen conch. The status review assessed the adequacy of regulatory mechanisms in each jurisdiction relative to the threats impacting the status of queen conch, and we concluded that existing regulations were unlikely to prevent queen conch from becoming in danger of extinction within the foreseeable future throughout its range.

We recognize that efforts are being made throughout the region to responsibly manage the queen conch fishery. However, many populations continue to decline, particularly in the central/southern Caribbean, despite these efforts. In addition, the regulatory mechanisms in place for minimum sizes, harvest rules, and landing methods are inadequate in many jurisdictions. For example, in many jurisdictions, current regulations allow the harvest of immature individuals. Moreover, as detailed in the proposed rule, many jurisdictions lack effective enforcement of their existing regulatory mechanisms and evidence of illegal, unreported, and unregulated (IUU) fishing undermines the ability of such mechanisms to prevent further declines. Only a fraction of the jurisdictions (*i.e.,* Belize, The Bahamas, Jamaica, Nicaragua, and Colombia) are conducting periodic surveys to inform their national harvest quotas. Several jurisdictions (*e.g.,* Curacao and Trinidad and Tobago) have no regulations despite having queen conch fisheries.

Despite some potentially effective local efforts to protect conch populations, when considering management strategies throughout the range of the species, most efforts have fallen short of their goals. Due primarily to a lack of population surveys, assessments, and monitoring, and a reliance on minimum size-based regulations that likely do not prevent the harvest of immature conch or protect spawning stocks, we conclude that existing regulatory mechanisms throughout the range of the species are inadequate to achieve their purpose of protecting the queen conch from unsustainable harvest and continued populations decline. The commenters provided no new information suggesting that new regulations have been implemented, that regulations exist that were not previously considered in making our listing determination, or that there is evidence that the existing regulations are effectively enforced or more effective than we considered.

Comment 19: Several commenters mentioned that inadequate enforcement of existing regulations is one of the primary threats to the queen conch population throughout the region. Similar comments mentioned that overutilization by IUU fishing was a significant contributor to the decline of the species.

Response: We agree that inadequate enforcement of existing regulations and IUU fishing are serious threats to the queen conch population throughout its range. We discussed these factors in the proposed rule and in response to comment 18.

Comment 20: One commenter encouraged NMFS to increase support for collaborative efforts to address IUU fishing throughout the region, because this is the largest threat that the queen conch is facing.

Response: As outlined in the status review and the proposed rule, NMFS recognizes the detrimental impact of IUU fishing on the population of queen conch as a serious threat throughout the region. We plan to work with regional stakeholders to foster collaborations and address this threat as we strive to implement actions that will promote the recovery of the species.

Comment 21: Several commenters expressed concern that the ESA listing would penalize particular regions or jurisdictions that have implemented sustainable regulations to protect queen conch as a result of detrimental actions in other jurisdictions.

Response: Under section 4(b) of the ESA, we are required to base listing decision solely on the best scientific and commercial data available after conducting a review of the status of the species, and after taking into account conservation efforts to protect the species (16 U.S.C. 1533(b)(1)(A)). When making a listing decision, we cannot consider economic impacts or other potential impacts that may result from a listing. Our decision to list the queen conch as a threatened species does not automatically result in take prohibitions, nor does it automatically impose any restrictions on trade in queen conch. However, under section 7(a)(2) of the ESA, listing does result in a requirement for Federal agencies to ensure that activities they carry out, fund, or authorize are not likely to jeopardize the continued existence of the species (16 U.S.C. 1533(d)). Section 4(d) of the ESA also authorizes us to issue protective regulations we deem necessary and advisable for the conservation of threatened species (16 U.S.C. 1533(d)). Under section 4(d) of the ESA, we may also prohibit any of the actions that are prohibited under section 9(a)(1) of the ESA for endangered species, including import into and export from the United States of the listed species. Protective regulations would be tailored specifically to prevent further decline and facilitate recovery, and would be issued through a separate rulemaking with further opportunity for public comment.

Because the queen conch is an invertebrate, we cannot list this species as distinct population segments, and therefore we cannot limit this species' listing to certain jurisdictions. Any future regulatory impacts associated with listing queen conch under the ESA apply within the United States, U.S. Territories, and any persons subject to U.S. jurisdiction. While we encourage other jurisdictions to implement actions to recover queen conch populations in light of this listing determination, we cannot enforce regulatory actions in foreign jurisdictions.

Comment 22: Several commenters suggested that NMFS consider other actions to facilitate the recovery of the queen conch population rather than an ESA listing, including regional collaborations, such as working with WECAFC or stricter CITES regulations.

Response: Section 4 of the ESA requires that we make listing determinations based solely on the best scientific and commercial data available after conducting a status review of the species and after taking into account efforts being made to protect the species (16 U.S.C. 1533(b)(1)(A)). In the proposed rule, we provided an assessment of existing regulations, including those associated with the CITES Appendix II, as well as other conservation measures currently underway in the region to account for efforts being made by any state or foreign nation to protect the species. We also evaluated the certainty of whether formalized conservation efforts will be implemented and will demonstrate effectiveness in accordance with the Policy for Evaluation of Conservation Efforts (68 FR 15100, March 28, 2003). The evaluation conducted under this policy assesses whether these conservation efforts are sufficiently certain to be implemented and effective

such that that they contribute to making it unnecessary to list a species, or to list a species as threatened rather than endangered. As explained in the proposed rule, and further expanded upon in comment 20, we concluded that existing regulatory mechanisms are inadequate to control overutilization of the species, and various protective efforts are not sufficient to change the species' risk of extinction. We acknowledge that the Seafood Import Monitoring Program of the United States includes the queen conch as one of the species monitored to combat IUU fishing and therefore promotes sustainable harvest. We are also aware of restoration efforts being carried out to promote population recovery (*e.g.,* Florida Atlantic University Queen Conch Aquaculture program), as well as the recovery of queen conch habitats, including coral reefs (*e.g.,* Coral Reef Conservation Program) and seagrasses (*e.g.,* Restore Act), all of which will in turn promote the recovery of the species. Despite fishery management regulations aimed at controlling commercial harvest, poor enforcement, inappropriate management measures, and significant IUU fishing demonstrate that the existing regulatory mechanisms throughout much of the range of the species are inadequate to control over-harvest and therefore are contributing to continued population decline. We note that the integration of efforts by FAO, CFMC, WECAFC, and the Organizacion del Sector Pesquero y Acuicola del Istmo Centroamericano (OPESCA) to coordinate and improve management and combat IUU fishing region-wide, is an encouraging sign, as their goals are to improve fishery data collection and establish reliable landings data based on scientifically supported conversion factors and management measures (Horn *et al.* 2022).

Comment 23: One commenter suggested that NMFS did not account for the ability of range states to adapt management policies based on their own queen conch population projections, such as has occurred in The Bahamas. According to this commenter, The Bahamas has greatly reduced queen conch exports in favor of meeting local demand due to population survey monitoring results.

Response: The status review report summarizes the adequacy of each jurisdiction's specific fisheries management regulations, in terms of their design and enforcement, on the status of queen conch populations across the range of the species, and includes a detailed Supplemental File describing regional management strategies (Supplemental File 1 in Horn *et al.* 2022). We understand The Bahamas policy referenced by the commenter is not an enforceable regulation, but rather a suggested policy. While we support all strategies that have the potential to reduce over-exploitation of the species, without data to support the effectiveness of such strategies, such as increased population density or increased reproductive output, we cannot rely on them to support a decision not to list a species that otherwise meets the definition of threatened.

Comment 24: Several commenters stated that their particular jurisdictions were promoting queen conch recovery via CITES management measures (including quotas, exploitation rates and density thresholds) and CRFM legislation, and therefore the ESA listing is unnecessary.

Response: The status review report and proposed rule considered existing regulations and recovery efforts, including those mentioned by the commenters (see the Inadequacy of Existing Regulatory Mechanisms section in Horn *et al.* (2022) for a jurisdiction by jurisdiction breakdown of regulatory mechanisms). We are encouraged by local recovery efforts, and intend to partner with local stakeholders to complement these types of efforts with our own to ultimately promote the recovery of the species.

Comments on Threats

Comment 25: One commenter asked what specifications allow a species to be listed under the ESA, whether different species have different specifications for a listing, whether a species can be listed based on loss of habitat, and whether overfishing of queen conch in one location can lead to a listing even if healthy populations exist elsewhere.

Response: A species is considered ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, whereas a ''threatened'' species is defined as any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. As mandated by the ESA, we are required to determine whether a species is threatened or endangered because of any of the factors identified in section 4(a)(1)(A)-(E) of the ESA. A species may be listed as threatened or endangered as a result of any one or more of those factors (threats). The particular circumstances and threats that contribute to a particular species' listing under the ESA are highly fact- and case-specific, but each listing determination must be based on the best scientific and commercial data available and be supported by those data.

One of the section 4(a)(1) factors (factor A) specifically addresses habitat loss as a potential basis for listing. However, with regard to queen conch, we concluded that at this time, the best available information indicates that habitat loss and degradation are not significantly contributing to the species' extinction risk. As outlined in the status review report, factor B, overutilization for commercial, recreational, scientific, or educational purposes, was identified as the primary contributor to the listing determination. The extinction risk analysis was conducted on the entire range of the species, assessing demographic trends, including productivity and connectivity across 39 unique jurisdictions. Overall, we concluded that overfishing, coupled with inadequate regulatory mechanisms to control overfishing, in particular jurisdictions is having adverse effects across the range of the species such that the species is likely to become an endangered species within the foreseeable throughout its range.

Comment 26: Several commenters pointed out that the exploitation rate of 8 percent for the adult queen conch populations referenced in the proposed rule was intended as a guideline to be used in data-limited situations as opposed to a firm threshold that cannot be surpassed in data-rich fisheries. These commenters suggested that their own jurisdictions could in fact surpass this threshold given the status of their monitoring programs and fishery regulations.

Response: We did not use the exploitation rate of 8 percent as a definitive threshold to evaluate the status of queen conch fisheries across all jurisdictions. Instead, we used it as a tool to flag areas that exhibited high amounts of harvest relative to the local population. We evaluated the threat of overutilization of conch populations across many factors including density thresholds, available habitat, and exploitation rate. In particular, we note that 51 percent of jurisdictions were above the 8 percent exploitation rate; 80 percent of those had densities below 100 adult conch/hectare and 65 percent had densities below 50 adult conch/hectare.

The commenters have not provided any new data or information derived from their monitoring programs beyond what was considered in the status review report and proposed rule. Moreover, the commenters did not identify better available scientific or commercial information that would lead us to change our determination.

Comment 27: Fourteen commenters recommended listing queen conch as endangered; one commenter specifically mentioned that the ESA section 4(a) risk factors support listing queen conch as an endangered species, rather than a threatened species. One commenter in particular stated that because overfishing (factor B) is reducing queen conch populations and there is no foreseeable reduction in fishing pressure, queen conch will continue on the path towards extinction, which the commenter equates with the standard for listing the species as endangered. This commenter also stated that existing regulatory mechanisms (factor D) over the past 30 years have not succeeded in recovering queen conch populations. According to this commenter, NMFS should list the species as endangered because once the population falls below critical density thresholds, it is at risk of extinction, and NMFS should not wait to list the species as endangered until this threat becomes more severe, which the commenter believes will occur in less than 30 years.

Response: We disagree that the queen conch should be listed as an endangered species. As explained in the proposed rule, the key statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either now (endangered) or in the foreseeable future (threatened). We have concluded that the queen conch is not presently in danger of extinction, but is likely to become so in the foreseeable future. The status review team conducted an extinction risk analysis whereby risk categories (*i.e.,* low, medium, high) were assigned to the threats and the demographic risks to the species throughout its range. Guided by the results of their demographic risk analysis and the threats assessment, the status review team used their informed professional judgement to make an overall extinction risk determination for the queen conch. The SRT ultimately concluded that queen conch is facing a moderate risk of extinction, meaning that it is on a trajectory that puts it at a high level of extinction risk within the foreseeable future.

As stated in the proposed rule and in our response above to comment 4, we evaluated the SRT's conclusions regarding extinction risk and ongoing and planned conservation efforts for queen conch. We considered each of the statutory factors to determine whether it presented an extinction risk to the queen conch on its own, now or in the foreseeable future, and also considered the combination of those factors to determine whether they collectively contribute to the extinction risk of the species, currently or in the foreseeable future. Based on our consideration of the best available scientific and commercial information, as summarized here, including the SPR analysis, we conclude that while queen conch is not currently in danger of extinction throughout all or a significant portion of its range, it is likely to become so within the foreseeable future as a result of ESA section 4(a)(1) factors: B (overutilization for commercial, recreational, scientific, or educational purposes); D (inadequacy of existing regulatory mechanisms to address identified threats); and E (other natural or human factors affecting its continued existence).

We conclude that the species does not currently have a high risk of extinction due to its broad distribution, its presence throughout its geographic range, and the significant connectivity between reproductively viable locations and other locations with reduced populations throughout the species' range. The commenters did not provide any new or better information about any threats that NMFS failed to consider in reaching its determination that the species' extinction risk is in the foreseeable future. Nor did the commenters suggest that NMFS relied on anything other than the best available information in assessing the threats.

Based on our consideration of the best data available, and as explained above, we do not find that queen conch is presently in danger of extinction. We also disagree that a species that is currently on a path towards extinction is necessarily equivalent to a species that is currently in danger of extinction. A species that is on a path towards extinction is, however, consistent with our determination in this case that queen conch is likely to become endangered in the foreseeable future, *i.e.,* threatened.

While we agree with the commenter that factor D is a threat to the species, we disagree that this threat means the species is currently at risk of extinction. Our decision to list the species as threatened does not mean that we will wait until the threats become more severe before we undertake actions to recover the species. To the contrary, after the species is listed, we will work on developing a recovery plan that will guide future efforts to change the species' trajectory toward recovery. To the extent this comment disagrees with NMFS's definition of the foreseeable future, we address that comment in response to comment 29.

Thus, while we recognize that the commenters would have reached a different assessment of the species' extinction risk based on the information NMFS relied upon, the commenters did not provide any information that would change our conclusion that the queen conch is not presently in danger of extinction, but is likely to become an endangered species within the foreseeable future.

Comment 28: One commenter stated that queen conch should be listed as endangered because ocean temperature, ocean acidification, and possible changes in Caribbean circulation patterns, all of which are associated with climate change (factor E), represent serious threats to the continued viability of the queen conch. This commenter also stated that because NMFS determined that the foreseeable future for climate change extends out to the year 2100, there may not be sufficient levels of queen conch to protect, or enough density to continue reproducing, given the current decline.

Response: NMFS agrees with the commenter that ocean temperature, ocean acidification, and changes in circulation patterns present threats to queen conch. We disagree, however, that these climate-change associated threats mean the species is currently at risk of extinction and thereby warrant listing the species as endangered. The climate-change associated threats have been evaluated for the foreseeable future *(i.e.,* to the year 2100), when we expect them to present greater challenges to the viability of queen conch. If a species is at risk of extinction in the foreseeable future, but not presently, then a threatened listing is warranted instead of an endangered one.

We selected a longer timeframe associated with the threat of climate change, out to the year 2100, because of the availability of long-term predictions of increasing climate change and associated predicted impacts on queen conch. The commenter did not provide a scientifically defensible alternative to the foreseeable future values that were developed and applied in the status review report. With respect to the year 2100 (equal to roughly 8–18 generations), the commenter is concerned that populations of queen conch will be too depleted to be recovered at that time, if they do not receive the protections of an endangered status. We also note that by listing queen conch as a threatened species, the goal is to alleviate the effects of such threats before the species becomes endangered. Once listed under the ESA, we are required to review the status of the species every 5 years, thereby ensuring that we monitor the status of

this species and the appropriateness of its classification as threatened.

As explained in response to comment 27, our determination that the species is likely to become in danger of extinction in the foreseeable future (*i.e.,* threatened) does not mean that we will wait until the effects associated with climate change occur before undertaking actions to recover the species. While the commenter disagrees with our assessment that 2100 represents the foreseeable future as it relates to climate change (factor E), the commenter does not assert that threats associated with climate change represent an imminent extinction risk for queen conch. Thus, even if the commenter believes NMFS should have selected a shorter timeframe as the foreseeable future associated with climate change, the commenter's acknowledgement that climate change presents threat to species' risk of extinction within the foreseeable future is consistent with our determination to list the species as threatened.

Comment 29: One commenter asserted that NMFS erred in limiting the foreseeable future as 30 years for factors B and D. The commenter stated that previous management measures that were enacted well over 30 years ago have yet to recover populations in individual jurisdictions.

Response: The ''foreseeable future,'' in the context of an ESA status review, is the time period over which we can reasonably determine that both the future threats and the species' responses to those threats are likely. After we published the proposed rule to list queen conch as a threatened species, NMFS and the USFWS jointly proposed to revise the interpretation of ''foreseeable future'' in the definition of a ''threatened species,'' as extending as far into the future as we can reasonably rely on information about the threats to the species and the species' responses to those threats (88 FR 40764, June 22, 2023). Applying either interpretation, we must have a reasonable degree of confidence in the prediction based on the best available information. Regarding listing factors B and D, the foreseeable future of 30 years indicates that we anticipate both the threats associated with those factors and their continued impact on queen conch are likely to be realized over that period. As the commenter points out, restrictions that were put in place over 30 years ago (equal to roughly 3–6 generations) have not resulted in fully recovered populations; however, some of those specific jurisdictions (*e.g.,* Florida) have seen initial signs of recovery which have resulted in some of the highest densities of aggregating individuals (Delgado and Glazer 2020) recorded throughout the range of the species. Additionally, recovery within a particular jurisdiction will depend on the larval dynamics associated with that sub-population, such that self-recruiting populations will have greater benefits resulting from no-take prohibitions, while other jurisdictions will need to rely on upstream sub-populations to augment recovery.

We continue to find that the foreseeable future timeframes applied to queen conch are appropriate and that we can reasonably determine that both the threats and the species' responses to the threats are likely to occur within those timeframes.

Comment 30: One commenter asserted that NMFS failed to analyze all of the statutory factors in ESA section 4(a)(1)(A)–(E) when determining whether queen conch should be listed as endangered or threatened. Namely, the commenter indicated that NMFS failed to analyze factors A (*e.g.,* the present or threatened destruction, modification, or curtailment of its habitat or range) and C (*e.g.,* disease or predation). The commenter went on to assert that the habitat of queen conch exhibits destruction and curtailment throughout its range, which is likely a result of risk factors B, D, and E. The commenter further indicated that climate change will exacerbate this destruction and therefore precautionary actions should be taken to acknowledge the habitat destruction in the jurisdiction of the United States.

Response: We disagree. We considered all five statutory factors (ESA section 4(a)(1)(A)–(E)) in reaching our determination that the queen conch warrants listing as a threatened species under the ESA. With respect to factor A, the SRT concluded that (i) habitat stability, quality, and resilience is decreasing in many parts of the Caribbean due to anthropogenic activities that have led to direct and indirect impacts to seagrass and substrate, which are important to queen conch, (ii) increased pollutants, contaminants, and microplastics are impacting conch via their habitats, and (iii) the severity of these habitat related threats depend on the spatial scope and temporal persistence of the specific activities and the local demographics of queen conch populations. Nonetheless, the SRT concluded that the best available information indicates that habitat loss and degradation alone are not threatening the species' persistence. Additionally, with respect to factor C, we concluded that the best available information indicates that an organism, which may be parasitic, is prevalent in all the sampled conch specimens throughout the Caribbean and that several studies suggest that the organisms are correlated with irregularities in reproductive cycles and reduced gametogenesis, while other studies are contradictory, suggesting that the organisms had no negative effects on health or reproduction. With respect to predation, the SRT concluded it is not believed to currently be a factor that is influencing the status of queen conch.

As explained in the proposed rule, we concluded that the SRT's findings on all five factors in ESA section 4(a)(1)(A)–(E), including factors A and C, were well-considered and based on the best available scientific information. We concurred with the SRT's assessment and found that the best available information does not indicate that factors A and C are operative threats on this species (87 FR 55209, September 8, 2022).

Comment 31: One commenter mentioned that it was contradictory to state that ESA section 4(a) risk factor A was not significantly contributing to the extinction of the species, while also acknowledging that specific jurisdictions may require habitat protections or regulations, adding that such measures would not be warranted if no threats to the species' habitat existed.

Response: We disagree that the need for measures to protect a species' habitat means that factor A must always be significantly contributing to the extinction risk of the species. In this case, the present or threatened destruction, modification, or curtailment of the species' habitat or range is not currently a factor contributing to the queen conch's overall extinction risk. At the same time, there are some areas, such as in Bermuda, where regulations aimed at protecting local habitat or water quality may be warranted. The fact that one jurisdiction may need additional measures to protect queen conch habitat within that jurisdiction does not necessarily mean that habitat destruction, modification, or curtailment is contributing to the species' extinction risk throughout all or a significant portion of its range.

Comment 32: Several commenters asserted that NMFS failed to provide a substantive analysis of the cumulative impact of the five factors (ESA section 4(a)(1)(A)–(E)). These commenters suggested that the cumulative impact of threats to queen conch supports listing the queen conch as an endangered species, rather than a threatened

species. The commenter further asserted that NMFS failed to provide any quantitative or qualitative assessments or estimates of the overall extinction risk for the queen conch.

Response: We disagree. NMFS considered all five listing factors in combination in determining whether to list the queen conch under the ESA. The analysis in the status review report considered and evaluated the species overall extinction risk resulting from the threats assessment as well as the demographic assessment. The overall extinction risk analysis ranking considers the cumulative impact of all identified threats and risks to the species. In the proposed rule, we describe in detail the relationship between the inadequacy of existing regulatory measures and enforcement to control the threat of overutilization, which translates into demographic concerns of low reproductive densities and disrupted population connectivity. Additionally, in our discussion of indirect impacts of climate change on queen conch (as part of our discussion of factor E), we discuss how higher temperatures could impact the availability of sea grasses and oxygen and salinity levels, all of which would impact the species habitat, food sources and availability of shelter from predators. We also discuss how ocean acidification could affect shell formation, which plays a vital role in protection from predators, parasites, and unfavorable environmental conditions.

We acknowledge that more information is needed to better understand the population consequences of multiple stressors, especially those associated with interactions between long-term climate change such as sea level rise and increased erosion, turbidity, siltation, and severity of tropical storms. These threats have the potential to produce more widespread impacts, especially as they affect key ecological processes during early life stages such as larval dispersal, growth, and predation and whether presence of parasites increases the species' extinction risk. Despite this need for more information and as explained above in our response to comment 27, we disagree that queen conch is currently at risk of extinction and should be listed as an endangered species. We find that the best available scientific and commercial information indicates that the species is likely to become ''endangered'' (in danger of extinction) ''within the foreseeable future,'' which is consistent with listing the species as threatened.

In support of this listing determination, the SRT conducted a qualitative assessment of the overall extinction risk for the queen conch. This assessment is discussed in detail in the status review report (Horn *et al.* 2022). There is no requirement under the ESA that NMFS conduct a quantitative assessment of extinction risk, and sufficient data to perform quantitative analyses of extinction risk are often not available. As we described in the proposed rule, based on demographic risk factors and threats to the species, the SRT evaluated the overall extinction risk for queen conch using a ''likelihood point'' (Forest Ecosystem Management Assessment Team 1993) method to express each team member's assessment of extinction risk across all factors and capture their uncertainty in that assessment. As discussed in more detail in the status review report, each of the 7 SRT members distributed 10 ''likelihood points'' among 3 extinction risk categories: (1) low risk; (2) moderate risk; and (3) high risk. The SRT placed 59 percent of their likelihood points in the ''moderate risk'' category. Due to uncertainty, particularly regarding consistent reporting of landings and survey methodologies, the SRT also placed some of their likelihood points in the ''low risk'' (30 percent) and ''high risk'' (11 percent) categories. Based on this analysis, the SRT concluded that the queen conch is currently at a ''moderate risk'' of extinction. We agreed that the SRT's approach to assessing the extinction risk for queen conch was appropriate, consistent with our agency practice, and based on the best scientific and commercial information available. After considering the SRT's assessment, we concluded that the queen conch is not currently in danger of extinction, but is likely to become so in the foreseeable future throughout all of its range.

Comments on Social, Economic, or Cultural Factors

Comment 33: Several commenters provided a social or cultural rationale as to why the species should not be listed under the ESA. The commenters referred to the cultural and social importance of queen conch in the form of traditional cuisine, subsistence, nutrition, and historical cultural values and beliefs.

Response: NMFS is mandated under the ESA to determine whether a species is an endangered or threatened species ''solely on the basis of the best scientific and commercial data available'' (16 U.S.C. 1533(b)(1)(A). Therefore, we are not allowed to consider social, economic, or cultural factors when deciding whether to list a species under the ESA. Within U.S. jurisdiction, the listing of listing queen conch as a threatened species under the ESA does not create additional user regulations beyond those that are already in place; therefore, this rule is not anticipated to impact the cultural or social importance of queen conch within the United States. The ESA listing will have no effect on the citizens of other nations, outside the jurisdiction of the United States, and thus would not restrict traditional uses there. Any potential regulations under the authority of the ESA for the species would be developed through a separate rulemaking process under section 4(d) of the ESA, whereby NMFS can tailor the rule to specifically address conservation needs. Public comment would be solicited and considered, along with economic and social impacts, in the development of any future 4(d) regulations.

Comment 34: Several commenters suggested that better outreach and educational programs are needed to inform stakeholders about how species can get listed under the ESA, citing concerns over equity and environmental justice. Specifically, commenters suggested that NMFS coordinate with under-served communities to promote outreach and education opportunities due to unawareness of regulations and local management strategies.

Response: Prior to publication of the proposed rule, NMFS sent Spanish-speaking staff to discuss the queen conch status review with the CFMC and WECFAC working groups. Following publication of the proposed rule, NMFS provided English, Spanish, French, Dutch, and Creole versions of the proposed rule; along with English and Spanish versions of Frequently Asked Questions. Additionally, NMFS provided an after-hours virtual public hearing presentation and question and answer session, with live Spanish-language interpretation services and English, French, German, Spanish, and Italian closed captioning translation options. Spanish-speaking staff have attended several CFMC and District Advisory Panel meetings to provide presentations and updates on queen conch rulemaking.

Although NMFS has made good faith efforts to engage under-served communities in the development of this final rule, we recognize there is room for improvement. NMFS identified outreach and engagement as a core component of the new national Equity and Environmental Justice (EEJ) strategy released in May of 2023 (*https://media.fisheries.noaa.gov/2023-05/NOAA-Fisheries-EEJ-Strategy-Final.pdf*). The three overarching goals of the strategy are to: (1) prioritize

identification, equitable treatment, and meaningful involvement of underserved communities; (2) prioritize equitable delivery of services; and (3) prioritize EEJ in our mandated and mission work with demonstrable progress. Our outreach and engagement objective aims to build relationships with underserved communities to better understand their engagement preferences and improve information sharing with all communities.

We are currently working to operationalize the national EEJ strategy in the Southeast Region through the development of a Southeast EEJ Implementation Plan. That plan is being informed by feedback we received in response to a public Request for Information, along with information we obtained through a series of focus group meetings conducted with underserved community members and liaisons throughout the region. We will continue to coordinate with underserved communities on outreach and education initiatives as we work to incorporate EEJ into the vital services we provide to all communities.

Comment 35: One commenter suggested that NMFS should increase outreach and education programs to warn fishers of the dangers of IUU fishing and overexploitation as there is a lack of awareness of local management strategies and regulations.

Response: We agree that increased outreach and education programs could promote queen conch fishery sustainability throughout the region, and we look forward to working with regional partners to promote such programs, as appropriate, to facilitate the recovery of the species.

Comment 36: Several commenters requested that the public documents, presentations, rulings, listings in the **Federal Register**, and other communications put forward by NMFS should be provided in Spanish.

Response: The issue of language alternatives was brought to our attention early on during the public comment period. In response, we provided English, Spanish, French, Dutch, and Creole versions of the proposed rule; English and Spanish versions of Frequently Asked Questions and the public hearing presentation; and live Spanish-language interpretation services and English, French, German, Spanish, and Italian closed captioning translation options for the public hearing. To the extent possible, we will similarly prepare English, Spanish, French, Dutch, and Creole versions of the final rule, and we will continue to provide English and Spanish versions of frequently asked questions and other documents that will be developed as a part of the recovery planning process.

Comment 37: One commenter suggested that NMFS is undermining local stakeholders to ensure that the queen conch is listed under the ESA.

Response: While we disagree with the commenter's assertion, we recognize the important role of stakeholders as we work together to recover the species. NMFS received a petition to list the species, and we are carrying out our statutory responsibilities under the ESA. Listing queen conch as a threatened species under the ESA recognizes the objectively determined status of the species and provides support from the Federal Government towards the recovery of the species.

Comment 38: One commenter suggested that NMFS is implementing ''draconian measures'' on resources in the U.S. Caribbean, which equates to ''institutional racism and discrimination.'' The commenter elaborated by mentioning that these issues fall under ''equity and environmental justice.''

Response: We disagree. By listing a species under the ESA, NMFS is executing its statutory responsibilities. As required by the ESA, we based our listing determination solely on the best scientific and commercial data available regarding the status of the species. Our procedures, some prescribed by statute and others by Agency regulations or policies, are focused on ensuring that our decisions are objective and based on the best available science. We recognized the need for further engagement with local stakeholders beyond conventional means, particularly to solicit input from underrepresented, marginalized, and underserved communities that may not have the technical training, technology, or experience needed to provide public comment via traditional platform, as explained in response to comment 34. As we develop further actions related to the queen conch, NMFS will continue to work to find ways to meaningfully engage with local stakeholders to promote the recovery of the species.

Comment 39: One commenter referenced the United Nations sustainable development goal 10, to ''Reduce inequality within and among countries.'' The commenter expressed concern that the listing determination would inadvertently lead to inequality and limit inclusion by stakeholder groups.

Response: We disagree that our determination to list queen conch as a threatened species will lead to inequality and limit inclusion by stakeholder groups. We note that listing of queen conch under the ESA has no regulatory effect beyond those required through ESA section 7 that Federal agencies consult with us on actions they authorize, fund, or carry out if those actions may affect the listed species or designated critical habitat within our jurisdiction. Under the ESA, we are also required to designate critical habitat for listed species to the maximum extent prudent and determinable (16 U.S.C. 1533(a)(3)(A)(ii). Per our implementing regulations, however, we cannot designate critical habitat within foreign countries or in other areas outside the jurisdiction of the United States (50 CFR 424.12(g)).

While we acknowledge that economic, social, and cultural considerations cannot be considered during the listing process, we note that the listing determination was based on the best available science, and we took measures to ensure broad and inclusive stakeholder participation. Public comments were solicited and received after the 90-day positive finding (77 FR 51763, December 6, 2019) and again for an extended period after the publication of the proposed listing (87 FR 55200, September 8, 2022; 87 FR 67853, November 10, 2022). As noted above, substantial efforts were made to provide materials across numerous languages and to engage with stakeholders throughout the range of the species. Our public hearing, held on November 21, 2022, was formally noticed to representatives from over 30 state, Federal, and international organizations including CITES; WECAFC; CRFM; CFMC; the United States Department of State; the United States Congress; State/Territorial partners; over 6,000 subscribers to our Fishery Bulletin, including 4,000 in the U.S. Caribbean; and many others.

Should further rulemaking be initiated through section 4(d) of the ESA, other factors including economic, social, and cultural considerations can be incorporated into the decision making process. This process would provide additional opportunities for public comment, community engagement, and stakeholder inclusion.

Comment 40: Several commenters referenced the economic importance of queen conch to their fisheries, and commented that any further restrictions on catch would hinder economic growth and fishing community prosperity.

Response: NMFS is mandated under the ESA to make listing decisions ''solely on the basis of the best scientific and commercial data available,'' after conducting a review of the status of the species and taking into account the efforts being made by any state or

foreign nation to protect the species. While we recognize the economic importance of queen conch to fishing communities, we cannot consider social, economic, or cultural impacts that may stem from a species' listing when determining whether to list that species under the ESA. Additionally, no fishing restrictions are being proposed at this time. Listing the species as threatened under the ESA does not automatically establish any take prohibitions, which would apply if the species were listed as endangered. However, based on our review of the current population trends of the species and the inadequacy of existing regulations to control the ongoing threat of overutilization, we intend to propose protective regulations pursuant to section 4(d) for queen conch in a future rulemaking. A future rulemaking on protective regulations will include an opportunity for additional public comment, including any comments related to the economic importance of queen conch. We will also develop a recovery plan for queen conch to identify actions and establish goals for conserving and recovering the species. The development of the recovery plan will also include an opportunity for public comment.

Comment 41: Several commenters pointed out that exports of queen conch out of their jurisdictions are already highly regulated and that the level of exports comply with CITES regulations to ensure sustainable resource use. Many of these commenters also mentioned that exports were primarily distributed to the United States and therefore U.S. law should not create any additional regulations that will inhibit exports of queen conch from their jurisdictions.

Response: In making our listing determination, we reviewed the best scientific and commercial data available and ultimately concluded that the species warrants listing as a threatened species under the ESA. Foreign regulatory measures and actions of other stakeholders, including a detailed analysis of management measures by jurisdiction, were considered during our determination. In the proposed rule, we reviewed existing regulatory measures and concluded that existing regulations are inadequate to control the ongoing threats of overutilization and climate change. We determined that despite CITES measures to ensure sustainable resource use, the species is likely to become endangered within the foreseeable future and therefore warrants a threatened listing status. A threatened listing under the ESA does not automatically establish any restrictions on imports into the United States. However, as stated in our response to comment 40, we recognize the threat of overutilization throughout the range of queen conch and we intend to propose protective regulations pursuant to section 4(d) for the queen conch in a future rulemaking. Such regulations, including any potential import restrictions, will be proposed in a separate rulemaking that will include an opportunity for additional public comment. We will also consider any comments related to export compliance with CITES regulations further in the subsequent rulemaking regarding protective regulations.

Comment 42: Several commenters mentioned that consumption of queen conch within local markets was exceptionally low and that their local fishery was only profitable by exporting their product, while others mentioned that local consumption was the only queen conch market that exists. These commenters assert that fishers within local jurisdictions do not apply sufficient fishing pressure to overharvest the species due to limited local demand and harvesting strategies.

Response: The proposed rule identified overutilization of the resource in the form of extraction as the primary threat to queen conch throughout its range. Many commenters provided evidence of industrial fishing driven by exports while others provided anecdotal evidence of high local consumption. We agree that industrial-scale fishing is a primary threat to the species. As we explain in the proposed rule, fishing pressure for local consumption remains difficult to quantify and varies considerably among locations. The high degree of impact from industrial fishing combined with the uncertainty of subsistence fishing efforts supports our decision to list the queen conch as threatened throughout its range. Although the contributions of industrial, artisanal, and IUU fishing are challenging to discretely quantify, the status review report clearly shows that overutilization, in aggregate, has contributed to declines in reproductive densities and fishery failures in many jurisdictions.

Comments on Recovery Planning and Recovery Actions

Comment 43: One commenter requested that NMFS implement protective measures that incentivize good practices instead of punishing unsustainable practices, recognizing that a collaborative, regional approach is essential to recover the species.

Response: We will consider these comments in a subsequent rulemaking regarding protective regulations under section 4(d), which will include an opportunity for additional public comment. We will also consider these comments when we develop a recovery plan under section 4(f) of the ESA. We agree that a collaborative, regional approach is essential to recover the species.

Comment 44: One commenter requested that NMFS take specific actions related to the queen conch population in Florida. These requests include: (1) limit the social, economic, and cultural impact of the ESA listing to communities that depend on the imports, cultural significance, and tourism associated with the species, such as in the Florida Keys; (2) develop criteria to identify sustainable commercial fisheries throughout the Caribbean to allow for the import, export, and sale of commercially harvested queen conch in these fisheries; (3) coordinate an aquaculture program to further develop the capacity of existing operations and to promote new operations for recovery and commercial aquaculture purposes; (4) allow for the possession of queen conch shells, as it would be impossible to determine existing products compared to newly extracted ones; and (5) allow for conservation activities that are currently being carried out to continue unhindered.

Response: The actions requested by this commenter go beyond the scope of this rule. Subsequent actions, including developing a recovery plan, can consider these actions requested by this commenter. Similarly, any potential take prohibitions we might develop under the authority of ESA section 4(d) can be specifically tailored to consider regional needs. Therefore, we will consider this comment in the context of future actions, including recovery planning, and any separate rulemaking we may undertake pursuant to ESA section 4(d).

Comment 45: Several commenters requested that they be consulted and included in strategies to enhance the recovery of the species moving forward.

Response: We thank these commenters for identifying their interest in the recovery planning process. NMFS intends to work with regional stakeholders to identify the most effective actions and the best strategies to promote the recovery of the species. This will include consultations with stakeholders and recovery planning based on the best available information.

Comment 46: One commenter recommended that NMFS establish a regional initiative with the following components: (1) define and standardize

a queen conch assessment method; (2) standardize survey designs; (3) develop a more robust monitoring design, ideally using electronic monitoring; and (4) apply the developed initiative in three pilot countries to determine effectiveness and analyze the results.

Response: We appreciate these suggestions, although they are beyond the scope of this rule. The actions requested are appropriate for evaluation during the recovery planning process. During the development of the recovery plan, NMFS will consider this comment and solicit additional information and recommendations from a variety of stakeholders to develop effective strategies to promote the recovery of queen conch throughout its range.

Summary of Changes From the Proposed Listing Rule

We did not receive, nor did we find, data or references that presented substantial new information that would cause us to change our proposed listing determination. We did however, receive nine sources of new data (see comment 1), eight of which provided data that fit within the range of estimates considered in the status review report (Horn *et al.* 2022) and proposed rule. As stated above, the ninth new data source provided data that was derived using experimental methodology that has yet to be sufficiently validated and is not considered the best scientific information available. Therefore, while the new data contributed to our overall understanding of population dynamics and provided more refined local density estimates for populations in Antigua and Barbuda, The Bahamas, Belize, Florida, Nicaragua, San Andres Islands in Colombia, St. Vincent and the Grenadines, and the USVI, they did not alter the outcomes of the extinction risk analysis nor our interpretation of risk factors across the range of the species.

After the publication of our proposed rule (87 FR 55200, September 8, 2022) and during our analysis of public comments, NMFS adopted a new set of guidelines with regards to climate considerations during rulemaking processes. On May 9, 2023, NMFS officially recognized climate scenario SSP3–7.0 as the most likely predictor of future climate conditions, and therefore the climate scenario that should be used to evaluate climate change effects under the ESA. The proposed rule evaluated the ESA section (4)(a)(1) factors (specifically factor E) using the climate scenario SSP5–8.5. Climate scenario SSP3–7.0 is characterized by emissions and temperatures rising steadily, with carbon dioxide emissions roughly doubling and average temperatures rising by 3.6 °C from current levels by 2100. While this scenario is more optimistic than scenario SSP5–8.5, the effects to queen conch and the corresponding extinction analysis are equivalent, as explained more fully below. ESA section 4(a)(1) factor E, other natural or man-made factors affecting the continued existence of the species, was highlighted by the SRT as one of the risk factors that was relevant to the listing determination in that climate change is significantly contributing to the species extinction risk in the foreseeable future, which in this case is the year 2100. The SRT highlighted high carbon dioxide levels, higher mean sea surface temperature, and possible changes to the Caribbean Sea circulation patterns as major threats to the species. The corresponding effects are predicted to include disruption to shell formation due to acidic ambient water conditions, negative implications on reproduction, and impacts to population-level connectivity and recruitment, respectively. The associated extinction analysis under climate scenario SSP5–8.5 was also conducted with the considerations into the foreseeable future (*i.e.,* 2100).

The climate considerations in the proposed rule represent a range of values and were used to analyze the effects on queen conch biology using possible trends that may occur under climate scenario SSP5–8.5. The environmental changes anticipated within the range of the species under climate scenario SSP3–7.0 do not alter our interpretation of anticipated trends in the climate change risk factor, nor do they affect our corresponding extinction analyses. Specifically, decreases in aragonite and larval shell calcification can occur at pH levels of 7.6–7.7, which are projected to occur by 2100 under climate scenario SSP3–7.0 due to elevated carbon dioxide levels. The anticipated mean sea surface temperature increases under scenario SSP3–7.0 are within the range evaluated in the status review report of 1.1–6.4 °C; thus, changes in reproductive biology are still anticipated. Additionally, the increase in water temperatures and its effects on circulation patterns in the Caribbean anticipated under climate scenario SSP3–7.0 are not substantively different from those considered in the proposed rule under SSP5–8.5, with similar impacts to conch connectivity and recruitment. Thus, the conclusions contained in the status review and determinations based on those conclusions in the proposed rule are reaffirmed in this final action.

ESA Section 4(a)(1) Factors Affecting the Queen Conch

As stated previously and as discussed in the proposed rule (87 FR 55200, September 8, 2022), we considered whether any one or a combination of the five threat factors specified in section 4(a)(1) of the ESA is contributing to the extinction risk of the queen conch. Several commenters provided additional information related to threats, such as overutilization, IUU fishing, inadequate regulatory mechanisms, and climate considerations. The information provided was consistent with or reinforced information in the status review and proposed rule, and thus, did not change our conclusions regarding any of the section 4(a)(1) factors or their interactions. Therefore, we incorporate and affirm herein all information, discussion, and conclusions regarding the factors affecting the queen conch from the status review report (Horn *et al.* 2022) and the proposed rule (87 FR 55200, September 8, 2022).

Protective Efforts

In addition to regulatory measures (*e.g.,* fishing regulations, seasonal closures, spatial closures, etc.), we considered other efforts being made to protect the queen conch. We assessed whether such protective efforts altered the conclusions of the extinction risk analysis for the species; however, none of the information we received on the proposed rule affected our prior conclusions regarding conservation efforts to protect the queen conch. Therefore, we incorporate and affirm herein all information, discussion, and conclusions on the extinction risk of the queen conch in the status review report (Horn *et al.* 2022) and proposed rule (87 FR 55200, September 8, 2022).

Final Listing Determination

We reviewed the best available scientific and commercial information, including the information in the status review report (Horn *et al.* 2022). Based on the status review report, our evaluation of protective efforts, and consideration of all public comments, we determine that the queen conch meets the definition of a threatened species under the ESA. We find that the queen conch is in danger of extinction in the foreseeable future throughout all of its range as a result of ESA section 4(a)(1) factors B, D, and E. We summarize the results of our determination as follows: (1) The most significant threat to queen conch is overutilization; (2) Existing regulatory mechanisms including morphometric

and exploitation thresholds, compliance, and enforcement are insufficient to protect the species from growth overfishing and poaching, including IUU fishing, throughout the Caribbean; (3) The majority of jurisdictions are below the minimum adult density threshold required to support mate finding (*i.e.,* 100 adult conch/hectare). These populations are not reproductive and unlikely to be contributing to recruitment and population growth; (4) The species currently suffers from low population densities and poor recruitment throughout a vast majority of its range and experiences limited larval dispersal and interrupted population connectivity; (5) The Caribbean region is likely to be impacted by climate change, and those adverse impacts, while not yet fully realized, could have devastating implications for queen conch over the next century (*i.e.,* by 2100). Based on the demographic risks and threats under ESA section (4)(1)B, D, and E, we have concluded that queen conch is likely to become an endangered species in the foreseeable future throughout its range. However, as stated in the proposed rule and reiterated here, we concluded that the species does not currently have a high risk of extinction such that it warrants listing as an endangered species due to the following: the species has a broad distribution and still occurs throughout its geographic range and is not confined or limited to a small geographic area; the species does not appear to have been extirpated from any jurisdiction and can still be found, albeit at low densities in most cases, throughout its geographic range; and there are several jurisdictions that have queen conch populations that are currently disproportionately contributing to the viability of the species, such that the species is not presently at risk of extinction. After considering efforts being made to protect the species, we conclude that existing conservation efforts are insufficient to alter the extinction risk. We evaluated 51 different portions of the species range at 4 different geographic scales and determined that none are at ''high risk'' of extinction but some are likely to become so in the foreseeable future. Therefore, our conclusion regarding the species' overall extinction risk does not change based on consideration of status of the species within portions of the species' range, and thus we find that queen conch is not currently in danger, but is likely to become an endangered species within the foreseeable future throughout all of its range. Accordingly, we have determined that the queen conch warrants listing as a threatened species under the ESA.

Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include the development and implementation of recovery plans (16 U.S.C. 1533(f)); designation of critical habitat (16 U.S.C. 1533(a)(3)(A)); and a requirement that Federal agencies consult with NMFS under section 7 of the ESA to ensure their actions are not likely to jeopardize the continued existence of the species or result in adverse modification or destruction of designated critical habitat (16 U.S.C. 1536). An endangered species automatically receives protections against ''take'' under section 9 of the ESA. The ESA defines take to mean ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' (16 U.S.C. 1532(19)). The ESA section 9 prohibitions do not automatically apply to species listed as threatened; however, we may extend any of these prohibitions to threatened species through a regulation issued under section 4(d) of the ESA (16 U.S.C. 1533(d)). Section 4(d) of the ESA also directs the Secretary of Commerce to develop regulations that the Secretary ''deems necessary and advisable to provide for the conservation of [a threatened] species.'' Recognition of the species' imperiled status through listing may also promote conservation actions by Federal and state agencies, foreign entities, private groups, and individuals.

Identifying ESA Section 7 Consultation Requirements

Section 7(a)(2) of the ESA (16 U.S.C. 1536(a)(2)) and joint NMFS and USFWS regulations (50 CFR part 402) require Federal agencies to consult with us on actions they authorize, fund, or carry out if those actions may affect the listed species or designated critical habitat. Based on currently available information, we conclude that examples of Federal actions that may affect the queen conch include but are not limited to: Fishery harvest and management, renewable energy projects, discharge of pollution from point sources, non-point source pollution, contaminated waste and plastic disposal, dredging, pile-driving, development of water quality standards, military activities, beach renourishment, coastal construction, and shoreline development.

Critical Habitat

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(5)) as: (1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed, if such areas are determined to be essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary. Designation of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat.

Section 4(a)(3)(A) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the maximum extent prudent and determinable, critical habitat be designated concurrently with the listing of a species, unless as described in section 4(b)(6)(C), critical habitat is not then determinable, in which case we may take an additional year to publish the final critical habitat determination (16 U.S.C. 1533(b)(6)(C)(ii)). In our proposal to list the queen conch, we requested information on the identification of specific features and areas in U.S. waters that may meet the definition of critical habitat for the queen conch (87 FR 55200, September 8, 2022). We received and considered six comments that specifically provided information to inform the determination of critical habitat. We conclude that critical habitat is not determinable at this time for the following reasons: (1) Sufficient information and analysis are not currently available to assess the impacts of designation; and (2) Sufficient information and analysis are not currently available regarding the physical and biological features essential to conservation. We will continue to evaluate potential critical habitat for the queen conch, and we intend to consider critical habitat for this species in a separate action.

ESA Section 9 Take Prohibitions

Because we are listing the queen conch as threatened, the prohibitions under section 9 of the ESA will not automatically apply to this species. As described below, ESA section 4(d) leaves it to the Secretary's discretion whether, and to what extent, to extend the section 9(a) prohibitions to threatened species, and authorizes us to issue regulations that are deemed

necessary and advisable to provide for the conservation of the species.

Protective Regulations Under Section 4(d) of the ESA

As discussed previously, NMFS has flexibility under section 4(d) to tailor protective regulations based on the needs of and threats to the species. Section 4(d) protective regulations may prohibit, with respect to threatened species, some or all of the acts which section 9(a) of the ESA prohibits with respect to endangered species. We are not proposing such regulations at this time, but may consider potential protective regulations pursuant to section 4(d) for the queen conch in a future rulemaking.

Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review. The primary purpose of the Bulletin is to improve the quality and credibility of scientific information disseminated by the Federal government by requiring peer review. To satisfy our requirements under the Bulletin, we solicited peer review comments on the draft status review report from three scientists with specific knowledge regarding queen conch. We received and reviewed comments from these scientists, and, prior to publication of the proposed rule, their comments were incorporated into the status review report (Horn *et al.* 2022), which was then made available for public comment. Peer reviewer comments on the status review report are available at *https://www.noaa.gov/organization/information-technology/information-quality-peer-review-id425.*

Information Solicited

Subsequent to this listing, as required by ESA, we will evaluate whether any locations within U.S. waters meet the definition of critical habitat for queen conch and designate any critical habitat as appropriate. We request interested persons to submit relevant information related to the identification of critical habitat and essential physical or biological features for this species, as well as economic or other relevant impacts of designation of critical habitat for the queen conch. Physical and biological features essential to the conservation of the species include, but are not limited to, features specific to queen conch habitats and life history characteristics within the following general categories: (1) space for individual growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for reproduction and development of offspring; and (5) habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of the species.

In addition, while we are not proposing any protective regulations under section 4(d) at this time, we intend to propose protective regulations to conserve queen conch throughout its range in the future. These regulations may prohibit for the threatened queen conch one or more of the acts prohibited by section 9(a)(1) of the ESA for endangered species. Examples of measures that may be included in protective regulations include prohibiting the import, export, or take of the species and also specifying conditions under which import, export, or take of the species may be allowed. We solicit information to inform this determination and the development of any protective regulations for the queen conch. In addition to information on the potential conservation benefits of particular protective regulations, we solicit input on the associated cultural and socio-economic impacts that those regulatory measures may produce. Information on these topics may be submitted from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party directly to us (see **ADDRESSES**).

References

A complete list of the references used in this final rule, and the corresponding proposed rule, is available upon request, and also available at: *https://www.fisheries.noaa.gov/species/queen-conch.*

Classification

National Environmental Policy Act (NEPA)

The 1982 amendments to the ESA in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 675 F. 2d 825 (6th Cir. 1981), NMFS has concluded that ESA listing actions are not subject to the environmental assessment requirements of the NEPA (See NOAA Administrative Order 216–6A).

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this final rule is exempt from review under Executive Order 12866. This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

In accordance with E.O. 13132, agencies are required to take into account any federalism impacts of regulations under development. This Executive Order includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this final listing determination. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, the proposed rule was provided to the relevant agencies in each state in which the subject species occurs, and these agencies were invited to comment. Their comments were addressed with other comments in the Public Comments and Our Responses section.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: February 8, 2024.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, we amend 50 CFR part 223 as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, in the table in paragraph (e), under the subheading ''Molluscs,'' add an entry for ''Conch,

queen'' in alphabetical order by common name to read as follows:

§ 223.102 Enumeration of endangered marine and anadromous species.

(e) * * *

* * * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	*	*
Molluscs					
Conch, queen	*Aliger gigas*	Entire species	*[Insert **Federal Register** citation]* February 14, 2024.	NA	NA.
*	*	*	*	*	*	*

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

* * * * *

[FR Doc. 2024–02966 Filed 2–13–24; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 89, No. 31
Wednesday, February 14, 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.

FEDERAL ELECTION COMMISSION

11 CFR Parts 102, 104, 106, 109, 110, 9008, and 9012

[NOTICE 2024–05]

Party Segregated Accounts

AGENCY: Federal Election Commission.

ACTION: Inquiry notification.

SUMMARY: The Commission is considering whether to initiate a rulemaking in response to two petitions that asked the Commission to issue new rules and to revise its existing rules regarding the segregated accounts of national party committees. To assist in its consideration, the Commission invites comments on the issues raised in the petitions and this document. The Commission particularly requests comments from national party committees with experience administering party segregated accounts. The Commission has made no final decisions regarding the issues discussed in this document and may ultimately decide not to initiate a rulemaking in response to either petition. Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

DATES: Comments must be submitted on or before March 15, 2024.

ADDRESSES: All comments should be addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and must be submitted in either written or electronic form. Commenters are encouraged to submit comments electronically via the Commission's website at *http://sers.fec.gov/fosers,* reference REG 2014–10 and REG 2019–04. Alternatively, comments may be submitted in paper form addressed to the Federal Election Commission, Attn.: Ms. Amy L. Rothstein, Assistant General Counsel, 1050 First Street NE, Washington, DC.

Each commenter must provide, at a minimum, the commenter's first name, last name, city, and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Amy L. Rothstein, Assistant General Counsel; Tony Buckley, Attorney; or Scarlett Rufener, Attorney; 1050 First Street NE, Washington, DC, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Consolidated and Further Continuing Appropriations Act of 2015 (the ''Appropriations Act'') [1] amended the Federal Election Campaign Act, 52 U.S.C. 30101–45 (''FECA''), by authorizing separate limits on contributions to three types of segregated accounts established by national party committees (collectively, ''party segregated accounts''). Under the Appropriations Act, national party committees may receive up to three times the usual amount of contributions into segregated accounts to defray expenses incurred with respect to (1) presidential nominating conventions; [2] (2) party headquarters buildings; [3] and (3) election recounts or contests and other legal proceedings.[4] These party segregated accounts are in addition to any other Federal accounts that the committees may lawfully maintain.[5]

REG 2014–10 (Party Contribution Limits)

On January 8, 2016, the Commission received a Petition for Rulemaking from the Perkins Coie LLP Political Law Group (''Perkins Coie Petition'').[6] The Perkins Coie Petition asked the Commission to adopt new regulations and to revise its existing regulations to implement the Appropriations Act's amendments to FECA. The Perkins Coie Petition asked the Commission to adopt a ''new regulatory framework'' for each type of party segregated account and to amend current regulations or adopt new regulations for all such accounts.

The Perkins Coie Petition also addressed convention committees. In 2014, Congress had passed legislation to terminate the public funding of presidential nominating conventions.[7] Previously, national party committees could receive public funds to defray the costs of their presidential nominating conventions,[8] and Commission regulations had established convention committees ''as a necessary requirement in order to enable the Commission to know who has initial responsibility for handling public funds and incurring expenditures.'' [9] The Perkins Coie Petition asked the Commission, in part, to remove regulations that had been rendered obsolete by the termination of public funds.

The Commission published a Notice of Availability for the Perkins Coie Petition on October 27, 2016.[10] The Commission received four timely, substantive comments in response: two comments from national party committees opposed initiating a rulemaking with respect to party

[1] 2015, Public Law 113–235, 128 Stat. 2130, 2772 (2014).

[2] Under the Appropriations Act, a national party committee may use its presidential nominating convention account ''solely to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay loans the proceeds of which were used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may make from such account may not exceed $20,000,000 with respect to any single convention.'' 52 U.S.C. 30116(a)(9)(A).

[3] A national party committee may use its party headquarters building account ''solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses.'' *Id.* 30116(a)(9)(B).

[4] A national party committee may use its election recounts or contests and other legal proceedings account to ''defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.'' *Id.* 30116(a)(9)(C).

[5] *Id.* 30116(a)(9).

[6] *See* Petition for Rulemaking (Nov. 8, 2016) (''Perkins Coie Petition''), REG 2014–10 (Party Contribution Limits).

[7] *See* Gabriella Miller Kids First Research Act, Public Law 113–94, 128 Stat. 1085 (2014).

[8] *See* 26 U.S.C. 9001–9013 (2012); 11 CFR part 9008.

[9] Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions, 44 FR 63036, 63038 (Nov. 1, 1979).

[10] Implementing the Consolidated and Further Continuing Appropriations Act, 2015, 81 FR 69722 (Oct. 7, 2016).

segregated accounts, while supporting the removal of regulations rendered obsolete by Congress's termination of public funding for national party committees' presidential nominating conventions; [11] and two comments from advocacy organizations supported initiating a rulemaking on party segregated accounts, without separately addressing the termination of public funds for presidential nominating conventions.[12]

REG 2019–04 (Reporting Party Segregated Accounts)

On August 5, 2019, the Commission received a Petition for Rulemaking from Campaign Legal Center and Center for Responsive Politics (''CLC/CRP Petition'').[13] The CLC/CRP Petition asked the Commission to ''promulgate rules and forms requiring national party committees to delineate within their reports the individual and aggregate transactions involving'' the accounts created by the Appropriations Act.[14]

FECA and Commission regulations require a political committee to report its receipts and disbursements.[15] On February 13, 2015, the Commission issued interim guidance on how national party committees should report the activities of their party segregated accounts.[16] The Commission noted that ''[a]lthough party committees normally disclose their contributions on Form 3X, Line 11(a), the Commission['s] forms currently do not provide a clear way to distinguish between contributions deposited into the committees' separate accounts.'' The Commission instructed committees to report contributions to their party segregated accounts on Line 17 of Form 3X titled ''Other Federal Receipts.'' When itemizing contributions in excess of $200 on Schedule A, the committees were instructed to enter ''Convention Account,'' ''Headquarters Account,'' or ''Recount Account,'' as appropriate, in the description field. The Commission instructed committees to report administrative or operating expenses paid from the accounts on Line 21(b) of Form 3X titled ''Other Federal Operating Expenditures'' (for expenses paid from a convention or headquarters account) and Line 29 of Form 3X titled ''Other Disbursements'' (for expenses paid from a recount account). When itemizing disbursements on Schedule B, the committees were instructed to enter ''Convention Account,'' ''Headquarters Account,'' or ''Recount Account,'' as appropriate, in the Purpose of Disbursement field along with the required purpose of the disbursement.

Notwithstanding this guidance, the CLC/CRP Petition asserted that ''there is no consistent location or terminology that committees use to denote transactions involving'' party segregated accounts.[17] The CLC/CRP Petition claimed that ''it is effectively impossible for the public to track the large quantities of funds flowing into and out of the [party segregated] accounts'' under current Commission regulations.[18]

On August 28, 2019, the Commission published a Notice of Availability for the CLC/CRP Petition.[19] The Commission received six timely, substantive comments in response. One comment opposed the petition; [20] three comments, including one from the petitioners, supported the petition; [21] and one comment, from the petitioner in REG 2014–10 (Party Contribution Limits), urged the Commission to engage in a comprehensive rulemaking and not to address the CLC/CRP Petition before acting on the Perkins Coie Petition.[22] No national party committees commented on the CLC/CRP Petition.

Request for Comments

The Commission is continuing to consider whether to initiate a rulemaking on the issues raised in the Perkins Coie Petition and the CLC/CRP Petition (collectively, the ''Petitions''). Given the relatively small number of comments received and the party committees' and the public's additional experience in administering and interpreting the information about party segregated accounts, the Commission invites comments on the Petitions and any other issues pertaining to party segregated accounts. Have commenters' or petitioners' additional experiences with party segregated accounts resulted in further development of their positions? Have the national party committees or the public encountered any further challenges during election cycles that a rulemaking on party segregated accounts could help to resolve?

If the Commission decides to initiate a rulemaking, are there any issues not reflected in the Petitions that the Commission should nonetheless address? Should the Commission consider prioritizing certain issues over others and, if so, which ones? The Commission welcomes comments on any other matter that could affect its consideration of whether to engage in a rulemaking.

Dated: February 8, 2024.

On behalf of the Commission,

Sean J. Cooksey,

Chairman, Federal Election Commission.

[FR Doc. 2024–03045 Filed 2–13–24; 8:45 am]

BILLING CODE 6715–01–P

[11] Comment by Republican National Committee; Comment by NRSC and NRCC.

[12] Comment by Center for Competitive Politics; Comment by Campaign Legal Center and Democracy 21.

[13] *See* Petition to Promulgate Rules on Reporting of ''Cromnibus'' Accounts (Aug. 5, 2019), (''CLC/CRP Petition''), REG 2019–04 (Reporting Party Segregated Accounts), *https://sers.fec.gov/fosers/showpdf.htm?docid=408347.*

[14] *Id.* at 6.

[15] 52 U.S.C. 30104(a); 11 CFR 104.3(a) (reporting of receipts), (b) (reporting of disbursements).

[16] *See https://www.fec.gov/updates/fec-issues-interim-reporting-guidance-for-national-party-committee-accounts/.*

[17] CLC/CRP Petition at 2–3.

[18] *Id.* at 2.

[19] Requiring Reporting of Party Segregated Accounts, 84 FR 45117 (Aug. 28, 2019).

[20] Comment from David Himes.

[21] Comment from Campaign Legal Center and Center for Responsive Politics; Comment from Democracy 21; Comment from Public Citizen.

[22] Comment from Perkins Coie LLP Political Law Group.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0227; Project Identifier MCAI–2023–00886–T]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD–700–2A12 airplanes. This proposed AD was prompted by a report indicating that the fan in a transformer rectifier unit (TRU) can become inoperative in a manner that is not detectable by the fan monitoring circuit. This proposed AD would require replacement of the existing TRU Number 2 with a new part number that incorporates a correction to the fan and the monitoring circuit. This proposed AD would also prohibit the installation of affected parts. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by April 1, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

• *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.

• *Fax:* 202–493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0227; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

• For service information identified in this NPRM, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.com*.

• You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0227; Project Identifier MCAI–2023–00886–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2023–53, dated July 14, 2023 (Transport Canada AD CF–2023–53) (also referred to after this as the MCAI), to correct an unsafe condition on certain Bombardier, Inc., Model BD–700–2A12 airplanes. The MCAI states that the fan in a TRU can become inoperative in a manner that is not detectable by the fan monitoring circuit. An inoperative fan leads to higher TRU operating temperatures, which can trigger the activation of the load shed function to reduce the electrical load and temperature in the TRU. If the TRU temperature continues to rise and exceeds the maximum temperature threshold, the TRU will automatically disconnect. The shed electrical load will be transferred to the remaining two TRUs, which could lead to overheating and cascading failures on the remaining TRUs.

In addition, a design issue was uncovered where the fan power-up built-in test (PBIT) and continuous built-in-test (CBIT) are not adequate to detect fan failure. The fan PBIT is a test that is automatically performed once the airplane is powered up. The fan PBIT initiates the fan to turn on regardless of the TRU temperature to test the fan's functionality. The fan CBIT detects fan failure during airplane operation. Therefore, if FAN PBIT and/or CBIT are not reliable to detect a fan failure, inoperative fan conditions will remain dormant.

It was also identified that an insulation blanket located close to the TRU 2 fan air inlet may be leading to an eventual reduction of TRU 2 cooling efficiency.

The FAA is proposing this AD to address the inability of a TRU to detect the fan failure. The unsafe condition, if not addressed, could lead to overheating and failures on the remaining TRUs, which could contribute to additional pilot workload and adversely affect the safe operation of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0227.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Bombardier Service Bulletin 700–24–7507, Revision 1, dated May 19, 2023. This service information specifies procedures for replacing the existing transformer rectifier unit (TRU) Number 2 part number (P/N) G02404521–001 with new P/N G02404521–003, including removal of the secondary layer of insulation blanket P/N ENM386519113D in front of the TRU Number 2 fan air inlet, re-identifying the blanket installation by ink stamp, checking the electrical bond resistance for TRU Number 2, and performing the operational test.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described, except as discussed under ''Difference Between this NPRM and the Service Information.'' This proposed AD would also prohibit the installation of affected parts.

Difference Between This NPRM and Service Information

This AD does not require replacing the existing essential TRU P/N G02404521–001 with new P/N G02404521–003, as specified in Bombardier Service Bulletin 700–24–7507, Revision 1, dated May 19, 2023. TRU Number 2 has a higher electrical load than the essential TRU and, therefore, is more susceptible to the fan inoperative condition. Replacement of TRU Number 2, as specified in this proposed AD, will adequately address the safety concern.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 56 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 5 work-hours × $85 per hour = Up to $425	Up to $34,754	Up to $35,179	Up to $1,970,024.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

Bombardier, Inc.: Docket No. FAA–2024–0227; Project Identifier MCAI–2023–00886–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by April 1, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model BD–700–2A12 airplanes, certificated in any category, serial numbers 70006 through 70166 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical power.

(e) Unsafe Condition

This AD was prompted by a report that the fan in a transformer rectifier unit (TRU) can become inoperative in a manner that is not detectable by the fan monitoring circuit. The FAA is issuing this AD to address the inability of a TRU to detect the fan failure. The unsafe condition, if not addressed, could lead to overheating and failures on the remaining TRUs, which could contribute to additional pilot workload and adversely affect the safe operation of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Transformer Rectifier Unit (TRU) Number 2 Replacement

Within 1,500 flight hours or 3 years, whichever occurs first after the effective date of this AD, replace TRU Number 2 part number (P/N) G02404521–001 with P/N G02404521–003, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 700–24–7507, Revision 1, dated May 19, 2023.

(h) Parts Installation Prohibition

As of the effective date of this AD, no person may install, on any airplane, a TRU part number G02404521–001.

(i) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using in accordance with Bombardier Service Bulletin 700–24–7507, dated March 31, 2023.

(j) Special Flight Permits

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the airplane to a location where the actions required by this AD can be accomplished, provided no passengers are on board, only essential crew, and day visual flight rules.

(k) Additional AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (l)(2) of this AD. Information may be emailed to: *9-AVS-NYACO-COS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada or Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Additional Information

(1) Refer to Transport Canada AD CF–2023–53, dated July 14, 2023, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2024–0227.

(2) For more information about this AD, contact William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (4) of this AD.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Bombardier Service Bulletin 700–24–7507, Revision 1, dated May 19, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations,* or email *fr.inspection@nara.gov.*

Issued on February 7, 2024.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–02948 Filed 2–13–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0229; Project Identifier AD–2023–00485–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–8 and Model 737–9 airplanes. This proposed AD was prompted by a Boeing review of the standby power system control unit (SPCU) design where a single point of failure exists internal to the SPCU. This proposed AD would require the installation of four diodes and changing wire bundles in the P5 panel, as well as performing installation and power tests and applicable on-condition actions. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by April 1, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0229; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2024–0229.

FOR FURTHER INFORMATION CONTACT: Hoang Yen Dang, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3610; email *Hoang.Yen.T.Dang@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0229; Project Identifier AD–2023–00485–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or

responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Hoang Yen Dang, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3610; email *Hoang.Yen.T.Dang@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received a report indicating that a Boeing review of the SPCU design revealed that a potential single point of failure exists internal to the SPCU. This condition, if not addressed, could result in a non-latent single point of failure, which can result in a non-latent loss of the entire battery buss and consequent un-annunciated loss of control and indication of both engine anti-ice (EAI) systems.

The unsafe condition, if not addressed, could result in loss of thrust on both engines due to damage from operation in icing conditions without EAI and can result in loss of continued safe flight and landing.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022. This service information specifies procedures for the installation of four diodes and changing wire bundles in the P5 panel, as well as performing an anti-ice diode installation test and an engine anti-ice and wing anti-ice power test and applicable on-condition actions. On-condition actions include doing applicable corrective actions until the tests are passed.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described and except for any differences identified as exceptions in the regulatory text of this proposed AD. Interim Action.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 205 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Installation, Wiring bundle changes, and tests.	Up to 18 work-hours × $85 per hour = Up to $1,530.	Up to $3,760	Up to $5,290	Up to $1,084,450.

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this proposed AD.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

The Boeing Company: Docket No. FAA–2024–0229; Project Identifier AD–2023–00485–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by April 1, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–8 and 737–9 airplanes, certificated in any category, having a line number identified in paragraph 1.A.,

''Effectivity,'' of Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice/Rain Protection System.

(e) Unsafe Condition

This AD was prompted by a Boeing review of the standby power system control unit (SPCU) design that determined a potential single point of failure exists in the SPCU. The FAA is issuing this AD to address a potential single point of failure in the SPCU, which can result in a non-latent loss of the entire battery buss and consequent un-annunciated loss of control and indication of both engine anti-ice (EAI) systems. The unsafe condition, if not addressed, could result in loss of thrust on both engines due to damage from operation in icing conditions without EAI and can result in loss of continued safe flight and landing.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 737–30A1083, dated November 18, 2022, which is referred to in Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time columns of the table in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022, uses the phrase ''the original issue date of Requirements Bulletin 737–30A1083 RB,'' this AD requires using the effective date of this AD.

(2) Where ''ACTION 3'' in the Action column of the table in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022, specifies to do applicable corrective actions and repeat the test until the test passes if any test fails, for this AD, the compliance time for those actions is before further flight after accomplishing the test.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of AIR–520, Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Hoang Yen Dang, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3610; email *Hoang.Yen.T.Dang@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Boeing Alert Requirements Bulletin 737–30A1083 RB, dated November 18, 2022.

(ii) [Reserved]

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Issued on February 8, 2024.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–02993 Filed 2–13–24; 8:45 am]

BILLING CODE 4910–13–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 2551, 2552, and 2553

RIN 3045–AA81

AmeriCorps Seniors Regulation Updates

AGENCY: Corporation for National and Community Service.

ACTION: Proposed rule with request for comments.

SUMMARY: The Corporation for National and Community Service (operating as AmeriCorps) proposes to revise its regulations governing AmeriCorps Seniors programs. This proposed rule would remove barriers to service for individuals and increase flexibility for sponsors to determine the best mix of staffing and resources to accomplish project goals. Specifically, this proposed rule would remove barriers for individuals to serve as AmeriCorps Seniors volunteers in three ways: first, by limiting what is considered income in the calculation that determines eligibility to receive a stipend; second, by allowing volunteers to continue to receive a stipend when their sponsor places them on administrative leave due to extenuating circumstances that prevent service; and third, by allowing sponsors to supplement stipends. This proposed rule would increase flexibility for AmeriCorps Seniors sponsors in three ways: first, by removing the prescriptive requirement for them to employ a full-time project director; second, by establishing a single 10 percent match value regardless of grant year; and third, by allowing sponsors to choose to pay more than (but not less than) the AmeriCorps-established stipend rates using non-AmeriCorps funds for the amount exceeding the AmeriCorps-established rate. These proposed changes would allow sponsors to determine the best staffing and volunteer mix to support projects and how to devote resources that would otherwise be devoted to meet increasingly high match requirements. This proposed rule would also update nomenclature to reflect that the Corporation for National and Community Service operates as AmeriCorps and that ''Senior Corps'' is now known as ''AmeriCorps Seniors.''

DATES: Written comments must be submitted by April 15, 2024.

ADDRESSES: You may send your comments electronically through the Federal Government's one-stop rulemaking website at *www.regulations.gov.* You may also

send your comments to Elizabeth Appel, Associate General Counsel, at *eappel@americorps.gov* or by mail to AmeriCorps (ATTN: Elizabeth Appel), 250 E Street SW, Washington, DC 20525.

FOR FURTHER INFORMATION CONTACT: Robin Corindo, Deputy Director, AmeriCorps Seniors, at *rcorindo@americorps.gov,* (202) 489–5578.

SUPPLEMENTARY INFORMATION:

I. Background

AmeriCorps Seniors operates four programs: the Senior Companion Program (SCP), Foster Grandparent Program (FGP), Retired and Senior Volunteer Program (RSVP), and a Senior Demonstration Program. This proposed rule would affect regulations implementing the first three programs. These programs are authorized by the Domestic Volunteer Service Act of 1973, as amended, 42 U.S.C. 4950 *et seq.,* and this rulemaking is authorized by the National and Community Service Act of 1990, as amended, 42 U.S.C. 12501 *et seq.*

AmeriCorps Seniors SCP and FGP each provide grants to qualified agencies and organizations (known as grantees or sponsors) for the dual purpose of engaging persons 55 and older, particularly those with limited incomes, in volunteer service to meet critical community needs and to provide a high-quality experience that will enrich the lives of the volunteers. In SCP, program funds are used to support Senior Companions in providing supportive, individualized services to help older adults with special needs maintain their dignity and independence. They also serve caregivers with respite support. In FGP, program funds are used to support Foster Grandparents in providing supportive, person-to-person service to children with special and/or exceptional needs, or in circumstances that limit their academic, social, or emotional development. In SCP and FGP (but not RSVP), volunteers who are ''low income'' (meaning their income is at or below 200 percent of the poverty line) may receive stipends to allow them to serve without cost to themselves. *See* 42 U.S.C. 5011(d)–(e), 5013(b).

In SCP, FGP, and RSVP, the sponsor receiving the grant has several responsibilities. Among them is the responsibility to provide staff sufficient to support the project. Another is the responsibility to raise ''match,'' meaning non-AmeriCorps cash and in-kind contributions in support of the grant. The match amount is stated as a percentage of the total project cost. For both SCP and FGP, the match required of sponsors is 10 percent, meaning the AmeriCorps grant funds 90 percent of the total project cost. *See* 42 U.S.C. 5011(a), 5013(a). For RSVP, the statute limits match to be no more than 10 percent in the first year, 20 percent in the second year, and 30 percent in subsequent years. *See* 42 U.S.C. 5001(b). In other words, the statute provides upper limits (tiered by year) on what RSVP sponsors may be required to provide as match. The current RSVP regulations, however, state these upper limits as requirements for sponsors to provide match at 10 percent in the first year, 20 percent in the second year, and 30 percent in subsequent years by limiting AmeriCorps' contributions to 90 percent in the first year, 80 percent in the second year, and 70 percent in subsequent years. *See* 45 CFR 2553.72.

Additionally, in SCP and FGP, AmeriCorps Seniors volunteers are offered a stipend for their service. The statute sets a minimum hourly rate for the stipend. *See* 42 U.S.C. 5011(d), 5013(b). AmeriCorps Seniors establishes the stipend rate annually through the Notice of Funding Opportunity; currently, the stipend rate is $4.00 per service hour. The current SCP and FGP regulations provide that a sponsor must pay the stipend rate that AmeriCorps establishes and offers no flexibility to sponsors who may have additional funding available to supplement the stipend.

II. Overview of Proposed Rule

This proposed rule would update AmeriCorps Seniors regulations implementing the SCP, FGP, and RSVP. The proposed updates to the SCP and FGP regulations, at Code of Federal Regulations (CFR) parts 2551 and 2552, respectively, parallel each other and would include changes to simplify provisions on calculation of an AmeriCorps volunteer's income for the purposes of determining whether they are eligible for a stipend and would remove certain items from being considered as income. The proposed updates to SCP and FGP regulations would also specify that volunteers receiving a stipend may be paid the stipend when the sponsor places them on administrative leave due to extenuating circumstances preventing service. The updates would also allow sponsors to pay stipends at a higher rate than that established by AmeriCorps Seniors, if they choose to do so, and as long as they use funds other than AmeriCorps grant funds to pay for the amount above the established stipend rate. The proposed updates to all three SCP, FGP, and RSVP regulations (CFR parts 2551 through 2553) would replace the requirement for sponsors to employ a full-time project director with a requirement for sufficient staffing to support the size, scope, and quality of project operations.

The updates to the RSVP regulations at part 2553 would also change the level of non-AmeriCorps support (''match'') that an RSVP sponsor must provide. Currently, the regulations allow AmeriCorps to grant up to 90 percent of the total RSVP project cost in the first year, but only 80 percent in the second year and 70 percent in the third and successive years. As a result, the matching funds a sponsor must provide are currently 10 percent of the total project cost in the first year and increase to 20 percent in the second year and 30 percent in successive years. The proposed rule would instead establish a single required match rate at 10 percent, regardless of the grant year.

Lastly, this proposed rule would make nomenclature changes to add a definition for ''AmeriCorps'' and change references to the ''Corporation'' and ''CNCS'' to ''AmeriCorps'' throughout these regulations to reflect that the Corporation for National and Community Service now operates as AmeriCorps. This proposed rule would also change ''National Service Senior Corps (NSSC)'' to ''AmeriCorps Seniors'' to reflect current terminology and branding.

Each of the substantive changes is described in more detail below.

A. Income Calculation—SCP (§§ 2551.12, 2551.43, and 2551.44); FGP (§§ 2552.12, 2552.43, and 2552.44)

The current regulations address an SCP and FGP volunteer's income in three sections: the definition of ''annual income'' (at §§ 2551.12 and 2552.12, respectively); the income guidelines governing eligibility to serve as a stipended volunteer (at §§ 2551.43 and 2552.43, respectively); and the categories of ''income'' for determining eligibility (at §§ 2551.44 and 2552.44, respectively). Currently, the definition of ''annual income'' and the sections addressing eligibility guidelines and the determination of ''income'' each contain components for the calculation of income. The proposed rule would streamline these sections so that the definition sets out only that the time period for calculation of annual income is 12 months, and all the components for the calculation of income are contained in one section each for SCP and FGP. Substantively, these changes would remove several items from being included in the calculation of a volunteer's income, including:

- The value of shelter, food, and clothing if provided at no cost by relatives of the volunteer or volunteer's spouse;
- Strike benefits;
- Training stipends; and
- Regular support that is not legally required from an absent family member or someone not living in the household.

As a result, when examining a volunteer's income to determine eligibility for a stipend under this proposal, AmeriCorps Seniors would look only at the volunteer's income (and spouse's income if the spouse lives in the same residence) without considering the value of any shelter, food, or clothing the volunteer's relatives are providing the volunteer or any other regular but not legally required support that an absent relative (or someone else not living in the household) is choosing to provide to the volunteer. The proposal would remove strike benefits and training stipends as categories to be considered in calculating income because volunteers rarely such benefits and stipends and their removal supports modernization of the regulations. These changes also simplify what is considered income by focusing solely on the volunteer's own income and resident spouse's income, rather than other relatives, and removes the necessity of collecting paperwork from the individuals volunteering.

AmeriCorps expects these changes would simplify the determination of whether someone is eligible to serve as a stipended FGP or SCP volunteer and remove barriers to those individuals to serve in FGP and SCP. These changes will also support AmeriCorps Seniors programs' ability to recruit and retain volunteers, rebuild volunteer numbers to pre-COVID–19 levels, and reduce relinquishment of FGP and SCP programs that result from difficulties recruiting eligible volunteers. Ultimately, this anticipated increase in AmeriCorps Seniors volunteers in SCP and FGP will allow more community needs to be met.

B. Administrative Leave—SCP (§§ 2551.23(i) and 2551.46(a)); FGP (§§ 2552.23(i) and 2552.46(a))

Currently, the regulations governing SCP and FGP are silent as to whether AmeriCorps Seniors volunteers who receive a stipend for their service and earned leave may also receive a stipend for administrative leave. The proposed rule would specify that stipended volunteers may be paid administrative leave and would require sponsors to establish written service policies to address administrative leave. While sponsors may define the specifics of administrative leave, the proposed rule identifies administrative leave as a temporary absence the sponsor allows in extenuating circumstances that prevent the volunteer from serving, or serving safely. The rulemaking would require AmeriCorps' approval to pay the stipend for administrative leave after the seventh calendar day of extenuating circumstances. An example of a circumstance justifying administrative leave would be flooding at a client's home.

This proposed change allows SCP and FGP grantees to grant administrative leave to their volunteers in those unusual and rare situations that prevent a volunteer, through no fault of their own, from serving at their volunteer station, as long as the grantee's program policies permit administrative leave in such situations. Many dedicated AmeriCorps Seniors volunteers in SCP and FGP rely upon the stipend to supplement their limited incomes so they can pay for things like medicine and groceries. This proposed change would ensure that these volunteers are not penalized by having their stipends withheld for being unable to serve due to extenuating circumstances (as defined in the program's policy).

C. Allowing Sponsors To Pay Higher Stipends—SCP (§ 2551.92(e)); FGP (§ 2552.92(e))

The current SCP and FGP regulations prohibit sponsors from paying stipends at rates different from those established by AmeriCorps. This restriction is not compelled by statute, as the DVSA establishes only a minimum stipend rate ($3.00 per hour). Earlier versions of the regulation had similar language stating that AmeriCorps Seniors volunteers in SCP and FGP ''will receive a stipend in an amount determined by [AmeriCorps] . . . The minimum amount of the stipend is set by law and may be adjusted by the Director from time to time.'' *See* 45 CFR 1207.3–5(c)(5) and 1208.3–5(c)(5) (10–1–96 edition). However, these earlier versions explicitly allowed for stipend payments in excess of the amount established by AmeriCorps (then ''ACTION'') and provided that the excess amount could not be included as part of the local support commitment (match). *See* 45 CFR 1207.2–2 and 1208.2–2 (10–1–96 edition). When these prior versions of the rules were updated and moved from chapter XII (parts 1207 and 1208) to chapter XXV (parts 2551 and 2552) in title 45 of the CFR, the provisions regarding stipend payments in excess of the AmeriCorps-established amount were omitted without explanation. *See* SCP proposed rule at 63 FR 46954 (September 3, 1998) and final rule at 64 FR 14113 (March 24, 1999) and FGP proposed rule at 63 FR 46963 (September 3, 1998) and final rule at 64 FR 14123 (March 24, 1999). AmeriCorps determined this allowance should be reinstituted so that sponsors may pay volunteers a stipend at a rate higher than the AmeriCorps-established rate should they have the desire and funding to do so. In contrast to the prior versions of the rule, the proposed rule would allow sponsors to use funds with which they supplement the stipend to count toward required match contributions. Sponsors' supplementation of volunteers' stipends must comply with anti-discrimination and other laws.

The proposed flexibility for supplementing stipends would help sponsors to recruit and retain volunteers by improving the feasibility of service for low-income volunteers whose costs of serving exceed the AmeriCorps-established stipend rate. This flexibility would also allow for sponsors to account for things like higher costs of living in providing their volunteers with stipends, by using their grantee (non-AmeriCorps) share funds to add on to the single stipend rate that AmeriCorps establishes for the entire country. The current regulation, which restricts all volunteers to the AmeriCorps-established stipend rate, prevents sponsors from adjusting their benefits to account for the needs of volunteers in their local communities. Under the proposed rule, AmeriCorps would continue to establish stipend rates and comply with the statutory minimum for stipend rates, but sponsors would have the flexibility to supplement the rate with their non-AmeriCorps funds.

D. Removing the Requirement for a Full-Time Project Director—SCP (§ 2551.25(c)); FGP (§ 2552.25(c)); RSVP (§ 2553.25(c))

The current SCP, FGP, and RSVP regulations all require a sponsor to employ a full-time project director to accomplish project objectives and manage functions and project activities, except in a limited circumstance where the sponsor may negotiate with AmeriCorps for permission to instead employ a part-time project director. That circumstance is when the sponsor has demonstrated to AmeriCorps that having only a part-time project director will not adversely affect the size, scope, or quality of project operations. The proposed rule would replace these prescriptive requirements with a more results-focused requirement that sponsors employ project staff sufficient to support the size, scope, and quality of project operations. In the application,

the sponsor must thoroughly outline their management plan to describe how each project director duty will be fulfilled. At the time of renewal, program structure will be evaluated based on performance measures. This proposed change would provide sponsors with the flexibility to determine their own appropriate mix of staffing to support the project.

E. Establishing a Single, 10 Percent Match, Regardless of Year—RSVP (§ 2553.72)

The statute limits how much funding RSVP sponsors must provide as match to be no more than 10 percent in the first year, 20 percent in the second year, and 30 percent in subsequent years. *See* 42 U.S.C. 5001(b). In other words, the statute provides upper limits (tiered by year) on what RSVP sponsors may be required to provide as match. In contrast, the current RSVP regulations convert these upper limits into requirements for sponsors to provide match at 10 percent in the first year, 20 percent in the second year, and 30 percent in subsequent years. *See* 45 CFR 2553.72. Specifically, the current regulation provides that AmeriCorps grants may fund up to 90 percent of the total project cost in the first year, leaving the sponsor responsible for 10 percent of the total project cost through locally generated contributions. The current regulation then decreases the level of funding AmeriCorps may provide to 80 percent (consequently increasing the sponsor's responsibility to 20 percent) in the second year, and further decreases AmeriCorps' contribution to 70 percent (consequently increasing the sponsor's responsibility to 30 percent) in the third year and beyond. The proposed rule would revise this approach to instead provide RSVP parity with the FGP and SCP programs, which each require 10 percent match regardless of year. For grantees that have RSVP programs and FGP and/or SCP programs, this proposal would allow them to have consistent policies across all their programs and reduce the burden of raising and reporting an increased match amount for just one of their programs. This proposed change in required match is not expected to impact the quality of services provided to communities by the program because all program expectations would remain the same under the proposal.

III. Regulatory Analyses

A. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs in the Office of Management and Budget determined this proposed rule is not a significant regulatory action.

B. Regulatory Flexibility Act

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), AmeriCorps certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. While many grantees are small governmental jurisdictions or not-for-profit enterprises that may qualify as small entities, the economic effect of this proposed rule on those small entities is minimal. Therefore, AmeriCorps has not performed the initial regulatory flexibility analysis that is required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) for rules that are expected to have such results.

C. Unfunded Mandates Reform Act of 1995

For purposes of title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, as well as Executive Order 12875, this regulatory action does not contain any federal mandate that may result in increased expenditures in Federal, State, local, or Tribal Governments in the aggregate, or impose an annual burden exceeding $100 million on the private sector.

D. Paperwork Reduction Act

Under the Paperwork Reduction Act, an agency may not conduct or sponsor a collection of information unless the collections of information display valid control numbers. This proposed rule does not affect any information collections.

E. Executive Order 13132, Federalism

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has federalism implications if the rule imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This rulemaking does not have any federalism implications, as described above.

F. Takings (Executive Order 12630)

This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this proposed rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable ''taking.'' A takings implication assessment is not required.

G. Civil Justice Reform (Executive Order 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rulemaking: (a) 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 (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (Executive Order 13175)

AmeriCorps recognizes the inherent sovereignty of Indian tribes and their right to self-governance. We have evaluated this rulemaking under the agency's consultation policy and the criteria in Executive Order 13175 and determined that this proposed rule does not impose substantial direct effects on federally recognized tribes.

I. Clarity of This Regulation

We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each proposed rule we publish must: (a) be logically organized; (b) use the active voice to address readers directly; (c) use clear language rather than jargon; (d) be divided into short sections and sentences; and (e) use lists and tables wherever possible. If you feel that we have not met these requirements, please send us comments by one of the methods listed in the **ADDRESSES** section. To help us revise the rule, your comments should be as specific as possible.

List of Subjects in 45 CFR Parts 2551, 2552, and 2553

Aged, Grant programs—social programs, Volunteers.

For the reasons stated in the preamble, under the authority of 42 U.S.C. 12651c(c), the Corporation for

National and Community Service is proposing to amend chapter XXV, title 45 of the Code of Federal Regulations as follows:

PART 2551—SENIOR COMPANION PROGRAM

■ 1. The authority citation for part 2551 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.;* 42 U.S.C. 12651b–12651d; E.O. 13331, 69 FR 9911.

■ 2. In § 2551.12:
■ a. Revise the definition of ''Adequate staffing level'';
■ b. Add in alphabetical order the definitions of ''AmeriCorps'' and ''AmeriCorps Seniors'';
■ c. Revise the definition of ''Annual income''; and
■ d. Remove the definitions of ''CNCS'' and ''National Senior Service Corps (NSSC)''.

The revisions and additions read as follows:

§ 2551.12 Definitions.

* * * * *

Adequate staffing level. The number of project staff or full-time equivalent needed by a sponsor to manage the AmeriCorps Seniors project operations considering such factors as: Number of budgeted Volunteer Service Years (VSYs), number of volunteer stations, and the size of the service area.

* * * * *

AmeriCorps. The Corporation for National and Community Service, established pursuant to section 191 of the National and Community Service Act of 1990, as amended, 42 U.S.C. 12651, which operates as AmeriCorps.

AmeriCorps Seniors. The collective name for the Senior Companion Program (SCP), the Foster Grandparent Program (FGP), the Retired and Senior Volunteer Program (RSVP), and Senior Demonstration Programs, all of which are established under parts A, B, C, and E, title II of the Act.

Annual income. The applicant or enrollee's total income for the preceding 12 months, including the applicant or enrollee's spouse's income, if the spouse lives in the same residence, as calculated in § 2551.44.

* * * * *

■ 3. In § 2551.23, redesignate paragraphs (i)(2) through (5) as paragraphs (i)(3) through (6) and add new paragraph (i)(2) to read as follows:

§ 2551.23 What are a sponsor's project responsibilities?

* * * * *

(i) * * *

(2) Administrative leave, meaning a temporary absence the sponsor allows in extenuating circumstances that prevent the Senior Companion from serving or serving safely.

* * * * *

■ 4. In § 2551.25, revise paragraphs (c) and (h) to read as follows:

§ 2551.25 What are a sponsor's administrative responsibilities?

* * * * *

(c) Employ project staff, including a project director, to accomplish project objectives and manage the functions and activities delegated to project staff for AmeriCorps Seniors project(s) within its control. The project director may participate in activities to coordinate project resources with those of related local agencies, boards, or organizations. Staffing must be sufficient to support the size, scope, and quality of project operations.

* * * * *

(h) Comply with, and ensure that Memorandums of Understanding require all volunteer stations to comply with, all applicable civil rights laws and regulations, including non-discrimination based on disability.

■ 5. Revise the heading for subpart C to read as follows:

Subpart C—Suspension and Termination of AmeriCorps Assistance

■ 6. In § 2551.43, revise paragraph (b) to read as follows:

§ 2551.43 What income guidelines govern eligibility to serve as a stipended Senior Companion?

* * * * *

(b) For applicants to become stipended Senior Companions, income is based on annual income at the time of application. For serving stipended Senior Companions, annual income is counted for the past 12 months. Annual income includes the applicant or enrollee's income and that of his/her spouse, if the spouse lives in the same residence, as calculated in § 2551.44.

* * * * *

■ 7. In § 2551.44, revise paragraph (a)(3) to read as follows:

§ 2551.44 What is considered income for determining volunteer eligibility?

(a) * * *

(3) Social Security, Unemployment or Workers Compensation, alimony, and military family allotments, or other legally required financial support from an absent family member or someone not living in the household.

* * * * *

■ 8. In § 2551.46, revise paragraph (a) to read as follows:

§ 2551.46 What cost reimbursements are provided to Senior Companions?

* * * * *

(a) *Stipend.* The stipend is paid for the time Senior Companions spend with their assigned clients, for earned leave, for administrative leave, and for attendance at official project events. The sponsor may pay a stipend for administrative leave for extenuating circumstances lasting up to seven calendar days but must obtain AmeriCorps' written approval to pay a stipend for administrative leave based on extenuating circumstances lasting beyond seven calendar days.

* * * * *

■ 9. In § 2551.92, revise paragraph (e) to read as follows:

§ 2551.92 What are project funding requirements?

* * * * *

(e) *May a sponsor pay stipends at rates different than those established by AmeriCorps?* A sponsor must pay stipends at rates no less than the rate established by AmeriCorps. A sponsor may use non-AmeriCorps funding to pay stipends at rates higher than the rate established by AmeriCorps, but may not use AmeriCorps funding for this purpose.

■ 10. In § 2551.121, revise paragraph (c)(1) to read as follows:

§ 2551.121 What legal limitations apply to the operation of the Senior Companion Program and to the expenditure of grant funds?

* * * * *

(c) * * *

(1) An agency or organization to which AmeriCorps Seniors volunteers are assigned or which operates or supervises any AmeriCorps Seniors program shall not request or receive any compensation from AmeriCorps Seniors volunteers, or from beneficiaries, for the services provided by AmeriCorps Seniors volunteers.

* * * * *

§§ 2551.12 through 2551.122 [Amended]

■ 11. In addition to the amendments set forth above, in §§ 2551.12 through 2551.122:
■ a. Remove the word ''CNCS'' and add in its place the word ''AmeriCorps'', wherever it appears; and
■ b. Remove the word ''non-CNCS'' and add in its place the word ''non-AmeriCorps'', wherever it appears.

PART 2552—FOSTER GRANDPARENT PROGRAM

■ 12. The authority for part 2552 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.;* 42 U.S.C. 12651b–12651d; E.O. 13331, 69 FR 9911.

■ 13. In § 2552.12:
■ a. Revise the definition of ''Adequate staffing level'';
■ b. Add in alphabetical order the definitions of ''AmeriCorps'' and ''AmeriCorps Seniors'';
■ c. Revise the definition of ''Annual income''; and
■ d. Remove the definitions of ''CNCS'' and ''National Senior Service Corps (NSSC)''.

The revisions and additions read as follows:

§ 2552.12 Definitions.

* * * * *

Adequate staffing level. The number of project staff or full-time equivalent needed by a sponsor to manage the AmeriCorps Seniors project operations considering such factors as: Number of budgeted Volunteer Service Years (VSYs), number of volunteer stations, and the size of the service area.

AmeriCorps. The Corporation for National and Community Service, established pursuant to section 191 of the National and Community Service Act of 1990, as amended, 42 U.S.C. 12651, which operates as AmeriCorps.

AmeriCorps Seniors. The collective name for the Senior Companion Program (SCP), the Foster Grandparent Program (FGP), the Retired and Senior Volunteer Program (RSVP), and Senior Demonstration Programs, all of which are established under parts A, B, C, and E, title II of the Act.

Annual income. The applicant or enrollee's total income for the preceding 12 months, including the applicant or enrollee's spouse's income, if the spouse lives in the same residence, as calculated in § 2551.44.

* * * * *

■ 14. In § 2552.23, redesignate paragraphs (i)(2) through (5) as paragraphs (i)(3) through (6) and add new paragraph (i)(2) to read as follows:

§ 2552.23 What are a sponsor's project responsibilities?

* * * * *

(i) * * *

(2) Administrative leave, meaning a temporary absence the sponsor allows in extenuating circumstances that prevent the Foster Grandparent from serving or serving safely.

* * * * *

■ 15. In § 2552.25, revise paragraphs (c) and (h) to read as follows:

§ 2552.25 What are a sponsor's administrative responsibilities?

* * * * *

(c) Employ project staff, including a project director, to accomplish project objectives and manage the functions and activities delegated to project staff for AmeriCorps Seniors project(s) within its control. The project director may participate in activities to coordinate project resources with those of related local agencies, boards, or organizations. Staffing must be sufficient to support the size, scope, and quality of project operations.

* * * * *

(h) Comply with, and ensure that Memorandums of Understanding require all volunteer stations to comply with, all applicable civil rights laws and regulations, including non-discrimination based on disability.

■ 16. Revise the heading for subpart C to read as follows:

Subpart C—Suspension and Termination of AmeriCorps Assistance

§ 2552.43 [Amended]

■ 17. In § 2552.43, revise paragraph (b) to read as follows:

§ 2552.43 What income guidelines govern eligibility to serve as a stipended Foster Grandparent?

* * * * *

(b) For applicants to become stipended Foster Grandparents, income is based on annual income at the time of application. For serving stipended Foster Grandparents, annual income is counted for the past 12 months. Annual income includes the applicant or enrollee's income, and that of his/her spouse, if the spouse lives in the same residence, as calculated in § 2552.44.

* * * * *

■ 18. In § 2552.44, revise paragraph (a)(3) to read as follows:

§ 2552.44 What is considered income for determining volunteer eligibility?

(a) * * *

(3) Social Security, Unemployment or Workers Compensation, alimony, and military family allotments, or other legally required financial support from an absent family member or someone not living in the household.

* * * * *

■ 19. In § 2552.46, revise paragraph (a) to read as follows:

§ 2552.46 What cost reimbursements and benefits do sponsors provide to Foster Grandparents?

* * * * *

(a) *Stipend.* The stipend is paid for the time Foster Grandparents spend with their assigned children, for earned leave, for administrative leave, and for attendance at official project events. The sponsor may pay a stipend for administrative leave for extenuating circumstances lasting up to seven calendar days but must obtain AmeriCorps' written approval to pay a stipend for administrative leave based on extenuating circumstances lasting beyond seven calendar days.

* * * * *

■ 20. In § 2552.92, revise paragraph (e) to read as follows:

§ 2552.92 What are project funding requirements?

* * * * *

(e) *May a sponsor pay stipends at rates different than those established by AmeriCorps?* A sponsor must pay stipends at rates no less than the rate established by AmeriCorps. A sponsor may use non-AmeriCorps funding to pay stipends at rates higher than the rate established by AmeriCorps but may not use AmeriCorps funding for this purpose.

■ 21. In § 2552.121, revise paragraph (c)(1) to read as follows:

§ 2552.121 What legal limitations apply to the operation of the Foster Grandparent Program and to the expenditure of grant funds?

* * * * *

(c) * * *

(1) An agency or organization to which AmeriCorps Seniors volunteers are assigned or which operates or supervises any AmeriCorps Seniors program shall not request or receive any compensation from AmeriCorps Seniors volunteers, or from beneficiaries, for the services provided by AmeriCorps Seniors volunteers.

* * * * *

§§ 2552.12 through 2552.122 [Amended]

■ 22. In addition to the amendments set forth above, in §§ 2552.12 through 2552.122:
■ a. Remove the word ''CNCS'' and add in its place the word ''AmeriCorps'', wherever it appears; and
■ b. Remove the word ''non-CNCS'' and add in its place the word ''non-AmeriCorps'', wherever it appears.

PART 2553—THE RETIRED AND SENIOR VOLUNTEER PROGRAM

■ 23. The authority for part 2553 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.*

■ 24. In § 2553.12:
■ a. Revise the definition of ''Adequate staffing level'';
■ b. Add in alphabetical order the definitions of ''AmeriCorps'' and ''AmeriCorps Seniors''; and
■ c. Remove the definitions of ''CNCS'' and ''National Senior Service Corps (NSSC)''.

The revision and additions read as follows:

§ 2553.12 Definitions.

* * * * *

Adequate staffing level. The number of project staff or full-time equivalent needed by a sponsor to manage the AmeriCorps Seniors project operations considering such factors as: Number of budgeted volunteers, number of volunteer stations, and the size of the service area.

AmeriCorps. The Corporation for National and Community Service, established pursuant to section 191 of the National and Community Service Act of 1990, as amended, 42 U.S.C. 12651, which operates as AmeriCorps.

AmeriCorps Seniors. The collective name for the Senior Companion Program (SCP), the Foster Grandparent Program (FGP), the Retired and Senior Volunteer Program (RSVP), and Demonstration Programs, all of which are established under parts A, B, C, and E, title II of the Act.

* * * * *

■ 24. In § 2553.25, revise paragraphs (c) and (h) to read as follows:

§ 2553.25 What are a sponsor's administrative responsibilities?

* * * * *

(c) Employ project staff, including a project director, to accomplish project objectives and manage the functions and activities delegated to project staff for AmeriCorps Seniors project(s) within its control. The project director may participate in activities to coordinate project resources with those of related local agencies, boards, or organizations. Staffing must be sufficient to support the size, scope, and quality of project operations.

* * * * *

(h) Comply with, and ensure that Memorandums of Understanding require all volunteer stations to comply with, all applicable civil rights laws and regulations, including non-discrimination based on disability.

■ 25. In § 2553.72, revise paragraph (a) paragraph heading and paragraphs (a)(1) and (c) to read as follows:

§ 2553.72 What are project funding requirements?

(a) *Is non-AmeriCorps support required?* (1) An AmeriCorps grant may be awarded to fund up to 90 percent of the total project cost.

* * * * *

(c) *May AmeriCorps restrict how a sponsor uses locally generated contributions in excess of the non-AmeriCorps support required?* Whenever locally generated contributions to RSVP projects are in excess of the non-AmeriCorps funds required (10 percent of the total cost), AmeriCorps may not restrict the manner in which such contributions are expended, provided such expenditures are consistent with the provisions of the Act.

* * * * *

■ 26. In § 2553.91, revise paragraph (c)(1) to read as follows:

§ 2553.91 What legal limitations apply to the operation of the RSVP volunteer program and to the expenditure of grant funds?

* * * * *

(c) * * *

(1) An agency or organization to which AmeriCorps Seniors volunteers are assigned or which operates or supervises any AmeriCorps Seniors program shall not request or receive any compensation from AmeriCorps Seniors volunteers or from beneficiaries for services of AmeriCorps Seniors volunteers.

* * * * *

§§ 2553.12 through 2553.108 [Amended]

■ 27. In addition to the amendments set forth above, in §§ 2552.12 through 2552.108:

■ a. Remove the word ''CNCS'' and add in its place the word ''AmeriCorps'', wherever it appears; and

■ b. Remove the word ''non-CNCS'' and add in its place the word ''non-AmeriCorps'', wherever it appears.

Fernando Laguarda,

General Counsel.

[FR Doc. 2024–02772 Filed 2–13–24; 8:45 am]

BILLING CODE 6050–28–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90, 16–271, 18–143, 19–126; AU Docket No. 20–34; FCC 24–77; FR ID 201594]

Wireline Competition Bureau Seeks Comment on Leveraging the Broadband Serviceable Location Fabric for High-Cost Support Mechanism Deployment Obligations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Wireline Competition Bureau (WCB or the Bureau) seeks comment on using the data included in the Broadband Serviceable Location Fabric (Fabric) to update and verify compliance with certain High-Cost program support recipients' deployment obligations.

DATES: Comments are due on or before March 15, 2024, and reply comments are due on or before April 1, 2024.

ADDRESSES: *Instructions for Filing Comments.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See* FCC Announces Closure of FCC Headquarters Open Window and Change in Hand Delivery Policy, Public Notice, 35 FCC Rcd 2788, 2788–89 (OS 2020).

People with Disabilities. 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).

FOR FURTHER INFORMATION CONTACT: For further information, please contact, Heidi Lankau, Telecommunications Access Policy Division, Wireline Competition Bureau, at *Heidi.Lankau@fcc.gov* or (202) 418–7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Bureau's Public Notice in WC Docket Nos. 10–90, 16–271, 18–143, 19–126 and AU Docket No. 20–34;

DA 24–77, released on January 25, 2024. The full text of this document is available at the following internet address: *https://docs.fcc.gov/public/attachments/DA-24-77A1.pdf.*

Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 45 L Street NE, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

Filing Requirements. Comments and reply comments exceeding 10 pages must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with § 1.49 and all other applicable sections of the Commission's rules. The Bureau directs all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. The Bureau also strongly encourages parties to track the organization set forth in this document in order to facilitate its internal review process.

Ex Parte Presentations—Permit-But-Disclose. The proceeding this document initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

I. Introduction

1. In this document, the Bureau seeks comment on using the data included in the Fabric to update and verify compliance with certain High-Cost program support recipients' deployment obligations. Generally, the Bureau proposes to leverage the Fabric to provide support recipients a reliable data source for determining locations and to maximize the number of consumers that are served by recipients of various High-Cost support mechanisms.

II. Discussion

2. The Bureau proposes using the Fabric as the data source to revise and verify deployment obligations for a number of the high-cost support mechanisms, including Rural Digital Opportunity Fund (RDOF), Alternative-Connect America Cost Model (A–CAM) I and II, the Bringing Puerto Rico Together Fund (Uniendo a Puerto Rico Fund), the Connect USVI Fund, and the Alaska Plan to promote universal access to broadband across the areas funded by these programs. The Bureau seeks comment on the proposal and on specific issues related to location total adjustments or verifications for each program.

3. The Commission proposes to use the Fabric to identify the actual number of residential and small business units in each relevant high-cost support recipient's service area, *i.e.,* the number of high cost-eligible locations. Because the Broadband Data Act directs the Commission to include in the Fabric ''all locations in the United States where fixed broadband internet access service can be installed,'' and to iteratively update the Fabric, including by incorporating the results of challenges submitted by stakeholders, improved and more updated data sets, and updates to reflect on-the-ground changes, the Bureau expects the Fabric is and will continue to be the most comprehensive and up-to-date source available to identify all the high-cost eligible locations in the eligible census blocks within a support recipient's service area. The Fabric identifies BSLs, which are locations ''where fixed mass-market broadband internet access service has, or could be, installed.'' Moreover, because the Fabric must ''serve as the foundation upon which all data relating to the availability of fixed broadband internet access service . . . shall be reported and overlaid,'' the Fabric will help facilitate the Bureau's future coordination with other agencies to avoid duplicative funding.

4. In identifying the high-cost eligible locations that are relevant to a high-cost support recipient's service area, the Bureau proposes to exclude group quarters locations, which are currently included as BSLs in the Fabric, from revised locations totals to remain consistent with its previous guidance to exclude such locations from the Bureau's High-Cost support mechanism location counts. The Bureau also proposes that if a portion of a parcel is inside an eligible census block, but the BSL structure located on the parcel falls outside of the census block, the BSL will not be counted towards a support recipient's location total, consistent with its other High-Cost programs. The Bureau notes that for support programs where the location totals were determined by the Connect America Cost Model (CAM) or A–CAM, these models assigned locations to census blocks using 2010 Census data that was updated to 2011 counts using Census Bureau 2011 county estimates. Because the Fabric incorporates 2020 Census data, the Bureau plans to overlay 2010 census blocks over the Fabric locations to determine updated location counts. Are there are any further adjustments or implications the Bureau should consider in using this approach?

5. The Bureau seeks comment on its proposal to use the Fabric as the source for data on supported locations and on the adjustments it proposes here. Should the Bureau use any sources to supplement its use of the Fabric? If the Bureau does rely on the Fabric as a source, are the adjustments it has identified appropriate? Are there other adjustments the Bureau would need to make to ensure it is accurately identifying the high cost-eligible locations located in the eligible census blocks in each support recipient's service area? Commenters suggesting that different sources should be used or that different adjustments should be

made for one support mechanism and not another should explain the characteristics of the particular support mechanism that require different sources or adjustments.

6. As directed by the Commission, the Bureau seeks comment on how to implement the Commission's framework for adjusting required location totals based on an updated location data source for RDOF. Specifically, the Bureau seeks comment on the timing for when it should announce new location totals, how it should adjust support in certain circumstances where there are significantly more or fewer locations in a service area than estimated by the CAM, standards the Bureau should use for waivers and determining whether requests for service are reasonable, and how it should apply the framework to support recipients that have multiple performance tiers associated with their winning bids.

7. Given the Commission's direction that WCB adopt revised location totals by the end of the sixth calendar year, the Bureau seeks comment on when it should consult the location data source to identify the relevant residential and small business units and announce revised location totals. If WCB adopts its proposal to use the Fabric as the location source for RDOF, the Bureau proposes that it announce revised location totals for each support recipient within a reasonable time after the Fabric version expected to be released in June 2027 is made available to licensees. The Federal Communications Commission (Commission) typically releases an updated Fabric approximately every six months, in around June and December. The Bureau expects that using the version of the Fabric that is expected to be released in June 2027 would provide sufficient time for WCB to recalculate location totals prior to December 31, 2027, which is the sixth year service milestone for RDOF support recipients authorized in 2021.

8. The Bureau anticipates that using the version of the Fabric expected to be released in June 2027 will balance its objectives of ensuring that the revised location totals are based on the most up-to-date location data and also giving support recipients notice of their revised location totals prior to the sixth year service milestone. Because support recipients will have the opportunity to access earlier versions of the Fabric, they will be able to monitor the addition of any locations to the Fabric and plan accordingly so they are prepared to serve any new BSLs once revised location totals are announced. The Bureau seeks comment on this proposal and on whether there are any sound reasons for adopting and announcing revised location totals earlier or later than proposed. Commenters proposing that WCB use different location data sources for RDOF should address timing considerations for their proposed sources.

9. The Bureau also proposes to adopt revised location totals for all support recipients at the same time, rather than waiting to the following year to adopt revised location totals for support recipients authorized in 2022 and 2023. Such an approach may mean that locations built after the Bureau announces revised location totals will not be included in the new totals and that support recipients authorized in 2022 and 2023 will have an extra year to meet their eighth year service milestone if they have newly identified locations when compared to those authorized in 2021. However, the Bureau expects the benefits of the administrative efficiency of determining and announcing all revised location totals at once will outweigh any potential concerns this approach may raise, particularly given that any locations built after the revised location totals and prior the end of the eighth year of support will be subject to the requirement that the support recipient serve the location upon reasonable request. The Bureau seeks comment on this rationale and on any other suggestions for how it can reconcile the requirement to announce revised locations by the sixth year service milestone with the fact that RDOF authorizations span multiple years.

10. The Bureau seeks comment on how to implement the Commission's framework for support recipients that must deploy to additional locations once WCB announces revised location totals. Specifically, the Bureau seeks comment on implementing the Commission's decision to give an opportunity for those support recipients to seek additional support relief if their new location count exceeds the CAM locations within their service area in each state by more than 35%. For such support recipients, the Bureau proposes to increase support on a pro rata basis for each location over the 35% threshold based on the average support amount per location.

11. The Bureau also seeks comment on any alternatives. For example, the Bureau could require a support recipient to seek a waiver of the requirement to serve a certain number of locations, but it expects it would be administratively burdensome to have to address such waivers on a case-by-case basis. Further, such an approach would potentially leave locations stranded without service and ineligible for other funding programs. As another alternative, the Bureau could provide additional time for locations above the 35% threshold to be served, but this would further delay the provision of broadband to these locations.

12. Additionally, the Bureau seeks comment on whether WCB should set any parameters for the flexibility support recipients have to seek to have their new location counts adjusted to exclude additional locations. Specifically, the Commission explained that support recipients could seek to exclude additional locations that it determines are ineligible, unreasonable to deploy to, or part of a development newly built after year 6 for which the cost and/or time to deploy would be unreasonable. Should the Bureau set up a process by which support recipients must notify the Bureau that their new location total includes locations that they would like to be excluded so that those locations can become eligible for other funding programs? Should the Bureau require that support recipients notify them in the relevant docket by a specific date during the support term? Are there any standards or procedures the Bureau could adopt to balance this flexibility with the Commission's goal of ''seek[ing] to ensure the availability of broadband and voice services to as many rural consumers and small businesses . . . by the end of the ten-year term as possible''?

13. For example, the Bureau proposes that if a support recipient seeks to have its new location total adjusted to remove locations it claims are ineligible, that support recipient must first successfully challenge the location as part of the Broadband Data Collection's (BDC) Fabric challenge process if the Bureau uses the Fabric to revise location totals. This would enable the Bureau to conserve administrative resources by leveraging the Commission's existing process and would also help to maintain consistency between the Fabric and the support recipient's obligations.

14. The Bureau also seeks comment on what criteria it should consider when determining whether a location is unreasonable to serve. Given the Commission's goal of maximizing RDOF support to serve as many consumers and small businesses as possible, the Bureau expects that it would not routinely grant requests to exclude locations from a support recipient's new location total.

15. The Bureau seeks comment on how to implement the Commission's framework for support recipients that have fewer actual locations in the eligible census blocks in their service area than estimated by the CAM.

16. *Prior to the sixth year service milestone.* First, the Commission directed support recipients to notify WCB no later than March 1st following the fifth year of deployment if there are fewer locations than were included in the RDOF auction. The Bureau proposes that if such a support recipient claims to have served all existing locations in the eligible census blocks prior to WCB announcing revised location totals, it would permit the support recipient to rely on the latest version of the Fabric available to Fabric licensees to demonstrate that there are no other locations left to serve and to request a verification that it has served all the locations identified in the Fabric. If a verification determines that the support recipient has served all existing locations prior to the sixth year service milestone, the Bureau proposes permitting the support recipient to close out its letter of credit. The Bureau expects changes in the Fabric will not be significant enough that it would be necessary for support recipients to keep their letters of credit open to secure any additional deployment that may be required after WCB revises location totals. Moreover, any non-compliance issues can be handled pursuant to the Commission's rules. The Bureau seeks comment on these assumptions and on whether it would be more advantageous to take another approach like requiring support recipients to wait until it announces the revised support totals before closing out their letters of credit once their deployment has been verified.

17. Because a support recipient with fewer locations than estimated by the CAM must serve all of its initial, model-estimated locations by the sixth year service milestone, the Bureau seeks comment on requiring a support recipient that has already been verified to have served all existing locations to serve any locations that are newly identified prior to the sixth year service milestone, up to the CAM-estimated location total. If the Bureau were to adopt this approach, should it announce after each Fabric release whether there are any new locations identified by the Fabric in the eligible census blocks served by a support recipient which the Bureau already verified has served all previously existing locations? If so, should WCB require that the support recipient serve the newly identified locations by the sixth year service milestone at the latest or by some other reasonable amount of time after WCB announces the newly identified locations? The Bureau seeks comment on the administrative challenges of monitoring the Fabric to identify new locations on a rolling basis and on the burdens of having to serve newly identified locations prior to the sixth year service milestone.

18. As an alternative, should WCB instead wait until it officially revises location totals for all support recipients to identify any newly added locations for those support recipients that it has already verified have served 100% of existing locations? If so, should such support recipients have until the eighth year service milestone to serve any of the newly identified locations? Are there any other alternatives for how the Bureau can ensure that new locations are timely served?

19. The Bureau seeks comment on, for added protection, whether and how it should withhold a certain percentage of support for support recipients if it permits them to close out their letters of credit prior to sixth year service milestone because there are fewer existing locations than estimated by the CAM and the Bureau has verified they have served all existing locations. For example, should the Bureau withhold support for all RDOF support recipients, or because WCB will only reduce support once it announces revised location totals if the revised location total is less than 65% of the CAM-estimated locations, should it only withhold support in circumstances where the number of locations the RDOF support recipient has served is less than 65% of the CAM-estimated total? Should the Bureau withhold support on a pro rata basis based on the gap between the CAM-estimated locations and the locations that do exist? As an alternative, should the Bureau withhold support on a pro rata basis for only the number of locations that bring the location total below the 65% threshold, if applicable? Should the support recipient be entitled to have all of its withheld support restored and its support payments resumed for any newly added locations once it has demonstrated that it is now offering the required service to any newly added locations? Or, for administrative efficiency, should support be restored and support payments resumed after the six year service milestone once it has been verified how many locations the support recipient has served? Given the Commission's rules provide broad authority to take other non-compliance measures, is it even necessary to withhold support to protect the public's funds under these circumstances? The Bureau also seeks comment on any alternatives, with a particular focus on how to balance administrative efficiency with its responsibility to protect the public's funds.

20. If a support recipient is unable to meet interim service milestones because there are significantly fewer existing locations than estimated by the CAM, the Commission directed such support recipients to seek a waiver of the relevant interim service milestones. The Bureau proposes finding good cause exists to waive the relevant interim service milestones if the support recipient demonstrates with Fabric data that it has identified all existing locations in its service area and USAC verifies that the support recipient offers service meeting the relevant Commission requirements to all existing locations. Generally, the Commission's rules may be waived for good cause shown. Waiver of the Commission's rules is appropriate only if both: (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.

21. The Bureau proposes finding that the fact that the Fabric shows that there are no more locations to serve in the relevant service area would constitute special circumstances to warrant a waiver. Moreover, the Bureau would find the waiver would serve the public interest because the support recipient could use any resources tied up by maintaining a letter of credit towards deploying more voice and broadband service, and the Commission would still have the ability to take further non-compliance measures if the support recipient does not serve any newly added locations as required. The Bureau seeks comment on its proposal and on any alternative approaches. For example, WCB could handle waivers on a case-by-case basis, but it expects such an approach to be unnecessarily onerous for both the petitioner and WCB when there is already an objective data source that both can rely on to confirm the existence of locations.

22. *Post WCB's announcement of revised location totals.* The Bureau seeks comment on how to implement the requirement that it reduce support for those support recipients for which the revised location count is less than 65% of the CAM locations. The Bureau proposes interpreting the Commission's direction that support be reduced on a pro rata basis by the number of reduced locations to mean that WCB would apply the pro rata support reduction to the number of locations that bring the location total below the 65% threshold. This would avoid the inequity of support recipients being subject to no support reduction if their revised location total is 65% of the CAM-

estimated location total, but being subject to a pro rata support reduction for all of the locations that make up the gap between the CAM estimated location total and the revised location total if their revised location total is 64% or less of the CAM estimated location total.

23. A number of support recipients were authorized to receive support for multiple performance tiers in a state. The Bureau proposes that when revising the location totals for such support recipients, it proportionally adjust their location totals for each performance tier so that the Bureau maintains the same ratio of locations across all performance tiers for the new location total as what was authorized under the initial deployment obligation. This approach is consistent with the Commission's direction that compliance with service milestones be determined at the state level, so that a recipient will be in compliance with service milestones if it offers service meeting the relevant performance requirements to the required percentage of locations across all of the relevant eligible census blocks in the state. As an alternative, should the Bureau just require that the support recipient serve more locations at the higher speed tier than the lower speed tier without requiring the support recipient to serve a set percentage of locations at each speed tier? The Bureau seeks comment on these options and on whether any other approaches would better align with such support recipients' deployment plans. For example, WCB could assign any new locations the performance tier associated with the census block where the location is located. This approach could better reflect RDOF support recipients' initial plans given a winning bidder had to assign a performance tier to each census block group when bidding, but the approach would not account for the flexibility the Commission afforded RDOF support recipients when deciding to measure compliance on a state-level basis.

24. RDOF support recipients must offer the required service upon reasonable request to any locations built after WCB announces revised location totals and prior to the end of the eighth year of support, excluding any locations that do not request service or that have exclusive arrangements with other providers. The Bureau proposes to rely on Fabric data to identify any new locations as of the end of the eighth year of support and confirm compliance with this requirement. The Bureau seeks comment on this proposal and on whether any other data sources should be consulted.

25. The Bureau also seeks comment on criteria for determining whether a request is reasonable. What kinds of parameters would appropriately balance the burden on RDOF support recipients of serving newly built locations with the Commission's goal of maximizing RDOF support to serve as many consumers and small businesses as possible?

26. The Bureau proposes to leverage Fabric data to simplify the location adjustment process for the Bringing Puerto Rico Together Fund and the Connect USVI Fund. Specifically, the Bureau proposes to require support recipients to submit a document in the relevant docket that identifies when there is a discrepancy between estimated locations and actual locations as shown by the Fabric. Rather than duplicate the map data by requiring support recipients to submit individual geocodes for each location shown by the Fabric, the Bureau proposes it is sufficient for support recipients to incorporate the data from the Fabric in their filings by reference and certify that the Fabric accurately depicts the number of actual locations in their service area based on their independent review of the relevant area. To the extent a carrier claims that the Fabric does not accurately depict the number of locations, the service recipient must submit challenges as part of the BDC location challenge process to either add or remove locations from the Fabric. The Bureau seeks comment on whether this proposal meets the Commission's requirement that support recipients submit evidence of existing locations and meets the Commission's objective of adequately verifying the number of locations that exist in the Territories post-hurricane.

27. Are there any alternatives that better achieve this objective? For example, since the process is mandatory for all support recipients, should WCB instead conduct an internal review of the Fabric data to identify where there might be discrepancies rather than having the support recipients conduct an independent review and file a notification with the Commission? How would this approach be consistent with the Commission's requirement that the support recipient submit data as part of this process?

28. The Bureau proposes that rather than provide a separate opportunity for stakeholders to comment on support recipients' filings, it will rely on the BDC's location challenge process for administrative efficiency. For example, once support recipients have notified the Bureau that there is a location discrepancy based on Fabric data or WCB alternatively conducts an internal review, it could wait a reasonable amount of time for stakeholders to file challenges to the Fabric to seek to have locations removed or added. The Commission seeks comment on this approach and suggestions for how much time it should provide to stakeholders to file challenges and for challenges to be resolved, understanding that the Fabric is only updated twice each year. If the Bureau adopts this approach, what would be a reasonable amount of time to wait for challenges? Should the Bureau require stakeholders to notify WCB if they are going to file challenges? Is it necessary to wait for challenges from stakeholders if they have already had ample opportunity to challenge the Fabric data prior to this process? That is, rather than set aside a certain amount of time for challenges, should the Bureau just rely on any challenges that have already been incorporated into the data at the time WCB conducts its review of the data?

29. Once any challenges to the Fabric from stakeholders have been adjudicated, the Bureau proposes finding that the support recipient has met its burden of proof to receive a downward adjustment in its location total and a corresponding pro rata support reduction for the number of locations reflected in the Fabric data. Are there any alternative approaches that would better further the Commission's objective of providing stakeholders with an opportunity to review and comment on the existence of locations without duplicating existing Commission processes?

30. When should WCB conduct the location readjustment process? The Commission anticipated that the process would occur within one year of the announcement of winning bidders, but later explained the process had been delayed. How much time do service providers need to adjust to any changes to their support and location totals so that they can meet the 100% service milestone by December 31, 2027?

31. The Bureau also seeks comment on leveraging Fabric data if a support recipient requests a reassessment of its obligations no later than the beginning of the fifth year of support, *i.e.,* 2026. Should the Bureau adopt the same or similar process for the reassessment that it adopts for the location adjustment process? What other information might be instructive for WCB to collect from support recipients to reassess their obligations? Given that the adjustment process has been delayed, should the Bureau just combine this assessment with the location adjustment process for administrative efficiency? Are there any benefits or drawbacks for service

providers or the public in giving support recipients an opportunity to have their obligations reassessed independently of the location adjustment process?

32. The Bureau also seeks comment on how to adjust support if the number of locations in a municipio or island is higher than what was initially determined. Should WCB increase support on a pro rata basis for any additional locations if the actual number of locations is higher? Are there any other approaches the Bureau should use for adjusting support? The Commission has reiterated that Bringing Puerto Rico Together Fund and the Connect USVI Fund support recipients must serve all locations in their supported areas.

33. The Bureau proposes to permit A–CAM I & A–CAM II recipients to seek a downward adjustment in their location totals by using the Fabric to demonstrate the actual number of locations in their service areas. Should the Bureau adopt the same process it proposes in this document for support recipients of the Bringing Puerto Rico Together Fund and the Connect USVI Fund—*i.e.,* requiring support recipients to request a downward adjustment in the docket and incorporating Fabric data by reference? If so, should the Bureau also provide an opportunity for stakeholders to file challenges to the Fabric through the National Broadband Map or in the BDC system in response to the notification or should the Bureau rely on prior challenges that are already incorporated into the data at the time of WCB's review? Should WCB apply a preponderance of the evidence standard consistent with the standard adopted for the Connect America Fund Phase II auction Eligible Location Adjustment Process, The Bringing Puerto Rico Together Fund, and the Connect USVI Fund? If so, should WCB find that the standard has been met if it verifies that the Fabric data is consistent with the support recipient's requested adjustment? The Bureau seeks comment on these issues and on any alternatives.

34. Although A–CAM recipients have a variety of broadband speed obligations within their service areas, they are able to meet their obligations by deploying to any location within the eligible area. Accordingly, if the Bureau grants a downward adjustment in the location total, it proposes reducing the location total on a pro rata basis so that it would reduce the number of locations proportionally across all of the speed tiers. Similarly, the Bureau also proposes to reduce support on a pro rata basis. The Bureau seeks comment on these proposals and whether WCB should use any alternative approaches for reducing location totals and support amounts.

35. The Bureau also seeks comment on the timing for when WCB should give A–CAM recipients an opportunity to seek a downward adjustment. For administrative efficiency, should the Bureau offer a one-time opportunity for A–CAM recipients to seek a downward adjustment? If so, when would it be an appropriate time to offer this opportunity so as to maximize the number of locations that are identified, but also give support recipients enough time to adjust their plans prior to the end of the support term? For example, the Bureau could require that A–CAM providers with support terms that end in 2028 to submit their request for a downward adjustment based on the latest release of Fabric data prior to end of the sixth year support, consistent with the Commission's requirement that WCB make location adjustments for RDOF recipients, which also have a 10-year support term, prior to the sixth year of support.

36. It is the Bureau's expectation that Alaska Plan participants will offer voice and broadband service to 100% of the locations in remote communities, including those locations not connected to the road system, at performance levels consistent with the type of middle mile commercially available in the community. The rationale is that while the communities are remote and isolated, the locations within the communities are in relatively close proximity. To avoid stranding locations in the Alask Plan participants' service areas without access to broadband service, the Bureau proposes to use Fabric data to identify all locations within each Alaska Plan participant's service area and adjust the Alaska Plan recipient's required location total to account for any locations not already included in the location total pursuant to WCB's delegated authority to approve changes to deployment obligations. The Bureau seeks comment on whether Fabric data is the best source for identifying such locations, and whether other sources should be used including submissions from the carrier.

37. Specifically, the Bureau could conclude that a comprehensive source like the Fabric had not been released when deployment obligations were reassessed in 2021 and that it would serve the public interest to further revise deployment obligations to ensure they accurately reflect the facts on the ground. If the Bureau were to take this step, when would be an appropriate time to revise deployment obligations so that Alaska Plan participants are able to complete deployment to all relevant locations by the end of the support term, *i.e.,* December 31, 2026? Should stakeholders have a defined period of time to make any final challenges to the Fabric through the National Broadband Map or in the BDC system so that the revised obligations incorporate any successful challenges? What other steps could WCB take to make certain that all locations in Alaska Plan recipients' service areas have access to voice and broadband service through the Alaska Plan?

III. Procedural Matters

A. Initial Paperwork Reduction Act

38. This document contains proposed new or modified information collection requirements. The Commission as part of its continuing effort to reduce paperwork burdens, will invite the general public and OMB to comment on the information collection requirements contained in this document, 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, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

39. *Supplemental Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA), the Bureau has prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this document. The supplemental IRFA supplements the Commission's Initial Regulatory Flexibility Analyses (IRFAs) in connection with the *USF/ICC Transformation FNPRM,* 76 FR 78384, December 16, 2011, *April 2014 Connect America FNPRM,* 79 FR 39196, July 9, 2014, *2018 Rate-of-Return Reform NPRM,* 83 FR 17968, April 25, 2018, and *Rural Digital Opportunity Fund NPRM* (*NPRMs and FNPRMs*), 84 FR 43543, August 21, 2019, and Final Regulatory Flexibility Analyses (FRFAs) in connection with the *USF/ICC Transformation Order,* 76 FR 73830, November 29, 2011, *2016 Rate-of-Return Reform Order,* 81 FR 24282, April 25, 2016, *2018 Rate-of-Return Reform Order,* 83 FR 18951, May 1, 2018, *Alaska Plan Order,* 81 FR 69696, October 7, 2016, and *Rural Digital Opportunity Fund Order,* 85 FR 13773, March 10, 2020. Written public comments are requested on this

Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the same deadline for comments specified in this document. The Commission will send a copy of the document, including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the document and Supplemental IRFA (or summaries thereof) will be published in the **Federal Register**.

40. *Need for, and Objectives of, the Proposed Rules.* This document proposes to leverage the Fabric, the ''common dataset of all locations in the United States where fixed broadband internet access service can be installed, as determined by the Commission,'' to provide recipients with a reliable data source for determining locations and to maximize the number of consumers that are served by recipients of various High-Cost support mechanisms. This includes using the Fabric to identify the actual number of residential and small businesses in each relevant high-cost support recipient's service area. The Commission delegated to WCB the authority to revise deployment obligations, and adjust funded locations and funding levels for support recipients' service areas. For RDOF, this document seeks to determine how to implement the Commission's framework for adjusting required location totals based on an updated location source. For the Bringing Puerto Rico Together Fund and the Connect USVI Fund, this document proposes and seeks comment on procedures for leveraging Fabric data to simplify the location adjustment process for these programs. For A–CAM I & II, this document considers permitting recipients to seek a downward adjustment in their location totals by using the Fabric to demonstrate the actual number of locations in their service areas. For the Alaska Plan, this document seeks to determine whether and how to adjust participants' required location totals to include all locations within each Alaska Plan participants' service area as identified by the Fabric.

41. *Legal Basis.* The statutory basis for the Bureau's proposed action is authorized pursuant to sections 4(i), 5(c), 214, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C 154(i), 155(c), 214, 254, 303(r), and 403.

42. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* 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 and policies, 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.

43. As noted in this document, Regulatory Flexibility Analyses were incorporated in the *USF/ICC Transformation FNPRM, April 2014 Connect America FNPRM, 2018 Rate-of-Return Reform NPRM, Rural Digital Opportunity Fund NPRM, USF/ICC Transformation Order, 2016 Rate-of-Return Reform Order, 2018 Rate-of-Return Reform Order, Alaska Plan Order,* and *Rural Digital Opportunity Fund Order.* In those analyses, the Commission described in detail the small entities that might be significantly affected. Accordingly, in the document, for the Supplemental IRFA, the Bureau hereby adopts by reference the descriptions and estimates of the number of small entities from these previous Regulatory Flexibility Analyses.

44. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.* For the relevant High-Cost programs, the Public Notice proposes and seeks comment on streamlined procedures that will leverage existing processes for maintaining the accuracy of the Fabric to minimize the burdens on support recipients, including small businesses, in demonstrating how many actual locations are within their service areas. These proposals may require modifications to the current compliance obligations for small and other providers based upon the proposed methodologies for adjusting support for RDOF, A–CAM, Bringing Puerto Rico Together Fund, and Connect USVI Fund providers based on the number of locations in their service areas that may impact their ability to meet their service obligations. Additionally, the compliance obligations for small and other providers may be impacted by proposals on certain parameters for identifying the locations that high-cost recipients are required to serve—for generally identifying which Fabric locations are relevant to the high-cost support obligations, and more specifically for identifying which locations must be served after the Bureau conducts its recount for RDOF—which may result in an increase or decrease in the number of locations certain support recipients, including small businesses, are required to serve. The Commission anticipates the proposals discussed in the Public Notice will have minimal cost implications because they impact recipients who are currently receiving support from the relevant programs and much of the required information is already collected to ensure compliance with the terms and conditions of support.

45. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

46. Among the alternatives considered that may impact small entities is whether the Bureau should require RDOF support recipients to seek a waiver of, or require additional time to meet, the requirement to serve more locations when their new location count exceeds the CAM locations within their service areas in each state by more than 35%, though addressing such waivers on a case-by-case basis may prove to be administratively burdensome and potentially leave locations stranded without service and ineligible for other funding programs. The Bureau also considers whether it should wait until the Bureau officially revises location totals for all support recipients to identify any newly added locations for those RDOF support recipients that WCB has already verified serve 100% of existing locations, and if so, whether these recipients should have until the eighth year service milestone to serve any of the newly identified locations. Additionally, in regards to multiple performance tier requirements, the Bureau considers whether after the recount it should require that the RDOF support recipients serve more locations at the higher speed tier than the lower speed tier without requiring that the support recipient serve a set percentage of locations at each speed tier, or instead whether the Bureau should

assign locations the performance tier associated with the census block where the location is located. When a carrier receiving Bringing Puerto Rico Together Fund or Connect USVI Fund support claims that Fabric does not accurately depict the number of locations, the Bureau considers whether WCB should conduct an internal review of the Fabric data to identify where there might be discrepancies instead of having the support recipients conduct an independent review and file a notification with the Commission.

Before reaching any final conclusions and taking any final actions however, the Bureau expects to review the comments filed in response to this document and more fully consider the economic impact and alternatives for small entities.

47. As noted in this document, the Bureau seeks comment on how the proposals in the document could affect the IRFAs and FRFAs. Such comments must be filed in accordance with the same filing deadlines for responses to this document and have a separate and distinct heading designating them as responses to the IRFAs and FRFAs.

48. *Providing Accountability Through Transparency Act.* Consistent with the Providing Accountability Through Transparency Act, Public Law 118–9, a summary of this document will be available on *https://www.fcc.gov/proposed-rulemakings.*

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–02971 Filed 2–13–24; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 89, No. 31
Wednesday, February 14, 2024

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 15, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Foreign Agricultural Service

Title: CCC EXPORT CREDIT GUARANTEE PROGRAM (GSM–102).

OMB Control Number: 0551–0004.

Summary of Collection: The CCC Export Credit Guarantee Program (GSM–102) is administered by the U.S. Department of Agriculture's (USDA) Foreign Agricultural Service (FAS) on behalf of USDA's Commodity Credit Corporation (CCC). This program provides guarantees to exporters in order to maintain and increase overseas importers' ability to purchase U.S. agricultural goods. The GSM–102 underwrites credit extended by U.S. private banks to approved foreign banks using dollar-denominated, irrevocable letters of credit. The GSM–102 program covers credit terms up to 18 months.

Need and Use of the Information: Information is collected from participating U.S. exporters and U.S. and Foreign Financial Institutions in order to determine their eligibility for program benefits. The information is also utilized in fulfilling the CCC's obligation under the issued payment guarantee. The information collected enables exporters, U.S. banks and foreign banks to receive the benefits of the program and to ensure compliance with the Federal Funding Accountability and Transparency Act (FFATA), the Debt Collection Improvement Act (DCIA), and non-procurement suspension and debarment regulations found at 2 CFR parts 180 and 417.

Description of Respondents: U.S. exporters, U.S. financial institutions, and foreign financial institutions.

Number of Respondents: 88.

Frequency of Responses: Annually.

Total Burden Hours: 1,065.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–03037 Filed 2–13–24; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 15, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Foreign Agricultural Service

Title: Pima Agriculture Cotton Trust Fund.

OMB Control Number: 0551–0044.

Summary of Collection: Section 12602 of the Agricultural Act of 2014 (Pub. L. 113–79) (The Act), as amended by the Agricultural Improvement Act of 2018 (Pub. L. 115–334), authorizes distributions out of the Pima Agriculture Cotton Trust Fund (''Pima Cotton Trust Fund'') in each of calendar years 2018 through 2023, payable to qualifying claimants. Eligible claimants are directed to submit a notarized affidavit, following the statutory procedures specified in section 12314(c) or (d) of the Act.

Need and Use of the Information: Distributions out of the Trust Fund is payable to (1) One or more nationally recognized associations established for the promotion of pima cotton for use in textile and apparel goods; (2) certain yarn spinners of pima cotton that produced ring spun cotton yarns in the United States from pima cotton during the prior calendar year; and (3) manufacturers who cut and sew cotton shirts in the United States who certify that they used imported cotton fabric during the prior calendar year. Eligible claimants for a distribution from the Pima Cotton Trust Fund are directed to submit a notarized affidavit. The Foreign Agriculture Service (FAS) will use the information provided in the affidavits to certify the claimants' eligibility and to authorize payment from the Pima Cotton Trust Fund. If eligible claimants do not submit an affidavit with the required information they will not be entitled to a distribution from the Pima Cotton Trust Fund.

Description of Respondents: Business or other-for-profit.

Number of Respondents: 9.

Frequency of Responses: Record keeping, Reporting: Annually.

Total Burden Hours: 3.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–03043 Filed 2–13–24; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

[Docket ID No. FCIC–24–0001]

Notice of Request for Renewal and Revision of the Currently Approved Information Collection

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Renewal and revision of the currently approved information collection.

SUMMARY: This notice announces a public comment period on the information collection requests (ICRs) associated with the submission of policies, provisions of policies, rates of premium, and non-reinsured supplemental policies under section 508(h) of the Federal Crop Insurance Act.

DATES: We will accept comments on this notice until close of business April 15, 2024.

ADDRESSES: We invite you to submit comments on this information collection request. You may submit comments electronically through the Federal eRulemaking Portal: Go to *http://www.regulations.gov* and search for Docket ID No. FCIC–24–0001. Follow the instructions for submitting comments. Comments will be available for viewing online at *regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Francie Tolle; telephone (816) 926–7829, email *francie.tolle@usda.gov.* Persons with disabilities who require alternative means of communication should contact the USDA Target Center at (202) 720–2600 (voice) or (844) 433–2774 (toll-free nationwide).

SUPPLEMENTARY INFORMATION:

Title: General Administrative Regulations; Subpart V—Submission of Policies, Provisions of Policies, Rates of Premium, and Non-Reinsured Supplemental Policies.

OMB Number: 0563–0064.

Expiration Date of Approval: May 31, 2024.

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

Abstract: The information collection requirements for this renewal package are necessary to administer subpart V which establishes guidelines for the submission of policies or other materials to the FCIC Board of Directors (Board) and identifies the required contents of a submission: the timing, review, and confidentiality requirements; reimbursement of research and development costs, maintenance costs, and user fees; and guidelines for non-reinsured supplemental policies. This data is used to administer the Federal crop insurance program in accordance with the Federal Crop Insurance Act, as amended.

FCIC is requesting the Office of Management and Budget (OMB) to extend the approval of this information collection for an additional 3 years.

The purpose of this notice is to solicit comments from the public concerning this information collection. These comments will help us:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.,* permitting electronic submission of responses.

Estimate of Burden: The public reporting burden for this collection of information is estimated to average 326 hours per response.

Respondents/Affected Entities: Parties affected by the information collection requirements included in this Notice is a person (including an approved insurance provider, a college or university, a cooperative or trade association, or any other person) who prepares a submission, proposes to the Board other crop insurance policies, provisions of policies, or rates of premium, or submits to the Risk Management Agency (RMA) a non-reinsured supplemental policy.

Estimated annual number of respondents: 138.

Estimated annual number of responses per respondent: .69.

Estimated annual number of responses: 95.

Estimated total annual burden hours on respondents: 30,921.

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

Marcia Bunger,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 2024–02991 Filed 2–13–24; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–156, A–588–881]

Aluminum Lithographic Printing Plates From the People's Republic of China and Japan: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

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

DATES: Applicable February 14, 2024.

FOR FURTHER INFORMATION CONTACT: Benito Ballesteros (the People's Republic of China (China)) and Caroline Carroll (Japan), AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–7425 and (202) 482–4948, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 18, 2023, the U.S. Department of Commerce (Commerce) initiated less-than-fair-value (LTFV) investigations of imports of aluminum lithographic printing plates (printing plates) from China and Japan.[1] Currently, the preliminary determinations are due no later than March 6, 2024.

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On February 6, 2024, the petitioner[2] submitted a timely request that Commerce postpone the preliminary determinations in these LTFV investigations, in accordance with 19 CFR 351.205(b)(2).[3] The petitioner requests postponement to allow Commerce adequate time to issue supplemental questionnaires and to conduct a thorough analysis in these investigations.[4]

For the reasons stated above and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act, is postponing the deadline for these preliminary determinations by 50 days (*i.e.,* 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its preliminary determinations no later than April 25, 2024. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed at a later date.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: February 8, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–03071 Filed 2–13–24; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Aluminum Lithographic Printing Plates from the People's Republic of China and Japan: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 73316 (October 25, 2023).

[2] The petitioner is the Eastman Kodak Company.

[3] *See* Petitioner's Letters, ''Less-Than-Fair-Value Investigation of Aluminum Lithographic Printing Plates from the People's Republic of China—Petitioner's Request for Postponement of Preliminary Determination,'' dated February 6, 2024; and ''Less-Than-Fair-Value Investigation of Aluminum Lithographic Printing Plates from Japan—Petitioner's Request for Postponement of Preliminary Determination,'' dated February 6, 2024.

[4] *Id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–802]

Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Determination of No Shipments of Antidumping Duty Administrative Review; 2022–2023

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that no companies under review qualify for a separate rate, and that these companies are, therefore, considered part of the Socialist Republic of Vietnam (Vietnam)-wide entity. Additionally, Commerce determines that certain companies had no shipments of subject merchandise during the period of review (POR), February 1, 2022, through January 31, 2023.

DATES: Applicable February 14, 2024.

FOR FURTHER INFORMATION CONTACT: Jonathan Schueler 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) 482–9175 respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 3, 2023, Commerce published in the **Federal Register** the preliminary results of this administrative review of the antidumping duty order on certain frozen warmwater shrimp from Vietnam.[1] This review covers 118 companies preliminarily determined to be part of the Vietnam-wide entity and four companies preliminarily determined to have no shipments of subject merchandise during the POR.[2] We invited parties to comment on the *Preliminary Results.*[3] No interested party submitted comments. Accordingly, the final results are unchanged from the *Preliminary Results,* with the exception of our treatment of Vietnam Fish One,[4] and no decision memorandum accompanies this **Federal Register** notice. Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order[5]

The merchandise subject to the *Order* is certain frozen warmwater shrimp from Vietnam. For a full description of the scope of the *Order, see* the *Preliminary Results.*[6]

Final Determination of No Shipments

In the *Preliminary Results,* Commerce found that the following four companies did not have any shipments of subject merchandise during the POR: (1) Bien Dong Seafood Co., Ltd.; (2) Vinh Hoan Corp.; (3) Seavina Joint Stock Company; and (4) BIM Foods Joint Stock

[1] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Preliminary Determination of No Shipments of Antidumping Duty Administrative Review; 2022–2023,* 88 FR 75550 (November 3, 2023) (*Preliminary Results*).

[2] In the *Preliminary Results,* we preliminarily determined that 117 companies under review belong to the Vietnam-wide entity. However, after the publication of the *Preliminary Results,* we determined that, based upon a re-examination of the record, Vietnam Fish One Co., Ltd. (Vietnam Fish One), a company with respect to which we stated we would rescind the review in the *Preliminary Results,* must be included in the Vietnam-wide entity because of its historical *a.k.a.* relationship with Viet Hai Seafood Co., Ltd., a company we preliminarily determined to belong to the Vietnam-wide entity. For a full discussion, *see* Memorandum, ''Status of Vietnam Fish One Co., Ltd.,'' dated November 13, 2023 (Vietnam Fish One Status Memorandum).

[3] *See Preliminary Results* at 75552.

[4] *See* Vietnam Fish One Status Memorandum.

[5] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam,* 70 FR 5152 (February 1, 2005) (*Order*).

[6] *See Preliminary Results,* 88 FR at 75552 and Appendix I.

Company.[7] As we have not received any information to contradict this preliminary finding, Commerce determines that these four companies did not have any shipments of subject merchandise during the POR and will issue appropriate instructions that are consistent with our ''automatic assessment'' clarification, for these final results.

Final Results of Review

As no parties submitted comments regarding the *Preliminary Results,* Commerce made no changes to its determinations for the final results of this review, with the exception of the treatment of Vietnam Fish One, as discussed above. For these final results, Commerce continues to find that no company under review submitted a timely separate rate application or separate rate certification, and therefore, no company has established eligibility for a separate rate.

Disclosure

Based on the above information, Commerce has not calculated any dumping margins for any companies under review, nor has Commerce granted separate rates to any companies under review. Commerce continues to find that 118 companies under review are part of the Vietnam-wide entity and are subject to the Vietnam-wide entity rate of 25.76 percent (*see* Appendix). Because no party requested a review of the Vietnam-wide entity, and we did not self-initiate a review, the Vietnam-wide entity rate (*i.e.,* 25.76 percent)[8] is not subject to change as a result of this review. Consequently, there are no calculations to disclose in accordance with 19 CFR 351.224(b) for these final results.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise covered by this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

We have not calculated any assessment rates in this administrative review. With regard to the 118 companies identified in the appendix to this notice as part of the Vietnam-wide entity, we will instruct CBP to apply an *ad valorem* assessment rate of 25.76 percent to all entries of subject merchandise during the POR which were exported by those companies. Additionally, consistent with Commerce's assessment practice in non-market economy (NME) cases, for any exporter under review which Commerce determined had no shipments of the subject merchandise during the POR, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the NME-wide rate.[9]

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 Vietnam entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) for previously investigated or reviewed Vietnamese and non-Vietnamese exporters that are not under review in this segment of the proceeding but have separate rates, the cash deposit rate will continue to be the exporter's existing cash deposit rate; (2) for all Vietnamese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the existing rate for the Vietnam-wide entity of 25.76 percent; and (3) for all non-Vietnamese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnamese exporter that supplied that non-Vietnamese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also 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 review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

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, 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 final results are issued and published in accordance with sections 751(a)(1)(B) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: February 6, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

Companies Under Review Determined To Be Part of the Vietnam-Wide Entity

1. AFoods
2. Amanda Seafood Co., Ltd.
3. An Nguyen Investment Production and Group
4. Anh Khoa Seafood
5. Anh Minh Quan Corp.
6. APT Co.
7. Au Vung One Seafood
8. Bentre Forestry and Aquaproduct Import-Export Joint Stock Company
9. Bentre Seafood Joint Stock Company
10. Beseaco
11. Binh Dong Fisheries Joint Stock Company
12. Binh Thuan Import-Export Joint Stock Company
13. Blue Bay Seafood Co., Ltd.
14. Cadovimex
15. Cadovimex II Seafood Import Export and Processing Joint Stock Company
16. Cadovimex Seafood Import-Export and Processing Joint Stock Company
17. Cantho Import Export Seafood Joint Stock Company
18. Caseamex
19. CJ Cau Tre Foods Joint Stock Company
20. Coastal Fisheries Development Corporation
21. COFIDEC
22. Dai Phat Tien Seafood Co., Ltd.
23. Danang Seafood Import Export
24. Danang Seaproducts Import-Export

[7] *Id.,* 88 FR at 75551. Consistent with the *Preliminary Results,* we omitted Van Duc Export Joint Stock Company from this list of companies because although it timely filed a no-shipment certification, the company is not under review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 21609, 2167 (April 11, 2023) (*Initiation Notice*).

[8] *See Order.*

[9] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Corporation
25. Dong Hai Seafood Limited Company
26. Dong Phuong Seafood Co., Ltd.
27. Duc Cuong Seafood Trading Co., Ltd.
28. Duong Hung Seafood
29. FAQUIMEX
30. FFC
31. Fine Foods Company
32. Gallant Dachan Seafood Co., Ltd.
33. Gallant Ocean (Vietnam) Co. Ltd.
34. Gallant Ocean (Vietnam) Joint Stock Company
35. Go Dang Joint Stock Company
36. GODACO Seafood
37. Green Farms Seafood Joint Stock Company
38. Hanh An Trading Service Co., Ltd.
39. Hoang Anh Fisheries Trading Company Limited
40. Hong Ngoc Seafood Co., Ltd.
41. Hung Bang Company Limited
42. Hung Dong Investment Service Trading Co., Ltd.
43. HungHau Agricultural Joint Stock Company
44. INCOMFISH
45. Investment Commerce Fisheries Corporation
46. JK Fish Co., Ltd.
47. Khang An Foods Joint Stock Company
48. Khanh Hoa Seafoods Exporting Company
49. KHASPEXCO
50. Long Toan Frozen Aquatic Products Joint Stock Company
51. MC Seafood
52. Minh Bach Seafood Company Limited
53. Minh Cuong Seafood Import Export Processing Joint Stock Company
54. Minh Phat Seafood Company Limited [10]
55. Minh Phu Hau Giang Seafood [11]
56. Minh Phu Seafood Corporation [12]
57. Minh Qui Seafood Company Limited [13]
58. Nam Phuong Foods Import Export Company Limited
59. Nam Viet Seafood Import Export Joint Stock Company
60. Namcan Seaproducts Import Export Joint Stock Company
61. NAVIMEXCO
62. New Generation Seafood Joint Stock Company
63. New Wind Seafood Company Limited
64. Ngoc Trinh Bac Lieu Seafood Co., Ltd.
65. Nguyen Chi Aquatic Product Trading Company Limited
66. Nhat Duc Co., Ltd.
67. Nigico Co., Ltd.
68. Phuong Nam Foodstuff Corp.
69. QAIMEXCO
70. Quang Minh Seafood Co., Ltd
71. Quoc Ai Seafood Processing Import Export Co., Ltd.
72. Quoc Toan PTE
73. Quoc Toan Seafood Processing Factory
74. Quy Nhon Frozen Seafoods Joint Stock Company
75. Safe And Fresh Aquatic Products Joint Stock Company
76. Saigon Aquatic Product Trading Joint Stock Company
77. Saigon Food Joint Stock Company
78. SEADANANG
79. Seafood Direct 2012 One Member Limited
80. Seafood Joint Stock Company No. 4
81. Seafood Travel Construction Import-Export Joint Stock Company
82. Seanamico
83. Seaproducts Joint Stock Company
84. Seaspimex Vietnam
85. Simmy Seafood Company Limited
86. South Ha Tinh Seaproducts Import-Export Joint Stock Company
87. South Vina Shrimp—SVS
88. Southern Shrimp Joint Stock Company
89. Special Aquatic Products Joint Stock Company
90. T & P Seafood Company Limited
91. Tai Nguyen Seafood Co., Ltd.
92. Tan Phong Phu Seafood Co., Ltd.
93. Tan Thanh Loi Frozen Food Co., Ltd.
94. THADIMEXCO
95. Thai Hoa Foods Joint Stock Company
96. Thai Minh Long Seafood Company Limited
97. Thaimex
98. Thanh Doan Fisheries Import-Export Joint Stock Company
99. Thanh Doan Sea Products Import & Export Processing Joint-Stock Company
100. Thanh Doan Seafood Import Export Trading Joint-Stock Company
101. The Light Seafood Company Limited
102. Thien Phu Export Seafood
103. Thinh Hung Co., Ltd.
104. Thinh Phu Aquatic Products Trading Co., Ltd.
105. Thuan Thien Producing Trading Ltd. Co.
106. TPP Co. Ltd.
107. Trang Corporation (Vietnam)
108. Trung Son Corp.
109. Trung Son Seafood Processing Joint Stock Company
110. Van Duc Food Company Limited
111. Viet Asia Foods Company Limited
112. Viet Hai Seafood Co., Ltd.
113. Viet Phu Foods and Fish Corp.
114. Viet Shrimp Corporation
115. Vietnam Fish One Co., Ltd.[14]
116. VIFAFOOD
117. Vinh Phat Food Joint Stock Company
118. XNK Thinh Phat Processing Company

[FR Doc. 2024–03072 Filed 2–13–24; 8:45 am]

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[10] As stated in the *Initiation Notice,* 88 FR at 21609, shrimp produced and exported by Minh Phat Seafood Company Limited were excluded from the *Order* effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. *See Initiation Notice,* 88 FR at 21616 (footnote 10).

[11] As stated in the *Initiation Notice,* shrimp produced and exported by Minh Phu Hau Giang Seafood were excluded from the *Order* effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. *See Initiation Notice,* 88 FR at 21616 (footnote 11).

[12] As stated in the *Initiation Notice,* shrimp produced and exported by Minh Phu Seafood Corporation were excluded from the *Order* effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. *See Initiation Notice,* 88 FR at 21616 (footnote 12).

[13] As stated in the *Initiation Notice,* shrimp produced and exported by Minh Qui Seafood Company Limited were excluded from the *Order* effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. *See Initiation Notice,* 88 FR at 21616 (footnote 13).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–134]

Certain Metal Lockers and Parts Thereof From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2020–2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies were provided to producers and exporters of certain metal lockers and parts thereof (metal lockers) from the People's Republic of China (China). The period of review (POR) is December 14, 2020, through December 31, 2021.

DATES: Applicable February 14, 2024.

FOR FURTHER INFORMATION CONTACT: Alex Cipolla, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4956.

SUPPLEMENTARY INFORMATION:

Background

On September 7, 2023, Commerce published the *Preliminary Results.*[1] For

[14] As noted above, though we stated we would rescind the review with respect to Vietnam Fish One in the *Preliminary Results,* we determined after the publication of the *Preliminary Results* that it must be included in the Vietnam-wide entity because of its historical *a.k.a.* relationship with Viet Hai Seafood Co., Ltd., a company we have determined to belong to the Vietnam-wide entity. For a full discussion, *see* the Vietnam Fish One Status Memorandum.

[1] *See Certain Metal Lockers and Parts Thereof from the People's Republic of China: Preliminary Results and Partial Rescission of the Countervailing*

Continued

a complete description of the events that occurred subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[2] On December 18, 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 the final results until February 6, 2024.[3]

Scope of the Order [4]

The merchandise subject to the *Order* are metal lockers from China. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

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

Changes Since the Preliminary Results

Based on our review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the countervailable subsidy rate calculations for mandatory respondents Xingyi Metalworking (Zhejiang) Co., Ltd. (Xingyi Metalworking) and Zhejiang Xingyi Metal Products Co., Ltd. (Zhejiang Xingyi). As a result of these changes, the final rates for the two companies under review which were not selected for individual examination also changed.[5] These changes are explained in the Issues and Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Act. For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[6] The Issues and Decision Memorandum contains a full description of the methodology underlying Commerce's conclusions, including any determination that relied upon the use of adverse facts available pursuant to sections 776(a) and (b) of the Act.

Companies Not Selected for Individual Examination

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(e)(2) of the Act. Generally, Commerce looks to section 705(c)(5) of the Act, which provides instructions for determining the all-others rate in an investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 705(c)(5)(A) of the Act, the all-others rate is normally an amount equal to the weighted average of the countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero or *de minimis* countervailable subsidy rates, and any rates determined entirely on the basis of facts available.

As stated above, there are two companies for which a review was requested and not rescinded, and which were not selected as mandatory respondents or found to be cross-owned with the mandatory respondents. Because the rate calculated for the mandatory respondents in this review, Xingyi Metalworking and Zhejiang Xingyi, is above *de minimis* and not based entirely on facts available, we are applying Xingyi Metalworking and Zhejiang Xingyi's subsidy rate to these non-selected companies. This methodology used to establish the rate for the non- selected companies is consistent with our practice regarding the calculation of the all-others rate, pursuant to section 705(c)(5)(A)(i) of the Act.

This is the same methodology Commerce applied in the *Preliminary Results* for determining a rate for companies not selected for individual examination. However, due to changes in the calculations for Xingyi Metalworking and Zhejiang Xingyi, we revised the non-selected rate accordingly. Consequently, for the two companies not selected for individual examination and for which the review was not rescinded, we are applying an *ad valorem* subsidy rate of 16.61 percent for 2020 and 22.72 percent for 2021.

Final Results of Review

We determine the following net countervailable subsidy rates exist for the period December 14, 2020, through December 31, 2021:

Producer/exporter	2020 subsidy rate (percent)	2021 subsidy rate (percent)
Xingyi Metalworking Technology (Zhejiang) Co., Ltd.; Zhejiang Xingyi Metal Products Co., Ltd	16.61	22.72
Hangzhou Evernew Machinery & Equipment Company Limited	16.61	22.72
Hangzhou Xline Machinery & Equipment Co. Ltd	16.61	22.72

Disclosure

Commerce intends to disclose its calculations and analysis performed for these final results to interested parties within five days of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Assessment Requirements

In accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(2), Commerce has

Duty Administrative Review; 2020–2021, 88 FR 61514 (September 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of Countervailing Duty Administrative Review: Certain Metal Lockers and Parts Thereof from the People's Republic of China; 2020–2021,'' dated concurrently with, and hereby adopted by, this notice.

[3] *See* Memorandum, ''Extension of Deadline for Final Results of Countervailing Duty Administrative Review,'' dated December 18, 2023.

[4] *See Certain Metal Lockers and Parts Thereof from the People's Republic of China: Antidumping and Countervailing Duty Orders,* 86 FR 46826 (August 20, 2021) (*Order*).

[5] The two companies not selected for individual examination are: Hangzhou Evernew Machinery & Equipment Company Limited, and Hangzhou Xline Machinery & Equipment Co. Ltd.

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

determined, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries covered by this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed for the corresponding time periods (*i.e.,* December 14, 2020, to December 31, 2020, and January 1, 2021, to December 31, 2021). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts calculated for the year 2021 for the above-listed companies with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

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 disposition 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 sanctionable violation.

Notification to Interested Parties

These final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: February 6, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, Performing the Non-exclusive Functions and Duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–03074 Filed 2–13–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Greater Atlantic Region Dealer Purchase Reports

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 November 03, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration, Commerce.

Title: Greater Atlantic Region Dealer Purchase Reports.

OMB Control Number: 0648–0229.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 641.

Average Hours per Response: 0.07.

Total Annual Burden Hours: 28,798.

Needs and Uses: This is an extension request of the current approval. Federally permitted dealers, and any individual acting in the capacity of a dealer, must submit to the Regional Administrator or to the official designee a detailed report of all fish purchased or received for a commercial purpose, other than solely for transport on land by one of the available electronic reporting mechanisms approved by National Marine Fisheries Service (NMFS). The information obtained is used by economists, biologists, and managers in the management of the fisheries. The data collection parameters are consistent with the current requirements for Federal dealers under the authority of the Magnuson-Stevens Fishery Conservation and Management Act.

Affected Public: Business or other for-profit organizations; Not-for-profit institutions; State, Local, Tribal government; Federal government.

Frequency: Weekly.

Respondent's Obligation: Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act, Code of Federal Regulations Title 50 Part 648. 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 0648–0229.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–03005 Filed 2–13–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD725]

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold meetings of the following: Mackerel Cobia Committee, Southeast Data, Assessment and Review (SEDAR) Committee, and Snapper Grouper Committee. The meeting week will also include a formal public comment session and meetings of the Full Council.

DATES: The Council meeting will be held from 1:30 p.m. on Monday, March 4, 2024, until 12 p.m. on Friday, March 8, 2024.

ADDRESSES: *Meeting address:* The meeting will be held at the Villas by the Sea Resort, 1175 Beachview Drive, Jekyll Island, GA 31527; phone: (912) 635–2521. The meeting will also be available via webinar. See **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 302–8440 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Meeting information, including agendas, overviews, and briefing book materials will be posted on the Council's website at: *https://safmc.net/council-meetings/.* Webinar registration links for the meeting will also be available from the Council's website.

Public comment: Public comment on agenda items may be submitted through the Council's online comment form available from the Council's website at: *https://safmc.net/events/march-2024-council-meeting/.* Written comments will be accepted from February 16, 2024, until March 8, 2024. These comments are accessible to the public, part of the Administrative Record of the meeting, and immediately available for Council consideration. A formal public comment session will also be held during the Council meeting.

The items of discussion in the individual meeting agendas are as follows:

Council Session I, Monday, March 4, 2024, 1:30 p.m. Until 5 p.m.

The Council will receive reports from NOAA Office of Law Enforcement, The Council's Law Enforcement Advisory Panel (AP), the U.S. Coast Guard, Council liaisons, and state agencies, and an update on Best Fishing Practices and Outreach conducted thus far in 2024. The Council will discuss potential modifications to the Southeast For-Hire Integrated Electronic Reporting (SEFHIER) Program and also consider limited-entry in South Atlantic For-Hire Fisheries.

Mackerel Cobia Committee, Tuesday, March 5, 2024, 8:30 a.m. Until 10 a.m.

The Committee will receive recommendations from the Law Enforcement AP and is scheduled to approve a plan for the Council to conduct port meetings for the mackerel fishery in 2024.

SEDAR Committee, Tuesday, March 5, 2024, 10 a.m. Until 12 p.m. (Partially-Closed Session)

The Committee will meet in Closed Session to approve appointments to SEDAR Panels and workgroups. The Committee will meet in Open Session to approve Terms of Reference for upcoming stock assessments and other business related to stock assessments.

Snapper Grouper Committee, Tuesday, March 5, 2024, 1:30 p.m. Until 5 p.m., Wednesday, March 6, 2024, 8:30 a.m. Until 3:45 p.m., and Thursday, March 7, 2024, 8:30 a.m. Until 12 p.m.

The Committee will receive a briefing on Exempted Fishing Permit applications and a presentation on projections for 2024 recreational seasons for red snapper and gag from NOAA Fisheries. The Committee will consider recommendations from the Wreckfish Subcommittee for Amendment 48 to the Snapper Grouper Fishery Management Plan addressing the wreckfish fishery and is scheduled to approve the amendment for public hearings. The Committee will receive Law Enforcement AP recommendations and public scoping comments relative to Regulatory Amendment 36 addressing gag and black grouper vessel limits and on-demand gear for black sea bass, and receive a stock assessment presentation and recommendations from its Scientific and Statistical Committee (SSC) relative to black sea bass and the development of Snapper Grouper Amendment 56.

The Committee will receive Law Enforcement AP recommendations relative to Snapper Grouper Amendment 46 addressing a private recreational permit for the snapper grouper fishery and consider modifications to actions currently in the amendment, review preliminary analysis for Amendment 55 addressing management measures for scamp and yellowmouth grouper, and discuss Regulatory Amendment 35 addressing red snapper management and consider modifications and additional actions. The Committee will receive an update on development of a Management Strategy Evaluation for the Snapper Grouper Fishery and consider SSC recommendations, an overview of commercial permits, and discuss topics for the March 2024 meeting of the Snapper Grouper AP.

Wednesday, March 6, 2024, 4 p.m.—Public comment will be accepted from individuals attending the meeting in person and via webinar on all items on the Council meeting agenda. The Council Chair will determine the amount of time provided to each commenter based on the number of individuals wishing to comment.

Council Session II, Thursday, March 7, 2024, 1:30 p.m. Until 5 p.m. and Friday, March 8, 2024, 8:30 a.m. Until 12 p.m.

The Council will receive a litigation brief if needed, receive a staff report, and a presentation from NOAA Fisheries on Equity and Environmental Justice. The Council will receive reports from NOAA Fisheries Southeast Regional Office and the Southeast Fisheries Science Center, and review the Council's workplan and upcoming meetings. The Council will receive Committee reports and discuss any other business as needed.

Documents regarding these issues are available from the Council office (see **ADDRESSES**).

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

Special Accommodations

These meetings are 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: February 9, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–03070 Filed 2–13–24; 8:45 am]

BILLING CODE 3510–02–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Greater Atlantic Region Vessel Identification Requirements

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites 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. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before April 15, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0350 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Laura Hansen, Fishery Management Specialist, NOAA, Greater Atlantic Regional Fisheries Office, (978) 281–9225, *Laura.Hansen@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for the extension of a current information collection. Regulations at 50 CFR 648.8 and § 697.8 require that owners of vessels over 25 ft (7.6 m) in registered length that have federal permits to fish in the Greater Atlantic Region display the vessel's name and official number. The name and number must be of a specific size at specified locations: the vessel name must be affixed to the port and starboard sides of the bow and, if possible, on its stern. The official number must be displayed on the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck so as to be clearly visible from enforcement vessels and aircraft. The success of fisheries management programs depends upon regulatory compliance. The vessel identification requirement, which is required of all federally permitted fishing vessels in the Greater Atlantic region, is essential to facilitate enforcement. The ability to link fishing or other activities to a vessel owner or operator is crucial to the enforcement of regulations issued under the authority of the Magnuson-Stevens Fisheries Conservation and Management Act. When this information is clearly displayed, it enables enforcement personnel to easily identify Federal permit holders while engaged in fishing.

II. Method of Collection

No information is submitted to NMFS as a result of this collection. The vessel's identification information must be affixed to the vessel in the designated locations, as specified in the regulations.

III. Data

OMB Control Number: 0648–0350.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households; business or other for-profit organizations.

Estimated Number of Respondents: 3,935.

Estimated Time per Response: 45 minutes (.75 hours) to affix vessel information to the required locations.

Estimated Total Annual Burden Hours: 2,952

Estimated Total Annual Cost to Public: $59,025.

Respondent's Obligation: Mandatory.

Legal Authority: 50 CFR 648.8.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–03001 Filed 2–13–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

Public Meeting of the Ocean Exploration Advisory Board

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda for a meeting of the Ocean Exploration Advisory Board (OEAB). OEAB members will discuss and provide advice on the Federal ocean exploration program, with a particular emphasis on the topics identified in the section on Matters To Be Considered.

DATES: The announced meeting is scheduled for Thursday, February 29, 2024 from 12 p.m.–4 p.m. (EST).

ADDRESSES: This will be a virtual meeting. Information about how to participate or observe virtually will be posted to the OEAB website at *https://oeab.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: Mr. David Turner, Designated Federal Officer, Ocean Exploration Advisory Board, National Oceanic and Atmospheric Administration, *David.Turner@NOAA.gov* or (859) 327–9661.

SUPPLEMENTARY INFORMATION: NOAA established the OEAB under the Federal Advisory Committee Act (FACA) and legislation that gives the agency statutory authority to operate an ocean exploration program and to coordinate a national program of ocean exploration. The OEAB advises NOAA leadership on strategic planning, exploration priorities, competitive ocean exploration grant programs, and other matters as the NOAA Administrator requests.

OEAB members represent government agencies, the private sector, academic institutions, and not-for-profit institutions involved in all facets of ocean exploration—from advanced technology to citizen exploration.

In addition to advising NOAA leadership, NOAA expects the OEAB to help to define and develop a national program of ocean exploration—a network of stakeholders and partnerships advancing national priorities for ocean exploration.

Matters To Be Considered: The OEAB will discuss finalizing recommendations they have been developing on ways to take ocean exploration to new heights with emphasis on need for creativity, challenging existing thinking, and pushing boundaries within the ocean exploration field. The board will discuss and deliberate on these topics. The agenda and other meeting materials will be made available on the OEAB website at *https://oeab.noaa.gov/.*

Status: The meeting will be open to the public via remote access. Please check the agenda on the OEAB website to confirm the public comment period schedule.

The OEAB expects that public statements at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to three minutes. The Designated Federal Officer must receive written comments by February 20, 2024, to provide sufficient time for OEAB review. Written comments received after February 20, 2024, will be distributed to the OEAB but may not be reviewed prior to the meeting date. Comments should be submitted to Designated Federal Officer *David.Turner@NOAA.gov.*

Special Accomodations: Requests for sign language interpretation or other auxiliary aids should be directed to the Designated Federal Officer by February 20, 2024.

David Holst,

Chief Financial and Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2024–03006 Filed 2–13–24; 8:45 am]

BILLING CODE 3510–KA–P

DEPARTMENT OF DEFENSE

Department of the Army

Advisory Committee on Arlington National Cemetery 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 meeting of the Advisory Committee on Arlington National Cemetery (ACANC). This meeting is open to the public. For more information, please visit: *https://www.arlingtoncemetery.mil/About/Advisory-Committee-on-Arlington-National-Cemetery/ACANC-Meetings.*

DATES: The ACANC will meet on Thursday, February 29, 2023, from 9 a.m. to 12 p.m. Eastern Time.

ADDRESSES: Multipurpose Room of the Welcome Center at Arlington National Cemetery, Arlington, Virginia 22211.

FOR FURTHER INFORMATION CONTACT: Ms. Renea Yates, Designated Federal Officer (DFO) for the ACANC, or Mr. Matthew Davis, Alternate Designated Federal Officer (ADFO) for the ACANC, Arlington National Cemetery (ANC), Arlington, VA 22211; by email at *matthew.r.davis.civ@army.mil;* or by phone at 1–877–907–8585.

SUPPLEMENTARY INFORMATION: This 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), and 41 CFR 102–3.150.

Purpose of the Meeting: The ACANC provides independent advice and recommendations to the Secretary of the Army on matters related to ANC, including, but not limited to, cemetery administration, the erection of memorials at the cemetery, and master planning for the cemetery. The Secretary of the Army may act on the Committee's advice and recommendations.

Agenda: The Committee will receive a status report of the planning for final disposition of the Confederate Memorial; receive a briefing on digital engagement strategy for Arlington National Cemetery; receive a status update on the progress of objectives at Arlington National Cemetery; and receive an update on the Military Equine Status.

Public's Accessibility to the Meeting: Pursuant to FACA and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public.

Procedures for Attendance and Public Comment: To attend this meeting, contact Mr. Matthew Davis, the ADFO. (See the information listed in the **FOR FURTHER INFORMATION CONTACT** section; email is preferred.) Individuals will be asked to submit their full name, organization, email address, and phone number to attend. Public attendance will be via physical presence.

For additional information about public access procedures, contact Mr. Matthew Davis, the ADFO. (See the information listed in the **FOR FURTHER INFORMATION CONTACT** section; email is preferred.)

Written Comments and Statements: Pursuant to 5 U.S.C. 1009(a)(3), 41 CFR 102–3.105(j), and 41 CFR 102–3.140, the public or interested organizations may submit written comments or statements to the ACANC either in response to the stated agenda of the open meeting or regarding the ACANC's mission in general. Written comments or statements should be submitted to Mr. Matthew Davis, the ADFO. (See the information listed in the **FOR FURTHER INFORMATION CONTACT** section; email is preferred.) Each page of the comment or statement must include the author's name, title or affiliation, address, and daytime phone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the ADFO at least seven business days prior to the meeting to be considered by the ACANC. Written comments or statements received after this date may not be provided to the ACANC until its next meeting. The DFO will review all timely written comments or statements with the ACANC Chairperson and will ensure such comments or statements are provided to all ACANC members before the meeting.

Pursuant to 41 CFR 102–3.140d, the ACANC is not obligated to allow any member of the public to speak or otherwise address the ACANC during the meeting. Members of the public may be permitted to make verbal comments during these meetings and if allowed, verbal comments may only be made 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, the individual must submit a request to the ADFO with a brief statement of the subject matter to be addressed by the comment. (See the information listed in the **FOR FURTHER INFORMATION CONTACT** section; email is preferred.) The request must be submitted to the ADFO at least three business days before the meeting. The ADFO will log each request in the order received. In consultation with the Chairperson(s), the DFO will determine whether the subject matter of each comment is relevant to the ACANC mission and/or to the agenda of this public meeting. Members of the public who asked to make a verbal comment and whose comments are deemed relevant under the process described above will be invited to speak in the order in which the ADFO received their request. The appropriate Chairperson(s) may allot a specific amount of time for verbal comments.

James W. Satterwhite, Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2024–03066 Filed 2–13–24; 8:45 am]

BILLING CODE 3711–02–P

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors for the Western Hemisphere Institute for Security Cooperation Meeting Notice

AGENCY: Department of the Army, Department of Defense (DoD).

ACTION: Notice of open meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory committee meeting of the Board of Visitors for the Western Hemisphere Institute for Security Cooperation (WHINSEC). This meeting is open to the public.

DATES: The Board of Visitors will meet from 9 a.m. to 4 p.m. on Wednesday, March 13, 2024 and from 9 a.m. to 12 p.m. on Thursday, March 14, 2024.

ADDRESSES: Western Hemisphere Institute for Security Cooperation, Bradley Hall, 7301 Baltzell Avenue, Building 396, Fort Benning, GA 31905.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Procell, Alternate Designated Federal Officer for the Committee, by email at *richard.d.procell2.civ@army.mil,* or by telephone at (913) 684–2963.

SUPPLEMENTARY INFORMATION: The committee meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), 41 CFR 102–3.140(c), and 41 CFR 102–3.150.

Purpose of the Meeting: The Board of Visitors for the Western Hemisphere Institute for Security Cooperation is a non-discretionary Federal Advisory Committee chartered to provide the Secretary of Defense, through the Secretary of the Army, independent advice and recommendations on matters pertaining to the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the institute; other matters relating to the institute that the board decides to consider; and other items that the Secretary of Defense determines appropriate. The board reviews curriculum to determine whether it adheres to current U.S. doctrine, complies with applicable U.S. laws and regulations, and is consistent with U.S. policy goals toward Latin America and the Caribbean. The board also determines whether the instruction under the curriculum of the institute appropriately emphasizes human rights, the rule of law, due process, civilian control of the military, and the role of the military in a democratic society. The Secretary of Defense may act on the committee's advice and recommendations.

Agenda: Update on the Human Rights and Democracy Program; Women Peace and Security Panel; Review of the WHINSEC Strategy and Implementation Plan; Briefs from the Department of State, U.S. Northern Command, U.S. Southern Command, and the U.S. Army Training and Doctrine Command; a public comments period; and presentation of other information appropriate to the board's interests.

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. A 30-minute period will be available for verbal public comments between 10:30 a.m. to 11 a.m. on Thursday, March 14, 2024. Seating is on a first to arrive basis. Those interested in attending are requested to submit their name, affiliation, and daytime phone number seven business days prior to the meeting to Mr. Procell, via electronic mail 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 the base. Please note that security and gate guards have the right to inspect vehicles and persons seeking to enter and exit the installation. Bradley Hall 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 Mr. Procell at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments and 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 regarding the committee's mission in general. Written comments or statements should be submitted to Mr. Procell via electronic mail at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Written comments or statements being submitted in response to the agenda set forth in this notice must be received at least five business days prior to the meeting to be considered by the committee. The Designated Federal Officer will review all timely submitted written comments or statements with the committee chairperson, and ensure the comments are provided to all members of the committee before the meeting. Written comments or statements received after this date will be filed and presented to the committee during its next meeting.

James W. Satterwhite, Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2024–03041 Filed 2–13–24; 8:45 am]

BILLING CODE 3711–02–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Technical Assistance and Dissemination To Improve Services and Results for Children With Disabilities—Model Demonstration Projects to Develop Equitable Family Engagement With Underserved Families of Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2024 for Model Demonstration Projects to Develop Equitable Family Engagement with Underserved Families

of Children with Disabilities, Assistance Listing Number 84.326M. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES:

Applications Available: February 14, 2024.

Deadline for Transmittal of Applications: April 24, 2024.

Deadline for Intergovernmental Review: June 24, 2024.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022-26554.*

FOR FURTHER INFORMATION CONTACT: Carmen Sanchez, U.S. Department of Education, 400 Maryland Avenue SW, Room 4A10, Washington, DC 20202. Telephone: (202) 987–0117. Email: *carmen.sanchez@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance (TA), supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

Priorities: This competition includes one absolute priority and, within that absolute priority, one competitive preference priority. In accordance with 34 CFR 75.105(b)(2)(v), the absolute priority is from allowable activities specified in or otherwise authorized in sections 663 and 681(d) of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1463 and 1481(d)).

Absolute Priority: For FY 2024 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Model Demonstration Projects to Develop Equitable Family Engagement with Underserved Families of Children with Disabilities.

Background

Model demonstrations to improve early intervention, educational, or transitional results for children with disabilities and their families have been authorized under the IDEA since the law's inception. For the purposes of this priority, a model is a set of existing evidence-based practices, including interventions and implementation strategies (*i.e.,* core model components), that research suggests will improve outcomes for children, families, personnel, administrators, or systems, when implemented with fidelity. Model demonstrations involve investigating the degree to which a given model can be implemented and sustained in real-world settings, by staff employed in those settings, while achieving outcomes similar to those attained under research conditions.

The work of the proposed models is consistent with the Secretary's Supplemental Priorities, published in the **Federal Register** on December 10, 2021 (86 FR 70612), as well as ''Raise the Bar: Lead the World'',[1] through its focus on promoting equity in student access to educational resources and opportunities; meeting student social, emotional, and academic needs; and strengthening cross-agency coordination and community engagement to advance systemic change. Proposed models may also address a competitive preference priority that builds on the absolute priority by being responsive to the focus in the First Lady's Joining Forces initiative[2] whose mission is to support military families, including families of service members and veterans, caregivers, and survivors. The initiative includes a focus on military child education, and specifically advancing programming to support military-connected children in their classrooms and help ease the burdens created by the highly mobile military lifestyle. For military-connected children with disabilities this includes simplifying and streamlining the onboarding process into a new school system, facilitating the transfer of individualized education programs (IEPs) from students' previous schools into their new schools, and providing required services to children and families without disruptions in educational programming when there is a change in duty station. This focus is aligned with the Department's focus on supporting military-connected and other highly mobile children with disabilities outlined in a February 2022 *Letter to State Directors of Special Education on Ensuring a High-Quality Education for Highly Mobile Children,* which provided resources and guidance for States, school districts, school staff, parents, families, and others on ensuring that highly mobile children with disabilities receive required special education and related services designed to meet their unique needs in a timely manner.[3]

Decades of research have shown the positive relationship between family engagement and improved outcomes for children (Fan & Chen, 2001; Henderson & Mapp, 2002; Hill & Tyson, 2009; Jeynes, 2005, 2007, 2012; Kim & Hill, 2015). The growing evidence base indicates that children with disabilities benefit when their families are systemically engaged in their education in ways that are responsive to the families' strengths, needs, cultures, and experiences. While not independently explored in the research, it stands to reason that systematic and responsive family engagement is particularly important when supporting military families with their unique strengths, needs, cultures, and experiences.

IDEA, through its emphasis on empowering parents to understand their rights and responsibilities under the law and by placing families at the center of the individualized education program process, has emphasized the importance of engaging families of children with disabilities. Furthermore, IDEA places families as vital partners with schools, districts, and States in creating systemic change through the development and implementation of comprehensive strategies to improve outcomes for children with disabilities (section 650(2) of IDEA; 20 U.S.C. 1450(c)).

Schools often have difficulty effectively supporting family engagement practices and instead focus on narrow ideas of family participation (*e.g.,* participating in back-to-school nights or parent teacher organization fundraisers) that disengage many families, and particularly disempower and exclude underserved families of children with disabilities (Baquedano-Lopez et al., 2013; Doucet, 2011; Dyrness, 2009; Lareau & Horvat, 1999; Olivos, 2006; Xu, 2020). Family disempowerment and inequity, created when schools do not account for the lived realities of underserved families

[1] *www.ed.gov/raisethebar/.*

[2] *www.whitehouse.gov/joiningforces/.*

[3] See *https://sites.ed.gov/idea/idea-files/letter-to-state-directos-of-special-education-on-ensuring-a-high-quality-education-for-highly-mobile-children-november-10-2022/.*

within their communities, mirrors the deep educational inequities in their children's experiences, (Buren et al., 2020) and can increase the disproportionate representation of underserved children in some disability categories, disproportionate discipline, and placement in more restrictive and segregated settings (Kramarczuk Voulgarides et al., 2017).

To support the engagement of underserved families, research points to the need to create ongoing, dynamic, and equitable collaborations that reorganize power structures, develop sustainable relationships (Ishimaru, 2020), and are culturally and linguistically responsive and trauma informed. Equitable collaborations between schools, underserved families, and their communities show promise in creating sustainable structural changes that improve educational outcomes for underserved children, including children with disabilities (Ishimaru, 2020).

To improve outcomes for children with disabilities, including military-connected children with disabilities, the Department is funding school-based models of equitable family engagement that systemically involve underserved families of children with disabilities as partners and leaders in creating more equitable and inclusive schools that are responsive to the families' priorities, strengths, and needs.

Priority

The purpose of this priority is to fund four cooperative agreements to establish and operate evidence-based [4] model demonstration projects. The models must implement sustainable, schoolwide policies, practices, and strategies that systemically engage underserved families [5] of children with disabilities as partners and leaders in creating more equitable and inclusive schools that lead to improved outcomes for children with disabilities.

The models must address the infrastructure (*e.g.,* implementation teams, data systems) and ongoing supports needed to foster the development, implementation, and evaluation of sustainable, schoolwide family engagement [6] policies, practices, and strategies that systemically involve underserved families of children with disabilities to create more equitable and inclusive schools that are responsive to the priorities, strengths and needs of underserved families of children with disabilities.

The models must demonstrate methods for identifying evidence-based strategies that build the capacity of school personnel and underserved families of children with disabilities to jointly develop and implement sustainable, equitable, and inclusive systemic change.

The models must capture information about challenges to implementation and determine what system supports may assist in meeting those challenges. Additionally, the models must use data to provide information about how the models affect family engagement policies, strategies, and practices within schools; school personnel's capacity to engage with underserved families of children with disabilities and their communities; underserved families' engagement and leadership in school activities; and systemic change that leads to more equitable and inclusive schools that improve outcomes for underserved children with disabilities.

The model demonstration projects must assess how models can—

(a) Increase the sustainable implementation of school policies, strategies, and practices that support the engagement of underserved families of children with disabilities;

(b) Increase the capacity of school personnel, underserved families of children with disabilities and their communities to build trusting relationships that support children with disabilities' learning and achievement;

(c) Increase the capacity of underserved families of children with disabilities to be leaders in partnership with school personnel in setting policy, making decisions, and implementing practices;

(d) Increase the engagement of underserved families of children with disabilities and their children with disabilities in school and extracurricular activities; and

(e) Improve the academic, social, emotional, and behavioral development and outcomes for underserved children with disabilities; increase access for underserved children with disabilities to general education and extracurricular activities with their peers without disabilities; and decrease disproportionality in the identification, placement, and discipline of underserved children with disabilities.

Applicants must propose models that meet the following requirements:

(a) The model's core intervention components must include—

(1) Family engagement practices based on evidence;

(2) Practices to build the capacity of underserved families of children with disabilities to engage with school personnel and act as leaders in systemic change;

(3) Practices to build the capacity of school personnel to engage with underserved families of children with disabilities and their communities;

(4) Practices that enable school personnel, underserved families of children with disabilities and their communities to jointly develop and implement systemic changes reflective of families' priorities, strengths, and needs;

(5) Methods for implementing capacity building activities for school personnel and underserved families of children with disabilities and their communities;

(6) Methods for measuring the impact of the model, including fidelity measures on the implementation of the practices, and data on increased equitable engagement between school personnel and underserved families of children with disabilities; decreased disproportionate application of practices in identification, placement, and discipline for underserved children with disabilities; and improved outcomes of children with disabilities;

(7) Measures of the model's social validity, *i.e.,* measures of school personnel's and underserved families', satisfaction with the model components, processes, and outcomes; and

(8) Procedures to refine the model based on data from the ongoing fidelity measures on the implementation of the practices, and the data collected on improved outcomes and increased capacity.

(b) The model's core implementation components must include—

[4] For purposes of this priority, ''evidence-based'' means the proposed project component is supported by promising evidence, which is evidence of the effectiveness of a key project component in improving a ''relevant outcome'' (as defined in 34 CFR 77.1), based on a relevant finding from one of the sources identified under ''promising evidence'' in 34 CFR 77.1.

[5] For the purposes of this priority, ''underserved families'' refers to foster, kinship, migrant, technologically unconnected, and military- or veteran-connected families; and families of color, living in poverty, without documentation of immigration status, experiencing homelessness or housing insecurity, or impacted by the justice system, including the juvenile justice system. Underserved families also refers to families that include: members of a federally or State recognized Indian Tribe; English learners; adults who experience a disability; members who are lesbian, gay, bisexual, transgender, queer or questioning, or intersex (LGBTQI+); adults in need of improving their basic skills or with limited literacy; and disconnected adults.

[6] For the purposes of this priority, ''family engagement'' refers to the systematic inclusion of families in activities and programs that promote children's development, learning, and wellness, including in the planning, development, and evaluation of such activities, programs, and systems.

(1) Criteria and strategies used to select [7] and recruit a minimum of three sites, which include demographic information, community context, and school initiatives, including approaches to introducing the model to, and promoting the model among, site participants.[8] Applicants are encouraged to choose sites in a variety of communities (*e.g.,* urban, rural, suburban). The sites must include various families and underserved families, whether defined by race, ethnicity, socioeconomic status, religious affiliation, family composition, or military connection among others; and have the need to improve equity and inclusion as demonstrated by disproportionality in the identification, placement, discipline, or outcomes of underserved children with disabilities. The selected sites can include any combination of grades from Pre-K through high school.

(2) A staggered implementation design, which allows for model development and refinement at the first site in year one of the project period, with sites two and three implementing a revised model based on data from the first site beginning in subsequent project years;

(3) A professional development component that includes a strategy to work with school personnel and underserved families of children with disabilities, to enable sites to implement, with fidelity, models of schoolwide equitable family engagement that systemically involve underserved families of children with disabilities as partners and leaders; and

(4) Measures of the results of the professional development required by paragraph (b)(3) of this section.

(c) The core strategies for sustaining the model must include—

(1) Procedures and materials that permit current and future site-based staff to replicate or appropriately tailor and sustain the model at any site;

(2) Guidelines and procedures to—

(i) Provide professional development activities to build school personnel's capacity to systematically and equitably engage with underserved families of children with disabilities, and build underserved families' leadership capacity;

(ii) Implement system changes to improve equitable engagement and shared leadership between school personnel and underserved families of children with disabilities;

(iii) Administer activities that allow underserved families of children with disabilities to take on leadership roles within schools;

(iv) Identify and establish collaborations with the communities to which the underserved families belong;

(v) Identify the strengths, needs, and priorities of underserved families of children with disabilities through the collaborative collection and analysis of data by school personnel and underserved families of children with disabilities and their communities;

(vi) Create and implement sustainable, equitable, and inclusive systemic changes that reflect the strengths, needs, and priorities of underserved families of children with disabilities; and

(vii) Collect, analyze, and use data regarding the engagement of underserved children with disabilities in schools and the impact of that engagement on—

(A) Academic, social, emotional, and behavioral development and outcomes for underserved children with disabilities;

(B) Increased access for underserved children with disabilities to general education and extracurricular activities with their peers without disabilities; and

(C) Decreased disproportionality in the identification, placement, and discipline of underserved children with disabilities;

(3) Strategies for the grantee to develop a manual, toolkit and other user-friendly and widely accessible resources for disseminating information on the final version of the model by the end of the grant period, such as developing easily accessible online products that specify model core components critical for improving outcomes, professional development materials, fidelity measures, key outcomes from the model (*e.g.* increases in the equity of referrals), and implementation procedures for disseminating the model and its components; and

(4) Strategies for the grantee to assist schools and school districts to scale up a model and its components.

To be considered for funding under this absolute priority, applicants must meet the requirements contained in this priority.

Application Requirements

An applicant must include in its application—

(a) A detailed review of the literature addressing the proposed evidence-based model or its implementation components and the proposed processes to develop equitable and schoolwide family engagement with underserved families of children with disabilities that systemically involve them as partners and leaders;

(b) A logic model [9] that depicts, at a minimum, the goals, activities, outputs, and outcomes (described in the requirements in paragraph (a) under the heading *Priority*) of the proposed model demonstration project.

Note: The following websites provide resources for constructing logic models: *https://osepideasthatwork.org/sites/default/files/2021-12/ConceptualFramework_Updated.pdf* and *www.osepideasthatwork.org/resources-grantees/program-areas/ta-ta/tad-project-logic-model-and-conceptual-framework;*

(c) A description of the activities and measures to be incorporated into the proposed model demonstration project (*i.e.,* the project design) to develop equitable and schoolwide family engagement with underserved families of children with disabilities that systemically involve them as partners and leaders. A detailed and complete description must include the following:

(1) Each of the capacity building, collaboration, and data gathering components;

(2) The existing and proposed measures of fidelity of the implementation of equitable and schoolwide family engagement and capacity building activities as well as social validity measures. The measures must be described as completely as possible, referenced as appropriate, and included, when available, in Appendix A;

(3) Each of the implementation components, including, at a minimum, those listed under requirements paragraph (b) under the heading *Priority.* The existing or proposed implementation fidelity measures must be described as completely as possible, referenced as appropriate, and included, when available, in Appendix A. In addition, this description must include—

[7] For factors to consider when selecting model demonstration sites, the applicant should refer to *Assessing Sites for Model Demonstration: Lessons Learned for OSEP Grantees* at *mdcc.sri.com/documents/MDCC_Site_Assessment_Brief_09–30–11.pdf.* The document also contains a site assessment tool.

[8] For factors to consider when preparing for model demonstration implementation, the applicant should refer to *Preparing for Model Demonstration Implementation* at *mdcc.sri.com/documents/MDCC_PreparationStage_Brief_Apr2013.pdf.*

[9] As defined in 34 CFR 77.1, ''logic model'' (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

(i) Demographics of the sites that have been identified and successfully recruited as implementation sites for the purposes of completing an application using the selection and recruitment strategies described in requirements paragraph (b)(1) under the heading *Priority.* The demographic data should include the race and ethnicity, socioeconomic status, military connectedness, and primary home language of all families; the number of families of children with disabilities in the schools' catchment area, and the larger school community; and indicators of the extent to which schools are equitable and inclusive, including identification rates for special education, placement data, discipline data, and outcomes of underserved children with disabilities;

Note: Applicants are encouraged to identify, to the extent possible, the sites willing to participate in the applicant's model demonstration. Final site selection will be determined in consultation with the Office of Special Education Programs (OSEP) project officer following the kick-off meeting described in paragraph (f)(1) of these application requirements; and

(ii) The staggered implementation design for implementation consistent with the requirements in paragraph (b)(2) under the heading *Priority;*

(4) Each of the strategies to promote sustaining and replicating the model, including, at a minimum, those listed under requirements paragraph (c) under the heading *Priority;* and

(5) The cost of the fully developed model and its implementation, including the resources used by the model as well as their actual or estimated costs; [10]

(d) A description of the evaluation activities and measures to be incorporated into the proposed model demonstration project. A detailed and complete description must include—

(1) A formative evaluation plan, consistent with the project's logic model, that includes evaluation questions, sources of data, a timeline for data collection, and analysis plans. The plan must show how the outcome data (*e.g.,* engagement, capacity, and social validity measures) and implementation data (*e.g.,* fidelity, effectiveness of school personnel professional development and capacity building activities, effectiveness of family capacity building, and effectiveness of activities that result in systemic changes) will be used separately or in combination to improve the project during the project period. These data will be reported in the annual performance report (APR). The plan also must outline how these data will be reviewed by project staff, when they will be reviewed, and how they will be used during the course of the project to adjust the model or its implementation to increase the model's usefulness, generalizability, and potential for sustainability; and

(2) A summative evaluation plan, including a timeline, to collect and analyze data on changes in the engagement of underserved families of children with disabilities, student outcomes, and systems improvements over time that can be reasonably attributable to project activities. The plan must show how the family, student, or system outcome and implementation data collected by the project will be used separately or in combination to demonstrate the promise of the model;

(e) A plan to disseminate the results of the project, including the findings that show the model had a beneficial effect on outcomes, the final version of the implemented model, and its associated products (such as curricula, professional development materials, implementation procedures, measures and assessments, guides, and toolkits). The dissemination plan must include the audiences who would most likely benefit from implementing the model and detailed strategies for reaching these audiences.

(1) In disseminating the results of the project, grantees must, at a minimum, conduct at least four of the following six activities:

(i) Promote the model to potential users through the grant's website or social media;

(ii) Promote the model to potential users through presentations at national meetings or conferences or publishing journal articles;

(iii) Promote the model in personnel preparation programs at institutions of higher education;

(iv) Promote the model to Department-funded dissemination networks (*e.g.,* OSEP TA Centers, Regional Education Labs, Comprehensive Centers);

(v) Provide training on model implementation to State educational agencies (SEAs), local educational agencies (LEAs), schools, early childhood programs or other new sites; and

(vi) Apply for additional funding to continue model dissemination and scale up to new sites.

(2) To facilitate implementation of the model in new sites, grantees may also consider collaborating with OSEP-funded TA centers, personnel preparation programs, and OSEP-funded State Personnel Development Grant projects; providing webinars, training sessions, or workshops to State and local agencies; and engaging with other federally funded TA centers, research networks, or Regional Educational Laboratories; and

(f) A budget for attendance at the following:

(1) A one and one-half day virtual kickoff meeting, after receipt of the award;

(2) A three-day project directors' conference in Washington, DC, during each year of the project period. The project must reallocate funds for travel to the project directors' conference no later than the end of the third quarter of each budget period if the conference is conducted virtually; and

(3) Four travel days spread across years two through four of the project period to attend planning meetings, Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP.

Other Project Activities

To meet the requirements of this priority, each project, at a minimum, must—

(a) Communicate and collaborate on an ongoing basis with other Department-funded projects, consistent with paragraph (e) under the heading *Application Requirements;*

(b) Maintain ongoing telephone and email communication with the OSEP project officer and the other model demonstration projects funded under this priority;

(c) Provide information annually using a template that captures descriptive data on project site selection and the process of implementing the model in the sites.

Note: The following website provides more information about implementation research: *https://implementation.fpg.unc.edu/.*

(d) If the project maintains a website, include relevant information about the model, the intervention, and the demonstration activities and ensure that the website meets or exceeds government- or industry-recognized standards for accessibility; and

(e) Ensure that annual progress toward meeting project goals is posted on a public website.

Fifth Year of Project

The Secretary may extend a project one year beyond the initial 48 months to disseminate the results of the project if the grantee is achieving the intended

[10] See the *IES Cost Analysis Starter Kit* at *https://ies.ed.gov/seer/cost_analysis.asp.*

outcomes of the project (as demonstrated by data gathered as part of the project evaluation) and making a positive contribution to identifying the system supports needed to implement the model. Each applicant must include in its application a plan for the full 60-month period. The fifth year should be budgeted at $100,000. In deciding whether to continue funding the project for the fifth year, the Secretary will consider the requirements of 34 CFR 75.253(a), including—

(a) The recommendations of a review team consisting of the OSEP project officer and other experts who have experience and knowledge in family engagement and children with disabilities. This review will be held during the first half of the fourth year of the project period;

(b) The success and timeliness with which the requirements of the negotiated cooperative agreement have been or are being met by the project; and

(c) The degree to which the project's activities have contributed to changed practices and improved outcomes for children with disabilities.

Competitive Preference Priority: Within this absolute priority, we give competitive preference to applications that address the following priority. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 9 points to an application that meets the competitive preference priority. Applicants should indicate in the abstract whether the competitive preference priority is addressed.

The competitive preference priority is:

Models in Schools with High Percentages of Military-Connected Students (0, 5, 7, or 9 points).

(a) Under this priority, applicants will receive five points if they propose to locate one site for the model in a school with a high percentage of military-connected [11] students, seven points if they propose to locate two sites for the model in schools with a high percentage of military-connected students, and nine points if they propose to locate three or more sites for the model in schools with a high percentage of military-connected students. Applicants must include a letter of commitment from the proposed sites describing how the unique needs of military-connected families—including simplifying and streamlining the onboarding process into the new school system, facilitating the transfer of IEPs without a major disruption in service delivery, and providing required services to children without disruptions in educational programming—will be addressed in the implementation of the model.

(b) For the purpose of this priority, a high percentage of military-connected students is 20 percent or higher of the school population.

[11] A military-connected student is defined as a student whose parent or guardian is on active duty, in the National Guard, or in the Reserve components of the United States military services.

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Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priorities in this notice.

Program Authority: 20 U.S.C. 1463 and 1481.

Note: Projects will be awarded and must be operated in a manner consistent

with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Cooperative agreements.

Estimated Available Funds: The Administration has requested $55,345,000 for the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program for FY 2024, of which we intend to use an estimated $1,600,000 for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2025 from the list of unfunded applications from this competition.

Estimated Range of Awards: $300,000 to $400,000.

Estimated Average Size of Awards: $350,000.

Maximum Award: We will not make an award exceeding $1,600,000 per project for a project period of 60 months.

Note: Applicants must describe, in their applications, the amount of funding being requested for each 12-month budget period. The fifth-year budget period should be budgeted at $100,000.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs, including charter schools that are considered LEAs under State law; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian Tribes or Tribal organizations; and for-profit organizations.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c), a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to the following types of entities: IHEs, nonprofit organizations suitable to carry out the activities proposed in the application, and other public agencies. The grantee may award subgrants to entities it has identified in an approved application or that it selects through a competition under procedures established by the grantee, consistent with 34 CFR 75.708(b)(2).

4. *Other General Requirements:*

a. Recipients of funding under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

b. Applicants for, and recipients of, funding must, with respect to the aspects of their proposed project relating to the absolute priority, involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022-26554,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 50 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the

guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Significance (15 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies;

(ii) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population;

(iii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement; and

(iv) The likely utility of the products (such as information, materials, processes, or techniques) that will result from the proposed project, including the potential for their being used effectively in a variety of other settings.

(b) *Quality of the project design (35 points).*

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable;

(ii) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to ensure successful achievement of project objectives;

(iii) The quality of the proposed demonstration design and procedures for documenting project activities and results;

(iv) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project; and

(v) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(c) *Adequacy of resources and quality of the management plan (25 points).*

(1) The Secretary considers the adequacy of resources and the quality of the management plan for the proposed project.

(2) In determining the adequacy of resources and the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization;

(ii) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project;

(iii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project;

(iv) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate; and

(v) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(d) *Quality of the project evaluation (25 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project;

(ii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes;

(iii) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies;

(iv) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing in other settings; and

(v) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions, and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

6. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an APR that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection, analysis, and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Model Demonstration Projects to Improve Services and Results for Infants, Toddlers, and Children with Disabilities under the Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities program. These measures are:

- Current Program Performance Measure: The percentage of effective evidence-based program models developed by model demonstration projects that are promoted to States and their partners through the Technical Assistance and Dissemination Network;
- Pilot Program Performance Measure: The percentage of effective program models developed by Model Demonstration Grants that are sustained beyond the life of the model demonstration project and promoted to other potential users.

The current program performance measure and the pilot program performance measure apply to projects funded under this competition, and grantees are required to submit data on these measures as directed by OSEP.

Grantees will be required to report information on their project's performance in annual and final performance reports to the Department (34 CFR 75.590).

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has

made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Danté Allen,

Commissioner, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services.

[FR Doc. 2024–02973 Filed 2–13–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0024]

Agency Information Collection Activities; Comment Request; Evaluation of the Toolkit To Support Evidence-Based Algebra Instruction in Middle and High School

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before April 15, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2024–SCC–0024. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Amy Johnson, (202) 453–7439.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Evaluation of the Toolkit to Support Evidence-Based Algebra Instruction in Middle and High School.

OMB Control Number: 1850–NEW.

Type of Review: New ICR.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 1,029.

Total Estimated Number of Annual Burden Hours: 348.

Abstract: The current authorization for the Regional Educational Laboratories (REL) program is under the Education Sciences Reform Act of 2002, Part D, Section 174, (20 U.S.C. 9564), administered by the Department of Education, Institute of Education Sciences (IES), National Center for Education Evaluation and Regional Assistance (NCEE). The central mission and primary function of the RELs is to support applied research and provide technical assistance to state and local education agencies within their region (ESRA, Part D, section 174[f]). The REL program's goal is to partner with educators and policymakers to conduct work that is change-oriented and supports meaningful local, regional, or state decisions about education policies, programs, and practices to improve outcomes for students.

Even prior to the COVID–19 pandemic, Algebra 1 proved challenging for many students because of the extensive abstract thinking it requires (Katz, 2007; Susa et al., 2014). To help students succeed in Algebra 1, REL Central is developing a toolkit of professional learning supports to help Algebra 1 teachers learn about, make sense of, plan for, and implement three evidence-based Algebra 1 teaching practices that were identified in the

related What Works Clearinghouse (WWC) Practice Guide, ''Teaching Strategies for Improving Algebra Knowledge in Middle and high School Students.'' The toolkit contains the following three parts: (1) Initial Diagnostic and On-going Monitoring Instruments, (2) Professional Development Resources, and (3) Steps for Institutionalizing Supports for Evidence-Based Practice.

This study will assess whether implementing the toolkit improves teacher and student outcomes and will describe the implementation of the toolkit in study schools that use it. Using a school-level randomized controlled trial during the 2024–2025 school year, the study will estimate the impact of the toolkit on teachers' self-efficacy and their understanding and use of the promising practices, as well as on students' algebraic content knowledge, self-efficacy, and mathematical mindsets. To provide context for the impact estimates and inform future use of the toolkit, the study will also describe the implementation of the toolkit. The study plans to include 20 schools from up to three school districts. To disseminate these findings, REL Central will produce a report for school leaders and teachers who are potential users of the toolkit.

Dated: February 9, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–03067 Filed 2–13–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[GDO Docket No. PP–503]

Application for Presidential Permit; Basin Electric Power Cooperative

AGENCY: Grid Deployment Office, Department of Energy.

ACTION: Notice of application.

SUMMARY: Basin Electric Power Cooperative (the Applicant or Basin Electric) has filed an application requesting a new Presidential permit to allow for the construction, connection, operation, and maintenance of facilities for transmission of electric energy at the international border between North Dakota and Saskatchewan, Canada.

DATES: Comments, protests, or motions to intervene must be submitted on or before March 15, 2024.

ADDRESSES: Comments, protests, or motions to intervene should be addressed by electronic mail to *Electricity.Exports@hq.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Christina Gomer, (240) 474–2403, *Electricity.Exports@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: The construction, operation, maintenance, and connection of facilities at the international border of the United States for the transmission of electric energy between the United States and a foreign country is prohibited in the absence of a Presidential permit issued by the Secretary of Energy pursuant to Executive Order (E.O.) 10485, as amended by E.O. 12038. On April 10, 2023, the authority to issue such permits was delegated to the DOE's Grid Deployment Office by Delegation Order No. S1–DEL–S3–2023 and Redelegation Order No. S3–DEL–GD1–2023.

On November 9, 2023, Basin Electric filed an application (Application or App.) with the Department of Energy (DOE) for a Presidential Permit to construct the Tande and Wheelock to Saskatchewan 230-kV Transmission Project.[1] App. at 1.

Basin Electric is an electric power generation and transmission cooperative headquartered in Bismarck, North Dakota. *Id.* The Applicant generates and transmits wholesale electricity to 141-member rural electric cooperatives located in a nine-state service area, which serves three million customers on their respective systems. *Id.*

Basin Electric's proposed project ''includes two new 230-kV electric transmission lines from existing substations in North Dakota (ND) to the Canadian Border.'' *Id.* According to the Application, Saskatchewan Power Corporation (SaskPower), ''a generation and transmission provider in Saskatchewan, will construct the transmission lines from the border to a new substation in Canada, approximately five miles north of the border.'' *Id.* The Applicant intends to route one circuit from the Wheelock substation near Ray, North Dakota, and the second circuit from Tande substation near Tioga, North Dakota. *Id.* Each circuit would require a separate border crossing. *Id.*

The Southwest Power Pool approved the project in 2022, and Basin Electric is the designated transmission owner for the upgrade in the United States. App. at 1. The project would provide export and import capabilities of up to 650 megawatts. *Id.*

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the Application at *Electricity.Exports@hq.doe.gov*. Protests should be filed in accordance with Rule 211 of Federal Energy Regulatory Commission's (FERC's) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at *Electricity.Exports@hq.doe.gov* in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning Basin Electric's Application should be clearly marked with Docket No. PP–503. Additional copies are to be provided directly to Anine Merkens, Staff Counsel, Basin Electric, *amerkens@bepc.com*; Erin Dukart, Director, Environmental Services, Basin Electric, *edukart@bepc.com*; and Bob Nasset, Civil Engineering, Basin Electric, *rnasset@bepc.com*.

Before a Presidential permit may be issued, DOE must determine whether the proposed action is in the public interest. In making that determination, DOE will consider the environmental impacts of the proposed action (*i.e.,* granting the Presidential permit, with any conditions and limitations, or denying the permit) pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021); determine the Applicant's proposed project's impact on electric reliability by ascertaining whether the proposed project would adversely affect the operation of the U.S. electric power supply system under normal and contingency conditions; and weigh any other factors that DOE may also consider relevant to the public interest. DOE also must obtain the favorable recommendation of the Secretary of State and the Secretary of Defense before taking final action on a Presidential permit application.

Basin's Application may be reviewed or downloaded electronically at *www.energy.gov/gdo/pending-applications-0* or by emailing *Electricity.Exports@hq.doe.gov*.

Signing Authority: This document of the Department of Energy was signed on February 8, 2024, by Maria Robinson, Director, Grid Deployment Office, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been

[1] On January 17, 2023, Basin Electric also filed a revised Application in response to DOE feedback on its November filing. The references to the Application in this notice reflect the latest revisions submitted by Basin Electric.

authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on February 9, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–03017 Filed 2–13–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14861–002]

FFP Project 101, LLC; Notice of Availability of the Final Environmental Impact Statement for the Goldendale Energy Storage Project

In accordance with the National Environmental Policy Act of 1969,[1] the Council Environmental Quality regulations for implementing NEPA,[2] and the Federal Energy Regulatory Commission's (Commission) regulations,[3] the Commission's Office of Energy Projects has reviewed the application for license for the Goldendale Energy Storage Project No. 14861–002 and has prepared a final environmental impact statement (EIS) for the project. The closed-loop pumped storage project would be located approximately 8 miles southeast of the City of Goldendale, Klickitat County, Washington, with transmission facilities extending into Sherman County, Oregon. The project would occupy 18.1 acres of lands owned by the U.S. Army Corps of Engineers (Corps) and administered by the Bonneville Power Administration. The Corps participated as a cooperating agency to prepare the EIS.

The final EIS contains staff's analysis of the applicant's proposal and the alternatives for licensing the Goldendale Energy Storage Project. The final EIS documents the views of governmental agencies, non-governmental organizations, affected Native-American Tribes, the public, the license applicant, and Commission staff.

The final EIS also may be viewed on the Commission's website at *http://www.ferc.gov* under the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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 at *OPP@ferc.gov*.

For further information, please contact Michael Tust at (202) 502–6522 or at *michael.tust@ferc.gov*.

Dated: February 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03052 Filed 2–13–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2701–061]

Erie Boulevard Hydropower, L.P.; Notice of Settlement Agreement and Soliciting Comments

Take notice that the following settlement agreement has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Settlement Agreement.

b. *Project No.:* 2701–061.

c. *Date Filed:* February 2, 2024.

d. *Applicant:* Erie Boulevard Hydropower, L.P. (Erie).

e. *Name of Project:* West Canada Creek Hydroelectric Project (West Canada Creek Project).

f. *Location:* The existing project is located on West Canada Creek, a tributary of the Mohawk River, in the counties of Oneida and Herkimer, New York.

g. *Filed Pursuant to:* Rule 602 of the Commission's Rules of Practice and Procedure, 18 CFR 385.602.

h. *Applicant Contact:* Steven Murphy, Director, Licensing, Brookfield Renewable, 33 West 1st Street South, Fulton, NY 13069, (315) 598–6130, *steven.murphy@brookfieldrenewable.com.*

i. *FERC Contact:* Laurie Bauer, (202) 502–6519, *laurie.bauer@ferc.gov.*

j. *Deadline for filing comments:* March 9, 2024. Reply comments due March 24, 2024.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.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 A. 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 A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–2701–061.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. Erie filed the Settlement Agreement for the project's relicense proceeding, on behalf of itself; the U.S. Department of the Interior, U.S. Fish and Wildlife Service; the New York State Department of Environmental Conservation; and the New York State Council of Trout Unlimited. The purpose of the Settlement Agreement is to resolve, among the signatories, relicensing issues related to project operation, fisheries,

[1] National Environmental Policy Act of 1969, amended (Pub. L. 91–190. 42 U.S.C. 4321 through 4347, as amended by Pub. L. 94–52, July 3, 1975, Pub. L. 94–83, August 9, 1975, Pub. L. 97–258, sec. 4(b), September 13, 1982, Pub. L. 118–5, June 3, 2023).

[2] 40 CFR parts 1500–1508.

[3] 18 CFR part 380.

wildlife, water quality, and recreation. The Settlement Agreement includes proposed terms and conditions for peaking operation, minimum flow requirements, streamflow and water level monitoring, aesthetic flows, recreation facility enhancements, invasive species management, and bald eagle protection. Erie requests that any license issued by the Commission for the West Canada Creek Project contain conditions consistent with the provisions of the Settlement Agreement and within the scope of its regulatory authority.

l. A copy of the Settlement Agreement may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, excluding the last three digits, in the docket number field to access the document (*i.e.,* P–2701). For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

You may also register online at *https://www.ferc.gov/ferc-online/overview* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

m. 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: February 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03053 Filed 2–13–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR24–4–000]

Wawa, Inc. v. Colonial Pipeline Company; Notice of Complaint

Take notice that on February 6, 2024, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 CFR 385.206 (2022), Wawa, Inc. filed a complaint against Colonial Pipeline Company (''Colonial'') challenging the justness and reasonableness of the rates charged by Colonial for transportation service pursuant to certain tariffs on file with the Commission.

The Complainant certifies that copies of the complaint were served on the contacts listed for Respondents in the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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.*

Comment Date: 5 p.m. eastern time on March 7, 2024.

Dated: February 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03055 Filed 2–13–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR24–5–000]

Cantium, LLC v. Rosefield Fourchon Operating, LLC; Notice of Complaint

Take notice that on February 7, 2024, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 CFR 385.206 (2023), Cantium, LLC filed a complaint against Rosefield Fourchon Operating, LLC (''Rosefield'') alleging that Rosefield is providing interstate transportation of Cantium's crude oil without a tariff on file with the Commission and that Rosenfeld is charging rates that are excessive and unlawful.

The Complainant certifies that copies of the complaint were served on the contacts listed for Respondent in the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the

Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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.*

Comment Date: 5:00 p.m. Eastern Time on February 27, 2024.

Dated: February 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03054 Filed 2–13–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–49–000]

Algonquin Gas Transmission, LLC; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on January 30, 2024 Algonquin Gas Transmission, LLC (Algonquin), 915 North Eldridge Parkway, Suite 1100, Houston, Texas 77079, filed in the above referenced docket, a prior notice request pursuant to sections 157.205 and 157.208 of the Commission's regulations under the Natural Gas Act (NGA), and Algonquin's blanket certificate issued in Docket No. CP87–317–000, for authorization to offset and replace a segment of pipeline on its G–2 System located in Newport County, Rhode Island at a crossing of the Sakonnet River (Sakonnet River Replacement or Replacement). The project will allow Algonquin to replace a segment of pipeline on the G–2 System following the identification of six anomalies during a recent inspection of the line. The estimated cost for the project is $39.7 million, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. Public access to records formerly available in the Commission's physical Public Reference Room, which was located at the Commission's headquarters, 888 First Street NE, Washington, DC 20426, are now available via the Commission's website. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY (202) 502–8659.

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

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5 p.m. eastern time on April 8, 2024. How to file protests, motions to intervene, and comments is explained below.

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

Protests

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

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is April 8, 2024. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

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

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is April 8, 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

[1] 18 CFR 157.205.

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

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before April 8, 2024. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP24–49–000 in your submission.

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

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP24–49–000.

To file via USPS: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other method: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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

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

Tracking the Proceeding

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

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

Dated: February 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03056 Filed 2–13–24; 8:45 am]

BILLING CODE 6717–01–P

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

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24–70–000; QF14–85–008; QF14–87–005; QF14–90–003; QF14–93–004; QF14–95–003; QF14–99–004; QF14–102–003; QF14–112–004; QF14–125–003; QF15–324–004; QF15–1025–003; QF18–1511–001.

Applicants: PRELUDE LLC, Thomas Mattson and EDWARD J. DOSTAL v. *BASIN ELECTRIC POWER COOPERATIVE, ROSEBUD ELECTRIC COOPERATIVE, INC., GRAND ELECTRIC COOPERATIVE, INC.*

Description: Petition for Enforcement of Prelude LLC, Thomas Mattson and Edward J. Dostal v. *Basin Electric Power Cooperative, Rosebud Electric Cooperative, Inc., Grand Electric Cooperative, Inc.*

Filed Date: 2/6/24.

Accession Number: 20240206–5126.

Comment Date: 5 p.m. ET 2/27/24.

Docket Numbers: EL24–71–000.

Applicants: Southern California Edison Company.

Description: Petition for Declaratory Order of Southern California Edison Company.

Filed Date: 2/7/24.

Accession Number: 20240207–5128.

Comment Date: 5 p.m. ET 3/8/24.

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

Docket Numbers: ER14–2140–009; ER14–2141–009.

Applicants: Selmer Farm, LLC, Mulberry Farm, LLC.

Description: Supplement to August 27, 2020, Updated Market Power Analysis, et al. of the Southeast MBR Sellers.

Filed Date: 11/20/23.

Accession Number: 20231120–5077.

Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER15–632–013; ER15–634–013; ER14–2939–011; ER15–2728–013; ER14–2140–012; ER15–1952–010; ER14–2466–014; ER14–2465–014; ER14–2141–012.

Applicants: Selmer Farm, LLC, RE Columbia Two LLC, RE Camelot LLC, Pavant Solar LLC, Mulberry Farm, LLC, Maricopa West Solar PV, LLC, Imperial Valley Solar Company (IVSC) 2, LLC, Cottonwood Solar, LLC, CID Solar, LLC.

Description: Supplement to March 3, 2022, Notice of Non-Material Change in Status of CID Solar, LLC, et al.

Filed Date: 11/20/23.
Accession Number: 20231120–5227.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER15–1471–010; ER15–632–010; ER16–915–003; ER15–634–010; ER15–1672–009; ER10–2861–008; ER19–2287–001; ER16–2010–004; ER14–2939–008; ER15–2728–010; ER19–2294–001; ER14–2140–010; ER12–1308–011; ER15–1952–008; ER16–711–007; ER14–2466–011; ER14–2465–011; ER14–2141–010; ER16–2561–004; ER13–1504–009; ER19–2305–001.

Applicants: Valencia Power, LLC, SWG Arapahoe, LLC, Sunflower Wind Project, LLC, Selmer Farm, LLC, RE Columbia Two LLC, RE Camelot LLC, Pio Pico Energy Center, LLC, Pavant Solar LLC, Palouse Wind, LLC, Mulberry Farm, LLC, Mesquite Power, LLC, Maricopa West Solar PV, LLC, Imperial Valley Solar Company (IVSC) 2, LLC, Hancock Wind, LLC, Goal Line L.P., Fountain Valley Power, L.L.C., Evergreen Wind Power II, LLC, Cottonwood Solar, LLC, Comanche Solar PV, LLC, CID Solar, LLC, Blue Sky West, LLC.

Description: Supplement to August 28, 2020, Notice of Non-Material Change in Status of Blue Sky West, LLC, et. al.

Filed Date: 11/20/23.
Accession Number: 20231120–5224.
Comment Date: 5 p.m. ET 2/28/24.

Docket Numbers: ER15–1471–011; ER15–632–011; ER16–915–004; ER15–634–011; ER10–2721–010; ER15–1672–010; ER10–2861–009; ER19–2287–002; ER16–2010–005; ER14–2939–009; ER10–1874–012; ER19–9–006; ER15–2728–011; ER19–2294–002; ER14–2140–011; ER12–1308–012; ER15–1952–009; ER16–711–008; ER14–2466–012; ER14–2465–012; ER14–2141–011; ER16–2561–005; ER13–1504–010; ER19–2305–002.

Applicants: Valencia Power, LLC, SWG Arapahoe, LLC, Sunflower Wind Project, LLC, Selmer Farm, LLC, RE Columbia Two LLC, RE Camelot LLC, Pio Pico Energy Center, LLC, Pavant Solar LLC, Palouse Wind, LLC, Mulberry Farm, LLC, Mesquite Power, LLC, Maricopa West Solar PV, LLC, Imperial Valley Solar Company (IVSC) 2, LLC, Hancock Wind, LLC, Goal Line L.P., Fountain Valley Power, L.L.C., Evergreen Wind Power II, LLC, Cottonwood Solar, LLC, Comanche Solar PV, LLC, CID Solar, LLC, Blue Sky West, LLC.

Description: Supplement to January 19, 2021, Notice of Non-Material Change in Status of Blue Sky West, LLC, et. al.

Filed Date: 11/20/23.
Accession Number: 20231120–5236.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER15–1471–012; ER15–632–014; ER16–915–005; ER15–634–014; ER15–1672–011; ER10–2861–010; ER19–2287–004; ER16–2010–006; ER14–2939–012; ER10–1874–014; ER19–9–008; ER15–2728–014; ER19–2294–004; ER14–2140–013; ER12–1308–013; ER15–1952–011; ER16–711–010; ER14–2466–015; ER14–2465–015; ER14–2141–013; ER16–2561–006; ER13–1504–011; ER19–2305–004; ER10–2721–012.

Applicants: Valencia Power, LLC, SWG Arapahoe, LLC, Sunflower Wind Project, LLC, Selmer Farm, LLC, RE Columbia Two LLC, RE Camelot LLC, Pio Pico Energy Center, LLC, Pavant Solar LLC, Palouse Wind, LLC, Mulberry Farm, LLC, Mesquite Power, LLC, Maricopa West Solar PV, LLC, Imperial Valley Solar Company (IVSC) 2, LLC, Hancock Wind, LLC, Goal Line L.P., Fountain Valley Power, L.L.C., Evergreen Wind Power II, LLC, Cottonwood Solar, LLC, Comanche Solar PV, LLC, CID Solar, LLC, Blue Sky West, LLC.

Description: Supplement to August 1, 2022, Notice of Change in Status of Blue Sky West, LLC, et. al.

Filed Date: 11/20/23.
Accession Number: 20231120–5222.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–226–002.

Applicants: Evergy Missouri West, Inc., Evergy Metro, Inc., Southwest Power Pool, Inc.

Description: Report Filing: Evergy Metro, Inc. submits tariff filing per: Evergy Metro, Inc. and Evergy Missouri West, Inc.—Supplemental Filing to be effective December 27, 2023.

Filed Date: 2/6/24.
Accession Number: 20240206–5036.
Comment Date: 5 p.m. ET 2/27/24.

Docket Numbers: ER24–248–000.

Applicants: The Potomac Edison Company, PJM Interconnection, L.L.C.

Description: Refund Report: PJM Interconnection, L.L.C. submits tariff filing per 35.19a(b): Potomac Edison submits Refund Report in Docket No. ER24–248 to be effective N/A.

Filed Date: 2/8/24.
Accession Number: 20240208–5078.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–706–001.

Applicants: Northern Orchard Solar PV, LLC.

Description: Tariff Amendment: Market Based Rate to be effective 2/19/2024.

Filed Date: 2/7/24.
Accession Number: 20240207–5112.
Comment Date: 5 p.m. ET 2/28/24.

Docket Numbers: ER24–707–001.

Applicants: Quartz Solar, LLC.

Description: Tariff Amendment: Market Based Rate to be effective 2/19/2024.

Filed Date: 2/7/24.
Accession Number: 20240207–5105.
Comment Date: 5 p.m. ET 2/28/24.

Docket Numbers: ER24–1209–000.

Applicants: Arizona Public Service Company.

Description: Petition for Limited Waiver of Arizona Public Service Company.

Filed Date: 2/1/24.
Accession Number: 20240201–5258.
Comment Date: 5 p.m. ET 2/22/24.

Docket Numbers: ER24–1210–000.

Applicants: Public Service Company of New Hampshire.

Description: § 205(d) Rate Filing: Related Facilities Agreement—NECEC Transmission LLC to be effective 2/9/2024.

Filed Date: 2/8/24.
Accession Number: 20240208–5043.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–1211–000.

Applicants: Ameren Transmission Company of Illinois.

Description: § 205(d) Rate Filing: ATXI—Joint Operating Agreement to be effective 4/9/2024.

Filed Date: 2/8/24.
Accession Number: 20240208–5045.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–1212–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original NSA, Service Agreement No. 7191; AF1–086 to be effective 4/9/2024.

Filed Date: 2/8/24.
Accession Number: 20240208–5057.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–1213–000.

Applicants: California Independent System Operator Corporation.

Description: § 205(d) Rate Filing: 2024–02–08 Tariff Amendment—Postpone 2024 Interconnection Request Window to be effective 3/31/2024.

Filed Date: 2/8/24.
Accession Number: 20240208–5070.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–1214–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii: Shortleaf Solar LGIA Filing to be effective 1/30/2024.

Filed Date: 2/8/24.
Accession Number: 20240208–5077.
Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–1215–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 1442; Queue No. NQ–123 to be effective 4/9/2023.

Filed Date: 2/8/24.

Accession Number: 20240208–5086.

Comment Date: 5 p.m. ET 2/29/24.

Docket Numbers: ER24–1216–000.

Applicants: Duke Energy Florida, LLC.

Description: § 205(d) Rate Filing: DEF-Bartow-FPL Dynamic Transfer Agmt RS No. 426 to be effective 3/1/2024.

Filed Date: 2/8/24.

Accession Number: 20240208–5095.

Comment Date: 5 p.m. ET 2/29/24.

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

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

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

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Dated: February 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03051 Filed 2–13–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

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

Filings Instituting Proceedings

Docket Numbers: RP24–394–000.

Applicants: Rockies Express Pipeline LLC.

Description: § 4(d) Rate Filing: REX 2024–02–08 Negotiated Rate Agreement Amendment to be effective 2/8/2024.

Filed Date: 2/8/24.

Accession Number: 20240208–5054.

Comment Date: 5 p.m. ET 2/20/24.

Docket Numbers: RP24–395–000.

Applicants: Gulf South Pipeline Company, LLC.

Description: § 4(d) Rate Filing: Update to Certain Auction Procedures to be effective 3/11/2024.

Filed Date: 2/8/24.

Accession Number: 20240208–5060.

Comment Date: 5 p.m. ET 2/20/24.

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

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

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

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Dated: February 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03057 Filed 2–13–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2023–0451; 11466–02–OLEM]

Waste Reduction Model (WARM) Version 16: Request for Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) is extending the comment period for the Waste Reduction Model (WARM) version 16 and its supporting documentation, along with the WARM v16 methodology external peer review report and the WARM v16 data quality assessment report. WARM is a tool that estimates the potential greenhouse gas emissions, energy savings and economic impacts of baseline and alternative waste management practices of materials. This Notice is inviting public comment on WARM v16 and its supporting documentation from a broad range of individuals and organizations. The EPA will consider the public comments received to inform future improvements to WARM.

DATES: Comments must be received on or before March 15, 2024.

ADDRESSES:

Written Comments: Submit your written comments, identified by Docket ID No. EPA–HQ–OLEM–2023–0451, through the Federal eRulemaking Portal at *https://www.regulations.gov/*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. 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. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at: *https://www.epa.gov/dockets*.

Instructions: All submissions received must include the Docket ID No. EPA–HQ–OLEM–2023–0451 for this notice. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Boone O'Neil, Resource Conservation and Sustainability Division, Office of Resource Conservation and Recovery, Office of Land and Emergency Management, Mail Code 5306T, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202–566–1094, or Kimberly Cochran (same address); telephone number: 202–566–0308; email address: *orcrWARMquestions@epa.gov.* For more information on WARM, please visit *https://epa.gov/warm.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

Response to this request for public comment is voluntary. Submit your comments, identified by Docket ID No. EPA–HQ–OLEM–2023–0451, at *https://www.regulations.gov/* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The Environmental Protection Agency may publish any comment received to its public docket. Responses to this request for public comment may be submitted by a single party or a team. Responses will only be accepted using Microsoft Word (.docx) or Adobe PDF (.pdf) file formats. The response document should contain the following:

- Two clearly delineated sections: (1) Cover page with company name and contact information; and (2) responses by topic and/or that address specific EPA questions.
- 1-inch margins (top, bottom, and sides).
- Times New Roman and 12-point font.

Comments containing references, studies, research, and other empirical data that are not widely published should include copies or electronic links to the referenced materials. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), 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). Please visit: *https://www.epa.gov/*dockets for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments. No confidential and/or business proprietary information, copyrighted information, or personally identifiable information should be submitted in response to this notice.

Privacy Note: All comments received from members of the public will be available for public viewing on *Regulations.gov.* In accordance with FAR 15.202(3), responses to this notice are not offers and cannot be accepted by the Federal Government to form a binding contract. Additionally, those submitting responses are solely responsible for all expenses associated with response preparation.

II. General Information

A. What is the purpose of this request for public comment?

The EPA will use the feedback and information received through this public comment process, along with findings of the external peer review and data quality assessment, to inform future improvements to WARM.

The Environmental Protection Agency launched the Waste Reduction Model (WARM) in 1998. WARM has been updated and expanded fifteen times since its launch in 1998. In 2022 and 2023, WARM underwent an external peer review and a data quality assessment as part of the EPA's on-going efforts to ensure WARM's scientific integrity. (Reports are available in the docket EPA–HQ–OLEM–2023–0451 and on the web at *https://epa.gov/warm.*)

The EPA created WARM to provide high-level comparisons of potential greenhouse gas (GHG) emissions reductions, energy savings, and economic impacts (labor hours, wages and taxes when considering different materials management practices. Materials management practices include—source reduction, recycling, anaerobic digestion, combustion, composting and landfilling.

WARM models 61 materials commonly found in municipal solid waste (MSW) and construction and demolition debris (C&D), including aluminum cans, glass, paper, plastics, organics (including food waste) and building materials.

WARM is a comparative tool rather than a comprehensive measurement tool. WARM was not developed for and, as such, should not be used for final site-specific materials management decisions, when other human health and environmental impacts of the different management methods may need to be considered (such as air pollution, water pollution, noise, etc.). It also should not be used for developing GhG inventories, which need to establish a baseline and measure reductions over time on an annual basis for an entity.

III. Request for Information

The Environmental Protection Agency requests public comment on WARM v16 and its supporting documentation from a broad range of individuals and organizations with an understanding of and interest in tools and models related to life cycle materials management, such as: federal, state, tribal, territorial, and local governments; industry; researchers; academia; non-profit organizations; community groups; individuals and international organizations. EPA is interested in receiving input on the following:

- How can the scientific rigor and adherence to modeling best practices and assumptions in WARM regarding biogenic carbon emissions, carbon storage in forests, soils, and landfills, and utility offsets from combustion be improved?
- How can WARM better align with best practices in climate change modeling and assumptions?
- How can the alignment of data, assumptions, and model components in WARM with real market practices be improved?
- In assessing WARM, how well do the modeled management practices represent the diversity of practices typically used in the United States?
- When evaluating WARM, how accurately does it depict the common secondary use of recycled materials in the United States?
- What recommendations can be made for enhancing the clarity, transparency, relevance, and usability of WARM and its accompanying documentation?
- Are there any studies or data sources that are relevant to WARM but are currently not integrated, and how could their inclusion be beneficial for future development?
- What are the potential advantages and disadvantages of conducting future WARM model development in a more publicly accessible development environment, such as GitHub, to encourage increased transparency and public involvement?
- What are the potential advantages and disadvantages of the EPA considering the use of readily available data from public sources (such as the Federal LCA Commons) in WARM, especially the use of non-waste management data, to enhance data

consistency, accessibility and reliability across federal government life cycle work?

The Environmental Protection Agency will use feedback and information received through this public comment, the external peer review and the data quality assessment to inform future improvements to WARM. Please identify the question(s) you are responding to when submitting your comments.

IV. Disclaimer and Important Note

This request for public comment is issued solely for information, research and planning purposes and does not constitute a Request for Proposals (RFP) or a Request for Applications (RFA). Responding to this notice will not give any advantage to or preclude any organization or individual in any subsequently issued solicitation, RFP, or RFA. Any future development activities related to this activity will be announced separately. This notice does not represent any award commitment on the part of the U.S. Government, nor does it obligate the Government to pay for costs incurred in the preparation and submission of any responses.

Dated: February 8, 2024.

Carolyn Hoskinson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2024–02974 Filed 2–13–24; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9448–03–OAR]

Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2022

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of document availability and request for comments.

SUMMARY: The Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2022 is available for public review. EPA requests recommendations for improving the overall quality of the inventory report to be finalized in April 2024, as well as subsequent inventory reports.

DATES: To ensure your comments are considered for the final version of the document, please submit your comments by March 15, 2024. However, comments received after that date will still be welcomed and considered for the next edition of this report.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2024–0004, to the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. Do not submit electronically any information you consider to be Confidential Business Information (CBI). Comments can also be submitted in hardcopy to GHG Inventory at: Environmental Protection Agency, Climate Change Division (6207A), 1200 Pennsylvania Ave. NW, Washington, DC 20460, Fax: (202) 343–2342. You are welcome and encouraged to send an email with your comments to *GHGInventory@epa.gov.* EPA may publish any comment received to its public docket, submitted in hardcopy or sent via email. For additional submission methods, the full EPA public comment policy, information about CBI, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Ms. Mausami Desai, Environmental Protection Agency, Office of Air and Radiation, Office of Atmospheric Protection, Climate Change Division, (202) 343–9381, *GHGInventory@epa.gov.*

SUPPLEMENTARY INFORMATION: Annual U.S. emissions for the period of time from 1990 through 2022 are summarized and presented by sector, including source and sink categories. The inventory contains estimates of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF_6), and nitrogen trifluoride (NF_3) emissions. The technical approach used in this report to estimate emissions and sinks for greenhouse gases is consistent with the methodologies recommended by the Intergovernmental Panel on Climate Change (IPCC), and reported in a format consistent with the Paris Agreement and United Nations Framework Convention on Climate Change (UNFCCC) reporting guidelines. The Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2022 is the latest in a series of annual, policy-neutral U.S. submissions to the Secretariat of the UNFCCC and the Paris Agreement. EPA requests recommendations for improving the overall quality of the inventory report to be finalized in April 2024, as well as subsequent annual inventory reports. The draft report is available at *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks.*

Paul Gunning,

Director, Office of Atmospheric Protection.

[FR Doc. 2024–01658 Filed 2–13–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2017–0747; FRL–11744–01–ORD]

Availability of the Protocol for the Uranium Integrated Risk Information System (IRIS) Assessment (Oral)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a 30-day public comment period associated with release of the document *Protocol for the Uranium IRIS Assessment (Oral).* This document communicates the rationale for conducting the human health assessment of natural and/or depleted uranium via oral exposure, describes screening criteria to identify relevant literature, outlines the approach for evaluating study quality, and describes the methods for dose-response analysis.

DATES: The 30-day public comment period begins February 14, 2024 and ends March 15, 2024. Comments must be received on or before March 15, 2024.

ADDRESSES: The Protocol for the Uranium IRIS Assessment (Oral) will be available via the internet on the IRIS website at *https://www.epa.gov/iris* and in the public docket at *http://www.regulations.gov,* Docket ID: EPA–HQ–ORD–2017–0747.

FOR FURTHER INFORMATION CONTACT: For information on the docket, contact the ORD Docket at the EPA Headquarters Docket Center; email: *Docket_ORD@epa.gov.*

For technical information on the protocol, contact Avanti Shirke and Dahnish Shams, EPA's Office of Research and Development (ORD) Center for Public Health & Environmental Assessment (CPHEA); email: *shirke.avanti@epa.gov* and *shams.dahnish@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information on the IRIS Program and Systematic Review Protocols

EPA's Integrated Risk Information System (IRIS) Program is a human health assessment program that evaluates quantitative and qualitative

information on effects that may result from exposure to chemicals found in the environment. Through the IRIS Program, EPA provides high quality science-based human health assessments to support the Agency's regulatory activities and decisions to protect public health.

As part of developing a draft IRIS assessment, EPA presents a methods document, referred to as the protocol, for conducting a chemical-specific systematic review of the available scientific literature. EPA is seeking public comment on components of the protocol including the described strategies for literature searches, criteria for study inclusion or exclusion, considerations for evaluating study methods, information management for extracting data, approaches for synthesis within and across lines of evidence, and methods for derivation of toxicity values. The protocol serves to inform the subsequent development of the draft assessment and is made available to the public. EPA may update the protocol based on the evaluation of the literature, and any updates will be posted to the docket and on the IRIS website.

II. How To Submit Technical Comments to the Docket at *https://www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2017–0747 for uranium, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: Docket_ORD@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center (ORD Docket), Mail Code: 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460. The phone number is 202–566–1752.

For information on visiting the EPA Docket Center Public Reading Room, visit *https://www.epa.gov/dockets.* The telephone number for the Public Reading Room is 202–566–1744. The public can submit comments via *www.regulations.gov* or email.

Instructions: Direct your comments to docket number EPA–HQ–ORD–2017–0747 for the uranium IRIS assessment. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *https://www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information through *https://www.regulations.gov* or email that you consider to be CBI or otherwise protected. The *https://www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

Docket: Documents in the docket are listed in the *https://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *https://www.regulations.gov* or as a hard copy at the ORD Docket in the EPA Headquarters Docket Center.

Wayne Cascio,

Director, Center for Public Health & Environmental Assessment.

[FR Doc. 2024–03038 Filed 2–13–24; 8:45 am]

BILLING CODE 6560–50–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 February 29, 2024.

A. Federal Reserve Bank of Minneapolis (Stephanie Weber, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291. Comments can also be sent electronically to *MA@mpls.frb.org:*

1. *Mark J. Heinemann Trust Agreement dated January 23, 2024, Mark Heinemann and Allison Berg Heinemann, as co-trustees, all of Albert Lea, Minnesota; Leslie Heinemann and Lisbeth Heinemann, both of Flandreau, South Dakota; and Thomas T. Berg and Paula D. Berg, both of Albert Lea, Minnesota;* as members of the Heinemann Family Control Group, a group acting in concert, to acquire voting shares of Minnesota Community Bancshares, Inc., and thereby indirectly acquire voting shares of Arcadian Bank, both of Albert Lea, Minnesota.

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2024–03023 Filed 2–13–24; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice–IE–2024–01 Docket No. 2024–0002; Sequence No. 5]

Privacy Act of 1974; System of Records

AGENCY: General Services Administration.

ACTION: Notice of a modified system of records.

SUMMARY: GSA reviews its Privacy Act systems to ensure that they are relevant, necessary, accurate, up-to-date, and covered by the appropriate legal or regulatory authority. This notice is an updated Privacy Act system of records notice.

DATES: This system of records will go into effect without further notice on March 15, 2024 unless otherwise revised pursuant to comments received.

ADDRESSES: Comments may be submitted to the Federal eRulemaking Portal, *http://www.regulations.gov.* Submit comments by searching for GSA/FSS–13, Personal Property Sales Program. Comments may also be submitted by mail at, General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Call or email Richard Speidel, Chief Privacy Officer, at 202–969–5830 and *gsa.privacyact@gsa.gov.*

SUPPLEMENTARY INFORMATION: GSA proposes to modify a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a, to update its routine uses pertaining to breach notification and to coordinate with the Office of the Inspector General when conducting an audit. GSA is also making technical changes to GSA/FSS–13 consistent with OMB Circular No. A–108. Accordingly, GSA has made technical corrections and non-substantive language revisions to the following sections: ''Policies and Practices for Storage of Records,'' ''Policies and Practices for Retrieval of Records,'' ''Policies and Practices for Retention and Disposal of Records,'' ''Administrative, Technical and Physical Safeguards,'' ''Record Access Procedures,'' ''Contesting Record Procedures,'' and ''Notification Procedures''. GSA has also created the following new sections: ''Security Classification'' and ''History.''

SYSTEM NAME:

Personal Property Sales Program.

SYSTEM NUMBER:

GSA/FSS–13.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

GSA Federal Acquisition Service (FAS) is the owner and is responsible for the system. The system is hosted, operated, and maintained by contractors. Records are maintained in an electronic form on a Software as a Service (SaaS) platform, within the United States. Contact the system manager for additional information.

SYSTEM MANAGER(S):

Narendra Rao Namana, Director of Personal Property and Travel Transportation Division, Office of GSA IT, General Services Administration, 1800 F Street NW, Washington, DC 20405.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

40 U.S.C. 121(c) and 40 U.S.C. 541, *et seq.*

PURPOSE(S) OF THE SYSTEM:

To establish and maintain a system of records for conducting public sales of Federal personal property by GSA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system will include those individuals who request to be added to GSA bidders mailing lists, register to bid on GSA sales, and/or enter into contracts to buy Federal personal property at sales conducted by GSA.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains information needed to identify potential and actual bidders and awardees, and transaction information involving personal property sales. System records include:

a. Personal information provided by bidders and buyers, including, but not limited to, names, phone numbers, addresses, Social Security Numbers, birth dates and credit card numbers or other banking information; and

b. Contract information on Federal personal property sales, including whether payment was received, the form of the payment, notices of default, and contract claim information.

RECORD SOURCE CATEGORIES:

Information is provided by individuals who wish to participate in the GSA personal property sales program, and system transactions designed to gather and maintain data and to manage and evaluate the Federal personal property disposal program.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

a. In any criminal, civil, or administrative legal proceeding, where pertinent, to which GSA, a GSA employee, or the United States or other entity of the United States Government is a party before a court or administrative body.

b. To an appeal, grievance, hearing, or complaints examiner; an equal employment opportunity investigator, arbitrator, or mediator; and/or an exclusive representative or other person authorized to investigate or settle a grievance, complaint, or appeal filed by an individual who is the subject of the record.

c. To a Federal agency, State, local, Tribal or other public authority in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation, the letting of a contract, or the issuance of a grant, license, or other benefit to the extent that the information is relevant and necessary to a decision.

d. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), or the Government Accountability Office (GAO) when the information is required for program evaluation purposes.

e. To a Member of Congress or his or her staff on behalf of and at the request of the individual who is the subject of the record.

f. To an expert, consultant, or contractor of GSA in the performance of a Federal duty related to the contract or appointment to which the information is relevant.

g. To the GSA Office of Finance for debt collection purposes (see GSA/PPFM–7).

h. To the National Archives and Records Administration (NARA) for records management purposes.

i. To appropriate agencies, entities, and persons when (1) The Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed

compromise and prevent, minimize, or remedy such harm.

j. To a Federal, State, local, or Tribal agency responsible for investigating, prosecuting, enforcing, or carrying out a statute, rule, regulation, or order when GSA becomes aware of a violation or potential violation of civil or criminal law or regulation; or to an agency, individual or organization, if there is reason to believe that such agency, individual or organization possesses information or is responsible for acquiring information relating to the investigation, trial or hearing, and the dissemination is reasonably necessary to elicit such information or to obtain the cooperation of a witness or an informant.

k. To the Office of Management and Budget (OMB) when necessary to the review of private relief legislation pursuant to OMB Circular No. A–19.

l. To designated agency personnel for controlled access to specific records for the purpose of performing authorized audit or oversight functions.

m. To another Federal agency or Federal entity, when GSA 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.

n. To agencies, to compare such records to other agencies' systems of records or to non-Federal records, in coordination with an Office of Inspector General (OIG) in conducting an audit, investigation, inspection, evaluation, or some other review as authorized by the Inspector General Act.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

All records are stored electronically in a database. Information is encrypted in transit and at rest.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrievable by a personal identifier or by other appropriate type of designation approved by GSA.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Content in this system will be disposed according to the following GSA schedule:

137.3/021 Personal Property Case Files And Summary Reports. This series describes those records created when accounting for individual instances of managing the evaluation, processing, sale, and transfer of excess and personal property. Included are personal property sales case files (containing routine documents associated with the above-listed activities), excess and personal property catalogs, bulletins, and lists, utilization surveys, donation case files, reserve excess property files, rehabilitated property stock listings and reports, and related records.

Retention Instructions: Temporary. Cut off at the end of the fiscal year when the property case file or transaction is completed and the final payment is received. Destroy 6 fiscal years after cutoff. Longer retention is authorized if needed for business reference purposes, but no longer than 10 fiscal years after cutoff.

Legal Disposition Authority: DAA–0137–2015–0001–0010 (137.3/021)

Approved by NARA: 4/5/2018.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in the system are protected from unauthorized access and misuse through a combination of administrative, technical and physical security measures. Administrative measures include but are not limited to policies that limit system access to individuals within an agency with a legitimate business need, and regular review of security procedures and best practices to enhance security. Technical measures include but are not limited to system design that allows authorized system users access only to data for which they are responsible; required use of strong passwords that are frequently changed; and use of encryption for certain data transfers. Physical security measures include but are not limited to the use of data centers which meet government requirements for storage of sensitive data.

RECORD ACCESS PROCEDURES:

If an individual wishes to access any data or record pertaining to him or her in the system after it has been submitted, that individual should consult the GSA's Privacy Act implementation rules available at 41 CFR part 105–64.2.

CONTESTING RECORD PROCEDURES:

If an individual wishes to contest the content of any record pertaining to him or her in the system after it has been submitted, that individual should consult the GSA's Privacy Act implementation rules available at 41 CFR part 105–64.4.

NOTIFICATION PROCEDURES:

If an individual wishes to be notified at his or her request if the system contains a record pertaining to him or her after it has been submitted, that individual should consult the GSA's Privacy Act implementation rules available at 41 CFR part 105–64.4.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None

HISTORY:

This system was previously published in the **Federal Register** at 73 FR 18637, 7–22–11.

Richard Speidel,

Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.

[FR Doc. 2024–03002 Filed 2–13–24; 8:45 am]

BILLING CODE 6820–AB–P

GENERAL SERVICES ADMINISTRATION

[Notice–IE–2024–01; Docket No. 2024–0002; Sequence No. 2]

Privacy Act of 1974; Notice of a Modified System of Records

AGENCY: Office of the Chief Privacy Officer; General Services Administration (GSA).

ACTION: Notice.

SUMMARY: GSA proposes to modify an existing System of Records Notice to more accurately describe functionality of the system of records and to bring the Notice into compliance with the format promulgated in OMB Guidance A–108.

DATES: Submit comments on or before March 15, 2024. The new and/or significantly modified routine uses will be applicable on March 15, 2024.

ADDRESSES: Comments may be submitted to the Federal eRulemaking Portal, *http://www.regulations.gov.* Submit comments by searching for ''Notice-IE–2024–01'', Notice of Revised System of Records. Comments may also be submitted by mail at GSA, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Call or email Richard Speidel, Chief Privacy Officer at 202–969–5830 and *gsa.privacyact@gsa.gov.*

SUPPLEMENTARY INFORMATION: GSA proposes to update a system of records subject to the Privacy Act of 1974, as amended. GSA is modifying the Notice to update the system name to ''Cloud Information Infrastructure System,'' which was previously entitled ''GSA's Enterprise Organization of Google

Applications, Moderate Impact Software as a Service Cloud (SaaS) Minor Applications & GSA's EEO Org of *Salesforce.com*.'' This system of records is directed to GSA's cloud-based information infrastructure systems and services implemented across various vendors as well as GSA applications, all of which are part of either the Google Workspace or Salesforce environments.

Substantive updates are being made to the Name of the System, System Manager, Authority for Maintenance of the System, Purpose, Categories of Individuals Covered by the System, Categories of Records in the System, Record Source Categories, Policies and Practices for Storage of Records, Policies and Practices for Retrieval of Records, Policies and Practices for Retention and Disposal of Records, Administrative, Technical, and Physical Safeguards, Record Access Procedures, and Notification Procedures. Minor administrative edits are being made to the Routine Uses and Contesting Record Procedures.

GSA is also making technical changes to GSA/CIO–3 consistent with OMB Circular No. A–108. Accordingly, GSA has made technical corrections to identify the newly-renamed sections: ''Policies and Practices for Storage of Records,'' ''Policies and Practices for Retrieval of Records,'' ''Policies and Practices for Retention and Disposal of Records,'' ''Administrative, Technical and Physical Safeguards,'' ''Record Access Procedures,'' ''Contesting Record Procedures,'' and ''Notification Procedures.'' GSA has also created the following new sections: ''Security Classification'' and ''History.''

SYSTEM NAME AND NUMBER:

Cloud Information Infrastructure System, GSA/CIO–3.

SYSTEM CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The Cloud Information Infrastructure System is operated and maintained by GSA and on behalf of GSA by its contractor(s). It is hosted in secure cloud hosted data centers in the continental United States.

SYSTEM MANAGER:

Associate CIO, Office of Corporate IT Services, Office of GSA IT, General Services Administration, 1800 F Street NW, Washington, DC 20405.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 40 U.S.C. 11315; 44 U.S.C. 3506; E.O. 9397, as amended; 5 U.S.C. 1001–14; 40 U.S.C. 3306.

PURPOSES:

To maintain a system of records directed to the use of GSA's cloud infrastructure systems, which contain a disparate set of systems and records. For example, GSA users maintain a limited set of personal information on the Google platform in order to facilitate use and management of information in order to carry out the requirements of their positions. Members of the public provide contact information to voluntarily participate in public outreach programs or to participate in the groups founded by the Federal Advisory Committee Act.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered by this system include members of the public, past and present GSA employees, past and present GSA contractors, and past and present employees of other federal agencies.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records includes, but is not limited to Name, Business Contact Information (business phone number, business email address, business location, organizational information), Social Security Number (SSN), Personal Contact Information (personal physical address, personal phone number, personal email address), information regarding employee relocations, and/or information regarding an individual's appointment to one or more advisory committees (title, details of department/committee, occupation, appointment type, funding source).

RECORD SOURCE CATEGORIES:

Information is provided by the individual to whom the record pertains.

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 GSA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. To a Member of Congress or his or her staff on behalf of and at the request of the individual who is the subject of the record.

b. To the National Archives and Records Administration (NARA) for records management purposes.

c. To an expert, consultant, or contractor of GSA in the performance of a Federal duty to which the information is relevant.

d. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations.

e. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), and the Government Accountability Office (GAO) in accordance with their responsibilities for evaluating Federal programs.

f. To appropriate agencies, entities, and persons when

(1) GSA suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

(2) GSA has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

g. To another Federal agency or Federal entity, when GSA 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.

h. In connection with any litigation or settlement discussions regarding claims by or against the GSA, including public filing with a court, to the extent that GSA determines the disclosure of the information is relevant and necessary to the litigation or discussions.

i. To an appeal, grievance, hearing, or complaints examiner; an equal employment opportunity investigator, arbitrator, or mediator; and an exclusive representative or other person

authorized to investigate or settle a grievance, complaint, or appeal filed by an individual who is the subject of the record.

j. To compare such records to other agencies' systems of records or to non-Federal records, in coordination with an Office of Inspector General (OIG) in conducting an audit, investigation, inspection, evaluation, or some other review as authorized by the Inspector General Act.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records are stored on a secure server with access limited to staff on a need-to-know basis.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name or another identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of according to GSA records maintenance and disposition schedules, GSA Directive CIO 1820.2—''GSA Records Management Program,'' and requirements of the National Archives and Records Administration (*e.g.,* NARA General Records Schedule (GRS)).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The underlying information systems are authorized to operate by the GSA CIO. Two-factor authentication is required and used for all individuals who access this system.

RECORD ACCESS PROCEDURES:

The Privacy Act allows individuals the right to access records about them in a system of records. A request for access must include: 1. Full Name and Address; 2. A description of the records sought; the title and number of this system of records as published in the **Federal Register**; 3. A brief description of the nature, time, and place of association with GSA; and 4. Any other information that will help in locating the record.

CONTESTING RECORD PROCEDURES:

An individual may request amendment to a record by writing to the system manager with the proposed amendment, which must bear the following marking: ''Privacy Act Request to Amend the Record.'' Certain records are unable to be amended.

NOTIFICATION PROCEDURES:

An individual may determine if this system contains a record pertaining to them by sending a request in writing, signed, to the System Manager at the above address. The same requirements for Record Access Procedures must be followed for Notification Procedures.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

79 FR 47138, September 11, 2014; 78 FR 35033, July 11, 2013; 77 FR 63316, November 15, 2012.

Richard Speidel,

Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.

[FR Doc. 2024–03000 Filed 2–13–24; 8:45 am]

BILLING CODE 6820–AB–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0292; Docket No. 2024–0001; Sequence No. 1]

Information Collection; FFATA Subaward and Executive Compensation Reporting Requirements

AGENCY: Office of the Integrated Award Environment, General Services Administration (GSA).

ACTION: Notice of request for comments regarding an extension to an existing OMB information collection.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of the currently approved information collection requirement regarding FFATA Subaward and Executive Compensation Reporting Requirements.

DATES: Submit comments on or before April 15, 2024.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to GSA via *http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by searching the OMB control number 3090–0292. Select the link ''Comment Now'' that corresponds with ''Information Collection 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Information Collection 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements'' on your attached document.

If your comment cannot be submitted using *regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite Information Collection 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements, in all correspondence related to this collection. Comments received generally will be posted without change to *regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Salomeh Ghorbani, Director, IAE Outreach and Stakeholder Engagement Division, at 703–605–3467 or *IAE_Admin@gsa.gov*.

SUPPLEMENTARY INFORMATION:

A. Purpose

The Federal Funding Accountability and Transparency Act (Pub. L. 109–282, as amended by section 6202(a) of Pub. L. 110–252), known as FFATA or the Transparency Act requires information disclosure of entities receiving Federal financial assistance through Federal awards such as Federal contracts, sub-contracts, grants and sub-grants, FFATA 2(a), (2), (i), (ii). Beginning October 1, 2010, the currently approved Paperwork Reduction Act submission directed compliance with the Transparency Act to report prime and first-tier subaward data. Specifically, Federal agencies and prime awardees of grants were to ensure disclosure of executive compensation of both prime and subawardees and subaward data pursuant to the Transparency Act. This information collection requires reporting of only the information enumerated under the Transparency Act.

B. Annual Reporting Burden

Sub-award Responses: 639,775.
Hours per Response: 1.
Total Burden Hours: 639,775.
Executive Compensation Responses: 387,644.
Hours per Response: 1.
*Total Burden Hours: 3*87,644.
Total Annual Burden Hours: 1,027,419.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary, whether it will have practical utility; whether our

estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements, in all correspondence.

Lois Mandell,

Director, Regulatory Secretariat Division, General Services Administration.

[FR Doc. 2024–03049 Filed 2–13–24; 8:45 am]

BILLING CODE 6820–WY–P

GENERAL SERVICES ADMINISTRATION

[Notice–IE–2024–02; Docket No. 2024–002; Sequence No. 6]

Privacy Act of 1974; System of Records

AGENCY: General Services Administration (GSA).

ACTION: Notice of a modified system of records.

SUMMARY: GSA reviewed its Privacy Act systems to ensure that they are relevant, necessary, accurate, up-to-date, covered by the appropriate legal or regulatory authority, and in response to OMB M–07–16. This notice is a compilation of the updated Privacy Act system of record notices.

DATES: This system of records will go into effect without further notice on March 15, 2024 unless otherwise revised pursuant to comments received.

ADDRESSES: Comments may be submitted to the Federal eRulemaking Portal, *http://www.regulations.gov.* Submit comments by searching for ''GSA/OAP–3'', Notice of Revised System of Records.

Comments may also be submitted by mail at, General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Call or email Richard Speidel, Chief Privacy Officer at 202–969–5830 and *gsa.privacyact@gsa.gov.*

SUPPLEMENTARY INFORMATION: GSA proposes to modify a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a, to update its routine uses pertaining to breach notification and to coordinate with the Office of the Inspector General when conducting an audit. GSA is also making technical changes to GSA/OAP–3 consistent with OMB Circular No. A–108. Accordingly, GSA has made technical corrections and non-substantive language revisions to the following sections: ''Policies and Practices for Storage of Records,'' ''Policies and Practices for Retrieval of Records,'' ''Policies and Practices for Retention and Disposal of Records,'' ''Administrative, Technical and Physical Safeguards,'' ''Record Access Procedures,'' ''Contesting Record Procedures,'' and ''Notification Procedures.'' GSA has also created the following new sections: ''Security Classification'' and ''History.''

SYSTEM NAME:

Federal Procurement Data System (FPDS).

SYSTEM NUMBER:

GSA/OAP–3.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

GSA Privacy Act Officer, General Services Administration, 1800 F Street NW, Washington, DC 20405.

SYSTEM MANAGER(S):

Arda Odabasio, System Owner—General Services Administration, 1800 F Street NW, Washington, DC 20405.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 93–400 Office of Federal Procurement Policy Act, as amended; 41 U.S.C. 405, 417, and 1122(a)(4)(A).

PURPOSE(S) OF THE SYSTEM:

To establish and maintain a system for assembling, organizing, and presenting contract procurement data for the Federal Government and the public sector.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

FPDS includes information on individuals who are sole proprietors who have or had contracts with the Federal Government. Those individuals include government users and public users. Authentication of Government and Public users are provided by *Login.gov* which maintains all the related user information.

For both public and government users, valid email-identification is maintained in the FPDS system to authorize the access control list within FPDS.

For System Users, only System ID and valid Government Agency POC details are maintained.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system collects, processes, and maintains official statistical data on Federal contracting, including:

a. Information on individual federal contractors that may include name, and Unique Entity Identifier (UEI).

FPDS receives and displays/shares UEI and Contractor Name details. The Taxpayer Identification Number (TIN) is not used anywhere in the FPDS system. Rather, FPDS receives the TIN from SAM and extracts it, but it is not used anywhere else in the FPDS application.

b. Contracts that are unclassified but may be considered sensitive due to insight they may provide into federal government activities in conjunction with data from other federal contracts.

RECORD SOURCE CATEGORIES:

Information is obtained from federal agencies who report federal contracts after award according to the reporting requirements included in the Federal Acquisition Regulation Subpart 4.6—Contract Reporting. These records may contain the names of individuals, their Unique Entity Identifier (UEI), and TIN.

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 to authorized entities, as is determined to be relevant and necessary, outside GSA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. In any legal proceeding, where pertinent, to which GSA is a party before a court or administrative body.

b. To a Federal, State, local, or foreign agency responsible for investigating, prosecuting, enforcing, or carrying out a statute, rule, regulation, or order when GSA becomes aware of a violation or potential violation of civil or criminal law or regulation.

c. To an authorized appeal or grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by

an individual to whom the information pertains.

d. To the Office of Management and Budget (OMB) and the Government Accountability Office (GAO) in accordance with their responsibilities for evaluating Federal programs.

e. To a Member of Congress or his or her staff on behalf of and at the request of the individual who is the subject of the record.

f. To authorized officials of the agency that provided the information for inclusion in the system.

g. To an expert, consultant, or contractor in the performance of a Federal duty to which the information is relevant.

h. To provide recurring or special reports to the President, Congress, the Government Accountability Office, Federal Executive agencies, and the general public.

i. As a means of measuring and assessing the impact of Federal contracting on the nation's economy and the extent to which small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged and woman-owned small business concerns are sharing in Federal contracts.

j. To provide information for policy and management control purposes.

k. To appropriate agencies, entities, and persons when (1) the Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

l. To another Federal agency or Federal entity, when GSA 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.

m. To agencies, to compare such records to other agencies' systems of records or to non-Federal records, in coordination with an Office of Inspector General (OIG) in conducting an audit, investigation, inspection, evaluation, or some other review as authorized by the Inspector General Act.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Information may be collected electronically and may be stored on electronic media, as appropriate. Electronic records are kept on server hard drives and electronic backup devices.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrievable by a variety of fields, the key for individual records being the unique Procurement Instrument Identifier (PIID).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system are used to generate annual reports that are sent to Congress and posted publicly. This compiled annual report follows the following GSA records retention schedule:

269.11/020 Annual Significant Reports And Studies.

This series includes documents created in reporting on management improvement goals, progress reports, and accomplishments for GSA internal and external Governmentwide programs. Also included in this series are special studies conducted at the request of the Congress, the Office of Management and Budget (OMB), or the Office of Personnel Management (OMB), and the GSA Annual Report issued by the Administrator's Office and related records.

Retention Instructions: Permanent. Cut off at the end of the fiscal year that the report has been issued. Transfer to NARA 15 years after cutoff.

Legal Disposition Authority: DAA–0269–2016–0006–0003 (269.11/020).

Date NARA Approved: 8/17/2018.

Records accumulated from agencies are stored under the following schedule:

GRS 05.2/020 Intermediary Records.

Records that meet the following conditions:

- They exist for the sole purpose of creating a subsequent record and
- They are not required to meet legal or fiscal obligations, or to initiate, sustain, evaluate, or provide evidence of decision-making.

This includes certain analog and electronic source records for electronic systems that are not otherwise excluded. For specific examples, see the GRS 5.2 Frequently Asked Questions (FAQs).

Exclusion: Source records that have been digitized. GRS 4.5, item 010, covers these records.

Note: The GRS provides disposition authority for copies of electronic records from one system that are used as source records to another system, for example an extracted data set. The GRS does not apply to either the originating system or the final system in which the final records reside. These systems must be disposed of per an agency-specific schedule, or if appropriate, another GRS. It is possible that sometimes information is moved from one system to another without the creation of an intermediary copy.

Retention Instructions: Temporary. Destroy upon creation or update of the final record, or when no longer needed for business use, whichever is later.

Legal Disposition Authority: DAA–GRS–2022–0009–0002 (GRS 05.2/020)

Date Approved by NARA: 6/30/2023.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

System records are safeguarded in accordance with the requirements of the Privacy Act, the Computer Security Act, and the FPDS System Security Plan. Technical, administrative, and personnel security measures are implemented to ensure confidentiality and integrity of the system data that is stored, processed, and transmitted. Electronic records are protected by passwords and other appropriate security measures.

Data entry is limited to authorized users whose names and levels of access are maintained by federal agencies and the information is securely stored online. Unclassified but sensitive contract data in the system is restricted to those who have access within the federal agency. Agencies determine when their contract information may be made available for viewing by other agencies and the public.

RECORD ACCESS PROCEDURES:

If an individual wishes to access any data or record pertaining to him or her in the system after it has been submitted, that individual should consult the GSA's Privacy Act implementation rules available at 41 CFR part 105–64.2.

CONTESTING RECORD PROCEDURES:

If an individual wishes to contest the content of any record pertaining to him or her in the system after it has been submitted, that individual should consult the GSA's Privacy Act

implementation rules available at 41 CFR part 105–64.4.

NOTIFICATION PROCEDURES:

If an individual wishes to be notified at his or her request if the system contains a record pertaining to him or her after it has been submitted, that individual should consult the GSA's Privacy Act implementation rules available at 41 CFR part 105–64.4.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

This system was previously published in the **Federal Register** at 73 FR 22388, April 24, 2008.

Richard Speidel,

Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.

[FR Doc. 2024–03007 Filed 2–13–24; 8:45 am]

BILLING CODE 6820–AB–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity: Risk Determination Hearings for Unaccompanied Children (New Collection)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is inviting public comments on the proposed collection. The request consists of several forms that will allow the Unaccompanied Children (UC) Program to implement a new set of hearings (''Risk Determination Hearings''), which will serve as due process protections for children in ORR care.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described in this notice.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *infocollection@acf.hhs.gov*. Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ORR plans to create a new information collection containing five instruments in order to implement risk determination hearings for unaccompanied children. This new information collection will replace the *Flores* bond hearing process. The new instruments will not take effect until the underlying regulations at 45 CFR part 410 on which they are based take effect. The UC Program issued a notice of proposed rulemaking in October 2023, which aims to adopt and replace regulations relating to key aspects of the placement, care, and services provided to unaccompanied children referred to ORR. The UC Program is currently adjudicating public comments received and preparing to publish the Final Rule in the second quarter of calendar year 2024; the Final Rule will take effect 30 days after publishing.

Risk Determination Hearing Forms

These forms are provided to unaccompanied children placed in ORR custody by their case manager or by individuals associated with the HHS Departmental Appeals Board (DAB), which is responsible for the actual day-to-day logistical operations of these hearings. These instruments are provided to all unaccompanied children placed in a restrictive setting (*i.e.,* secure facilities [including residential treatment facilities] and heightened supervision facilities), and to unaccompanied children placed in other types of facilities upon request. They will be translated into Spanish and other languages, as necessary.

- *Request for Risk Determination Hearing (Form RDH–1):* The unaccompanied child, the child's parent/legal guardian, or the child's representative may use this instrument to request a Risk Determination hearing. Children in heightened security placements who initially waive a hearing may use this form to later request a hearing; the form may also be used by children in non-restrictive settings to request a hearing.
- *Risk Determination Hearing Opt-Out (Form RDH–2):* The unaccompanied child or the child's representative may use this instrument to opt out of a Risk Determination hearing.
- *Appointment of Representation for Risk Determination hearing (Form RDH–3):* The unaccompanied child or the child's parent/legal guardian may use this instrument to appoint a representative to act on the child's behalf throughout the Risk Determination hearing process and consent to the release of any records that are related to the child's case to that representative.
- *Risk Determination Hearing Transcript Request (Form RDH–4):* The unaccompanied child, the child's parent/legal guardian, or the child's representative may use this instrument to request a written transcript of the Risk Determination hearing.
- *Request for Appeal of Risk Determination Hearing (Form RDH–5):* The unaccompanied child, the child's parent/legal guardian, or the child's representative may use this instrument to appeal the decision of the hearing officer.

Once the new risk determination hearing forms are in effect, the UC Program will prepare a non-substantive change request to the Office of Management and Budget (OMB) to discontinue the use of three instruments currently approved under the Legal Services for Unaccompanied Children information collection (OMB# 0970–0565). The forms to be replaced by the Risk Determination Hearing forms described above include the following:

- Request for a Flores Bond Hearing (Form LRG–7)
- Motion Requesting a Bond Hearing—Secure or Staff Secure (Form LRG–8A)
- Motion Requesting a Bond Hearing—Non-Secure (Form LRG–8B)

Respondents: ORR grantee and contractor staff, unaccompanied children, parents/legal guardians of unaccompanied children, attorneys of record, and legal service providers.

ANNUAL BURDEN ESTIMATES

Instrument	Annual total number of respondents	Annual total number of responses per respondent	Average burden hours per response	Annual total burden hours
Request for Risk Determination Hearing (Form RDH–1)	435	1	0.17	72.5
Risk Determination Hearing Opt-Out (Form RDH–2)	435	1	0.17	72.5

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Annual total number of respondents	Annual total number of responses per respondent	Average burden hours per response	Annual total burden hours
Appointment of Representative for Risk Determination Hearing (Form RDH–3)	1740	1	0.17	290
Risk Determination Hearing Transcript Request (Form RDH–4)	16	1	0.17	3
Request for Appeal of Risk Determination Hearing (Form RDH–5)	3	1	0.17	.5

Estimated Total Annual Burden Hours: 438.5

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 6 U.S.C. 279; 8 U.S.C. 1232

Mary C. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2024–03018 Filed 2–9–24; 4:15 pm]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Availability of Program Application Instructions for Adult Protective Services Funding

Title: Elder Justice Act—Adult Protective Services.

Announcement Type: Initial.

Statutory Authority: 42 U.S.C 1397m–1.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.698.

DATES: Letters of Assurance and the Initial Spend Plan must be submitted electronically by 11:59 p.m. (EST) March 15, 2024.

I. Funding Opportunity Description

The Administration for Community Living (ACL) is establishing the ''Elder Justice Act—Adult Protective Services'' funding opportunity in accordance with section 2042(b) of subtitle B of title XX of the Social Security Act, otherwise known as the Elder Justice Act (EJA) as authorized and funded through the Further Additional Continuing Appropriations and Other Extensions Act, 2024, Public Law 118–35. In accordance with these statutes, the purpose of this opportunity is to enhance and improve adult protective services provided by States, the District of Columbia, and the Territories.

Funds awarded to States and Territories under this opportunity will provide Adult Protective Services (APS) programs in the States, District of Columbia, and Territories with resources to enhance, improve, and expand the ability of APS to investigate allegations of abuse, neglect, and exploitation. Examples of activities consistent with the purposes of the statute include:

- Costs and salaries for hiring permanent or temporary staff members, extended hours/over-time for current staff, and associated personnel costs;
- Costs associated with providing goods and services to APS clients;
- Costs associated with community outreach, including public awareness campaigns and other resources designed to increase the public's awareness and understanding of APS' role in the community;
- Training costs, including state-wide training conferences for APS staff;
- Acquiring personal protection equipment and supplies;
- Improving and enhancing technology systems, including supporting remote work, such as the purchase of communications and technology hardware, software, or infrastructure in order to provide adult protective services;
- Improving data collection and reporting at the case worker, local-, and State-levels in a manner that is consistent with the National Adult Maltreatment Reporting System (NAMRS);
- Improving or enhancing existing APS processes for receiving reports, conducting intakes and investigations, planning/providing for services, making case determinations, documenting and closing cases, and continuous quality improvement;
- Working with tribal adult protective services efforts, such as conducting demonstrations on State-Tribal APS partnerships to better serve tribal elders who experience abuse, neglect, and exploitation, partnering with Tribes within the State to include tribal elder abuse data in the State's NAMRS reporting, and undertaking demonstrations to better understand elder abuse experienced by tribal individuals living in non-tribal communities and served by State APS programs;
- Establishing or enhancing the availability for elder shelters and other emergency, short-term housing and accompanying ''wrap-around'' services for APS clients;
- Establishing, expanding, or enhancing state-wide and local-level elder justice networks for the purpose of removing bureaucratic obstacles and improving coordination across the many State and local agencies interacting with APS clients who have experienced abuse, neglect, or exploitation;
- Costs associated with establishing new, or improving existing processes for responding to alleged scams and frauds;
- Costs associated with assisting APS clients secure the least restrictive option for emergency or alternative housing, and with obtaining, providing, or coordinating with care transitions as appropriate;
- Costs associated with transporting APS clients to necessary appointments, such as medical visits; and
- Costs associated with establishing grants or contracts to address gaps in the APS program identified in the environmental scan previously completed.

Awards authorized under the EJA section 2042(b) shall be provided to the agency or unit of State government having the legal responsibility for providing adult protective services within the State, District of Columbia, or Territory. Funding under this opportunity may be used to serve any APS client who meets their State's statutory or regulatory criteria for client eligibility for APS services. This funding must supplement and not supplant existing funding for APS

provided by States and local units of government. Additionally, award recipients will be required to submit Federal financial reports and annual program reports related to the activities performed.

II. Award Information

A. Eligible Entity

The eligible entity for these awards is the agency or unit of State government legally responsible for providing adult protective services in each State, the District of Columbia, or Territory (EJA section 2042(b)(3)(B)).

B. Funding Instrument Type

These awards will be made in the form of formula grants to the agencies and units of State government with the legal responsibility to provide adult protective services.

C. Anticipated Total Funding per Budget Period

Under this program, ACL intends to make grant awards to each State, Territory, and the District of Columbia. Funding will be distributed through the formula identified in section 2042(b) of the Elder Justice Act. The amounts allocated are based upon the proportion of elders living in each State and Territory, as defined in statute, and will be distributed based on the formula. There are no cost-sharing nor match requirements.

The project period for awards made under this announcement have an estimated start date of April 1, 2024 and an estimated end date of March 30, 2028. These awards have a 24-month budget period. Projected available funding for FY 2024 is $13,766,829. The projected available funding is based on the FY23 appropriation levels, as described in the Further Additional Continuing Appropriations and Other Extensions Act, 2024, Public Law 118–35. Availability of funding and Notices of Award are contingent upon final Congressional appropriations, and this Notice will be updated accordingly.

Below are the projected award amounts for FY 2024:

Alabama	$202,092
Alaska	103,251
Arizona	295,966
Arkansas	118,929
California	1,370,306
Colorado	204,579
Connecticut	148,885
Delaware	103,251
District of Columbia	19,193
Florida	1,020,937
Georgia	371,308
Hawaii	103,251
Idaho	103,251
Illinois	481,263
Indiana	257,455
Iowa	128,721
Kansas	111,431
Kentucky	176,257
Louisiana	174,021
Maine	103,251
Maryland	234,760
Massachusetts	280,653
Michigan	416,921
Minnesota	223,065
Mississippi	112,707
Missouri	247,579
Montana	103,251
Nebraska	103,251
Nevada	118,427
New Hampshire	103,251
New Jersey	361,336
New Mexico	103,251
New York	788,096
North Carolina	411,823
North Dakota	103,251
Ohio	478,682
Oklahoma	146,670
Oregon	175,035
Pennsylvania	557,851
Rhode Island	103,251
South Carolina	220,397
South Dakota	103,251
Tennessee	271,006
Texas	914,609
Utah	103,251
Vermont	103,251
Virginia	326,196
Washington	288,664
West Virginia	103,251
Wisconsin	246,152
Wyoming	103,251
American Samoa	13,767
Guam	13,767
Northern Marianas	13,767
Puerto Rico	157,773
Virgin Islands	13,767

III. Submission Requirements

A. Letter of Assurance

A *Letter of Assurance* is required to be submitted by the eligible entity in order to receive an award. The Letter of Assurance must include the following:

1. Assurance that the award recipient is the agency or unit of State government legally responsible for providing adult protective services in each State and Territory.

2. Assurance that funds will supplement and not supplant existing APS funding.

3. Assurance that the award recipient has included an initial spend plan for the FY 2024 funds, that a spend plan will be submitted prior to awards for each new budget period, and that the initial spend plans will be regularly maintained to accurately reflect how the recipient is investing their funding under this program.

4. Assurance that the award recipient will provide within 180 days of award an updated operational plan that covers activities through 2028.

5. Assurance that funds will be spent in ways consistent with the Elder Justice Act Section 2042(b) and guidance provided by ACL, including the examples of activities consistent with the purposes of the authorizing legislation contained in this notice:

- Personnel costs;
- Providing goods and services to APS clients;
- Community outreach;
- Training;
- Acquiring personal protection equipment and supplies;
- Improving and enhancing technology systems;
- Improving data collection and reporting at the case worker, local-, and State-levels in a manner that is consistent with the National Adult Maltreatment Reporting System;
- Improving or enhancing existing APS processes;
- Working with tribal adult protective services efforts;
- Establishing or enhancing the availability for elder shelters and other emergency, short-term housing and accompanying ''wrap-around'' services;
- Establishing, expanding, or enhancing state-wide and local-level elder justice networks;
- Improving and supporting remote work;
- Establishing new, or improving existing processes for responding to alleged scams and frauds;
- Transportation costs;
- Assisting APS clients secure the least restrictive option for emergency or alternative housing, and with obtaining, providing, or coordinating with care transitions as appropriate; and
- Establishing grants and contracts as needed.

6. Assurance to provide Federal financial reports and annual program reports related to the activities performed for each fiscal year of funding received.

B. Spend Plans

An *Initial Spend Plan* is required with the submission of the Letter of Assurance, and prior to awards for each new budget period through the end of the project period. The Initial Spend Plan should outline how the State/Territory intends to spend their fiscal year allotment in response to the needs and challenges to their APS program. The plan should be consistent with the purpose of the authorizing legislation and the description and examples outlined above. The Initial Spend Plan should have the following format: 3–5 pages in length, double-spaced, with 12pt font and 1″ margins, with a layout of 8.5″ x 11″ paper. The Initial Spend Plan submitted is considered a preliminary framework for how the State/Territory will plan to spend the

funds for the specified fiscal year, and they should be maintained on a regular basis to reflect accurately how the APS program is investing their funding.

C. Unique Entity ID Number

All grant applicants must obtain and keep current a Unique Entity ID (UEI). On April 4, 2022, the unique entity identifier used across the Federal Government changed from the DUNS Number to the Unique Entity ID (generated by *SAM.gov*). The Unique Entity ID is a 12-character alphanumeric ID assigned to an entity by *SAM.gov*. The UEI is viewable in your *SAM.gov* entity registration record.

D. Intergovernmental Review

Executive Order 12372, Intergovernmental Review of Federal Programs, is not applicable to these grant applications.

IV. Submission Information

A. Submission Process

To receive funding, eligible entities must provide a *Letter of Assurance* and an *Initial Spend Plan* (if applicable) containing all the information outlined in section III A. and B. above.

Materials should be addressed to: Alison Barkoff, Administration for Community Living, 330 C Street SW, Washington, DC 20201.

Letters of Assurance and the Initial Spend Plan should be submitted electronically via email to *aps@acl.hhs.gov.*

B. Submission Dates and Times

To receive consideration, Letters of Assurance and the Initial Spend Plan must be submitted by 11:59 p.m. (EST) March 15, 2024, Letters of Assurance and the Initial Spend Plan should be submitted electronically via email to *aps@acl.hhs.gov* and have an electronic time stamp indicating the date/time submitted.

V. Agency Contacts

A. Programmatic Issues/Questions

Direct programmatic inquiries to: Erin Kee, *erin.kee@acl.hhs.gov* and/or 202–795–7312.

B. Submission Issues/Questions

Direct inquiries regarding submission of applications to *aps@acl.hhs.gov.* ACL will provide a response within 2 business days.

Dated: February 8, 2024.

Alison Barkoff,

Principal Deputy Administrator for the Administration for Community Living, performing the delegable duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2024–03010 Filed 2–13–24; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–2222 and FDA–2022–E–2223]

Determination of Regulatory Review Period for Purposes of Patent Extension; SIMPLIFY CERVICAL ARTIFICIAL DISC

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for SIMPLIFY CERVICAL ARTIFICIAL DISC and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of patents which claim that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–2222 and FDA–2022–E–2223 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; SIMPLIFY CERVICAL ARTIFICIAL DISC.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper

submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device SIMPLIFY CERVICAL ARTIFICIAL DISC. SIMPLIFY CERVICAL ARTIFICIAL DISC is indicated for use in skeletally mature patients for reconstruction of the disc at one level from C3–C7 following single-level discectomy for intractable radiculopathy (arm pain and/or a neurological deficit) with or without neck pain, or myelopathy due to a single-level abnormality localized to the level of the disc space and manifested by at least one of the following conditions confirmed by radiographic imaging (*e.g.,* X-rays, computed tomography, magnetic resonance imaging): herniated nucleus pulposus, spondylosis (defined by the presence of progressive symptoms (*e.g.,* numbness or tingling)) prior to implantation. Subsequent to this approval, the USPTO received patent term restoration applications for SIMPLIFY CERVICAL ARTIFICIAL DISC (U.S. Patent Nos. 7,753,956 and 9,107,762) from Simplify Medical Pty Ltd., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated January 18, 2023, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of SIMPLIFY CERVICAL ARTIFICIAL DISC represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for SIMPLIFY CERVICAL ARTIFICIAL DISC is 2,020 days. Of this time, 1,842 days occurred during the testing phase of the regulatory review period, while 178 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption for this device, under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)), became effective:* March 11, 2015. FDA has verified the applicant's claim that the date the investigational device exemption for human tests to begin, as required under section 520(g) of the FD&C Act, became effective March 11, 2015.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* March 25, 2020. FDA has verified the applicant's claim that the premarket approval application (PMA) for SIMPLIFY CERVICAL ARTIFICIAL DISC (PMA P200022) was initially submitted March 25, 2020.

3. *The date the application was approved:* September 18, 2020. FDA has verified the applicant's claim that PMA P200022 was approved on September 18, 2020.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,098 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket

No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03024 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–E–1643]

Determination of Regulatory Review Period for Purposes of Patent Extension; ERVEBO

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ERVEBO and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–E–1643 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; ERVEBO.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product ERVEBO (Ebola Zaire Vaccine, Live). ERVEBO is indicated for the prevention of disease caused by *Zaire ebolavirus* in individuals 18 years of age and older. Subsequent to this approval, the USPTO received a patent term restoration application for ERVEBO (U.S. Patent No. 8,012,489) from Merck Sharp & Dohme Corp., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated August 20, 2020, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of ERVEBO represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for ERVEBO is 1,941 days. Of this time, 1,783 days occurred during the testing phase of the regulatory review period, while 158 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* August 28, 2014. The applicant claims September 20, 2014, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was August 28, 2014, which was the first date after receipt of the IND that the investigational studies were allowed to proceed.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* July 15, 2019. FDA has verified the applicant's claim that the biologics license application (BLA) for ERVEBO (BLA 125690) was initially submitted on July 15, 2019.

3. *The date the application was approved:* December 19, 2019. FDA has verified the applicant's claim that BLA 125690/0 was approved on December 19, 2019.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,038 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03030 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–0771; FDA–2022–E–0772; and FDA–2022–E–0780]

Determination of Regulatory Review Period for Purposes of Patent Extension; REACTIV8 SYSTEM

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for REACTIV8 SYSTEM and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any

confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–0771; FDA–2022–E–0772; and FDA–2022–E–0780 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; REACTIV8 SYSTEM.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device REACTIV8 SYSTEM. REACTIV8 SYSTEM is indicated for bilateral stimulation of the L2 medial branch of the dorsal ramus as it crosses the transverse process at L3 as an aid in the management of intractable chronic low back pain associated with multifidus muscle dysfunction, as evidenced by imaging or physiological testing in adults who have failed therapy, including pain medications and physical therapy, and are not candidates for spine surgery. Subsequent to this approval, the USPTO received patent term restoration applications for REACTIV8 SYSTEM (U.S. Patent Nos. 8,606,358; 9,474,906; and 9,861,811) from Mainstay Medical Limited, and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated September 28, 2022, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of REACTIV8 SYSTEM represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for REACTIV8 SYSTEM is 1,729 days. Of this time, 1,436 days occurred during the testing phase of the regulatory review period, while 293 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption for this device, under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)), became effective:* September 24, 2015. FDA has verified the applicant's claim that the date the investigational device exemption for human tests to begin, as required under section 520(g) of the FD&C Act, became effective September 24, 2015.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* August 29, 2019. FDA has verified the applicant's claim

that the premarket approval application (PMA) for REACTIV8 SYSTEM (PMA P190021) was initially submitted August 29, 2019.

3. *The date the application was approved:* June 16, 2020. FDA has verified the applicant's claim that PMA P190021 was approved on June 16, 2020.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 591 days, 812 days, or 1,011 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03026 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–2171; FDA–2022–E–2172; and FDA–2022–E–2173]

Determination of Regulatory Review Period for Purposes of Patent Extension; TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MILLIMETERS)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MILLIMETERS (MM)) and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–2171; FDA–2022–E–2172; and FDA–2022–E–2173 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MM).'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available

for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MM). TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MM) is indicated for use in mid/distal popliteal, tibial, and peroneal arteries, ranging in diameter from 1.5 mm to 4.5 mm, for the repair of post percutaneous transluminal balloon angioplasty dissection(s).

Subsequent to this approval, the USPTO received patent term restoration applications for TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MM) (U.S. Patent Nos. 9,974,670; 10,137,013; and 10,271,973) from Intact Vascular, Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated January 18, 2023, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MM) represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MM) is 1,203 days. Of this time, 1,010 days occurred during the testing phase of the regulatory review period, while 193 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption for this device, under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)), became effective:* December 26, 2016. The applicant claims that the investigational device exemption (IDE) required under section 520(g) of the FD&C Act for human tests to begin became effective on December 22, 2016. However, FDA records indicate that the IDE was determined substantially complete for clinical studies to have begun on December 26, 2016, which represents the IDE effective date.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* October 1, 2019. The applicant claims September 30, 2019, as the date the premarket approval application (PMA) for TACK ENDOVASCULAR SYSTEM (4F, 1.5–4.5 MM) (PMA P190027) was initially submitted. However, FDA records indicate that PMA P190027 was submitted on October 1, 2019.

3. *The date the application was approved:* April 10, 2020. FDA has verified the applicant's claim that PMA P190027 was approved on April 10, 2020.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 271 days, 348 days, or 442 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03032 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–0763, FDA–2022–E–0764, FDA–2022–E–0765, FDA–2022–E–0767, and FDA–2022–E–0770]

Determination of Regulatory Review Period for Purposes of Patent Extension; PORTICO TRANSCATHETER AORTIC VALVE IMPLANT

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for the PORTICO TRANSCATHETER AORTIC VALVE IMPLANT and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–0763, FDA–2022–E–0764, FDA–2022–E–0765, FDA–2022–E–0767, and FDA–2022–E–0770 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; PORTICO TRANSCATHETER AORTIC VALVE IMPLANT.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market

the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device PORTICO TRANSCATHETER AORTIC VALVE IMPLANT. PORTICO TRANSCATHETER AORTIC VALVE IMPLANT is indicated for relief of aortic stenosis in patients with symptomatic heart disease due to severe native calcific aortic stenosis who are judged by a heart team, including a cardiac surgeon, to be at high or greater risk for open surgical therapy (*i.e.,* predicted risk of surgical mortality ≥8 percent at 30 days, based on the Society of Thoracic Surgeons (STS) risk score and other clinical comorbidities unmeasured by the STS risk calculator). Subsequent to this approval, the USPTO received a patent term restoration application for the PORTICO TRANSCATHETER AORTIC VALVE IMPLANT (U.S. Patent Nos. 9,011,527; 9,039,759; 9,241,791; 9,289,292; and 9,775,707) from St. Jude Medical, Cardiology Division, Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated September 13, 2022, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of the PORTICO TRANSCATHETER AORTIC VALVE IMPLANT represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for the PORTICO TRANSCATHETER AORTIC VALVE IMPLANT is 3,028 days. Of this time, 2,288 days occurred during the testing phase of the regulatory review period, while 740 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption for this device, under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)), became effective:* June 5, 2013. FDA has verified the applicant's claim that the date the investigational device exemption for human tests to begin, as required under section 520(g) of the FD&C Act, became effective June 5, 2013.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* September 9, 2019. FDA has verified the applicant's claim that the premarket approval application (PMA) for the PORTICO TRANSCATHETER AORTIC VALVE IMPLANT (PMA P190023) was initially submitted September 9, 2019.

3. *The date the application was approved:* September 17, 2021. FDA has verified the applicant's claim that PMA P190023 was approved on September 17, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 660 days; 932 days; 1,093 days; 1,459 days; and 1,486 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03029 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–E–0782]

Determination of Regulatory Review Period for Purposes of Patent Extension; VIVISTIM SYSTEM

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for VIVISTIM SYSTEM and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically,

including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–E–0782 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; VIVISTIM SYSTEM.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device VIVISTIM SYSTEM. VIVISTIM SYSTEM is indicated for stimulation of the vagus nerve during rehabilitation therapy in order to reduce upper extremity motor deficits and improve motor function in chronic ischemic stroke patients with moderate to severe arm impairment. Subsequent to this approval, the USPTO received a patent term restoration application for VIVISTIM SYSTEM (U.S. Patent No. 9,522,274) from MicroTransponder, Inc. (Agent of Board of Regents, The University of Texas System), and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 13, 2022, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of VIVISTIM SYSTEM represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for VIVISTIM SYSTEM is 2,719 days. Of this time, 2,540 days occurred during the testing phase of the regulatory review period, while 179 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption for this device, under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)), became effective:* March 20, 2014. FDA has verified the applicant's claim that the date the investigational device exemption for human tests to begin, as required under section 520(g) of the FD&C Act, became effective March 20, 2014.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* March 2, 2021. FDA has verified the applicant's claim that the premarket approval application

(PMA) for VIVISTIM SYSTEM (PMA P210007) was initially submitted March 2, 2021.

3. *The date the application was approved:* August 27, 2021. FDA has verified the applicant's claim that PMA P210007 was approved on August 27, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,359 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 6, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03025 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–4094]

Kalpen D. Patel: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Kalpen D. Patel from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Patel was convicted of a felony under Federal law for conduct that relates to the regulation of any drug product under the FD&C Act. Mr. Patel was given notice of the proposed permanent debarment and was given an opportunity to request a hearing to show why he should not be debarred within the timeframe prescribed by regulation. Mr. Patel responded to the notice by submitting correspondence to FDA, but he did not request a hearing. Mr. Patel's failure to request a hearing within the prescribed timeframe constitutes a waiver of his right to a hearing concerning this action.

DATES: This order is applicable February 14, 2024.

ADDRESSES: Any application by Mr. Patel for special termination of debarment under section 306(d)(4) of the FD&C Act (21 U.S.C. 335a(d)(4)) may be submitted as follows:

Electronic Submissions

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. An application submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your application will be made public, you are solely responsible for ensuring that your application does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your application, that information will be posted on *https://www.regulations.gov.*
- If you want to submit an application with confidential information that you do not wish to be made available to the public, submit the application as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For a written/paper application submitted to the Dockets Management Staff, FDA will post your application, as well as any attachments, except for information submitted, marked, and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All applications must include the Docket No. FDA–2023–N–4094. Received applications will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit an application with confidential information that you do not wish to be made publicly available, submit your application only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of your application. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 240–402–8743, *debarments@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On September 7, 2023, Mr. Patel was convicted, as defined in section 306(l)(1) of the FD&C Act, in the U.S. District Court for the Eastern District of Texas-Beaumont Division, when the court accepted his plea of guilty and entered a judgment against him for the felony offense of conspiracy to traffick in drugs with counterfeit mark in violation of 18 U.S.C. 371 and 18 U.S.C. 2320(a)(4).

The factual basis for this conviction is as follows: as contained in the Second Superseding Indictment and in the Factual Basis, between approximately April 2014 and February 2021, Mr. Patel conspired with drug traffickers to distribute misbranded and counterfeit cough syrup. Specifically, Mr. Patel worked for Pernix Manufacturing LLC (Pernix) as a product-development scientist. Pernix had, in January 2014, entered into an agreement with Byron A. Marshall and his drug trafficking organization (DTO) to copy and manufacture cough syrup according to the directions of Marshall and his associates. Marshall was not licensed or authorized to distribute cough syrup, and any background check of the personal information provided by Marshall to Pernix would have revealed that he was not a licensed physician as he claimed. Marshall sought to copy Actavis Prometh VC with Codeine (Actavis). Actavis is a purple, peach-mint flavor prescription cough syrup that was in demand as a street drug. Marshall and his associates wanted to mass produce and traffic a counterfeit version of Actavis that contained promethazine, but not codeine.

On April 24, 2014, Actavis Holdco US discontinued production of Actavis due to its widespread abuse by recreational drug users. In his role at Pernix as a product-development scientist, Mr. Patel worked with Marshall and his associates to recreate Actavis without codeine and promethazine in order to recreate the syrup base, which is a necessary component of cough syrup. Mr. Patel referred to the new product as a ''placebo.'' Marshall and his associates would then add promethazine to this counterfeit ''placebo'' substance prior to bottling and distribution in order to create the street drug.

On April 25, 2014, as Pernix was scaling-up production of the ''placebo'' syrup base, Pernix was acquired by Woodfield Pharmaceutical LLC, a contract manufacturing company, and Woodfield Distribution LLC, a third-party logistics company (collectively, Woodfield). Mr. Patel was subsequently promoted to Woodfield's Research and Development Manager. In that role he supervised Woodfield's chemical formulation development, optimization, and scale-up for clients, and he worked with Marshall and his associates to develop and distribute the misbranded and counterfeit cough syrup. When Marshall and his DTO had difficulty dissolving promethazine into the ''placebo'' syrup base, Mr. Patel, along with others, worked to resolve that issue.

In or about July 2017, Marshall and his DTO asked Mr. Patel to reformulate another cough syrup to use in their drug trafficking scheme: Hi-Tech Promethazine Hydrocholoride and Codeine Phosphate Oral Solution (Hi-Tech). Mr. Patel reformulated Hi-Tech without the promethazine and codeine, and Woodfield began producing it for Marshall and his DTO. Later, Mr. Patel was promoted to Woodfield's Director of Technical Operations, and in that role, he agreed with other Woodfield employees to create additional ''placebo'' syrup base supply not authorized by Woodfield's ownership in order to sell that additional supply to Marshall and DTO at a reduced price and split the fee with other Woodfield employees.

On or about December 10, 2019, Marshall and his DTO asked Mr. Patel to reformulate another cough syrup to use in their drug trafficking scheme: Wockhardt Promethazine Syrup Plain (Wockhardt). Mr. Patel reformulated Wockhardt, and Woodfield eventually produced the ''placebo'' syrup base for Marshall and his DTO.

Initially, there were no batch records to document the production of the ''placebo'' cough syrups as required; Woodfield provided the syrup to Marshall and his DTO without any corresponding documentation that identified the ingredients of the syrup. This practice continued until February 2019, when Mr. Patel started creating paper records for some of the cough syrup batches Woodfield made for the DTO. Based on the records that do exist and Mr. Patel's own statements, from 2014 through February 2021, the conspiracy with the Marshall DTO produced and distributed, or attempted to produce and distribute, approximately 65,920 gallons of counterfeit cough syrup.

Based on this conviction, FDA sent Mr. Patel by certified mail on October 30, 2023, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act, that Mr. Patel was convicted, as set forth in section 306(l)(1) of the FD&C Act, of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal also offered Mr. Patel an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to file a timely request for a hearing would constitute an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Mr. Patel received the proposal on November 8, 2023. On December 12, 2023, Mr. Patel submitted correspondence to FDA explaining the reasons why he believed he was not guilty of the offenses he pled guilty to in court. However, in his request he did not request a hearing and has, therefore, waived his opportunity for a hearing and any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Patel has been convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Mr. Patel is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(B) and 306(c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses in any capacity the services of Mr. Patel during his debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Mr. Patel provides services in any capacity to a person with an approved or pending drug product application during his period of debarment, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new

drug application from Mr. Patel during his period of debarment, other than in connection with an audit under section 306(c)(1)(B) of the FD&C Act. Note that, for purposes of sections 306 and 307 of the FD&C Act, a ''drug product'' is defined as a drug subject to regulation under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262) (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03036 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2180]

Ross Lucien: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) debarring Ross Lucien for a period of 5 years from importing or offering for import any drug into the United States. FDA bases this order on a finding that Mr. Lucien was convicted of one felony count under Federal law for conspiracy to smuggle goods into the United States. The factual basis supporting Mr. Lucien's conviction, as described below, is conduct relating to the importation into the United States of a drug or controlled substance. Mr. Lucien was given notice of the proposed debarment and was given an opportunity to request a hearing to show why he should not be debarred. As of December 20, 2023 (30 days after receipt of the notice), Mr. Lucien had not responded. Mr. Lucien's failure to respond and request a hearing constitutes a waiver of his right to a hearing concerning this matter.

DATES: This order is applicable February 14, 2024.

ADDRESSES: Any application by Mr. Lucien for termination of debarment under section 306(d)(1) of the FD&C Act (21 U.S.C. 335a(d)(1)) may be submitted as follows:

Electronic Submissions

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments. An application submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your application will be made public, you are solely responsible for ensuring that your application does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your application, that information will be posted on *https://www.regulations.gov*.
- If you want to submit an application with confidential information that you do not wish to be made available to the public, submit the application as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For a written/paper application submitted to the Dockets Management Staff, FDA will post your application, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All applications must include the Docket No. FDA–2023–N–2180. Received applications will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit an application with confidential information that you do not wish to be made publicly available, submit your application only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of your application. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov*. Submit both copies to the Dockets Management Staff. Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf*.

Docket: For access to the docket, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500, between 9 a.m. and 4 p.m., Monday through Friday. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, at 240–402–8743, or *debarments@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(b)(1)(D) of the FD&C Act permits debarment of an individual from importing or offering for import any drug into the United States if FDA finds, as required by section 306(b)(3)(C) of the FD&C Act, that the individual has been convicted of a felony for conduct relating to the importation into the United States of any drug or controlled substance.

On February 23, 2023, Mr. Lucien was convicted, as defined in section 306(l)(1) of FD&C Act, in the United States District Court for Western District of Michigan, when the court entered judgment against him for the offense of conspiracy to smuggle goods into the United States in violation of 18 U.S.C. 371 and 545. FDA's finding that debarment is appropriate is based on the felony conviction referenced herein.

The factual basis for this conviction is as follows: as contained in the indictment and plea agreement in Mr. Lucien's case, both filed on May 6, 2022, Mr. Lucien agreed to participate in a scheme to receive, repackage, and reship misbranded prescription drugs purchased by customers on the website *www.ExpressPCT.com,* without a prescription, and shipped to the United States from foreign countries. Mr. Lucien received approximately 11 packages containing bulk quantities of misbranded prescription drugs, all shipped mostly from India but also from

other countries. Mr. Lucien then reshipped the misbranded prescription drugs according to instructions he received from co-conspirators. In exchange for Mr. Lucien's participation in the scheme, he received free or discounted prescription drugs.

As a result of this conviction, FDA sent Mr. Lucien, by United Parcel Service, on November 17, 2023, a notice proposing to debar him for a 5-year period from importing or offering for import any drug into the United States. The proposal was based on a finding under section 306(b)(3)(C) of the FD&C Act that Mr. Lucien's felony conviction under Federal law for conspiracy to smuggle goods into the United States in violation of 18 U.S.C. 371 and 545, was for conduct relating to the importation into the United States of any drug or controlled substance because he was involved in a scheme to illegally import and introduce prescription drugs into the United States. In proposing a debarment period, FDA weighed the considerations set forth in section 306(c)(3) of the FD&C Act that it considered applicable to Mr. Lucien's offense and concluded that the offense warranted the imposition of a 5-year period of debarment.

The proposal informed Mr. Lucien of the proposed debarment and offered him an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Mr. Lucien received the proposal and notice of opportunity for a hearing at his residence on November 20, 2023. Mr. Lucien failed to request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and waived any contentions concerning his debarment. (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(b)(3)(C) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Ross Lucien has been convicted of a felony under Federal law for conduct relating to the importation into the United States of any drug or controlled substance. FDA finds that the offense should be accorded a debarment period of 5 years as provided by section 306(c)(2)(A)(iii) of the FD&C Act.

As a result of the foregoing finding, Mr. Lucien is debarred for a period of 5 years from importing or offering for import any drug into the United States, effective (see **DATES**). Pursuant to section 301(cc) of the FD&C Act (21 U.S.C. 331(cc)), the importing or offering for import into the United States of any drug by, with the assistance of, or at the direction of Mr. Lucien is a prohibited act.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03020 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–2205; FDA–2022–E–2206; FDA–2022–E–2207; FDA–2022–E–2208; FDA–2022–E–2243; FDA–2022–E–2244; and FDA–2022–E–2246]

Determination of Regulatory Review Period for Purposes of Patent Extension; WINLEVI

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for WINLEVI and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of patents which claim that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–2205; FDA–2022–E–2206; FDA–2022–E–2207; FDA–2022–E–2208; FDA–2022–E–2243; FDA–2022–E–2244; and FDA–2022–E–2246 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; WINLEVI.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product WINLEVI (clascoterone). WINLEVI is indicated for the topical treatment of acne vulgaris in patients 12 years of age and older. Subsequent to this approval, the USPTO received patent term restoration applications for WINLEVI (U.S. Patent Nos. 8,143,240; 8,785,427; 8,865,690; 9,211,295; 9,433,628; 9,486,458; and 10,159,682) from Cassiopea S.p.A., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated September 21, 2022, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of WINLEVI represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for WINLEVI is 3,102 days. Of this time, 2,736 days occurred during the testing phase of the regulatory review period, while 366 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* March 1, 2012. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on March 1, 2012.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* August 27, 2019. FDA has verified the applicant's claim that the new drug application (NDA) for WINLEVI (NDA 213433) was initially submitted on August 27, 2019.

3. *The date the application was approved:* August 26, 2020. FDA has verified the applicant's claim that NDA 213433 was approved on August 26, 2020.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 489 days, 877 days, 909 days, 1,042 days, 1,252 days, 1,297 days, or 1,721 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03022 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–E–0761]

Determination of Regulatory Review Period for Purposes of Patent Extension; ORGAN CARE SYSTEM HEART

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ORGAN CARE SYSTEM HEART (OCS HEART SYSTEM) and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–E–0761 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; OCS HEART SYSTEM.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award

(half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device OCS HEART SYSTEM. OCS HEART SYSTEM is indicated for the preservation of donor-after-brain-death hearts deemed unsuitable for procurement and transplantation at initial evaluation due to limitations of prolonged cold static cardioplegic preservation (*e.g.,* >4 hours of cross-clamp time). Subsequent to this approval, the USPTO received a patent term restoration application for the OCS HEART SYSTEM (U.S. Patent No. 7,651,835) from TransMedics, Inc., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 28, 2022, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of the OCS HEART SYSTEM represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for the OCS HEART SYSTEM is 5,518 days. Of this time, 4,535 days occurred during the testing phase of the regulatory review period, while 983 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)) involving this device became effective:* July 28, 2006. FDA has verified the applicant's claim that the date the investigational device exemption for human tests to begin, as required under section 520(g) of the FD&C Act, became effective July 28, 2006.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* December 26, 2018. FDA has verified the applicant's claim that the premarket approval application (PMA) for the OCS HEART SYSTEM (PMA P180051) was initially submitted December 26, 2018.

3. *The date the application was approved:* September 3, 2021. FDA has verified the applicant's claim that PMA P180051 was approved on September 3, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,826 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03028 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0179]

Training Program for Regulatory Project Managers; Information Available to Industry

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's (FDA or the Agency) Center for Drug Evaluation and Research (CDER) is announcing the continuation of the Regulatory Project Management Site Tours and Regulatory Interaction Program (the Site Tours Program). The purpose of this document is to invite pharmaceutical companies interested in participating in this program to contact CDER.

DATES: Pharmaceutical companies may send proposed agendas to the Agency by April 15, 2024.

FOR FURTHER INFORMATION CONTACT: Dan Brum, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 5480, Silver Spring, MD 20993–0002, 301–796–0578, *Dan.Brum@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

An important part of CDER's commitment to make safe and effective drugs available to all Americans is optimizing the efficiency and quality of the drug review process. To support this goal, CDER has initiated various training and development programs to promote high performance in its regulatory project management staff. CDER seeks to enhance review efficiency and review quality by providing the staff with a better understanding of the pharmaceutical industry and its operations. To this end, CDER is continuing its training program to give regulatory project managers the opportunity to tour pharmaceutical facilities. The goals are to provide the following: (1) firsthand exposure to industry's drug development processes and (2) a venue for sharing information about project management procedures (but not drug-specific information) with industry representatives.

II. The Site Tours Program

In this program, which generally lasts a few days, small groups of CDER regulatory project managers, often including a senior level regulatory project manager, can observe operations of pharmaceutical manufacturing and/or packaging facilities, pathology/toxicology laboratories, and regulatory affairs operations. Neither this tour nor any part of the program is intended as a mechanism to inspect, assess, judge, or perform a regulatory function, but is meant rather to improve mutual understanding and to provide an avenue for open dialogue. During the Site Tours Program, regulatory project managers will also participate in daily workshops with their industry counterparts, focusing on selective regulatory issues important to both CDER staff and industry. The primary objective of the

daily workshops is to learn about the team approach to drug development, including drug discovery, nonclinical and clinical evaluation, postmarketing activities, and regulatory submission operations. The overall benefit to regulatory project managers will be exposure to project management, team techniques, and processes employed by the pharmaceutical industry. By participating in this program, the regulatory project manager will grow professionally by gaining a better understanding of industry processes and procedures.

III. Site Selection

All travel expenses associated with the Site Tours Program will be the responsibility of CDER; therefore, selection will be based on the availability of funds and resources for each fiscal year. Selection will also be based on firms having a favorable facility status as determined by FDA's Office of Regulatory Affairs District Offices in the firms' respective regions. Firms that want to learn more about this training opportunity or that are interested in offering a site tour should respond by sending a proposed agenda by email directly to Dan Brum (see **DATES** and **FOR FURTHER INFORMATION CONTACT**).

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03039 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–E–0762]

Determination of Regulatory Review Period for Purposes of Patent Extension; ORGAN CARE SYSTEM LIVER

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ORGAN CARE SYSTEM LIVER (OCS LIVER) and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–E–0762 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; OCS LIVER.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device OCS LIVER. OCS LIVER is indicated for preservation and monitoring of hemodynamics and metabolic function which allows for ex-vivo assessment of liver allografts from donors after brain death or liver allografts from donors after circulatory death <=55 years old and with <=30 minutes of warm ischemic time, macrosteatosis <=15%, in a near-physiologic, normothermic and functioning state intended for a potential transplant recipient. Subsequent to this approval, the USPTO received a patent term restoration application for OSC LIVER (U.S. Patent No. 10,076,112) from TransMedics, Inc., and the USPO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 28, 2022, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of OSC LIVER represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for OCS LIVER is 2,275 days. Of this time, 1,819 days occurred during the testing phase of the regulatory review period, while 456 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption for this device, under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)), became effective:* July 9, 2015. FDA has verified the applicant's claim that the date the investigational device exemption for human tests to begin, as required under section 520(g) of the FD&C Act, became effective July 9, 2015.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* June 30, 2020. FDA has verified the applicant's claim that the premarket approval application (PMA) for OCS LIVER (PMA P20031) was initially submitted June 30, 2020.

3. *The date the application was approved:* September 28, 2021. FDA has verified the applicant's claim that PMA P20031 was approved on September 28, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 72 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03034 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–2097; FDA–2022–E–2098; and FDA–2022–E–2100]

Determination of Regulatory Review Period for Purposes of Patent Extension; SKYTROFA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for SKYTROFA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late,

untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–2097; FDA–2022–E–2098; and FDA–2022–E–2100 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; SKYTROFA.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product SKYTROFA (lonapegsomatropin-tcgd). SKYTROFA is indicated for the treatment of pediatric patients 1 year and older who weigh at least 11.5 kilograms and have growth failure due to inadequate secretion of endogenous growth hormone. Subsequent to this approval, the USPTO received a patent term restoration application for SKYTROFA (U.S. Patent Nos. 9,272,048; 9,511,122; and 10,682,395) from Ascendis Pharma Endocrinology Division A/S, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 28, 2022, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of SKYTROFA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for SKYTROFA is 2,133 days. Of this time, 1,706 days occurred during the testing

phase of the regulatory review period, while 427 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* October 25, 2015. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on October 25, 2015.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* June 25, 2020. FDA has verified the applicant's claim that the biologics license application (BLA) for SKYTROFA (BLA 761177) was initially submitted on June 25, 2020.

3. *The date the application was approved:* August 25, 2021. FDA has verified the applicant's claim that BLA 761177 was approved on August 25, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 431 days, 1,075 days or 1,215 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03031 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–0648 and FDA–2022–E–0649]

Determination of Regulatory Review Period for Purposes of Patent Extension; QULIPTA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for QULIPTA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by April 15, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 12, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. eastern time at the end of April 15, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov*.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand Delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–0648 and FDA–2022–E–0649 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; QULIPTA.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS

CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov*. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf*.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, QULIPTA (atogepant) indicated for the preventive treatment of episodic migraine in adults. Subsequent to this approval, the USPTO received a patent term restoration application for QULIPTA (U.S. Patent Nos. 8,754,096 and 9,499,545) from Merck Sharp & Dohme Corp., and the USPTO requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated June 14, 2022, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of QULIPTA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for QULIPTA is 3,374 days. Of this time, 3,130 days occurred during the testing phase of the regulatory review period, while 244 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* July 5, 2012. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on July 5, 2012

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* January 28, 2021. FDA has verified the applicant's claim that the new drug application (NDA) for QULIPTA (NDA 215206) was initially submitted on January 28, 2021.

3. *The date the application was approved:* September 28, 2021. FDA has verified the applicant's claim that NDA 215206 was approved on September 28, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,008 days or 1,166 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 9, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03019 Filed 2–13–24; 8:45 am]

BILLING CODE 4164–01–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: Healthcare Delivery and Methodologies Integrated Review Group; Population and Public Health Approaches to HIV/AIDS Study Section.

Date: March 11–12, 2024.

Time: 8:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Bethesdan Hotel, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Aubrey Spriggs Madkour, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000C, Bethesda, MD 20892, (301) 594–6891, *madkouras@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Social and Community Influences Across the Life Course.

Date: March 11–12, 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: David E. Pollio, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1006F, Bethesda, MD 20892, (301) 594–4002, *polliode@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Musculoskeletal Sciences in Diagnostics, Devices, and Rehabilitation.

Date: March 12–13, 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: Amber Taylor Collins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 827–5245, *amber.collins@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Kidney and Urological Sciences.

Date: March 14, 2024.

Time: 8:00 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: Ganesan Ramesh, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, 301–827–5467, *ganesan.ramesh@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: The Cellular and Molecular Biology of Complex Brain Disorders.

Date: March 14, 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: Adem Can, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4190, MSC 7850, Bethesda, MD 20892, (301) 435–1042, *cana2@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Biomaterials, Delivery, and Nanotechnology.

Date: March 14–15, 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: David R. Filpula, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301–435–2902, *filpuladr@mail.nih.gov*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular and Surgical Devices.

Date: March 14–15, 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: Willard Wilson, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, 301–867–5309, *willard.wilson@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: February 8, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–02987 Filed 2–13–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 of Allergy and Infectious Diseases Special Emphasis Panel; Sex Differences in Radiation Research: Models, Underlying Pathways, Biomarkers of Injury, and Medical Countermeasure Responses (U01 Clinical Trial Not Allowed).

Date: March 11–12, 2024.

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

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20892 (Video Assisted Meeting).

Contact Person: Maryam Rohani, Ph.D., Scientific Review Officer, Immunology Review Branch, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20852, (301) 761–6656d, *maryam.rohani@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Resource Related Research Projects (R24 Clinical Trial Not Allowed).

Date: April 3, 2024.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20892 (Video Assisted Meeting).

Contact Person: Maryam Rohani, Ph.D., Scientific Review Officer, Immunology Review Branch, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20852, (301) 761–6656d, *maryam.rohani@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology,

and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 8, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–02986 Filed 2–13–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious 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 Allergy and Infectious Diseases Special Emphasis Panel; NIAID SBIR Phase II Clinical Trial Implementation Cooperative Agreement (U44 Clinical Trial Required).

Date: March 7, 2024.

Time: 1:00 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G42, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Poonam Tewary, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G42, Rockville, MD 20852, (301) 761–7219, *tewaryp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 8, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–02989 Filed 2–13–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request; NIH Office of Intramural Training & Education—Application, Registration, and Alumni

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

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

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Patricia Wagner, Program Analyst, Office of Intramural Training & Education (OITE), Office of Intramural Research (OIR), Office of the Director (OD), National Institutes of Health (NIH); 2 Center Drive: Building 2/2nd Floor; Bethesda, Maryland 20892 or call non-toll-free number 240–476–3619 or email your request, including your address to: *wagnerpa@od.nih.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on November 1, 2023, page 75007 (88 FR 75007) and allowed 60 days for public comment. One public comment was received. The purpose of this notice is to allow an additional 30 days for public comment. The Office of the Director, National Institutes of Health (NIH), may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid Office of Management and Budget (OMB) control number.

In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, NIH has submitted to OMB a request for review and approval of the information collection listed below.

Proposed Collection: NIH Office of Intramural Training & Education—Application, Registration, and Alumni Systems, 0925–0299, exp., date, 31–May–2027, REVISION, Office of Intramural Training & Education (OITE), Office of Intramural Research (OIR), Office of the Director (OD), National Institutes of Health (NIH).

Need and Use of Information Collection: The OITE administers a variety of programs and initiatives to recruit pre-college through pre-doctoral educational level individuals into the National Institutes of Health Intramural Research Program (NIH–IRP) to facilitate their development into future biomedical scientists. The proposed information collection is necessary in order to determine the eligibility and quality of potential awardees for traineeships in these programs. The applications for admission consideration solicit information including: personal information, ability to meet eligibility criteria, contact information, university-assigned student identification number, training program selection, scientific discipline interests, educational history, standardized examination scores, reference information, resume components, employment history, employment interests, dissertation research details, letters of recommendation, financial aid history, sensitive data, and travel information, as well as feedback questions about interviews and application submission experiences. Sensitive data collected on the applicants: race, gender, ethnicity, relatives at NIH, and recruitment method, are made available only to OITE staff members or in aggregate form to select NIH offices and are not used by the admission committees for admission consideration. In addition, information to monitor trainee placement after departure from NIH is periodically collected.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 12,824.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses annually per respondent	Average time/ response (hours)	Total annual burden hours
NIHAC—Applications	10,000	1	45/60	7,500
NIHAC—Reference Letters	25,000	1	10/60	4,167
NIHAC—UGSP Financial Need Form	125	1	10/60	21
GPP—Interview Experience Survey	90	1	10/60	15
UGSP—Interview Experience Survey	30	1	10/60	5
UGSP—Contract	25	1	10/60	4
UGSP—Evaluation of Scholar PayBack Period	40	1	10/60	7
UGSP—Deferment Form	50	1	10/60	8
GPP—Awards Certificate	75	1	3/60	4
Trainee—Climate Survey	500	1	20/60	167
Trainee—Onboarding Survey	1,575	1	10/60	263
Trainee—Exit Survey	1,575	1	10/60	263
MyOITE User Accounts (NIH-only)	3,000	1	3/60	150
Event Registrations	5,000	1	3/60	250
Totals	47,085	47,085	n/a	12,824

Dated: February 5, 2024.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2024–03035 Filed 2–13–24; 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 Research Enhancement Center.

Date: March 12, 2024.

Time: 11:30 a.m. to 2:00 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: Elena Sanovich, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7351, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–594–8886, *sanoviche@mail.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: February 8, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–02988 Filed 2–13–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2024–0007; OMB No. 1660–0103]

Agency Information Collection Activities: Proposed Collection, Comment Request; Property Acquisition and Relocation for Open Space

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the property acquisition and relocation for open space process as part of FEMA's administration of mitigation grants programs and the removal of five instruments from the inventory of this collection that are approved under other OMB Control Numbers.

DATES: Comments must be submitted on or before April 15, 2024.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at *http://www.regulations.gov* under Docket ID FEMA–2024–0007. Follow the instructions for submitting comments.

All submissions received must include the Agency name and Docket ID. Regardless of the method used to submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jennie Orenstein, Branch Chief, FEMA/Mitigation Directorate's Policy, Tools and Training Branch, at *jennie.gallardy@fema.dhs.gov* or (202) 212–4071. You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-*

Information-Collections-Management@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: On September 16, 2009, FEMA published a Final Rule on Property Acquisition and Relocation for Open Space (44 CFR part 80) that governs property acquisitions for FEMA's four Hazard Mitigation Assistance (HMA) grant programs, three of which, Pre-Disaster Mitigation, the Hazard Mitigation Grant Program, and the Safeguarding Tomorrow Revolving Loan Fund (RLF) program are authorized under the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Pub. L. 93–288, as amended) (42 U.S.C. 5133, 5170c, and 5135) and the fourth (Flood Mitigation Assistance) under Section 1366 of the National Flood Insurance Act (NFIA) of 1968 (Pub. L. 90–448, as amended) (42 U.S.C. 4001 *et seq.*). 44 CFR part 80 requires the collection of information from grant applicants to ensure the voluntary nature of the property acquisitions and to ensure that the property acquired remains in open space in perpetuity.

States, federally-recognized Tribes (Tribes) and Territories as applicants/recipients, per 44 CFR 80.5(b)(3), are responsible for collecting and reviewing applications for acquisition projects to ensure that the proposed activities comply with 44 CFR part 80. States, Territories and Tribes must ensure that the property acquisition is voluntary in nature. The subapplication they submit to FEMA for proposed projects must include information to enable FEMA's determination of eligibility, technical feasibility, cost effectiveness, and environmental and historic preservation compliance (44 CFR 80.5(b)(4)). Per 44 CFR 80.5(b), once the property is acquired, States, Territories and Tribes, as well as FEMA and the subrecipients, must enforce the terms of 44 CFR part 80 and the deed restrictions to ensure that the property remains committed to open space use in perpetuity. States, Territories and Tribes must report on property compliance with open space requirements after the grant is awarded.

With this revision, FEMA is removing five instruments off the inventory for this information collection because each of these five instruments are approved for use in a different information collection with its own OMB Control Number. These five instruments will still be used but do not require to be approved for use by OMB twice.

Collection of Information

Title: Property Acquisition and Relocation for Open Space.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0103.

FEMA Forms: FEMA Form FF–206–FY–21–124 (formerly 086–0–31), Statement of Voluntary Participation for Acquisition of Property for Purpose of Open Space.

Abstract: FEMA and State, Tribal and local recipients of FEMA mitigation grant programs will use the information collected to meet the Property Acquisition requirements to implement acquisition activities under the terms of grant agreements for acquisition and relocation activities. FEMA and State/local grant recipients will also use the information to monitor and enforce the open space requirements for all properties acquired with FEMA mitigation grants.

Affected Public: State, local or Tribal governments.

Estimated Number of Respondents: 573.

Estimated Number of Responses: 573.

Estimated Total Annual Burden Hours: 573.

Estimated Total Annual Respondent Cost: $36,557.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $425,794.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (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.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2024–03059 Filed 2–13–24; 8:45 am]

BILLING CODE 9111–BW–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/A0A501010.999900]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment Between the Kalispel Indian Community of the Kalispel Reservation and the State of Washington

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Fifth Amendment to the Tribal-State Compact for Class III Gaming between the Kalispel Indian Community of the Kalispel Reservation and the State of Washington.

DATES: The Amendment takes effect on February 14, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, *IndianGaming@bia.gov;* (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under Section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment authorizes the Tribe to offer Electronic Table Games, as well as extend credit, at the Tribe's class III gaming facilities. Additionally, the Amendment establishes new upper limitations on certain wagers, gaming stations numbers, and player terminals, as well as increasing contributions to problem gaming resources and charitable donations while reducing payments to local mitigation funds. The Amendment is approved.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2024–03012 Filed 2–13–24; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/A0A501010.999900]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment Between the Confederated Tribes of the Chehalis Reservation and the State of Washington

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Seventh Amendment to the Tribal-State Compact for Class III Gaming between the Confederated Tribes of the Chehalis Reservation and the State of Washington.

DATES: The Amendment takes effect on February 14, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, *IndianGaming@bia.gov;* (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment authorizes the Tribe to offer certain Electronic Table Games and increases fee contributions related to problem gambling.

The Amendment is approved.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2024–03014 Filed 2–13–24; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_HQ_FRN_MO4500177510]

Second Call for Nominations for the National Wild Horse and Burro Advisory Board

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of second call for nominations.

SUMMARY: The purpose of this notice is to solicit public nominations for one position on the Wild Horse and Burro Advisory Board (Board) that expired on January 11, 2024. The Board provides advice concerning the management, protection, and control of wild free-roaming horses and burros on public lands administered by the Department of the Interior, through the Bureau of Land Management (BLM), and the Department of Agriculture, through the U.S. Forest Service.

DATES: Nominations must be post marked or submitted to the following address no later than March 15, 2024.

ADDRESSES: All mail and packages sent via the U.S. Postal Service, FedEx, or UPS should be addressed as follows:

U.S. Department of the Interior, Bureau of Land Management, Wild Horse and Burro Division, Attn: Dorothea Boothe, HQ–260; 9828 31st Avenue; Phoenix, AZ 85051.

Please consider emailing PDF documents to Ms. Boothe at *dboothe@blm.gov.*

FOR FURTHER INFORMATION CONTACT: Dorothea Boothe, Wild Horse and Burro Program Coordinator, telephone: 602–906–5543, email: *dboothe@blm.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 for contacting Ms. Boothe. 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: Members of the Board serve without compensation; however, while away from their homes or regular places of business, Board and subcommittee members engaged in Board or subcommittee business approved by the Designated Federal Officer (DFO) may be allowed travel expenses, including per diem in lieu of subsistence under 5 U.S.C. 5703, in the same manner as persons employed intermittently in government service. Nominations for a term of 3 years are needed to represent the following category of interest:

- Natural Resource Management

The Board will meet one to four times annually. The DFO may call additional meetings in connection with special needs for advice. Individuals may nominate themselves or others. Any individual or organization may nominate one or more persons to serve on the Board.

The BLM and U.S Forest Service first issued a call soliciting nominations for the positions of natural resource management, public interest (with special knowledge of equine behavior), and wild horse and burro research on October 2, 2023, for 45 days. Due to the limited number of nomination packets received, BLM determined that a second call for nominations is warranted for the natural resource position.

Nominations should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Departments of the Interior and Agriculture to make an informed decision regarding meeting the membership requirements of the Board and permit the Departments to contact a potential member. Nominations are to be sent to the address listed under **ADDRESSES**. To assist nominees in developing nominations packets, please visit the BLM website at *https://www.blm.gov/programs/wild-horse-and-burro/get-involved/advisory-board* and use the document template *Applying to Serve on the Advisory Board.*

As appropriate, certain Board members may be appointed as Special Government Employees (SGEs). Please be aware that applicants selected to serve as SGEs will be required, prior to appointment, to file a Confidential Financial Disclosure Report in order to avoid involvement in real or apparent conflicts of interest. You may find a copy of the Confidential Financial Disclosure Report at the following Web site: *https://www.doi.gov/ethics/financial-disclosure.*

Additionally, after appointment, members appointed as SGEs will be required to meet applicable financial disclosure and ethics training requirements. Please contact the at Department of the Interior's Ethics Office (202) 202–208–7960 or email: *DOI_Ethics@sol.doi.gov* with any questions about the ethics requirements for members appointed as SGEs.

Membership Selection: Individuals shall qualify to serve on the Board because of their education, training, or experience that enables them to give informed and objective advice regarding the interest they represent. They should demonstrate experience or knowledge of the area of their expertise and a commitment to collaborate in seeking solutions to resource management issues. The Board is structured to provide fair membership and balance, both geographic and interest specific, in terms of the functions to be performed and points of view to be represented. Members are selected with the objective of providing representative counsel and advice about public land and resource planning.

Pursuant to Section 7 of the Wild Free-Roaming Horses and Burros Act, members of the Board cannot be employed by the State or Federal Government.

(Authority: 43 CFR 1784.4–1)

Sharif D. Branham,

Assistant Director, Resources and Planning.

[FR Doc. 2024–02979 Filed 2–13–24; 8:45 am]

BILLING CODE 4331–27–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–0065]

Notice of Intent To Prepare an Environmental Assessment for Commercial Wind Leasing and Site Assessment Activities on the U.S. Outer Continental Shelf Offshore Oregon

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of intent; request for comments.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) intends to prepare an environmental assessment (EA) to consider the potential environmental impacts associated with possible wind energy-related leasing, site assessment, and site characterization activities on the U.S. Outer Continental Shelf (OCS) offshore Oregon. BOEM seeks public input regarding important environmental issues and the identification of reasonable alternatives that should be considered in the EA. BOEM will assess the environmental impacts of any proposed wind energy projects after a lease is issued and before deciding whether or not to approve any lessee's construction and operations plan.

DATES: BOEM must receive your comments no later than 11:59 p.m. eastern time on March 15, 2024.

ADDRESSES: You may submit comments by either of the following methods:

- *Through the regulations.gov web portal:* Navigate to *https://www.regulations.gov* and search for Docket No. BOEM–2023–0065 to submit public comments and view supporting and related materials available for this notice. Click on the ''Comment'' button below the document link. Enter your information and comment, then click ''Submit Comment''; or
- *By U.S. Postal Service or other delivery service:* Send your comments and information to: ''OREGON Environmental Assessment'' addressed to Chief, Environmental Assessment Section, Office of Environment, Bureau of Ocean Energy Management, 760 Paseo Camarillo, Suite 102, Camarillo, California 93010.

FOR FURTHER INFORMATION CONTACT: Lisa Gilbane, BOEM Pacific Region Office of Environment, 760 Paseo Camarillo, Suite 102, Camarillo, California 93010, (805) 384–6387 or *lisa.gilbane@boem.gov.*

SUPPLEMENTARY INFORMATION:

Background: On August 15, 2023, BOEM announced two draft wind energy areas (WEAs) on the U.S. OCS offshore Oregon for public review and comment. BOEM has now finalized the WEAs. The final WEAs offshore Oregon cover approximately 195,000 acres, an 11 percent reduction from the draft WEAs. Before finalizing the WEAs, BOEM considered feedback from Tribes, government partners, ocean users, and stakeholders, and potential conflicts with commercial and recreational fishing, seafloor habitat, marine mammals, sea turtles, and the National Oceanic and Atmospheric Administration's (NOAA) scientific survey locations.

Proposed Action and Scope of Analysis: The EA's proposed action is issuing wind energy leases in the WEAs offshore Oregon. The EA will consider project easements and grants for subsea cable corridors associated with leasing. The EA also will consider the potential environmental impacts associated with site characterization surveys (biological, archeological, geological, and geophysical surveys and core samples) and site assessment activities (*e.g.,* installation of meteorological buoys) that are expected to take place following leasing. The EA's proposed action does not include the installation of meteorological towers because buoys have become the preferred meteorological and oceanographic data collection platforms for developers. In addition to the no-action alternative, other alternatives may be considered, such as exclusion of certain areas.

BOEM is preparing an EA for this proposed action to assist its planning and decision-making (40 CFR 1501.3). This notice starts the scoping process for the EA and solicits information regarding additional important environmental issues and alternatives that should be considered (43 CFR 46.305). Additionally, BOEM will use the scoping process to identify and eliminate from detailed analysis issues that are not significant or that have been analyzed by prior environmental reviews (40 CFR 1501.9(f)(1)).

BOEM will use responses to this notice and the EA public input process to satisfy the public involvement requirements of the National Historic Preservation Act (NHPA) (36 CFR 800.2(d)(3)). Specific to NHPA, BOEM seeks information from the public on the identification and assessment of potential impacts to cultural resources and historic properties that might be impacted by possible wind energy-related leasing, site characterization, and site assessment activities in the WEAs.

The EA analyses will also support compliance with other environmental statutes (*e.g.,* Coastal Zone Management Act, Endangered Species Act, Magnuson-Stevens Fishery Conservation and Management Act, and Marine Mammal Protection Act).

Wind energy leases do not authorize any activities on the OCS. Instead, leases grant lessees the exclusive right to submit plans for BOEM approval. Prior to deciding whether to approve any construction and operation plan for commercial wind energy facilities, BOEM will prepare a plan-specific environmental analysis and will comply with all consultation requirements. Therefore, this EA will not consider the construction and operation of any commercial wind energy facilities in the WEAs.

Cooperating Agencies: BOEM invites Tribal governments and Federal, State, and local government agencies to consider becoming cooperating agencies in the preparation of this EA. Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) define cooperating agencies as those with ''jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative)'' (40 CFR 1508.1(e)). Potential cooperating agencies should consider their authority and capacity to assume the responsibilities of a cooperating agency. A cooperating agency's role in the environmental analysis neither enlarges nor diminishes the final decision-making authority of any other agency involved in the NEPA process.

Upon request, BOEM will provide potential cooperating Tribal governments and agencies with a draft memorandum of agreement that includes a schedule with critical action dates and milestones, mutual responsibilities, designated points of contact, and expectations for handling pre-decisional information. Agencies should also consider the ''Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status'' in

CEQ's memo ''Cooperating Agencies in Implementing the Procedural Requirements of [NEPA]'' dated January 30, 2002.

BOEM, as the lead agency, will not provide financial assistance to cooperating agencies. Even if an organization is not a cooperating agency, opportunities will exist to provide information and comments to BOEM during the normal public input phases of the NEPA process.

Comments: Federal agencies; Tribal, State, and local governments; and other interested parties are requested to comment on the important issues to be considered in the EA. For information on how to submit comments and the submission deadline, see the **DATES** and **ADDRESSES** sections above.

Privileged and Confidential Information: BOEM will protect privileged and confidential information in your comment under the Freedom of Information Act (FOIA). Exemption 4 of FOIA applies to trade secrets and commercial and financial information that is privileged or confidential. If you wish to protect the confidentiality of such information, clearly label it and request that BOEM treat it as confidential. BOEM will not disclose such information if BOEM determines under 30 CFR 585.114(b) that the information qualifies for a FOIA exemption. Please label privileged or confidential information ''Contains Confidential Information'' and consider submitting such information as a separate attachment.

BOEM will not treat as confidential any aggregate summaries of such information or comments not containing such privileged or confidential information. Information that is not labeled as privileged or confidential may be regarded by BOEM as suitable for public release.

Personally Identifiable Information (PII): BOEM encourages you to not submit anonymous comments. Please include your name with your comment. You should be aware that your entire comment, including your name and any other PII included in your comment, may be made publicly available. All submissions from identified individuals, businesses, and organizations will be available for public viewing on *regulations.gov*. Except for clearly identified privileged and confidential information, BOEM will make available for public inspection all comments, in their entirety, submitted by organizations and businesses, or by individuals identifying themselves as representatives of organizations or businesses.

For BOEM to consider withholding your PII from disclosure, you must identify any information contained in your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. Even if BOEM withholds your information in the context of this notice, your submission is subject to FOIA, and if your submission is requested under FOIA, your information will only be withheld if a determination is made that one of FOIA's exemptions to disclosure applies. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law.

Section 304 of the National Historic Preservation Act (54 U.S.C. 307103(a)): After consultation with the Secretary of the Interior, BOEM is required to withhold the location, character, or ownership of historic resources if it determines that disclosure may, among other things, cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of a traditional religious site by practitioners. Tribal entities and other parties providing information on historic resources should designate information that they wish to be held as confidential and provide the reasons why BOEM should do so.

Authority: National Environmental Policy Act, 43 U.S.C. 4321 *et seq.;* 43 CFR 46.305.

Douglas P. Boren,

Pacific Regional Director, Bureau of Ocean Energy Management.

[FR Doc. 2024–02985 Filed 2–13–24; 8:45 am]

BILLING CODE 4340–98–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1390]

Certain Capacitive Discharge Ignition Systems, Components Thereof, and Products Containing the Same; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on January 10, 2024, under section 337 of the Tariff Act of 1930, as amended, on behalf of Altronic, LLC of Girard, Ohio. A supplement was filed on January 30, 2024. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain capacitive discharge ignition systems, components thereof, and products containing the same by reason of the infringement of certain claims of U.S. Patent No. 7,401,603 (''the '603 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine Hiner, The Office of the Secretary, Dockets Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on February 8, 2024, *Ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 6, 8–13, 15, and 16 of the '603 patent, and whether an industry in the United

States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''internal combustion engine ignition systems with a controllable switch, components of such ignition systems, and products containing same'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Altronic, LLC, 712 Trumbull Avenue, Girard, OH 44420.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

MOTORTECH GmbH, Hunaeusstrasse 5, 29227 Celle, Germany.

MOTORTECH Americas, LLC, 1400 Dealers Ave. Ste A, New Orleans, LA 70123.

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations is not participating as a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: February 8, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–02992 Filed 2–13–24; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–576–577 and 731–TA–1362–1367 (Review)]

Cold-Drawn Mechanical Tubing From China, Germany, India, Italy, South Korea, and Switzerland

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the countervailing duty orders on certain cold-drawn mechanical tubing of carbon and alloy steel (''cold-drawn mechanical tubing'') from China and India and the antidumping duty orders on cold-drawn mechanical tubing from China, Germany, India, Italy, South Korea, and Switzerland would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on January 3, 2023 (88 FR 114) and determined on April 10, 2023 that it would conduct a full review (88 FR 24442, April 20, 2023). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on July 13, 2023 (88 FR 44841). The Commission conducted its hearing on November 28, 2023. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on February 9, 2024. The views of the Commission are contained in USITC Publication 5487 (February 2024), entitled *Cold-Drawn Mechanical Tubing from China, Germany, India, Italy, South Korea, and Switzerland: Investigation Nos. 701–TA–576–577 and 731–TA–1362–1367 (Review).*

By order of the Commission.

Issued: February 9, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–03061 Filed 2–13–24; 8:45 am]

BILLING CODE 7020–02–P

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

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Experience Rating Report

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Experience Rating Report.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by April 15, 2024.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free by contacting Edward M. Dullaghan by telephone at (202) 693–2927 (this is not a toll-free number), or by email at *dullaghan.edward@dol.gov*.

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue NW, Frances Perkins Building, Room S–4524, Washington, DC 20210; by email: *dullaghan.edward@dol.gov;* or by fax (202) 696–3229.

FOR FURTHER INFORMATION CONTACT: Kevin Stapleton by telephone at (202) 693–3009 (this is not a toll-free number) or by email at *stapleton.kevin@dol.gov*.

SUPPLEMENTARY INFORMATION: DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

The data submitted annually on the ETA 204 report enables ETA to project revenues for the Unemployment Insurance (UI) program on a state-by-state basis and to measure the variations in assigned contribution rates that result from different experience rating systems. Used in conjunction with other data, the ETA 204 report assists in determining the effects of certain factors (*e.g.,* stabilization, expansion, or contraction in employment, etc.) on the unemployment experience of various groups of employers. The data also provide an early signal for potential solvency problems and are useful in analyzing factors that give rise to these potential problems and permit an evaluation of the effectiveness of the various approaches available to correct the detected problems. The report collects annual information about the taxation efforts in states relative to both taxable and total wages and allows comparison between states. Further, the data are key components to the Significant Tax Measures Report. The Significant Tax Measures Report provides the information necessary to evaluate and compare state UI tax systems. 44 U.S.C. 3506(c)(2)(A) authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB control number 1205–0164.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;
- Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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).

Agency: DOL–ETA.

Type of Review: Extension without change.

Title of Collection: Experience Rating Report.

Form: ETA–204.

OMB Control Number: OMB 1205–0164.

Affected Public: State Workforce Agencies.

Estimated Number of Respondents: 53.

Frequency: Annual.

Total Estimated Annual Responses: 53.

Estimated Average Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 27 hours.

Total Estimated Annual Other Cost Burden: $0.

(Authority: 44 U.S.C. 3506(c)(2)(A))

Brent Parton,

Principal Deputy Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2024–03077 Filed 2–13–24; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Regulations Containing Procedures for Handling of Retaliation Complaints

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety & Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 15, 2024.

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

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Employees may file complaints with the OSHA for investigation alleging that their employer violated ''whistleblower'' protection provisions contained in certain statutes and regulations for which the Agency has investigatory responsibility. These whistleblower provisions prohibit retaliatory action by employers against employees who report alleged violations of certain laws or regulations or otherwise engage in protected activities

specified by the whistleblower provisions. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on December 4, 2023 (88 FR 84174).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

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

Agency: DOL–OSHA.

Title of Collection: Regulations Containing Procedures for Handling of Retaliation Complaints.

OMB Control Number: 1218–0236.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 17,387.

Total Estimated Number of Responses: 17,387.

Total Estimated Annual Time Burden: 17,387 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Certifying Official.

[FR Doc. 2024–02996 Filed 2–13–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Refuse Piles and Impoundment Structures, Recordkeeping and Reporting Requirements

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 15, 2024.

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

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Requires coal mine operators to submit to MSHA annual reports and certification on refuse piles and impoundments and to keep records of the results of weekly examinations and instrumentation monitoring. Impoundments are structures that can impound water, sediment, or slurry or any combination of materials; and refuse piles are deposits of coal mine waste (other than overburden or spoil) that are removed during mining operations or separated from mined coal and deposited on the surface. The failure of these structures can have a devastating effect on a community. To avoid or minimize such disasters, standards have been promulgated for the design, construction, and maintenance of these structures; for annual certifications; for certification for hazardous refuse piles; for the frequency of inspections; and the methods of abandonment for impoundments and impounding structures. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 16, 2023 (88 FR 55728).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

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

Agency: DOL–MSHA.

Title of Collection: Refuse Piles and Impoundment Structures, Recordkeeping and Reporting Requirements.

OMB Control Number: 1219–0015.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 907.

Total Estimated Number of Responses: 22,533.

Total Estimated Annual Time Burden: 55,933 hours.

Total Estimated Annual Other Costs Burden: $1,155,051.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024–02999 Filed 2–13–24; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Information Collection Activities; Comment Request

AGENCY: Bureau of Labor Statistics, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the

Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the ''National Longitudinal Survey of Youth 1979.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before April 15, 2024.

ADDRESSES: Send comments to Nora Kincaid, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room G225, 2 Massachusetts Avenue NE, Washington, DC 20212. Written comments also may be transmitted by email to *BLS_PRA_Public@bls.gov.*

FOR FURTHER INFORMATION CONTACT: Nora Kincaid, BLS Clearance Officer, 202–691–7628 (this is not a toll-free number). (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The National Longitudinal Survey of Youth 1979 (NLSY79) is a representative national sample of persons who were born in the years 1957 to 1964 and lived in the U.S. in 1978. These respondents were ages 14 to 22 when the first round of interviews began in 1979; they were ages 59 to 66 as of December 31, 2023. The NLSY79 was conducted annually from 1979 to 1994 and has been conducted biennially since 1994. The longitudinal focus of this survey requires information to be collected from the same individuals over many years in order to trace their education, training, work experience, fertility, income, and program participation, and to continue tracing their interactions with the labor market as they experience changes in health, family situations, and other environmental contexts.

In addition to the main NLSY79, the biological children of female NLSY79 respondents have been surveyed since 1986. A battery of child cognitive, socio-emotional, and physiological assessments was administered biennially from 1986 until 2012 to NLSY79 mothers and their children. Starting in 1994 through 2018, children who had reached age 15 by December 31 of the survey year (the Young Adults) were interviewed about their work experiences, training, schooling, health, fertility, self-esteem, and other topics.

One of the goals of the Department of Labor (DOL) is to produce and disseminate timely, accurate, and relevant information about the U.S. labor force. The BLS contributes to this goal by gathering information about the labor force and labor market and disseminating it to policymakers and the public so that participants in those markets can make more informed, and thus more efficient, choices. Research based on the NLSY79 contributes to the formation of national policy in the areas of education, training, employment programs, school-to-work transitions, and preparations for retirement. In addition to the reports that the BLS produces based on data from the NLSY79, members of the academic community publish articles and reports based on NLSY79 data for the DOL and other funding agencies. To date, more than 3,000 articles examining NLSY79 data have been published in scholarly journals. The survey design provides data gathered from the same respondents over time to form the only data set that contains this type of information for this important population group. Without the collection of these data, an accurate longitudinal data set could not be provided to researchers and policymakers, thus adversely affecting the DOL's ability to perform its policy- and report-making activities.

II. Current Action

The BLS seeks approval to conduct Round 31 of the NLSY79. Respondents of the NLSY79 will undergo an interview of approximately 73 minutes during which they will answer questions about schooling and training, employment and labor market experiences, family relationships, wealth, and expectations about the future.

During the field period, about 100 NLSY79 interviews will be validated to ascertain whether the interview took place as the interviewer reported and whether the interview was done in a polite and professional manner.

BLS has undertaken a continuing redesign effort to examine the current content of the NLSY79 and provide direction for changes that may be appropriate as the respondents age. The 2024 instrument reflects a number of changes recommended by experts in various fields of social science and by our own internal review of the survey's content.

The Round 31 questionnaire includes new questions on the location of work that will empower research examining how the growth of remote work arrangements may affect the labor market experiences of people in this age cohort. It also asks about the respondents' assets and assesses their cognitive ability—both areas that have appeared in previous rounds of the NLSY79 but not in Round 30.

III. Desired Focus of Comments

The BLS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- 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 submissions of responses.

Title of Collection: National Longitudinal Survey of Youth 1979.

OMB Number: 1220–0109.

Type of Review: Revision of a previously approved collection.

Affected Public: Individuals or households.

Form	Total respondents	Frequency	Total responses	Average time per response (minutes)	Estimated total burden
NLSY79 Round 31 Main Survey	6,353	1	6,353	73	7,730 hours.

Form	Total respondents	Frequency	Total responses	Average time per response (minutes)	Estimated total burden
Round 31 Validation Interviews	100	1	100	6	10 hours.
Totals [1]	6,353		6,453		7,740 (rounded).

[1] The difference between the total number of respondents (6,353) and the total number of responses (6,453) reflects the fact that about 100 respondents will be interviewed twice, once in the main survey and a second time in the 6-minute validation interview.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, on February 8, 2024.

Eric Molina,

Chief, Division of Management Systems, Branch of Policy Analysis.

[FR Doc. 2024–03078 Filed 2–13–24; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Wage and Hour Division

Agency Information Collection Activities: Comment Request; Information Collections: Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), is soliciting comments concerning an extension of the information collection request (ICR) titled ''Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. A copy of the proposed information collection request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 15, 2024.

ADDRESSES: You may submit comments, identified by Control Number 1235–0016, by either one of the following methods: *Email: WHDPRAComments@dol.gov. Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Commenters are encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). 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:

I. Background: The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) provides that no person will engage in any farm labor contracting activity for any money or valuable consideration paid or promised to be paid, unless such person has a certificate of registration from the Secretary of Labor specifying which farm labor contracting activities such person is authorized to perform. *See* 29 U.S.C. 1802(7), 1811(a); 29 CFR 500.1(c), 500.20(i), 500.40. MSPA also provides that a Farm Labor Contractor (FLC) will not hire, employ, or use any individual to perform farm labor contracting activities unless such individual has a certificate of registration as a FLC or a certificate of registration as a Farm Labor Contractor Employee (FLCE) of the FLC that authorizes the activity for which such individual is hired, employed, or used. 29 U.S.C. 1811(b); 29 CFR 500.1(c). Form WH–530 provides the means for a FLC applicant to obtain a certificate of registration. Form WH–535 provides the means for a FLCE applicant to obtain a certificate of registration. Form WH–540 allows registered FLCs and FLCEs to amend a currently existing certificate.

MSPA section 401 (29 U.S.C. 1841) requires all FLCs, agricultural employers, and agricultural associations, subject to certain exceptions, to ensure that any vehicle they use or cause to be used to transport or drive any migrant or seasonal agricultural worker conforms to safety and health standards prescribed by the Secretary of Labor under MSPA and with other applicable federal and state safety standards. These MSPA safety standards address the vehicle, the driver, and insurance. The Wage and Hour Division (WHD) has created forms WH–514, WH–514a, and WH–515, which allow FLC applicants to verify to WHD that the vehicles used to transport migrant/seasonal agricultural workers meet the MSPA vehicle safety standards and that anyone who drives such workers meets the Act's minimum physical requirements. WHD uses the information collected on the forms in deciding whether to authorize the FLC/FLCE applicant to transport/drive any migrant/seasonal agricultural worker(s) or to cause such transportation. Form WH–514 is used to verify that any vehicle used or caused to be used to transport any migrant/seasonal agricultural worker(s) meets the Department of Transportation (DOT) safety standards. When the adopted DOT rules do not apply, FLC applicants seeking authorization to transport any migrant/seasonal agricultural workers use form WH–514a to verify that the vehicles meet the DOL safety standards. The form is completed when the

applicant lists the identifying vehicle information and an independent mechanic attests that the vehicle meets the required safety standards. Form WH–515 is a doctor's certificate used to document that a motor vehicle driver or operator meets the minimum DOT physical requirements that the Department has adopted.

The Department proposes a substantive change with the proposed debut of the FLCE portal, which will allow respondents to fill out WH–530, WH–535, and WH–540 online and submit electronically. Respondents will be able to upload WH–514 and WH–514a to the portal as well. The Department also proposes minor revisions to forms WH–515, WH–530, WH–535, and WH–540. These revisions clarify the instructions and ensure that applicants provide a contact email address. There are no revisions to the WH–514 and WH–514a forms.

II. Review Focus: The Department is particularly interested in comments that:

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

III. Current Actions: The Department seeks approval to revise this information collection to ensure effective administration of the requirements governing FLCs and FLCEs under MSPA.

Type of Review: Revision.

Agency: Wage and Hour Division.

Titles: Application for a Farm Labor Contractor or a Farm Labor Contractor Employee Certificate of Registration.

OMB Control Number: 1235–0016.

Agency Numbers: Forms WH–514, WH–514a, WH–515, WH–530, WH–540, WH–535.

Affected Public Businesses or other for-profits, Farms.

Total Estimated Respondents: 35,224.

Total Annual responses: 58,570.

Estimated Total Burden Hours: 58,570.

Estimated Time per Response: 5 minutes for the vehicle mechanical inspection reports (WH–514 or WH–514a) and 26 minutes for MSPA Doctor's Certification (WH–515) and 30 minutes for the Farm Labor Contractor and the FLCE Applications (WH–530 and WH–535) and 30 minutes for the Application Amendment (WH–540).

Frequency: On Occasion, but no more often than annual.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $1,486,984.37.

Dated: February 8, 2024.

Amy Hunter,

Director, Division of Regulations, Legislation, & Interpretation.

[FR Doc. 2024–03076 Filed 2–13–24; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

[OMB Control No. 1240–0NEW]

Proposed Information Collection; Claim for Consequential Illness Benefits Under the Energy Employees Occupational Illness Compensation Program Act (EE–1A)

AGENCY: Division of Energy Employees Occupational Illness Compensation, Office of Workers' Compensation Programs (DEEOIC), Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance request for comment to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This request helps to ensure that: requested data can be provided in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the impact of collection requirements on respondents can be properly assessed. Currently, the OWCP/DEEOIC is soliciting comments on the information collection for Energy Employees Occupational Illness Compensation Program Act Form (EE–1A). The form is required to determine a claimant's eligibility for compensation and medical benefits under the Energy Employees Occupational Illness Compensation Program Act and is required to enable eligible claimants to receive benefits.

DATES: All comments must be received on or before April 15, 2024.

ADDRESSES: You may submit comment as follows. Please note that late, untimely filed comments will not be considered. Written/Paper Submissions: Submit written/paper submissions in the following way:

- *Mail/Hand Delivery:* Mail or visit DOL–OWCP/DEEOIC, Office of Workers' Compensation Programs, Division of Energy Employees Occupational Illness Compensation, U.S. Department of Labor, 200 Constitution Ave. NW, Room C–3510, Washington, DC 20210.
- *Email:* Send comments on this collection by email to *suggs.anjanette@dol.gov* and mention Form EE–1A in the subject line.
- Please use only one method of transmission for comments. OWCP/DEEOIC will post your comment as well as any attachments, except for information submitted and marked as confidential, in the docket at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Anjanette Suggs, Office of Workers' Compensation Programs, Division of Energy Employees Occupational Illness Compensation, OWCP/DEEOIC, *suggs.anjanette@dol.gov;* (202) 354–9660 (voice).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Workers' Compensation Programs (OWCP) is the primary agency responsible for administration of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. 7384 *et seq.* EEOICPA provides for the payment of compensation to covered employees and, where applicable, survivors of deceased employees, who sustained either an ''occupational illness'' or a ''covered illness'' in the performance of duty for the Department of Energy and certain of its contractors and subcontractors. Following acceptance of an occupational illness or a covered illness, claimants can file for ''consequential illnesses.''

A consequential illness is a newly diagnosed medical condition that a physician links to a previously accepted work-related illness. Currently, OWCP does not have a specific form that claimants can utilize to file a claim for consequential illnesses. The absence of a specific form to file claims for consequential illnesses has made it difficult for stakeholders to submit these types of claims and/or understand the

process. The use of a standardized form, along with instructions, will provide claimants with a more precise filing mechanism. In addition, OWCP will be able to differentiate claims more easily for consequential illnesses from other claim types, increase the accuracy of claim tracking, and improve consequential illness claim adjudication timeliness. The collection of this information is authorized by 20 CFR 30.100, 30.103, 30.505 and 30.620.

The information collection in this Information Collection Request collects demographic, factual and medical information that OWCP needs to process claims for consequential illnesses. The collection in this ICR and the purpose is listed below. The associated regulatory authority for this ICR is listed above.

EE–1A—Claim for Consequential Illness Benefits Under the Energy Employees Occupational Illness Compensation Program Act will be used to initiate claims for consequential illnesses under the Act. It requests information about the employee/claimant, the specific medical diagnoses that they claim as consequential illness(es), and previous awards or settlements received in connection with the claimed consequential illnesses.

II. Desired Focus of Comments

OWCP is soliciting comments concerning the proposed information collection titled, ''Claim for Consequential Illness Benefits, EE–1A. OWCP/DEEOIC is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;
- Evaluate the accuracy of OWCP/DEEOIC's estimate of the burden related to the information collection, including the validity of the methodology and assumptions used in the estimate;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the information collection on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Background documents related to this information collection request are available at *https://regulations.gov* and at DOL–OWCP/DEEOIC located at 200 Constitution Ave. NW, Room C–3510, Washington, DC 20210. Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION** section of this notice.

III. Current Actions

This information collection request concerns Energy Employees Occupational Illness Compensation Program Act Form EE–1A, Claim for Consequential Illness Benefits. OWCP/DEEOIC has estimated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request from the current claim statistics derived from OWCP/DEEOIC's case management system.

Type of Review: New collection.

Agency: Office of Workers' Compensation Programs, Division of Energy Employees Occupational Illness Compensation, OWCP/DEEOIC.

OMB Number: 1240–0NEW.

Affected Public: Individuals and Households.

Number of Respondents: 2,425.

Frequency: On Occasion.

Number of Responses: 4,850.

Annual Burden Hours: 810 hours.

Annual Respondent or Recordkeeper Cost: $1,120.35.

OWCP/DEEOIC Form EE–1A, Claim for Consequential Illness Benefits.

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

Anjanette Suggs,

Certifying Officer.

[FR Doc. 2024–02995 Filed 2–13–24; 8:45 am]

BILLING CODE 4510–CR–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 24–009]

Name of Information Collection: NASA/KSC Business Opportunities Expo

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Comments are due by April 15, 2024.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to NASA PRA Clearance Officer, Bill Edwards-Bodmer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, phone 757–864–7998, or email *hq-ocio-pra-program@mail.nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The NASA Business Opportunities Expo is an annual event sponsored by the NASA KSC Prime Contractor Board, U.S. Air Force 45th Space Wing, and Canaveral Port Authority. Attendees include small businesses who want to meet and network with NASA and KSC prime contractors, large contractors seeking teaming opportunities with small businesses, and construction companies interested in learning more about NASA contract opportunities. Exhibitors include businesses offering a variety of products and services, representatives from each NASA center, the Patrick Air Force Base 45th Space Wing, prime contractors, and other government agencies.

Attendee information collected is name, company, address, email, telephone. Exhibitors are asked to provide the same information, plus company information that is published in the event program: Commercial and Government Entity (CAGE) Code, Primary North American Industry Classification System (NAICS) Code Business Categories, Core company capabilities and Past or current work/contracts with NASA.

The National Aeronautics and Space Administration (NASA) is committed to effectively performing the Agency's communication function in accordance with the Space Act Section 203(a)(3) to ''provide for the widest practicable and appropriate dissemination of information concerning its activities and the results there of,'' and to enhance public understanding of, and participation in, the nation's space program in accordance with the NASA Strategic Plan.

II. Methods of Collection

This information will be collected via an electronic process.

III. Data

Title: NASA Business Opportunities Expo.

OMB Number: 2730–0001.

Type of review: Reinstatement.

Affected Public: Individuals.

Estimated Annual Number of Activities: 1.

Estimated Number of Respondents per Activity: 2,300.

Annual Responses: 2,300.

Estimated Time per Response: Attendees: 1 minute; Exhibitors: 5 minutes.

Estimated Total Annual Burden Hours: 16.6.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

William Edwards-Bodmer,

NASA PRA Clearance Officer.

[FR Doc. 2024–03040 Filed 2–13–24; 8:45 am]

BILLING CODE 7510–13–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–188 and CP2024–194]

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:* February 16, 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).:* MC2024–188 and CP2024–194; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 187 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* February 8, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* February 16, 2024.

This Notice will be published in the **Federal Register**.

Jennie L. Jbara,

Alternate Certifying Officer.

[FR Doc. 2024–03011 Filed 2–13–24; 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).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–141, OMB Control No. 3235–0249]

Proposed Collection; Comment Request; Extension: Rule 12f–3

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 12f–3 (17 CFR 240.12f–3), under the Securities Exchange Act of 1934 (''Act'') (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 12f–3 (''Rule''), which was originally adopted in 1955 pursuant to Sections 12(f) and 23(a) of the Act, and as further modified in 1995, sets forth the requirements to submit an application to the Commission for termination or suspension of unlisted trading privileges in a security, as contemplated under Section 12(f)(4) of the Act. In addition to requiring that one copy of the application be filed with the Commission, the Rule requires that the application contain specified

information. Under the Rule, an application to suspend or terminate unlisted trading privileges must provide, among other things, the name of the applicant, a brief statement of the applicant's interest in the question of termination or suspension of such unlisted trading privileges, the title of the security, the name of the issuer, certain information regarding the size of the class of security, the public trading volume and price history in the security for specified time periods on the subject exchange, and a statement indicating that the applicant has provided a copy of such application to the exchange from which the suspension or termination of unlisted trading privileges are sought and to any other exchange on which the security is listed or admitted to unlisted trading privileges.

The information required to be included in applications submitted pursuant to Rule 12f–3 is intended to provide the Commission with sufficient information to make the necessary findings under the Act to terminate or suspend by order the unlisted trading privileges granted a security on a national securities exchange. Without the Rule, the Commission would be unable to fulfill these statutory responsibilities.

The burden of complying with Rule 12f–3 arises when a potential respondent, having a demonstrable bona fide interest in the question of termination or suspension of the unlisted trading privileges of a security, determines to seek such termination or suspension. The staff estimates that each such application to terminate or suspend unlisted trading privileges requires approximately one hour to complete. Thus each potential respondent would incur on average one burden hour in complying with the Rule.

The Commission staff estimates that there could be as many as 24 responses annually for an aggregate burden for all respondents of 24 hours. Each respondent's related internal cost of compliance for Rule 12f–3 would be $242, or the cost of one hour of professional work of a paralegal needed to complete the application. The total annual internal cost of compliance for all potential respondents, therefore, is $5,808 (24 responses × $242/response).

Compliance with the application requirements of Rule 12f–3 is mandatory, though the filing of such applications is undertaken voluntarily. Rule 12f–3 does not have a record retention requirement *per se.* However, responses made pursuant to Rule 12f–3 are subject to the recordkeeping requirements of Rules 17a–3 and 17a–4 of the Act. Information received in response to Rule 12f–3 shall not be kept confidential; the information collected is public information.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; 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. Consideration will be given to comments and suggestions submitted by April 15, 2024.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street, NE, Washington DC, 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: February 8, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–02977 Filed 2–13–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99495; File No. SR–NYSECHX–2024–04]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Harmonize Rules 10.9261 and 10.9830

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 31, 2024, the NYSE Chicago, Inc. (''NYSE Chicago'' 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to harmonize Rules 10.9261 and 10.9830 to permit video conference hearings under specified conditions in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA''). The proposed rule change is available on the Exchange's website at *www.nyse.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 self-regulatory organization 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 those 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 parts 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 harmonize Rules 10.9261 (Evidence and Procedure in Hearing) and 10.9830 (Hearing) to permit video conference hearings under specified conditions in conformity with recent changes by FINRA.

Background

In 2022, NYSE Chicago adopted disciplinary rules that are, with certain exceptions, substantially the same as the disciplinary rules of its affiliate NYSE Arca, Inc., which are in turn substantially similar to the FINRA Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and enforcement actions.[4]

In adopting disciplinary rules modeled on FINRA's rules, the Exchange adopted the hearing and

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 95020 (June 1, 2022), 87 FR 35034, (June 8, 2022) (SR–NYSECHX–2022–10) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Investigation, Disciplinary, Sanction, and Other Procedural Rules Modeled on the Rules of the Exchange's Affiliates).

evidentiary processes set forth in Rule 10.9261 and in Rule 10.9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 9800 Series. As adopted, the text of Rule 10.9261 is identical to the counterpart FINRA rule. Rule 10.9830 is also identical to FINRA's counterpart rule, except for conforming and technical amendments.[5]

In 2020, given the spread of COVID–19 and its effect on FINRA's adjudicatory functions nationwide, FINRA filed a temporary rule change to grant FINRA's Office of Hearing Officers (''OHO'') and the National Adjudicatory Council (''NAC'') the authority to conduct certain hearings by video conference if warranted by the current COVID–19-related public health risks posed by in-person hearings. Among the rules FINRA amended were FINRA Rules 9261 and 9830.[6]

In its filing, FINRA represented that its protocol for conducting hearings by video conference would ensure that such hearings maintain a fair process for the parties by, among other things, FINRA's use of a high quality, secure and user-friendly video conferencing service and provision of thorough instructions, training and technical support to all hearing participants.[7] According to FINRA, the changes were a reasonable interim solution to allow FINRA's critical adjudicatory processes to continue to function while protecting the health and safety of hearing participants.[8]

Recently, the Commission approved FINRA's proposal to make the temporary amendments regarding video conference hearings permanent, with some modifications, to permit the use of video conferences for reasons beyond COVID–19.[9] Specifically, FINRA amended, among other rules, FINRA Rules 9261 and 9830 to extend OHO's authority to order hearings by video conference to other similar situations in which proceeding in person could endanger the health or safety of the participant or alternatively would be impracticable (*e.g.,* an uncommon situation or extraordinary circumstances such as a natural disaster or terrorist attack that caused travel to be cancelled for an extended period of time).[10] As approved, OHO has discretion to determine whether the circumstances for a video hearing have been met and can act quickly if a future unexpected event impairs their ability to conduct in-person hearings safely.[11] In addition, OHO has authority to order hearings to occur by video conference based on a motion, which was not permitted under the previous temporary amendments to FINRA Rules 9261 and 9830.[12]

As the FINRA Approval Order noted, FINRA represented that it will utilize the same protocols for conducting video conference hearings as those employed under the temporary amendments, including using a high quality, secure, user-friendly video conferencing service and providing thorough instructions, training, and technical support to all hearing participants.[13] In addition, the FINRA Approval Order noted that, according to FINRA, the parties could file a joint motion requesting the hearing to occur, in whole or in part, by video conference based on a showing of good cause. In-person hearings, however, would remain the default method for conducting hearings.[14]

Further, as noted in the FINRA Approval Order, given the nature of evidentiary hearings,[15] which often occur over multiple days and generally include numerous documents in evidence and witness testimony, motions for a hearing by video conference would need to be joined by all parties, and even joint motions could be denied if the adjudicator determines that good cause has not been shown.[16] According to FINRA, OHO would have reasonable discretion based on a joint motion of the parties to exercise its authority to determine whether a hearing should occur by video conference under the proposed rule change.[17] Moreover, in deciding whether to schedule a hearing by video conference, OHO could consider and balance a variety of factors including, for example and without limitation, a hearing participant's individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing. Additionally, as noted above, OHO may consider whether a situation is uncommon or there are extraordinary circumstances.[18]

Finally, the FINRA Approval Order noted that for approximately two and a half years, while the temporary amendments were in effect, OHO successfully conducted numerous hearings by video conference using Zoom, a system which was vetted by FINRA's information technology staff.[19] FINRA stated that this use of video conference technology has been an effective and efficient alternative to in-person hearings.[20]

As discussed below, the Exchange proposes to adopt rule text based on FINRA's recently approved amendments to its Rules 9261 and 9830 permitting video conference hearings under specified conditions. Each of the Exchange's affiliates recently adopted the same amendments.[21]

Proposed Rule Change

NYSE Chicago Rule 10.9261(b) provides that if a disciplinary hearing is held, a party shall be entitled to be heard in-person, by counsel, or by the party's representative. Similarly, NYSE Chicago Rule 10.9830 outlines the requirements for hearings for temporary and permanent cease and desist orders.

[5] *See id.*

[6] *See* Securities Exchange Act Release No. 83289 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR–FINRA–2020–027). Given that FINRA's OHO administers all aspects of Exchange adjudications, including assigning hearing officers to serve as NYSE Chicago hearing officers, pursuant to a regulatory services agreement (''RSA''), and that the public health concerns addressed by FINRA's amendments applied equally to the Exchange's disciplinary hearings, in 2022, the Exchange also temporarily amended its disciplinary rules to allow virtual hearings. *See* Securities Exchange Act Release No. 95477 (August 11, 2022), 87 FR 50680 (August 17, 2022) (SR–NYSECHX–2022–19). The temporary relief was extended through April 30, 2023, due to the continuing public health risks and logistical challenges related to COVID–19, including whether hearing participants could safely travel and abide by state or local quarantine requirements. *See* Securities Exchange Act Release No. 96872 (February 9, 2023), 88 FR 9922 (February 15, 2023) (SR–NYSECHX–2023–007) (extending the expiration date of the temporary rule amendments to, among other rules, FINRA Rules 9261 and 9830 from January 31, 2023 to April 30, 2023). The temporary amendments expired on April 30, 2023 and, because the Exchange did not file another proposed rule change extending the temporary amendments beyond that date, the rules reverted back to their original state on April 30, 2023. *See id.* at 9924.

[7] *See* 85 FR at 55713.

[8] *See id.*

[9] *See* Securities Exchange Act Release No. 98029 (August 4, 2023), 88 FR 51879 (August 4, 2023) (SR–FINRA–2023–008) (Order Approving a Proposed Rule Change To Amend FINRA Rules 1015, 9261, 9341, 9524, 9830 and Funding Portal Rule 900 (Code of Procedure) To Permit Hearings Under Those Rules To Be Conducted by Video Conference) (''FINRA Approval Order'').

[10] *See* FINRA Approval Order, 88 FR at 51880.

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] As used herein, ''evidentiary hearings'' refers to hearings conducted before OHO under Rules 10.9261 and 10.9830. *See id.,* 88 FR at 51880, n. 25.

[16] *See id.* at 51881.

[17] *See id.*

[18] *See* text accompanying note 10, *supra.*

[19] *See* FINRA Approval Order, 88 FR at 51880.

[20] *See id.*

[21] *See* Securities Exchange Act Release No. 99120 (December 8, 2023), 88 FR 86708 (December 14, 2023) (SR–NYSE–2023–47); Securities Exchange Act Release No. 99121 (December 8, 2023), 88 FR 86697 (December 14, 2023) (SR–NYSEAMER–2023–62); Securities Exchange Act Release No. 99122 (December 8, 2023), 88 FR 86693 (December 14, 2023) (SR–NYSEARCA–2023–82); and Securities Exchange Act Release No. 99127 (December 8, 2023), 88 FR 86689 (December 14, 2023) (SR–NYSENAT–2023–28).

NYSE Chicago Rule 10.9830(a), however, does not specify that a party shall be entitled to be heard in-person, by counsel, or by the party's representative.

The Exchange proposes to conform Rules 10.9261 and 10.9830 to FINRA Rules 9261 and 9830 as recently amended. The Exchange would add text to the rules permitting the Chief or Deputy Chief Hearing Officer to order the hearing to be conducted in whole or in part by video conference consistent with the FINRA Approval Order either based upon an assessment that proceeding in person may endanger the health or safety of the participants or would be impracticable or upon consideration of a joint motion of the parties for good cause shown. As noted, FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain a fair process for the parties.[22] Moreover, the proposed rule change would modernize existing procedures and allow parties who jointly prefer video conference to potentially save travel costs and time. As proposed, the use of video conferences would be limited and controlled, and in-person hearings would continue to be the default method for conducting hearings.[23] Furthermore, the proposed rule includes procedural safeguards to ensure fairness, such as the requirement for evidentiary hearings that any motions be joined by all parties and show good cause.[24] The Exchange believes that this is a reasonable procedure to follow in hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee.[25]

To effectuate these changes, the Exchange proposes to add the following additions (italicized) to Rule 10.9261(b):

If a hearing is held, a Party shall be entitled to be heard in person, by counsel, or by the Party's representative. *Upon a determination that proceeding in person may endanger the health or safety of the participants or would be impracticable, or upon consideration of a joint motion of the Parties for good cause shown, the Chief Hearing Officer or Deputy Chief Hearing Officer may, in the exercise of reasonable discretion, order the hearing to be conducted, in whole or in part, by video conference.*

The proposed text is identical to the language adopted by FINRA.[26]

Similarly, the Exchange proposes the following additions to Rule 10.9830(a):

The hearing shall be held not later than 15 days after service of the notice and filing initiating the temporary cease and desist proceeding, unless otherwise extended by the Chief Hearing Officer or Deputy Chief Hearing Officer for good cause shown. If a Hearing Officer or Hearing Panelist is recused or disqualified, the hearing shall be held not later than five days after a replacement Hearing Officer or Hearing Panelist is appointed. *Upon a determination that proceeding in person may endanger the health or safety of the participants or would be impracticable, or upon consideration of a joint motion of the Parties for good cause shown, the Chief Hearing Officer or Deputy Chief Hearing Officer may, in the exercise of reasonable discretion, order the hearing to be conducted, in whole or in part, by video conference.*

Once again, the proposed language is identical to the language adopted by FINRA.[27]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[28] in general, and furthers the objectives of Section 6(b)(5),[29] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the 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 designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[30]

The Exchange believes that the proposed rule changes support the objectives of the Act by harmonizing Exchange rules modeled on FINRA's rules, resulting in less burdensome and more efficient regulatory compliance. As previously noted, the text proposed for Rule 10.9261 and Rule 10.9830 is identical to the text in the counterpart FINRA rules. As such, the proposed rule change would facilitate rule harmonization among self-regulatory organizations with respect to the conduct of video conference hearings, thereby fostering cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change protects investors and the public interest by permitting the use of broadly available technology to allow hearings to proceed by video conference under certain circumstances. The Exchange's disciplinary proceedings serve a critical role in providing investor protection and maintaining fair and orderly markets by, for example, sanctioning misconduct and preventing further customer harm by members and associated persons. The proposed rule change would encourage the prompt resolution of these cases while preserving fair process. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to proceed without delay, thereby enabling the Exchange to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

The proposed rule change promotes efficiency by permitting hearings to occur by video conference in situations where the hearings would otherwise be postponed for an uncertain period of time. Moreover, as noted, FINRA will utilize the same protocols for conducting video conference hearings as those employed under the temporary amendments, including using a high quality, secure, user-friendly video conferencing service and providing thorough instructions, training, and technical support to all hearing participants.[31] Moreover, the Chief or Deputy Chief Hearing Officer may take into consideration, among other things, a hearing participant's individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing.[32]

[22] *See* text accompanying notes 7–8, *supra.*

[23] *See* FINRA Approval Order, 88 FR at 51882.

[24] *See id.*

[25] As noted, FINRA and OHO administer disciplinary hearings on the Exchange's behalf pursuant to an RSA. *See* note 6, *supra.* FINRA's OHO administers all aspects of Exchange adjudications, including assigning hearing officers to serve as NYSE Chicago hearing officers. A hearing officer from OHO will, among other things, preside over the disciplinary hearing, select and chair the hearing panel, and prepare and issue written decisions. The Chief or Deputy Hearing Officer for all Exchange disciplinary hearings are currently drawn from OHO and are all FINRA employees. The Exchange understands that OHO will utilize the same video conference protocol and processes for Exchange matters under the RSA as it proposes for FINRA matters.

[26] *See* Exchange Act Release No. 97403 (May 4, 2023), 88 FR 28645 (May 4, 2023) (File No. SR–FINRA–2023–008) (Notice of Filing of a Proposed Rule Change To Amend FINRA Rules 1015, 9261, 9341, 9524, 9830 and Funding Portal Rule 900 (Code of Procedure) To Permit Hearings Under Those Rules To Be Conducted by Video Conference).

[27] *See id.*

[28] 15 U.S.C. 78f(b).

[29] 15 U.S.C. 78f(b)(5).

[30] 15 U.S.C. 78f(b)(7) & 78f(d).

[31] *See* FINRA Approval Order, 88 FR at 51880.

[32] *See id.* at 51881 & n. 36.

For the same reasons, the Exchange believes that the proposed changes are designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[33] The Exchange believes that the proposed rule change provides a fair procedure by allowing hearings to proceed by video conference not only due to public health or safety reasons, but also at a party or the parties' request for reasons particular to them. The Chief or Deputy Chief Hearing Officer could allow a hearing to proceed by video conference in the exercise of reasonable discretion and subject to procedural safeguards that ensure fairness, including the requirement that any motions be joined by all parties and show good cause. Overall, the proposed rule change represents a significant step toward modernizing disciplinary process procedures in a manner that preserves in-person hearings but allows for the use of video conference technology under certain circumstances.

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 proposed rule change is not intended to address competitive issues but is rather intended solely to create permanent rules that would allow video conference hearings if OHO determines that proceeding in person may endanger the health or safety of the participants or would be impracticable, or where both parties prefer doing so and show good cause, thereby providing greater harmonization with approved FINRA rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [34] and Rule 19b–4(f)(6) thereunder.[35] 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [36] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[37] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such 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) [38] 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–NYSECHX–2024–04 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–NYSECHX–2024–04. 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–NYSECHX–2024–04 and should be submitted on or before March 6, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Dated: February 8, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–02978 Filed 2–13–24; 8:45 am]

BILLING CODE 8011–01–P

[33] 15 U.S.C. 78f(b)(7) and 78f(d).

[34] 15 U.S.C. 78s(b)(3)(A)(iii).

[35] 17 CFR 240.19b–4(f)(6).

[36] 17 CFR 240.19b–4(f)(6).

[37] 17 CFR 240.19b–4(f)(6)(iii).

[38] 15 U.S.C. 78s(b)(2)(B).

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99497; File No. SR–MEMX–2024–02]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule

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 January 31, 2024, 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members [3] (the ''Fee Schedule'') pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on February 1, 2024. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to: (i) increase the rebate for executions of Retail Orders [4] in securities priced below $1.00 per share that add displayed liquidity to the Exchange (such orders, ''Added Displayed Sub-Dollar Retail Volume'') and make a corresponding increase in the rebate provided for executions of Added Displayed Sub-dollar Retail Volume under Retail Tier 1; and (ii) modify NBBO Setter Tier 1 by adopting a new additive rebate for executions of added displayed volume (other than Retail Orders) that meet the criteria under NBBO Setter Tier 1 and modifying the required criteria under such tier, each as further described below.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 15% of the total market share of executed volume of equities trading.[5] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 3% of the overall market share.[6] The Exchange in particular operates a ''Maker-Taker'' model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Increase Rebate for Added Displayed Sub-Dollar Retail Volume

Currently, the Exchange provides a rebate of 0.075% of the total dollar value of the transaction for executions of Retail Orders in securities priced below $1.00 per share that add displayed liquidity to the Exchange (such orders, ''Added Displayed Sub-Dollar Retail Volume''). This rebate is applicable to all executions of Added Displayed Sub-Dollar Retail Volume and is applicable to all Members (including those that qualify for any of the Exchange's volume tiers). Now, the Exchange proposes to increase the rebate provided to Members for all executions of Added Displayed Sub-Dollar Retail Volume to 0.15% of the total dollar value of the transaction. The Exchange also currently offers Retail Tier 1, whereby the Exchange provides an enhanced rebate of $0.0034 per share for executions of Added Displayed Retail Volume in securities priced at or above $1.00 and 0.075% of the total dollar value of the transaction for executions of Added Displayed Retail Volume in securities priced below $1.00 for a Member that qualifies for Retail Tier 1 by achieving a Retail Order ADAV [7] that is equal to or great than 0.07% of the TCV.[8] Given that the Exchange is now proposing to increase the rebate for *all* executions of Added Displayed Sub-dollar Retail Volume from 0.075% of the total dollar value of the transaction to 0.15% of the total dollar value of the transaction, it follows that the rebate provided under Retail Tier 1 for executions of Added Displayed Sub-Dollar Retail Volume should also be increased to 0.15% of the transaction. As such, the Exchange is similarly proposing to increase the rebate provided to Members that qualify for Retail Tier 1 to 0.15% of the total dollar value of the transaction for executions of Added Displayed Sub-Dollar Retail Volume, which again, is the same rebate that will be applicable to such executions for all Members under this proposal.[9]

The purpose of increasing the rebate for executions of Added Displayed Sub-Dollar Retail Volume is for business and competitive reasons, as the Exchange believes that increasing such rebate would incentivize Members to submit additional Added Displayed Sub-Dollar Retail Volume to the Exchange, which the Exchange believes would promote price discovery and price formation, provide more trading opportunities and tighter spreads, and deepen liquidity that is subject to the Exchange's transparency, regulation and oversight, thereby enhancing market quality to the benefit of all Members and investors.

[3] *See* Exchange Rule 1.5(p).

[4] A ''Retail Order'' means an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization (''RMO''), provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* Exchange Rule 11.21(a).

[5] Market share percentage calculated as of January 30, 2024. The Exchange receives and processes data made available through consolidated data feeds (*i.e.,* CTS and UTDF).

[6] *Id.*

[7] As set forth on the Fee Schedule, ''ADAV'' means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis, and ''Displayed ADAV'' means ADAV with respect to displayed orders.

[8] As set forth on the Fee Schedule, ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[9] The pricing for the Retail Tier is referred to by the Exchange on the Fee Schedule under the description ''Added displayed volume, Retail Tier 1'' with a Fee Code of ''Br1'', ''Dr1'' or ''Jr1'', as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

NBBO Setter Tier

The Exchange currently offers NBBO Setter Tier 1 under which a Member may receive an additive rebate of $0.0002 per share for executions of Added Displayed Volume (other than Retail Orders) that establish the NBBO (such orders, ''Setter Volume'') by achieving an ADAV with respect to orders with Fee Code B [10] that is equal to or greater than 0.10% of the TCV. The Exchange now proposes to modify NBBO Setter Tier 1 by adopting a new additive rebate under such tier that would apply to a qualifying Member's executions of Added Displayed Volume (other than Retail Orders) that have a Fee Code of D or J, and modifying the required criteria under such tier.

First, the Exchange proposes to adopt a new additive rebate under NBBO Setter Tier 1 of $0.0001 per share for a qualifying Member's executions of Added Displayed Volume with a Fee Code of D or J.[11] The Exchange is not proposing to modify the existing additive rebate of $0.0002 per share for a Member's executions of Added Displayed Volume (other than Retail Orders) that establish the NBBO (*i.e.* Fee Code B), however, the Exchange is proposing to add language within the NBBO Setter Tier 1 pricing table that clarifies which Fee Codes would receive which Additive Rebate. Specifically, the Exchange will offer an additive rebate of $0.0002 per share for a qualifying Member's executions of Added Displayed Volume with Fee Code B and an additive rebate of $0.0001 per share for a qualifying Member's executions of Added Displayed Volume with Fee Codes D and J. To summarize, under the current proposal, if a Member meets the criteria under NBBO Setter Tier 1, that Member will now receive the current additive rebate of $0.0002 per share on all of its executions of Added Displayed Volume that establish the NBBO (*i.e.* Fee Code B), as well as a new additive rebate of $0.0001 per share on all of its executions of Added Displayed volume that do *not* establish the NBBO (*i.e.* Fee Codes D and J).[12]

Second, the Exchange is proposing to modify the required criteria under NBBO Setter Tier 1. Currently, a Member qualifies for such tier by achieving an ADAV with respect to orders with a Fee Code B that is equal to or greater than 0.10% of the TCV. The Exchange proposes to keep this criteria intact and adopt an additional (*i.e.,* alternative) criteria that a Member may achieve in order to qualify for such tier. Specifically, the Exchange proposes to modify the required criteria such that a Member would now qualify for such tier by achieving: (i) an ADAV with respect to Fee Code B that is equal to or greater than 0.10% of the TCV; or (ii) an ADAV with respect to orders with Fee Code B that is equal to or greater than 0.05% of the TCV and a Step-Up ADAV [13] with respect to orders with a Fee Code B that is equal to or greater than 75% of the Member's December 2023 ADAV with respect to orders with a Fee Code B. Thus, such proposed change would add an alternative criteria that includes a lower overall Fee Code B ADAV threshold but that also requires a Member to increase its Fee Code B ADAV above its December 2023 ADAV by a specified threshold. Additionally, the Exchange is proposing that criteria (2) of NBBO Setter Tier 1 will expire no later than July 31, 2024, and the Exchange will indicate this in a note under the NBBO Setter Tier pricing table on the Fee Schedule. Again, the Exchange notes that it is not proposing to change the current additive rebate under NBBO Setter Tier 1 that is provided in addition to the otherwise applicable rebate for executions of added displayed volume (other than Retail Orders) in securities priced at or above $1.00 per share that establish the NBBO.

The purpose of adopting a new additive rebate under the NBBO Setter Tier 1 that applies to a qualifying Member's executions of Added Displayed Volume with Fee Codes D or J (in addition to Setter Volume) is, like the original purpose of the NBBO Setter Tier, to attract aggressively priced displayed liquidity to the Exchange, which the Exchange believes would enhance market quality by increasing execution opportunities, tightening spreads, and promoting price discovery on the Exchange. Additionally, the Exchange believes that the additive rebate for executions of Added Displayed Volume is commensurate with the corresponding required criteria under such tier and is reasonably related to such market quality benefits that such tier is designed to achieve.

The Exchange believes that the proposed alternative criteria to NBBO Setter Tier 1 provides an incremental incentive for Members to strive for higher ADAV on the Exchange with respect to orders with a Fee Code B to receive the corresponding additive rebate for executions of Added Displayed Volume under such tier, and thus, it is designed to encourage Members that do not currently qualify for such tier to increase their aggressively priced, liquidity adding orders to the Exchange. The Exchange believes that the tier, as proposed, would further incentivize increased order flow to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants. The Exchange notes that, as the proposed change to the required criteria under NBBO Setter Tier 1 merely provides an alternative criteria and does not change the existing criteria, the Exchange believes that such change would make the tier easier for Members to achieve, and, in turn, while the Exchange has no way of predicting with certainty how the proposed new criteria will impact Member activity, the Exchange expects that more Members will strive to qualify for such tier than currently do, resulting in the submission of additional order flow to the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[14] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[15] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be

[10] The Exchange notes that orders with Fee Code B include orders, other than Retail Orders, that establish the NBBO.

[11] The Exchange notes that orders with Fee Code D include orders that add displayed liquidity to the Exchange but that are not Fee Code B or J. Orders with Fee Code J include orders, other than Retail Orders, that establish a new BBO on the Exchange that matches the NBBO first established on an away market. Thus, orders with Fee Code B, D or J include all orders, other than Retail Orders, that add displayed liquidity to the Exchange. The pricing for NBBO Setter Tier 1 is referred to by the Exchange on the Fee Schedule under the description ''NBBO Setter Tier 1'' with a Fee Code of S1 to be appended to the otherwise applicable Fee Code assigned by the Exchange on the monthly invoices for qualifying executions.

[12] In connection with the proposed changes to this tier, the Exchange is proposing to revise the note under the NBBO Setter Tier pricing table to reflect that the additive rebate under such tier is applicable to executions of Added Displayed Volume (other than Retail Orders) in securities priced at or above $1.00 per share rather than being limited to the Fee Code associated with Setter Volume.

[13] As set forth on the Fee Schedule, ''Step-Up ADAV'' means ADAV in the relevant baseline month subtracted from current ADAV.

[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(4) and (5).

excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [16]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect to Added Displayed Volume and Sub-Dollar Retail Volume, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow, including displayed, liquidity-adding, NBBO Setting and/or Retail orders, to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants.

The Exchange believes that the proposed change to increase the rebate provided for all executions of Added Displayed Sub-Dollar Retail Volume, including those that meet the criteria under Retail Tier 1, is reasonable because it is designed to incentivize Members to submit additional displayed liquidity-adding Retail Orders to the Exchange, which would enhance liquidity on the Exchange and promote price discovery and price formation. The Exchange further believes the proposed increased rebate is reasonable and appropriate because it is comparable to and competitive with the rebates provided by other exchanges for executions of added displayed volume in Retail Orders in securities priced below $1.00 per share.[17] The Exchange further believes the proposed rebate for executions of Added Displayed Sub-Dollar Retail Volume is equitable and not unfairly discriminatory, as such rebate will apply equally to all Members submitting Retail Orders to the Exchange.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes that NBBO Setter Tier 1 as modified by the changes proposed herein is reasonable, equitable and not unfairly discriminatory for these same reasons, as such tier would provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange, is available to all Members on an equal basis, and, as described above, is designed to encourage Members to maintain or increase their order flow, including in the form of displayed, liquidity-adding NBBO setting orders, to the Exchange in order to qualify for an additive rebate for executions of Added Displayed Volume, as applicable, thereby contributing to a deeper, more liquid and well balanced market ecosystem on the Exchange to the benefit of all Members and market participants. The Exchange also believes that such tier reflects a reasonable and equitable allocation of fees and rebates, as the Exchange believes that the additive rebate for executions of Added Displayed Volume under the proposed NBBO Setter Tier 1 remains commensurate with the corresponding required criteria under such tier and is reasonably related to the market quality benefits that such tier is designed to achieve, as described above.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act [18] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to incentivize market participants to direct additional order flow, including displayed, liquidity-adding, NBBO setting and Retail orders, to the Exchange, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members and market participants, as well as to generate additional revenue in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [19]

Intramarket Competition

As discussed above, the Exchange believes that the proposal would incentivize Members to submit additional order flow, including displayed, liquidity-adding, aggressively priced displayed orders that establish the NBBO Setting, and/or Retail orders to the Exchange, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn,

[16] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[17] *See, e.g.,* the MIAX Pearl LLC equities trading fee schedule on its public website (available at: *https://www.miaxglobal.com/markets/us-equities/pearl-equities/fees*) which reflects a standard rebate of 0.15% of the total dollar value of executions that add liquidity in displayed Retail Orders; and the NYSE Arca equities trading fee schedule (at: *https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf*) which reflects a standard rebate of 0.05% of the total dollar value of executions in Retail Orders that add liquidity.

[18] 15 U.S.C. 78f(b)(4) and (5).

[19] *See supra* note 16.

would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants.

The Exchange does not believe that the proposed change to increase the rebate for all executions of Added Displayed Sub-Dollar Retail Volume, including those that meet the criteria under Retail Tier 1, would impose any burden on intramarket competition because such change will apply to all Members uniformly, in that the proposed rebate for such executions would be the rebate applicable to all Members. The opportunity to qualify for the proposed NBBO Setter Tier 1, and thus receive the proposed additive rebate for executions of Added Displayed Volume under such tier, would be available to all Members that meet the associated volume requirements in any month. 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

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 15% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect to Added Displayed Sub-Dollar Retail Volume and Setter Volume, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed changes represent a competitive proposal through which the Exchange is seeking to generate additional revenue with respect to its transaction pricing and to encourage the submission of additional order flow to the Exchange through volume-based tiers, which have been widely adopted by exchanges, including the Exchange. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing incentives to market participants.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [20] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *SEC,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[21] Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the accordance with Section 6(b)(8) of the Act,[22] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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 [23] and Rule 19b–4(f)(2) [24] 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–2024–02 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–2024–02. 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

[20] *See supra* note 16.

[21] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSE–2006–21)).

[22] 15 U.S.C. 78f(b)(8).

[23] 15 U.S.C. 78s(b)(3)(A)(ii).

[24] 17 CFR 240.19b–4(f)(2).

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–2024–02 and should be submitted on or before March 6, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Dated: February 8, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–02980 Filed 2–13–24; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Military Reservist Economic Injury Disaster Loans; Interest Rate for Second Quarter Fiscal Year 2024

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of the Military Reservist Economic Injury Disaster Loans interest rate for loans approved on or after January 29, 2024.

DATES: Issued on February 6, 2024.

FOR FURTHER INFORMATION CONTACT: Robert Blocker, Office of Financial Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 619–0477.

SUPPLEMENTARY INFORMATION: The Small Business Administration publishes an interest rate for Military Reservist Economic Injury Disaster Loans (13 CFR 123.512) on a quarterly basis. The interest rate will be 4.000 for loans approved on or after January 29, 2024.

Robert Blocker,

Chief, Disaster Loan Policy Division, Office of Financial Assistance.

[FR Doc. 2024–02981 Filed 2–13–24; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20187; OREGON Disaster Number OR–20000 Declaration of Economic Injury]

Administrative Declaration of an Economic Injury Disaster for the State of Oregon

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of Oregon dated 02/08/2024.

Incident: Winter Ice Storm.

Incident Period: 01/12/2024 through 01/20/2024.

DATES: Issued on 02/08/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 11/08/2024.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's EIDL declaration, applications for disaster loans may be submitted online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Clackamas, Clatsop, Lane, Lincoln, Multnomah, Washington.

Contiguous Counties:

Oregon: Benton, Columbia, Deschutes, Douglas, Hood River, Klamath, Linn, Marion, Polk, Tillamook, Wasco, Yamhill.

Washington: Clark, Pacific, Skamania, Wahkiakum.

The Interest Rates are:

	Percent
Business and Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for economic injury is 201870.

The States which received an EIDL Declaration are Oregon, Washington.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2024–03016 Filed 2–13–24; 8:45 am]

BILLING CODE 8026–09–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2023–0021]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Office of Personnel Management (OPM). Under this matching program, OPM will provide SSA with civil service benefit and payment data. This disclosure will provide SSA with information necessary to verify an individual's self-certification of eligibility for the Extra Help with Medicare Prescription Drug Plan Costs program (Extra Help). It will also enable SSA to identify individuals who may qualify for Extra Help as part of the agency's Medicare outreach efforts.

DATES: The deadline to submit comments on the proposed matching program is March 15, 2024.

The matching program will be applicable on March 14, 2024, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2023–0021 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only

[25] 17 CFR 200.30–3(a)(12).

information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *https://www.regulations.gov.* Use the *Search* function to find docket number SSA–2023–0021 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (833) 410–1613.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* Comments are also available for public viewing on the Federal eRulemaking portal at *https://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Cynthia Scott, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–1943, or send an email to *Cynthia.Scott@ssa.gov.*

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies: SSA and OPM.

Authority for Conducting the Matching Program: This agreement is executed in compliance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988, and the regulations and guidance promulgated thereunder.

The legal authority for OPM to disclose information under this agreement is 42 U.S.C. 1383(f) of the Social Security Act (Act).

The legal authorities for SSA to conduct this computer matching are sections 1144(a)(1) and (b)(1) and 1860D–14(a)(3) of the Act (42 U.S.C. 1320b–14(a)(1) and (b)(1) and 1395w–114(a)(3)).

Purpose(s): This agreement sets forth the terms and conditions under which OPM will provide SSA with civil service benefit and payment data. This disclosure will provide SSA with information necessary to verify an individual's self-certification of eligibility for Extra Help. It will also enable SSA to identify individuals who may qualify for Extra Help as part of the agency's Medicare outreach efforts.

Categories of Individuals: The individuals whose information is involved in this matching program are civil service annuitants, individuals who self-certify their eligibility for the Extra Help program, and individuals who may qualify for Extra Help.

Categories of Records: OPM's data file will consist of approximately 125,000 records of updated payment information for new civil service annuitants and annuitants whose civil service annuity has changed. SSA's comparison file consists of approximately 111 million records from the Medicare Database file.

OPM will provide SSA with civil service benefit and payment data for individuals who apply for the Extra Help program. The file includes:

a. Annuitant Name and Date of Birth,

b. Annuitant Social Security number,

c. Annuitant Civil Service Claim Number, and

d. Amount of current gross civil service benefits.

System(s) of Records: OPM will provide SSA with electronic files containing civil service benefit and payment data from its system of records (SOR) titled OPM/Central—1, Civil Service Retirement and Insurance Records, published at 73 FR 15013 (March 20, 2008) and 87 FR 5874 (February 2, 2022).

SSA will match OPM data with the SSA SOR 60–0321, Medicare Database File, last fully published at 71 FR 42159 (July 25, 2006), and amended at 72 FR 69723 (December 10, 2007) and 83 FR 54969 (November 1, 2018).

[FR Doc. 2024–03021 Filed 2–13–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice: 12330]

Notification of Meetings of the United States-Bahrain Subcommittee on Environmental Affairs and Joint Forum on Environmental Cooperation

ACTION: Notice of meetings and request for comments; invitation to public session.

SUMMARY: The U.S. Department of State and the Office of the United States Trade Representative (USTR) are providing notice that the United States and the Kingdom of Bahrain plan to hold meetings of the Subcommittee on Environmental Affairs (Subcommittee), established under the United States-Bahrain Free Trade Agreement (FTA), and the Joint Forum on Environmental Cooperation (Joint Forum), established under the United States-Bahrain Memorandum of Understanding on Environmental Cooperation (MOU), on February 21, 2024, in Manama, Bahrain. The purposes of the meetings of these two bodies, respectively, are to review implementation of the Environment Chapter (Chapter 16) of the FTA and to review and assess cooperative environmental activities undertaken under the MOU.

DATES: The joint public sessions of the Subcommittee and Joint Forum will be held on February 21, 2024, from 5:30 a.m. to 7:15 a.m. EST (1:30 p.m. to 3:15 p.m. AST) in Manama, Bahrain, with an option to join virtually or in-person. Please contact Merideth Manella and Tia Potskhverashvili for the location of this meeting in Manama, Bahrain, or to request a link to join virtually. Confirmations of attendance and comments or questions are requested in writing no later than February 16, 2024.

ADDRESSES: Written comments or questions should be submitted to both:

(1) Merideth Manella, U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Office of Environmental Quality, by email to *ManellaM@state.gov* with the subject line ''United States-Bahrain FTA Subcommittee/MOU Joint Forum Meetings''; and

(2) Tia Potskhverashvili, Office of the United States Trade Representative, by email to *tiapots@ustr.eop.gov* with the subject line ''United States-Bahrain FTA Subcommittee/MOU Joint Forum Meetings''.

In your email, please include your full name and organization.

If you have access to the internet, you can view and comment on this notice by going to: *http://www.regulations.gov/#!home* and searching for docket number DOS–2024–0004.

FOR FURTHER INFORMATION CONTACT: Merideth Manella, (202) 286–5271, *ManellaM@state.gov* or Tia Potskhverashvili, (202) 395–5414, *tiapots@ustr.eop.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Department of State and USTR invite written comments or questions from the public to be submitted no later than

February 16, 2024, regarding implementation of Chapter 16 and the MOU, and any topics that should be considered for discussion at the Subcommittee and Joint Forum meetings consistent with their respective purposes. When preparing comments, submitters are encouraged to refer to Chapter 16 of the FTA and/or the MOU, as relevant (available at *https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/current-trade-agreements-with-environmental-chapters/#bahrain* and *https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta*). Instructions on how to submit comments are under the heading **ADDRESSES**.

Article 16.5 of the FTA provides for the establishment of a Subcommittee on Environmental Affairs to discuss matters related to the operation of Chapter 16. Article 16.5 further provides that, unless the Parties otherwise agree, meetings of the Subcommittee shall include a session in which members of the Subcommittee have an opportunity to meet with the public to discuss matters relating to the implementation of Chapter 16.

Section II of the MOU establishes a Joint Forum on Environmental Cooperation responsible for, among other things, establishing, reviewing, and assessing cooperative environmental activities under the MOU.

On February 21, 2024, the Subcommittee and Joint Forum will meet in a closed government-to-government session to (1) review implementation of Chapter 16 and (2) review activities under the 2022–2025 Plan of Action Under the United States-Bahrain Memorandum of Understanding on Environmental Cooperation Plan of Action.

All interested persons are invited to attend a joint public session on Chapter 16 implementation and environmental cooperation under the MOU, beginning at 5:30 a.m. EST (1:30 p.m. AST) on February 21, 2024. At the session, the Subcommittee and Joint Forum will welcome questions, input, and information about challenges and achievements in implementation of Chapter 16 and environmental cooperation under the MOU. If you would like to attend the public session either in-person, in Manama, Bahrain, or virtually, please notify Merideth Manella and Tia Potskhverashvili at the email addresses listed under the heading **ADDRESSES**.

Visit the Department of State website at *www.state.gov* and the USTR website at *www.ustr.gov* for more information.

Scott B. Ticknor,

Director, Office of Environmental Quality, U.S. Department of State.

[FR Doc. 2024–03027 Filed 2–13–24; 8:45 am]

BILLING CODE 4710–09–P

SUSQUEHANNA RIVER BASIN COMMISSION

General Permit Notice

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Grandfathering Registration for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: January 1–31, 2024.

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 General Permits for projects described below, pursuant to 18 CFR part 806.17(c)(4), for the time period specified above:

1. Harley-Davidson Motor Company, Inc.—York Plant, General Permit Approval of Coverage No. GP–01–20240101, Springettsbury Township, York County, Pa.; groundwater remediation system withdrawal approved up to 0.576 mgd (30-day average); Approval Date: January 23, 2024.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806 and 808.

Dated: February 8, 2024.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2024–02984 Filed 2–13–24; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Grandfathering (GF) Registration Notice

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Grandfathering Registration for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: January 1–31, 2024.

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 GF Registration for projects described below, pursuant to 18 CFR part 806, subpart E, for the time period specified above:

1. State University of New York at Morrisville—SUNY Morrisville, GF Certificate No. GF–202401267, Village of Morrisville, Madison County, N.Y.; combined withdrawals from Wells 1 and 2, and Well 3; Issue Date: January 19, 2024.

2. U.S. Silica Company—Mapleton Plant, GF Certificate No. GF–202401268, Brady Township, Huntingdon County, Pa.; Juniata River, Quarry Sump, and consumptive use; Issue Date: January 19, 2024.

3. York Building Products Co., Inc.—Lincoln Stone Quarry, GF Certificate No. GF–202401269, Jackson Township, York County, Pa.; Quarry Sump and consumptive use; Issue Date: January 19, 2024.

4. York Building Products Co., Inc.—Roosevelt Quarry, GF Certificate No. GF–202401270, West Manchester Township, York County, Pa.; Quarry Sump and consumptive use; Issue Date: January 19, 2024.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806 and 808.

Dated: February 8, 2024.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2024–02982 Filed 2–13–24; 8:45 am]

BILLING CODE 7040–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2023–0013]

Submission of Post-Hearing Comments: Operation of the United States-Mexico-Canada Agreement With Respect to Trade in Automotive Goods

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice and request for post-hearing comments.

SUMMARY: On February 7, 2024, the Office of the United States Trade Representative (USTR) and the Interagency Committee on Trade in Automotive Goods (Committee) held a virtual public hearing to receive oral testimony related to the biennial review of the operation of the United States-Mexico-Canada Agreement (USMCA) with respect to trade in automotive goods. USTR is accepting post-hearing comments until February 28, 2024.

DATES: February 28, 2024 at 5 p.m. EST: Deadline for submission of post-hearing briefs or supplementary materials related to the virtual public hearing.

ADDRESSES: USTR strongly prefers electronic submissions made through the Federal rulemaking Portal: *https://www.regulations.gov/* (*Regulations.gov*). Follow the instructions for submitting written submissions in section II below, using docket number USTR–2023–0013. For alternatives to on-line submissions, please contact Justin Hoffmann, Deputy Assistant U.S. Trade Representative for Market Access and Industrial Competitiveness, in advance of the deadline at (202) 395–2990 or *Justin.D.Hoffmann@ustr.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Justin Hoffmann, Deputy Assistant U.S. Trade Representative for Market Access and Industrial Competitiveness at (202) 395–2990 or *Justin.D.Hoffmann@ustr.eop.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In a notice published on November 22, 2023 (88 FR 81527) (November 22 notice), USTR requested public comments for the biennial review of the USMCA with respect to trade in automotive goods, and announced a virtual public hearing that was held on February 7, 2024. The November 22 notice included the hearing date, as well as the deadlines for requests to testify and the submission of written comments. An announcement regarding post-hearing submissions was made during the February 7, 2024 virtual hearing, and the transcript of the hearing will be available on *Regulations.gov* under Docket Number USTR–2023–0013.

This notice announces that interested parties may submit post-hearing briefs, supplementary materials, and statements by 5 p.m. EST on February 28, 2024.

II. Procedures for Written Submissions

To be assured of consideration, submit your post-hearing briefs or supplementary materials by the February 28, 2024, 5 p.m. EST deadline. All submissions must be in English. USTR strongly encourages submissions via *Regulations.gov*, using Docket Number USTR–2023–0013.

To make a submission via *Regulations.gov*, enter Docket Number USTR–2023–0013 in the 'search for' field on the home page and click 'search.' The site will provide a search results page listing all documents associated with this docket. Find a reference to this notice by selecting 'notice' under 'document type' in the 'refine documents results' section on the left side of the screen and click on the link entitled 'comment.' *Regulations.gov* allows users to make submissions by filling in a 'type comment' field, or by attaching a document using the 'upload file' field. USTR prefers that you provide submissions in an attached document and that you write 'see attached' in the 'type comment' field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If you use an application other than those two, please indicate the name of the application in the 'type comment' field.

At the beginning of your submission or on the first page (if an attachment), include the following text: (1) 2024 USMCA Autos Report; (2) your organization's name; and (3) that it is a post-hearing submission. Please do not attach separate cover letters, exhibits, annexes, or other attachments to electronic submissions; rather, include any in the same file as the submission itself, not as separate files. You will receive a tracking number upon completion of the submission procedure at *Regulations.gov*. The tracking number is confirmation that *Regulations.gov* received your submission. Keep the confirmation for your records. USTR is not able to provide technical assistance for *Regulations.gov*.

For further information on using *Regulations.gov,* please consult the resources provided on the website by clicking on 'How to Use *Regulations.gov*' on the bottom of the home page. USTR may not consider submissions that you do not make in accordance with these instructions.

If you are unable to provide submissions as requested, please contact Justin Hoffmann, Deputy Assistant U.S. Trade Representative for Market Access and Industrial Competitiveness, in advance of the deadline at *Justin.D.Hoffmann@ustr.eop.gov* or (202) 395–2990, to arrange for an alternative method of transmission. USTR will not accept hand-delivered submissions. General information concerning USTR is available at *www.ustr.gov.*

If you ask USTR to treat information you submit as business confidential information (BCI), you must certify that the information is business confidential and you would not customarily release it to the public. For any comments submitted electronically containing BCI, the file name of the business confidential version should begin with the characters 'BCI.' You must clearly mark any page containing BCI with 'BUSINESS CONFIDENTIAL' at the top of that page. Filers of submissions containing BCI also must submit a public version of their submission that will be placed in the docket for public inspection. The file name of the public version should begin with the character 'P.'

USTR will post written submissions in the docket for public inspection, except properly designated BCI. You can view submissions at *Regulations.gov* by entering Docket Number USTR–2023–0013 in the search field on the home page.

Juan Millan,

Acting General Counsel, Office of the United States Trade Representative.

[FR Doc. 2024–03050 Filed 2–13–24; 8:45 am]

BILLING CODE 3390–F4–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2024–0003]

Award Management Requirements Circular (C 5010.1) Proposed Updates

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of availability of proposed circular updates and request for comments.

SUMMARY: The Federal Transit Administration (FTA) is seeking public comment on proposed updates to FTA's Award Management Requirements circular (C 5010.1). The proposed updates combine requirements applicable to all FTA financial

assistance awards (referred to as ''cross-cutting'' requirements) and, when final, will supersede parts of three separate FTA circulars (the proposed ''Grant Programs for Urbanized Areas'', ''Formula Grants for Rural Areas'' (C 9040.1G), and ''Enhanced Mobility of Seniors and Individuals with Disabilities'' (C 9070.1G)). The proposed updates also reflect changes made by the Fixing America's Surface Transportation (FAST) Act; the Infrastructure Investment and Jobs Act (IIJA), also known as the Bipartisan Infrastructure Law (BIL)); the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; and other updates to FTA policies and procedures.

DATES: Comments must be submitted by April 15, 2024. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by only one of the following methods, identifying your submission by docket number FTA–2024–0003. All electronic submissions must be made to the U.S. Government electronic site at *https://www.regulations.gov/.*

(1) *Federal eRulemaking Portal:* Go to *https://www.regulations.gov/* and follow the online instructions for submitting comments.

(2) *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

(3) *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.

(4) *Fax:* 202–493–2251.

Instructions: You must include the agency name (Federal Transit Administration) and Docket number (FTA–2024–003 for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA received your comments, include a self-addressed stamped postcard. Note that all comments received will be posted without change to *https://www.regulations.gov/* including any personal information provided and will be available to internet users. For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

Docket: For access to the docket to read background documents and comments received, go to *https://www.regulations.gov/* at any time or to the U.S. Department of Transportation, 1200 New Jersey Ave. SE, Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For award management questions, Latrina Trotman, Office of Program Management, Federal Transit Administration, 1200 New Jersey Ave. SE, Room E46–301, Washington, DC 20590, phone: (202) 366–2328, or email, *Latrina.Trotman@dot.gov.* For legal questions, Jerry Stenquist, Office of Chief Counsel, same address, Room E56–314, phone: (202) 493–8020, or email, *Jerry.Stenquist@dot.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents:

I. Overview

FTA proposes an update to its Award Management Requirements Circular (C 5010.1). The proposed circular updates summarize FTA and Federal-wide administrative requirements for financial assistance awards while consolidating pre-existing cross-cutting guidance from previous FTA program circulars and reducing duplicative information repeated in separate circulars. The proposed circular updates also incorporate provisions of the Fixing America's Surface Transportation (FAST) Act, the Infrastructure Investment and Jobs Act (IIJA), and new or updated administrative requirements from 2 CFR parts 200 and 1201. Additionally, the updates clarify existing policy issues as interpreted and applied by FTA. Furthermore, the circular includes updated FTA policy regarding real property status reporting, the incidental use of FTA-funded project property, and transfer of real property to third party entities for affordable housing. The proposed circular updates also increase the use of graphics, tables, and weblinks to improve clarity. A copy of the proposed updated circular will be placed in the docket, and posted on FTA's Proposed Circulars web page (*https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/proposed-circulars*).

II. Chapter-by-Chapter Analysis

A. Chapter I—Introduction and Background

Due to the consolidation of three program circulars, definitions and program descriptions were compared and revised for consistency with proposed revisions and updates to the following FTA circulars: the proposed ''Grant Programs for Urbanized Areas'', ''Formula Grants for Rural Areas'' (C 9040.1G), and ''Enhanced Mobility of Seniors and Individuals with Disabilities'' (C 9070.1G). FTA proposes to amend the definitions section for consistency, clarification, and to reflect changes to statute and other authorities. Specifically, FTA has updated the following terms:

- ''Amendment'' has been added for consistency with the three program circulars.
- ''Capital Asset'' is modified for consistency with 2 CFR 200.1.
- ''Concurrent Non-Project Activities'' has been removed and requirements have been relocated to the body of the circular.
- ''Excess Real Property Inventory and Utilization Plan'' has been removed as information is required in the revised Real Property Status Report.
- ''Facilities'' has been updated to add fixed guideways.
- ''Federal Interest'' has been updated to better align with FTA and Federal regulations, including in cases where fair market value determinations are not readily discernable.
- ''Incidental Use'' has been updated to align with FTA and Federal requirements to ensure that recipients maintain satisfactory continuing control over FTA funded property.
- ''National Environmental Policy Act'' has been updated to clarify the role in FTA funded projects. Requirements have been moved to the body of the circular.
- ''Operating Expenses'' has been updated to clarify the differentiation from capital expenses.
- ''Pre-award Authority'' has been updated to clarify the process in which announcements and notifications occur.
- ''Program of Projects'' has been updated to align with changes made in other FTA circulars.
- ''Real Property'' has been modified for consistency with 2 CFR 200.1.
- ''Real Property Inventory'' has been renamed the Real Property Status Report and has been updated to reflect the revised requirements of 2 CFR 200.330.
- ''Remaining Federal Interest for Dispositions Before the End of the Useful Life of Project Property'' has been deleted and requirements have

been relocated to the body of the circular.

• ''Remaining Federal Interest in Federally Assisted Property'' has been deleted and requirements have been relocated to the body of the circular.

• ''Rolling Stock Repowering'' has been updated and requirements have been moved to the body of the circular.

• ''Satisfactory Continuing Control'' has been updated to more closely align with FTA and Federal requirements for the use of, and Federal interest in, project property.

• ''Shared Use'' has been updated for clarity and differentiation from ''incidental use'' as defined in the circular. Requirements have been relocated to the body of the circular.

• ''Unobligated Balance'' has been updated to provide concept clarifications. Methodology and reporting requirements have been relocated to the body of the circular.

• ''Urbanized Area'' has been updated to reflect changes in designation by the Census Bureau, which no longer utilizes ''Urbanized Area'' but ''Urban Area'' (UZA), as defined by the Secretary of Commerce.

• ''Useful Life'' clarifies applicability to real property and other capital assets. Because useful life depends on depreciation and estimated time in use, expected minimum useful life changes according to the type of asset in question. Furthermore, ''Useful Life'' has been updated to clarify the relationship between the measurement of property use and federal financial interest in project property. The revised definition also distinguishes from the ''useful life benchmark'' concept utilized by the Transit Asset Management (TAM) System.

In addition, FTA proposes updates to the list of abbreviations and acronyms provided in the circular to better reflect agency standards for references and text additions found elsewhere in the body of the circular.

B. Chapter II—Circular, FTA Programs, and Grants Management

Chapter II of the proposed circular updates provide an overview of the requirements and procedures for the management of all applicable FTA programs authorized under 49 U.S.C. Chapter 53. Additionally, this chapter provides an overview of the government-wide requirements applicable to FTA awards. This chapter's updates reflect statutory and regulatory requirements enacted since the issuance of previous versions of this circular. Major updates in this chapter include:

• Updating the list of FTA programs to which the circular will apply. This includes the addition of program descriptions for the Rural Transportation Assistance Program (RTAP) (Section 5311(b)(3)) and the Intercity Bus Program (Section 5311(f)) as well as the removal of program descriptions of programs that are no longer active.

• Updating the roles and responsibilities of the recipient to clarify the necessary timing of funding drawdown requests.

• Updating FTA's coordination of triennial and state management reviews and substantial involvement in cooperative agreements.

• Disadvantaged Business Enterprise (DBE) program goals and requirements located throughout the circular.

• Adding descriptions of the Build America, Buy America Act (BABA) domestic preference requirements, which apply in addition to FTA's longstanding Buy America statute.

• Amending the ''Buy America Domestic Preference'' subsection to reflect updates made by 2 CFR part 184 implementing the Build America, Buy America Act (BABA), primarily affecting FTA-funded infrastructure projects by adding domestic preferences for construction materials and additional procedures related to Buy America waivers.

• Within the ''Design and Construction of Facilities'' subsection, distinguishing FTA's Project and Construction Management Guidelines from the Construction Project Management Handbook.

• Adding a subsection entitled ''Title VI Equity Analysis for Facilities'' to better inform recipients of the requirement to conduct such analyses.

• A subsection on project signage has been added to address FTA's project signage preferences for FTA assisted projects. This subsection includes guidelines for displaying agency logos, incorporating text, placement of signage, and associated costs, among other signage guidance.

C. Chapter III—Award Development and Administration

This chapter describes the requirements for administering an award made by FTA. Chapter III is reorganized to include both pre-award and post-award administrative requirements. The Chapter's updates consolidate established cross-cutting requirements as well as those based on newly enacted statute or regulation. Major updates within this chapter include:

• An award lifecycle graphic provides an overview of the major phases of an award.

• Updates to the ''Metropolitan and Statewide Planning Requirements'' incorporating information from the relevant program circulars and the Statewide Transportation Improvement Plan (STIP) and Transportation Improvement Plan (TIP) processes.

• Updates to the ''Multiple Designated Recipients in Large UZAs'' subsection more accurately reflecting FTA expectations for coordination among local officials.

• Expansion of the ''Force Account'' subsection to include additional explanation of the FTA approval process.

• Reorganization of the ''Certifications and Assurances'' subsection by general capacities, standard assurances, and certification procedures.

• Expansion of the ''Application Process'' subsection clarifying the requisite structure of award budgets in the Transit Award Management System (TrAMS).

• Updates to the ''Reporting Requirements for Post Award Administration'' subsection to include planning reports for multiple activities, projects, and awards.

• An expansion of the guidance on the ''Federal Financial Report (FFR)'' subsection to include the reporting of approved Indirect Cost Rate Proposals or Cost Allocation Plans.

• Updates to the ''Budget Revision'' subsection consolidating the requirements and procedures for revising award budgets.

• Clarification regarding an award's period of performance and related eligibilities of costs incurred after the award end date.

• Updates to the subsection on ''Changes to Discretionary Awards or Earmarks'' highlighting the necessity of the competitive process and pre-award negotiations.

• Updates to the Adjustments to the ''Federal Share of Costs'' subsection clarifying that recipients are required to refund any costs FTA disallows during or after the award closeout process.

• Broadening of, and change to, the ''Disposition of Equipment and Supplies'' subsection to the ''Disposition of Property'' subsection.

• Relocation of property disposition procedures to Chapter IV.

D. Chapter IV—Property Administration and Award Management

Chapter IV of the proposed circular updates reorganize and update the award management requirements

regarding real property and equipment administration. This chapter provides guidance on the acquisition, management, use, and disposition of FTA assisted property, including facilities purchased or constructed, and rolling stock, other equipment, and supplies procured under an FTA award. The updated requirements are in accordance with 2 CFR part 200, authorizing and appropriating legislation, and other Federal property requirements. In addition, much of the content within the chapter has been reorganized and consolidated. Some of the major changes include:

- A reorganization and consolidation of the real property and equipment requirements into separate sections.
- An overview of Transit Asset Management (TAM) regulations that impact FTA assisted property has been moved under the General heading of Chapter IV.
- Updates to the ''Appraisal Review of Real Estate'' subsection to clarify the requirements and FTA expectations for a technical analysis and review of appraisal reports. Additional guidance has been made regarding the qualifications of review appraisers and FTA concurrence requirements. For Major Capital projects, FTA is proposing to reduce submission requirements for projects with an approved Real Estate Acquisition Management Plan.
- Updates to concurrence requirements for incidental uses of project property within the subsections ''Property Management for Real Property'' and ''Incidental Use for Non-Transit Uses of FTA Assisted Real Property'', including specifying of circumstances in which a recipient must notify or seek concurrence from FTA in advance of its incidental uses of project property.
- Retitling of the ''Real Property Inventory'' subsection to ''Real Property Status Report'' and updating the subsection to reflect the current requirements in 2 CFR 200.330 that recipients must submit a real property status report to FTA every three years. FTA proposes the minimum elements of such reports. Additionally, FTA proposes in its policy that these recipients shall generally submit these reports to FTA as part of the triennial or state management review process. The Real Property reporting requirements apply to all FTA assisted real property held by a recipient, regardless of the date real property was acquired or improved. Any recipient not subject to a Triennial or State Management Review should discuss the timing of the report submissions with their regional office.
- A new subsection, ''Transfers for Affordable Housing'', which incorporates a new disposition option added in 49 U.S.C. 5334(h)(1)(B) that allows a recipient to dispose of an asset with no repayment to the Federal Government if it will be used for a transit-oriented development that includes a minimum amount of affordable housing, as a percentage of the total floor area.
- Updates to the subsection ''Incidental use for Equipment and Supplies (including Rolling Stock)'', specifying the circumstances in which a recipient must notify and seek concurrence from FTA in advance of its incidental uses of project property.
- Updates to the subsection ''Leases'' clarifying the eligibility of Federal funding of capital lease payments as distinguished from payments for operating leases, including the removal of cost analyses as a prerequisite for payment eligibility as repealed by the FAST Act.
- Updates to the ''Management of Federally Assisted Property'' subsection for equipment and rolling stock with more clearly defined requirements for equipment records.
- Updates to the ''Maintenance and Warranty'' subsection for equipment and rolling stock to clarify the requirement for recipients to develop and implement maintenance procedures for FTA funded equipment.
- Updates to the ''Disposition of Equipment and Supplies'' subsection to clarify reimbursement requirements to resolve FTA's remaining share.
- Addition of a subsection ''Vehicle Components (Including Converted Vehicles) at End of Minimum Useful Life'' outlining requirements governing the retention and disposition of vehicle components after disposition of the vehicle. In the event that a recipient disposes of a vehicle but retains vehicle components, recipients must treat the component the same as other Federally funded equipment, including maintaining records identifying the retained vehicle components in its equipment inventory until disposition of the retained components. FTA continues to retain a Federal interest in any vehicle components retained or repurposed by the recipient. The Federal interest will continue to be proportional to the Federal share of participation in the vehicle acquisition. The remaining components must be valued at the time of removal from the vehicle.
- Updates to the subsection ''Insurance Proceeds for Equipment and Rolling Stock'' including clarifications for applying or repaying insurance proceeds for equipment or rolling stock with an FTA interest.
- Updates to the subsection ''Disposition or Use of Assets for Other Than Purposes of the Award after the End of Their Useful Life'' setting forth the requirements in 49 U.S.C. 5334(h) for retaining, using, and disposing of property with a fair market value of more or less than $5,000.

E. Chapter V—FTA Oversight

This chapter provides an overview of the FTA framework for evaluating recipient adherence to program and administrative requirements through a comprehensive oversight program. FTA determines compliance through self-certification, oversight review, audits, and site visits. Major updates include:

- Reorganization of the subsection ''Financial Management'' to clarify major types of financial management oversight reviews.

F. Chapter VI—Financial Management

This chapter discusses requirements for the use and management of Federal assistance. Chapter VI changes include a reorganization and updates to information on non-Federal share of awards, indirect costs, program income, and single audits. Significant updates include:

- The subsection ''Non-Federal Share'' has been updated to clarify what FTA considers an amount over the required match and a reference added to 2 CFR 200.306.
- The subsection ''Transportation Development Credits under Additional Sources of Non-Federal Share'' has been reorganized to clarify requirements for the use of, and the process for, determining the availability of such credits.
- The subsection ''In-Kind Contributions of Real Property under Additional Sources of Non-Federal Share'' has been updated to clarify requirements governing the applicability of an FTA interest when real property is used as local match.
- The subsection ''Indirect Costs'' has been reorganized and updated with additional information explaining the eligibility of indirect costs for FTA reimbursement.
- The subsection ''Cognizant Federal Agency under Indirect Costs'' has been updated with additional information regarding FTA's determination of the cognizant agency receiving FTA assistance. This determination is based on appendix V of 2 CFR part 200.
- The subsection on ''Plans and Proposals under Indirect Costs'' has been updated with clarifications regarding FTA approval requirements

for Cost Allocation Plans or Indirect Cost Rate Proposals as well as for the election of the de minimis indirect cost rate.

• The subsection on ''Single Audits'' has been updated with additional information on the resolution of audit findings, including provisions for FTA technical advice and counsel.

G. Appendices

FTA proposes revisions to the organization of the various appendices in this circular and the three program circulars it would supersede upon becoming final. Appendices have been moved, relabeled, updated, or removed. The revised structure of the appendices and an overview of major updates is included below:

• Appendix A: Required Prerequisite Documentation

○ This appendix was added to capture guidance for key documents recipients must certify before receiving awards.

• Appendix B: Award Development

○ This appendix was added as a compilation of guidance previously provided across the program circulars. Appendix B is designed to provide instruction for preparing an FTA application, developing an award budget, and information regarding an approved award budget. The appendix covers topics during the pre-application stage, at application submission, for developing an award budget, executing award approvals, a recommended application checklist, and examples related to award management.

• Appendix C: Post-Award Modification

○ This appendix was added as a compilation of guidance previously provided across the program circulars. Appendix C has clarifications for common post-award changes. Post-award changes are primarily made through a revision to the award budget, an ''administrative'' amendment, or an amendment. The appendix provides enhanced guidance on the requirements for prior approval from FTA and more information on when either a budget revision, administrative amendment, or amendment is appropriate.

• Appendix D: Real Estate Acquisition Management Plan

○ The updates include minor reorganization of information to clarify elements of a Real Estate Acquisition Management Plan.

• Appendix F: Rolling Stock Status Report

○ Updates have been made to the list of elements included in the Rolling Stock Status Report to better align with requirements listed in the body of Chapter IV. FTA proposes minor edits to reflect changes made to the subsection ''Replacements at the End of the Minimum Useful Life.''

• Appendix G: Equipment Disposition Scenarios

○ The appendix has been added to consolidate the equipment disposition scenarios previously provided within the body of this circular and the circulars that would be superseded by this circular.

• Appendix H: Cost Allocation Plans

○ Clarifications have been made to the Submission Requirements subsection to incorporate 2 CFR part 200 reference.

○ A section ''Cost Allocation Plan Review and Approval'' has been added which consolidates the requirements for recipients to submit their Cost Allocation Plan for review and approval.

• Appendix I: Indirect Cost Rate Proposals

○ Clarifying edits have been made throughout to enhance guidance surrounding the requirements for preparation, submission, and FTA approval of Indirect Cost Rate Proposals.

○ References to applicable 2 CFR part 200 requirements have been incorporated.

○ Cost Allocation Plan information has been moved incorporated into Appendix H.

Closing

After a review and consideration of the comments provided on the updates proposed, FTA will publish the updated Award Management Requirements circular (C 5010.1) on its website. On October 5, 2023, the Office of Management and Budget (OMB) published a notice of proposed rulemaking (NPRM) in the **Federal Register** to revise 2 CFR part 200 and other OMB guidance for grants and agreements (88 FR 69390). FTA intends to incorporate any changes in 2 CFR part 200 to the extent OMB issues the final rule before FTA publishes the updated circular.

Nuria I. Fernandez,

Administrator.

[FR Doc. 2024–03044 Filed 2–13–24; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

[Docket No. DOT–OST–2015–0070]

Joint Application of Delta Air Lines, Inc. and Aerovias de Mexico, S.A. de C.V. for Approval of and Antitrust Immunity for Alliance Agreements

AGENCY: Office of the Secretary of Transportation (OST), Department of Transportation (DOT).

ACTION: Notice of order to show cause and order extending comment period.

SUMMARY: The United States Department of Transportation is required to give notice in the **Federal Register** that it has issued an Order to Show Cause tentatively dismissing without prejudice the application of Delta Air Lines (''Delta'') and Aerovias de Mexico, S.A. (''Aeromexico'') (collectively the ''Joint Applicants'') to renew the Department's approval and grant of antitrust immunity (''ATI'') for their Joint Cooperation Agreement (''JCA'') and alliance agreements. Subsequently, upon motion of the Joint Applicants, the Department issued an Order extending the comment period. Interested stakeholders are invited to submit comments on the tentative decision.

DATES: Objections or comments to the Department's tentative findings and conclusions were initially due no later than 14 calendar days from the service date of the Order (*i.e.,* February 9, 2024), and answers to objections were to be due no later than seven (7) business days thereafter (*i.e.,* February 21, 2024). In a subsequent motion, the Joint Applicants petitioned for an extension of the comment period. The Department partially granted the request; objections or comments to the Department's tentative findings are now due no later than February 23, 2024, and answers to objections are now due no later than March 5, 2024. If no objections are filed, all further procedural steps shall be deemed waived, and we may enter an order making final our tentative findings and conclusions.

ADDRESSES: You may send comments, identified by docket number DOT–OST–2015–0070, via the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for sending comments. In addition, comments must be properly served on all interested parties in accordance with the Department's procedural regulations (14 CFR part 302).

FOR FURTHER INFORMATION CONTACT: Jason Horner, Transportation Industry

Analyst, Office of Aviation Analysis, 1200 New Jersey Ave. SE, Washington, DC 20590; telephone (202) 366–5903; email *jason.horner@dot.gov.*

SUPPLEMENTARY INFORMATION: 14 CFR 303.43 requires that ''[n]otice to the public of any . . . order to show cause concerning an application shall be made by publication in the **Federal Register**.'' Accordingly, through this **Federal Register** Notice, the Department gives ''notice to the public'' that on January 26, 2024, the Department issued an Order to Show Cause (Order 2024–1–17, ''Show Cause Order'') tentatively dismissing without prejudice the application of Delta and Aeromexico to renew the Department's approval and grant of antitrust immunity (''ATI'') for their Joint Cooperation Agreement. On January 29, 2024, the Joint Applicants petitioned the Department for additional time for objections and comments to the Show Cause Order. On February 7, 2024, the Department issued an Order Extending Comment Period (Order 2024–2–6, ''Order Extending Comment Period'') by two weeks.

The Show Cause Order and the Order Extending Comment Period have both been posted in docket DOT–OST–2015–0070 at *www.regulations.gov.* The Show Cause Order directs all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions discussed therein. Objections or comments to our tentative findings and conclusions shall now, pursuant to the Joint Applicant's motion and a subsequent Order by the Department, be due no later than 28 calendar days from the service date of the Order (*i.e.,* February 23, 2024), and answers to objections shall be due no later than seven (7) business days thereafter (*i.e.,* March 5, 2024). If no objections are filed, all further procedural steps shall be deemed waived, and we may enter an order making final our tentative findings and conclusions.

Dated: February 8, 2024.

Todd Homan,

Director, Office of Aviation Analysis, U.S. Department of Transportation.

[FR Doc. 2024–02976 Filed 2–13–24; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–OCC–2024–0003]

Mutual Savings Association Advisory Committee

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The OCC announces a meeting of the Mutual Savings Association Advisory Committee (MSAAC).

DATES: A public meeting of the MSAAC will be held on Tuesday, March 5, 2024, beginning at 8:30 a.m. eastern standard time (EST). The meeting will be in person and virtual.

ADDRESSES: The OCC will host the March 5, 2024, meeting of the MSAAC at the OCC's offices at 400 7th Street SW, Washington, DC 20219 and virtually.

FOR FURTHER INFORMATION CONTACT: Michael R. Brickman, Deputy Comptroller for Specialty Supervision, (202) 649–5420, Office of the Comptroller of the Currency, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services. You also may access prior MSAAC meeting materials on the MSAAC page of the OCC's website.[1]

SUPPLEMENTARY INFORMATION: Under the authority of the Federal Advisory Committee Act (the Act), 5 U.S.C. 1001 *et seq.,* and the regulations implementing the Act at 41 CFR part 102–3, the OCC is announcing that the MSAAC will convene a meeting on Tuesday, March 5, 2024. The meeting is open to the public and will begin at 8:30 a.m. EST. The purpose of the meeting is for the MSAAC to advise the OCC on regulatory or other changes the OCC may make to ensure the health and viability of mutual savings associations. The agenda includes a discussion of current regulatory and policy topics of interest to the industry, for example, updates on economic trends affecting mutual savings associations and the implementation of rules and policies that affect the operations and consumer compliance activities of mutual savings associations. The agenda also includes a Roundtable discussion with MSAAC members and OCC staff.

Members of the public may submit written statements to the MSAAC. The OCC must receive written statements no later than 5:00 p.m. EST on Thursday, February 29, 2024. Members of the public may submit written statements to *MSAAC@occ.treas.gov.*

Members of the public who plan to attend the meeting should contact the OCC by 5 p.m. EST on Thursday, February 29, 2024, to inform the OCC of their desire to attend the meeting and whether they will attend in person or virtually, and to obtain information about participating in the meeting. Members of the public may contact the OCC via email at *MSAAC@OCC.treas.gov* or by telephone at (202) 649–5420. Attendees should provide their full name, email address, and organization, if any. For persons who are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to arrange telecommunications relay services for this meeting.

Michael J. Hsu,

Acting Comptroller of the Currency.

[FR Doc. 2024–03009 Filed 2–13–24; 8:45 am]

BILLING CODE 4810–33–P

[1] *https://occ.gov/topics/supervision-and-examination/bank-management/mutual-savings-associations/mutual-savings-association-advisory-committee.html.*

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Preparer Hardship Waiver Request and Preparer Explanation for Not Filing Electronically

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning preparer hardship waiver request and preparer explanation for not filing electronically.

DATES: Written comments should be received on or before April 15, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include OMB control number 1545–2200 or Preparer Hardship Waiver

Request and Preparer Explanation for Not Filing Electronically.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Preparer Hardship Waiver Request and Preparer Explanation for Not Filing Electronically.

OMB Number: 1545–2200.

Form Number(s): 8944 and 8948.

Abstract: A tax preparer uses Form 8944 to request a waiver from the requirement to file tax returns on magnetic media when the filing of tax returns on magnetic media would cause a hardship. A specified tax return preparer uses Form 8948 to explain which exception applies when a covered return is prepared and filed on paper.

Current Actions: There are no changes being made to the forms or burden at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Form 8944

Estimated Number of Respondents: 90,000.

Estimated Number of Responses: 90,000.

Estimated Time per Response: 1 hour.

Estimated Annual Burden Hours: 719,100 hours.

Form 8948

Estimated Number of Respondents: 180,000.

Estimated Number of Responses: 740,500.

Estimated Time per Response: 160 hours.

Estimated Annual Burden Hours: 1,473,595 hours.

Total Burden Estimates

Estimated Total Respondents: 830,500.

Estimated Total Annual Burden Hours: 2,192,695 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 7, 2024.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2024–03033 Filed 2–13–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on the Readjustment of Veterans, Notice of Meeting, Amended

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C., Ch. 10., that the Advisory Committee on the Readjustment of Veterans will hold a meeting virtually. The meeting will begin, and end as follows:

Date	Time	Open session
March 5, 2024	2:30 p.m. to 3:00 p.m. Eastern Standard Time (EST).	Yes.

The meeting is open to the public.

The purpose of the Committee is to advise the Department of Veterans Affairs (VA) regarding the provision by VA of benefits and services to assist Veterans in the readjustment to civilian life. In carrying out this duty, the Committee shall take into account the needs of Veterans who served in combat theaters of operation. The Committee assembles, reviews, and assesses information relating to the needs of Veterans readjusting to civilian life and the effectiveness of VA services in assisting Veterans in that readjustment.

The Committee, comprised of 14 subject matter experts, advises the Secretary, through the VA Readjustment Counseling Service, on the provision by VA of benefits and services to assist Veterans in the readjustment to civilian life. In carrying out this duty, the Committee assembles, reviews, and assesses information relating to the needs of Veterans readjusting to civilian life and the effectiveness of VA services in assisting Veterans in that readjustment, specifically taking into account the needs of Veterans who served in combat theaters of operation.

On March 7, 2024, the agenda will include review of the 24th report, a calendar forecast and discussion over subject matter experts to consider presenting at the next full Committee meeting. The Committee will meet from 2:30 p.m.–3:00 p.m. EST, for public members wishing to provide oral comments or join the meeting, please use the following Microsoft Teams link: *https://teams.microsoft.com/l/meetup-join/19%3ameeting_OTgxZGM5OGQtYTJhZi00ZGRlLTk3MjgtZTYzZTQ2YzEzZWEw%40thread.v2/0?context=%7b%22Tid%22%3a%22e95f1b23-abaf-45ee-821d-b7ab251ab3bf%22%2c%22Oid%22%3a%228aa84165-5b4e-40e7-8e32-63a80c0bd33a%22%7d*.

The Committee will also accept written comments from interested parties on issues outlined in the meeting agenda or other issues regarding the readjustment of Veterans. Parties should contact Mr. Richard Barbato via email at *VHARCSStratAnalysis@va.gov,* or by mail at Department of Veterans Affairs, Readjustment Counseling Service (10RCS), 810 Vermont Avenue, Washington, DC 20420. Any member of the public seeking additional information should contact Mr. Barbato at the phone number or email address noted above.

Dated: February 9, 2024.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2024–03046 Filed 2–13–24; 8:45 am]

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FEDERAL REGISTER

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No. 31 February 14, 2024

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Empire Wind Project, Offshore New York; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 240118–0017]

RIN 0648–BL97

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Empire Wind Project, Offshore New York

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

ACTION: Final rule; notification of issuance of letter of authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS promulgates regulations to govern the incidental taking of marine mammals incidental to Empire Offshore Wind, LLC (Empire Wind), a 50–50 partnership between Equinor, ASA (Equinor) and BP p.l.c., during the construction of an offshore wind energy project (the Project) in Federal and State waters off of New York, specifically within the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Area (OCS–A–512) (referred to as the Lease Area) and along two export cable routes to sea-to-shore transition points (collectively, the Project Area), over the course of 5 years (February 22, 2024, through February 21, 2029). These regulations, which allow for the issuance of a Letter of Authorization (LOA) for the incidental take of marine mammals during specific construction related activities within the Project Area during the effective dates of the regulations, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking. Upon publication of this final rule and within 30 days, NMFS will issue a LOA to Empire Wind for the effective period of the final rule.

DATES: This rulemaking and issued LOA are effective from February 22, 2024, through February 21, 2029.

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of Empire Wind's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

This final rule, as promulgated, provides a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to construction of the Empire Wind project within the Lease Area and along export cable corridors to landfall locations in New York. To allow this to occur, NMFS received a request from Empire Wind for 5-year regulations and a LOA that would authorize take of individuals of 17 species of marine mammals, comprising 18 stocks (two species by Level A harassment and Level B harassment and 17 species by Level B harassment only) incidental to Empire Wind's construction activities. No mortality or serious injury was requested, nor is it anticipated or authorized in this final rulemaking. Please see the *Legal Authority for the Final Action* section below for definitions of harassment, serious injury, and incidental take.

Legal Authority for the Final Action

As noted in the Changes from the Proposed to Final Rule section, we have added regulatory definitions for terms used in this final rule. These changes are described, in detail, in the sections below and, otherwise, the description of the legal authority has not changed since the proposed rule.

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are promulgated (when applicable), and public notice and an opportunity for public comment are provided.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

As noted above, no serious injury or mortality is anticipated or authorized in this final rule. Relevant definitions of MMPA statutory and regulatory terms are included below:

- *Citizen*—individual U.S. citizens or any corporation or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13) (50 CFR 216.103);
- *Take*—to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362);
- *Incidental taking*—an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental (see 50 CFR 216.103);
- *Serious Injury*—any injury that will likely result in mortality (50 CFR 216.3);
- *Level A harassment*—any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362; 50 CFR 216.3); and
- *Level B harassment*—any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (16 U.S.C. 1362).

Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I, provide the legal basis for proposing and, if appropriate, issuing this rule containing 5-year regulations and associated LOA. This final rule also establishes required mitigation, monitoring, and reporting requirements for Empire Wind's construction activities.

Summary of Major Provisions Within the Final Rule

The major provisions within this final rule include:

- The authorized take of marine mammals by Level A harassment and/or Level B harassment;
- No mortality or serious injury of any marine mammal is authorized;
- The establishment of a seasonal moratorium on impact pile driving foundation piles during the months of the highest presence of North Atlantic right whales (*Eubalaena glacialis*) in the Project Area (January 1 to April 30 annually);
- A requirement for both visual and passive acoustic monitoring (PAM) to occur by trained, NOAA Fisheries-approved Protected Species Observers (PSOs) and PAM (where required) operators before, during, and after select activities;
- The establishment of clearance and shutdown zones for all in-water construction activities to prevent or reduce the risk of Level A harassment and to minimize the risk of Level B harassment;
- A requirement to use sound attenuation device(s) during all impact pile driving installation activities to reduce noise levels;
- A delay to the start of foundation installation if a North Atlantic right whale is observed at any distance by PSOs or acoustically detected;
- A delay to the start of foundation installation if other marine mammals are observed entering or within their respective clearance zones;
- A requirement to shut down pile driving (if feasible) if a North Atlantic right whale is observed or if other marine mammals are observed entering their respective shutdown zones;
- A requirement to implement sound field verification (SFV) requirements during impact pile driving of foundation piles to measure in situ noise levels for comparison against the modeled results;
- A requirement to implement soft starts during impact pile driving using the least hammer energy necessary for installation;
- A requirement to implement ramp-up during the use of high-resolution geophysical (HRG) marine site characterization survey equipment;
- A requirement for PSOs to continue to monitor for 30 minutes after any impact pile driving for foundation installation;
- A requirement for the increased awareness of North Atlantic right whale presence through monitoring of the appropriate networks and Channel 16, as well as reporting any sightings to the sighting network;
- A requirement to implement various vessel strike avoidance measures;
- A requirement to implement measures during fisheries monitoring surveys, such as removing gear from the water if marine mammals are considered at-risk or are interacting with gear; and
- A requirement for frequently scheduled and situational reporting including, but not limited to, information regarding activities occurring, marine mammal observations and acoustic detections, and SFV monitoring results.

Under section 105(a)(1) of the MMPA, failure to comply with these requirements or any other requirements in a regulation or permit implementing the MMPA may result in civil monetary penalties. Pursuant to 50 CFR 216.106, violations may also result in suspension or withdrawal of the LOA for the Project. Knowing violations may result in criminal penalties, under section 105(b) of the MMPA.

Fixing America's Surface Transportation Act (FAST–41)

This project is covered under title 41 of the Fixing America's Surface Transportation Act, or ''FAST–41.'' FAST–41 includes a suite of provisions designed to expedite the environmental review for covered infrastructure projects, including enhanced interagency coordination as well as milestone tracking on the public-facing Permitting Dashboard. FAST–41 also places a 2-year limitations period on any judicial claim that challenges the validity of a Federal agency decision to issue or deny an authorization for a FAST–41 covered project (42 U.S.C. 4370m–6(a)(1)(A)).

The Project is listed on the Permitting Dashboard, where milestones and schedules related to the environmental review and permitting for the Project can be found at *https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/empire-wind-energy-project.*

Summary of Request

On December 7, 2021, Empire Wind submitted a request for the promulgation of regulations and issuance of an associated 5-year LOA to take marine mammals incidental to construction activities associated with implementation of the Project (offshore of New York in BOEM Lease Area OCS–A–0512. The request was for the incidental, but not intentional, taking of a small number of 17 marine mammal species (comprising 18 stocks). Neither Empire Wind nor NMFS expects any serious injury or mortality to result from the specified activities, nor has NMFS authorized any.

In response to our questions and comments, and following extensive information exchange between Empire Wind and NMFS, Empire Wind submitted a final, revised application on August 8, 2022. NMFS deemed it adequate and complete on August 11, 2022. This final application is available on NMFS' website at *https://www.fisheries.noaa.gov/protected-resource-regulations.*

On September 9, 2022, NMFS published a notice of receipt (NOR) of Empire Wind's adequate and complete application in the **Federal Register** (87 FR 55409), requesting public comments and information on Empire Wind's request during a 30-day public comment period. During the NOR public comment period, NMFS received comment letters from an environmental non-governmental organization (Responsible Offshore Development Alliance) and a corporate entity (Allco Renewable Energy Limited). NMFS has reviewed all submitted material and has taken these into consideration during the drafting of this final rule.

In June 2022, new scientific information was released regarding marine mammal densities (Roberts *et al.,* 2023). In response, Empire submitted a final addendum to the application on January 25, 2023, which included revised marine mammal densities and take estimates based on Roberts *et al.* (2023). The addendum also identified a revision to the density calculation methodology. Both of these revisions were recommended by NMFS. Empire requests the regulations and subsequent LOA be valid for 5 years beginning in the first quarter of 2024 (February 22) through the first quarter of 2029 (February 21). Neither Empire Wind nor NMFS expects serious injury or mortality to result from the specified activities. Empire's complete application and associated addendum are available on NMFS' website at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1?check_logged_in=1.*

On April 13, 2023, NMFS published a proposed rule in the **Federal Register** for the Project (88 FR 22696). In the proposed rule, NMFS synthesized all of the information provided by Empire Wind, all best available scientific findings and literature relevant to the proposed project, and outlined, in detail, proposed mitigation, monitoring, and reporting measures designed to effect the least practicable adverse impacts on marine mammal species and

stocks. The public comment period on the proposed rule was open for 30 days on *https://www.regulations.gov* starting on April 13, 2023, and closed after May 13, 2023. Specific details on the public comments received during this 30-day period are described in the Comments and Responses section.

NMFS previously issued three Incidental Harassment Authorizations (IHAs) to Equinor and its predecessors for related work regarding high resolution site characterization surveys (see 83 FR 19532, May 3, 2018; 84 FR 18801, May 2, 2019 (renewal); 85 FR 60424, September 25, 2020). To date, Equinor has complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Estimated Take section. These monitoring reports can be found on NMFS' website: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.*

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations (87 FR 46921, August 1, 2022) to further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an ongoing Unusual Mortality Event (UME). Should a final vessel speed rule be issued and become effective during the effective period of this incidental take regulation (ITR)—or any other MMPA incidental take authorization (ITA)—the authorization holder will be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders will be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization will remain in place. The responsibility to comply with the applicable requirements of any vessel speed rule will become effective immediately upon the effective date of any final vessel speed rule and, when notice is published on the effective date, NMFS will also notify Empire Wind if the measures in the speed rule were to supersede any of the measures in the MMPA authorization such that they were no longer required.

Description of the Specified Activity

Overview

Empire Wind plans to construct and operate two offshore wind projects within OCS–A 0512: Empire Wind 1 (western portion of Lease Area) and Empire Wind 2 (eastern portion of Lease Area). The two projects combined will produce a total of approximately 2,076 megawatts (MW) of renewable energy to New York. Empire Wind 1 (816 MW) and Empire Wind 2 (1,260 MW) will be electrically isolated and independent of each other and each will be connected to their own points of interconnection via individual submarine export cable routes.

The Project will consist of several different types of permanent offshore infrastructure, including wind turbine generators (WTGs) and associated foundations, offshore substations (OSSs), inter-array cables, submarine export cables and scour protection. Specifically, activities to construct the Project include the installation of up to 147 WTGs and two OSSs by impact pile driving (total of 149 foundations). Additional activities will include cable installation, site preparation activities (*e.g.,* dredging), HRG surveys, installation of cofferdams or casing pipes supported by goal post piles, removal of berthing piles and performing marina bulkhead work; and conducting several types of fishery and ecological monitoring surveys. Multiple vessels will transit within the Project Area and between ports and the wind farm to perform the work and transport crew, supplies, and materials. All offshore cables will connect to onshore export cables, substations, and grid connections on Long Island and Brooklyn, New York. Marine mammals exposed to elevated noise levels during impact and vibratory pile driving or site characterization surveys may be taken by Level A harassment and/or Level B harassment, depending on the specified activity. A detailed description of the construction project is provided in the proposed rule as published in the **Federal Register** (88 FR 22696, April 13, 2023).

Activities Not Considered in Empire Wind's Request for Authorization

During construction, Empire will receive equipment and materials to be staged and loaded onto installation vessels at one or more existing third-party port facilities. Empire has not yet finalized the selection of all facilities, although they will include the South Brooklyn Marine Terminal (SBMT) in Brooklyn, New York. SBMT has been selected as the location for export cable landfall and the onshore substation for Empire Wind 1. Empire also has leased portions of SBMT for Empire Wind 1 and Empire Wind 2 for laydown and staging of wind turbine blades, turbines, and nacelles; foundation transition pieces; or other facility parts during construction of the offshore wind farm.

The final port selection(s) for staging and construction will be determined based upon whether the ports are able to accommodate Empire Wind's schedule, workforce, and equipment needs. Any port improvement construction activities to facilitate laydown and staging would be conducted by a separate entity, would serve the broader offshore wind industry in addition to the Project, and are not addressed further.

Empire Wind is not planning on detonating any unexploded ordnance (UXO) or munitions and explosives of concern (MEC) during the effective period of the rule. Hence, Empire Wind did not analyze or request, and NMFS is not authorizing, take associated with this activity. Other means of removing UXO/MEC may occur (*e.g.,* lift and shift). As UXO/MEC detonation will not occur, it is not discussed further in this analysis.

Dates and Duration

Empire Wind anticipates activities resulting in harassment to marine mammals occurring throughout all 5 years of the final rule (table 1). Offshore Project activities are expected to begin in March 2024, after issuance of the 5-year LOA, and continue through March 2029. Empire Wind anticipates the following construction schedule over the five-year period. Empire Wind has noted that these are the best and conservative estimates for activity durations, but that the schedule may shift due to weather, mechanical, or other related delays. Additional information on dates and activity-specific durations can be found in the proposed rule and are not repeated here.

TABLE 1—ACTIVITY SCHEDULE TO CONSTRUCT AND OPERATE THE PROJECT

Project activity	Expected timing Empire Wind 1	Expected timing Empire Wind 2
Submarine Export Cables	Q3 2024; Q3 2025	Q3–Q4 2025.
OSS Jacket Foundation and Topside	Q2 [1]–Q4 2025	Q2 [1]–Q4 2025; Q2[1]–Q4 2026.[2]
Monopile Foundation Installation	Q2 [1]–Q4 2025	Q2 [1]–Q4 2025; Q2[1]–Q4 2026.
WTG Installation	Q4 2025–Q2 2026	Q4 2026–Q3 2027.
Interarray Cables	Q2–Q4 2025	Q2–Q3 2026.
HRG Surveys	Q1 2024–Q4 2028	Q1 2024–Q4 2028.
Cable Landfall Construction	Q1–Q4 2024 [3]	Q1 2024–Q4 2025.[3]
Marina Activities	n/a	Q1–Q4 2024.
Barnum Channel Cable Bridge Construction	n/a	Q4 2024–Q2 2025.

Note: Project activities are anticipated to start no earlier than Q1 2024. Q1 = January through March; Q2 = April through June; Q3 = July through September; Q4 = October through December.

[1] Impact driving of foundation piles is prohibited between January 1 and April 30. During Q2 such activities could not start until May 1.

[2] Empire Wind 2 OSS jacket installation is planned for 2025, only Empire Wind 2 topside work is planned for 2026.

[3] While cable landfall construction could occur at any time during the time period identified would only occur for approximately 30 days.

Specific Geographic Region

A detailed description of the Specific Geographic Region, defined as the Mid-Atlantic Bight, is provided in the proposed rule as published in the **Federal Register** (88 FR 22696, April 13, 2023). Since the proposed rule was published, no changes have been made to the Specified Geographic Region. Generally, most of Empire Wind's specified activities (*i.e.,* impact pile driving of WTGs and OSS monopile foundations; vibratory pile driving (installation and removal) of temporary cofferdams and goal posts; vibratory pile and removal of sheet piles and bulkhead piles; placement of scour protection; trenching, laying, and burial activities associated with the installation of the export cable route and inter-array cables; HRG site characterization surveys; and WTG operation) are concentrated in the Lease Area and cable corridor.

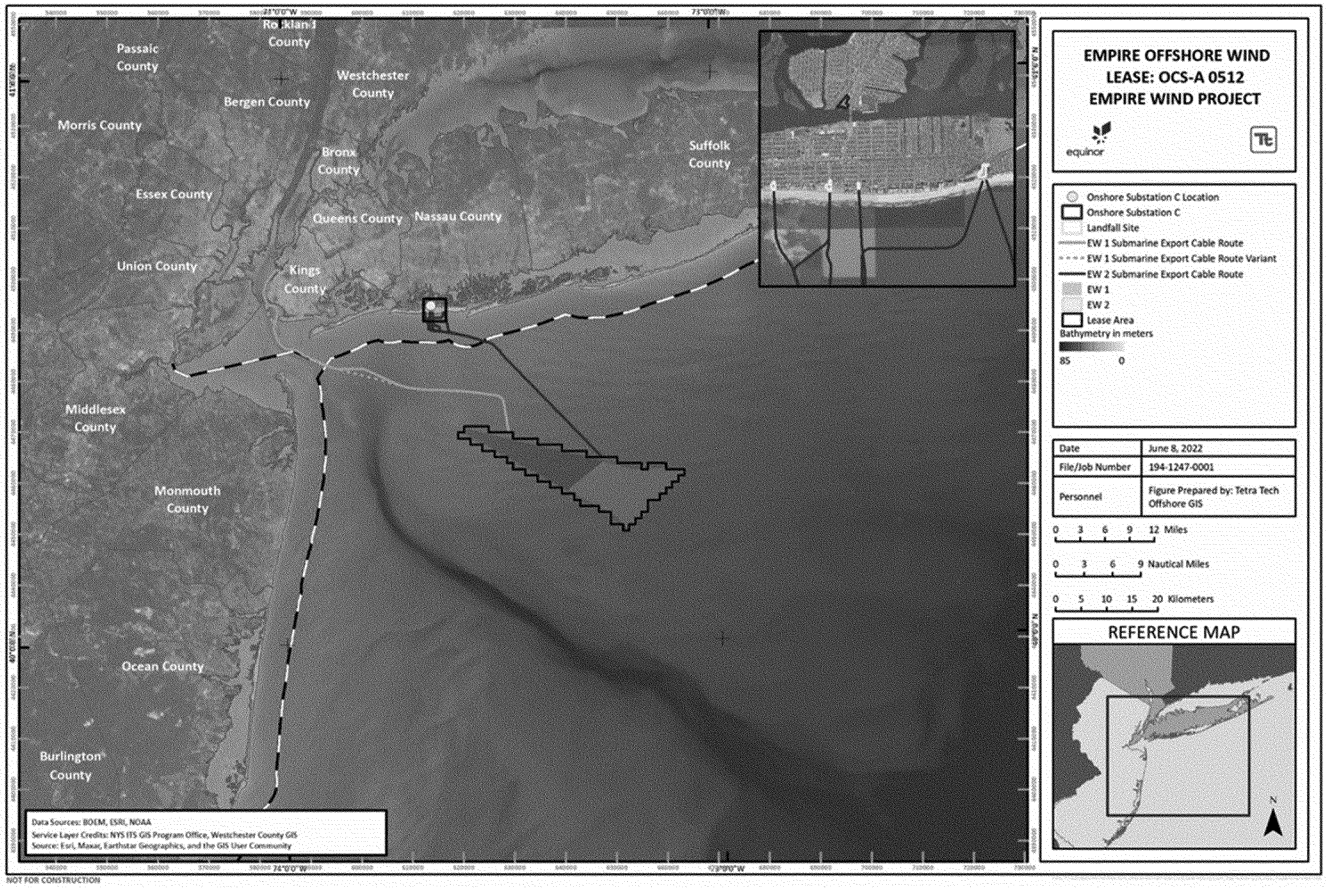

Figure 1 -- Project Area

Comments and Responses

A notice of proposed rulemaking was published in the **Federal Register** on April 13, 2023 (88 FR 22696). The proposed rulemaking described, in detail, Empire Wind's specified activities, the specific geographic region of the specified activities, the marine mammal species that may be affected by these activities, and the anticipated effects on marine mammals. In the proposed rule, we requested that interested persons submit relevant information, suggestions, and comments on Empire Wind's request for the promulgation of regulations and issuance of an associated LOA described therein, our estimated take analyses, the preliminary determinations, and the proposed regulations. The proposed rule was available for a 30-day public comment period.

NMFS received 328 comment submissions, comprising 319 individual comments from private citizens and 8 comment letters from organizations or public groups, including, but not limited to, the Marine Mammal Commission (the Commission), Clean Ocean Action, Oceana, Inc., Responsible Offshore Development Alliance, Friends of Animals, Lido Beach Civic Association, Defend Brigantine Beach, and the Natural Resources Defense Council. Some of the comments received were considered out-of-scope, including, but not limited to: comments related to impacts to the coastal ecosystem and local community; concerns for other species outside of NMFS' jurisdiction (*e.g.,* birds); maintenance of the permanent structures; costs associated with offshore wind development; distance of the Project from shore; and other projects that are not the Project. These are not described herein or discussed further. Moreover, where comments recommended that we include measures that were already contained within the proposed rule, we have not included them here if the final rule carries over the same measure as those comments are considered adequately addressed. In addition, if a comment received was unclear and therefore did not raise a significant point, the comment is not responded to herein.

The comment letters received during the public comment period which contained substantive information were considered by NMFS in its estimated take analysis; required mitigation, monitoring, and reporting measures; final determinations; and final regulations. These comments are described and responded to below. All substantive comments and letters are available on NMFS' website: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* Please review the corresponding public comment link for full details regarding the comments and letters.

Public Comments and Responses

Modeling and Take Estimates

Comment 1: The Commission has stated that, due to uncertainty in how NMFS will be addressing their previously submitted comments for other final offshore wind rulemakings, they are not providing ''an exhaustive letter regarding similar issues'' for Empire Wind's action. They have stated that, in lieu of this, they incorporate by reference all previously submitted comment letters for past proposed rules (*i.e.,* Sunrise Wind, Revolution Wind, Ocean Wind 1) and that NMFS should specifically review these previously submitted letters (*i.e.,* Sunrise Wind (88 FR 8996, February 10, 2023), Revolution Wind (87 FR 79072, December 23, 2022), and Ocean Wind 1 (87 FR 64868, October 26, 2022) and incorporate, where applicable, relevant information in the context of the Project. They specifically noted that these general concerns could include ''underestimated numbers of Level A and B harassment takes (including failing to round up to group size), incomplete SFV measurement requirements, insufficient mitigation and monitoring measures, errors and omissions in the preamble to and the proposed rule, and the general issue of quality control and quality assurance in NMFS's preparation of proposed incidental take authorizations.''

Response: NMFS acknowledges the receipt of a comment letter on the proposed Project by the Commission, as well as receipt of comment letters from the Commission for the Sunrise Wind (88 FR 8996, February 10, 2023), Revolution Wind (87 FR 79072, December 23, 2022), and Ocean Wind 1 (87 FR 64868, October 26, 2022) proposed projects. We appreciate that, in the past, the Commission has provided very specific and detailed comments and suggestions on NMFS' actions, as a collaborative effort to improve both the incidental take authorizations (ITAs) themselves as well as the conservation benefits for NMFS' trust species. Because the Commission did not provide specific comments on the proposed rule for the Project, we cannot address any specific concerns. However, we can address general themes of concern raised in previous letters, and, inasmuch as another specific comment is applicable here, we refer the Commission back to our previous responses.

Overall, the Commission's previous letters raised concerns over acoustic modeling, underestimating take estimates, mitigation and monitoring, and reporting measures. The Commission raised specific concerns over underestimating take requests by Level A harassment associated with impact pile driving (see comment 2), the size of the minimum visibility zone (see comment 15), the number of vessels required to implement mitigation measures (see comment 5), and SFV reporting measures (see comment 18) in its letter and we have addressed these in the relevant responses. With respect to mitigation, monitoring and reporting requirements, we have thoroughly addressed the Commission's previous concerns and have updated final rules, including this one, accordingly. In response to the Commission's comments, NMFS has strengthened requirements for noise attenuation systems, increased the number of PSOs required for monitoring, and added additional reporting requirements for SFV measurements. Lastly, any ''omissions'' and ''general issues of quality control and quality assurance'' from one action are less likely to be present in another action as updates are carried through across actions (although NMFS does not agree that every example previously raised by the Commission was, in fact, an error). For all of these reasons, not all of the Commission's specific concerns raised in previous letters apply to this project and we cannot address specific concerns the Commission did not identify in its letter. We have, however, made certain changes based on the Commission's previous comments referenced here. Those changes are identified in the Changes From the Proposed to Final Rule section, and are also described below in this Response to Public Comments section.

As we continue to learn from and refine our MMPA process for offshore wind actions, we look forward to continuing to work cooperatively with the Commission to identify opportunities to further minimize impacts to marine mammals, where practicable.

Comment 2: The Commission indicated that, for past proposed rules, there have been discrepancies with take requests by Level A harassment associated with impact pile driving accounting for documented average group sizes of species, and suggested ensuring that Empire Wind's take requests by Level A harassment are

consistent with documented average group sizes for the Project Area.

Response: While we do not agree with the Commission in all cases regarding their identification of ''discrepancies,'' in this case, we have agreed that their recommendation is appropriate. Specifically, in response to the Commission's comment and Endangered Species Act (ESA) consultation discussion, and based upon recent PSO sighting reports in the Project Area, NMFS has decided to increase take by Level A harassment associated with impact pile driving for fin whales in order to ensure that authorized take is consistent with documented average group size for the Project Area. Take by Level A harassment for year 2 (2025) associated with impact-pile-driving activities will be increased from two fin whales to four fin whales, assuming two groups of two whales each are taken by Level A harassment. In year 3 (2026), take by Level A harassment associated with impact-pile-driving activities will be increased from one fin whale to two fin whales, assuming one group of two whales are taken by Level A harassment. Additional take by Level A harassment is authorized during year 2 due to increased pile-driving activity during that year.

Comment 3: Commenters stated that there is no evidence or research proving that the Project would not cause the mortality or serious injury of marine mammals. The commenters mistakenly categorized Level A harassment and Level B harassment as mortality and serious injury.

Response: Regarding take by serious injury or mortality, the proposed rule stated that no serious injury and/or mortality is expected or proposed for authorization, and the same carries into the final rule for which no take by serious injury or mortality has been authorized (see 50 CFR 217.292(c)).

Regarding the suggestion that there is no evidence proving the take estimates are accurate, the take numbers, as shown in the proposed and final rule, are based on the best available marine mammal density data, published and peer reviewed scientific literature, on-the-water reports from other nearby projects or past MMPA actions, and highly complex statistical models of which real-world assumptions and inputs have been incorporated to estimate take on a project-by-project basis. In the Estimated Take section, NMFS has provided a detailed rationale for why the amount and manner of take described in this final rule is reasonable and based on the best available science. The commenters did not provide any information to support the claim that take estimates are not representative of the take that may occur incidental to the Project. NMFS disagrees with the commenter and expects that the take numbers authorized for this action are sufficient given the activity proposed and planned by Empire Wind.

Mitigation

Comment 4: Commenters recommended that NMFS increase the size of the clearance and shutdown zones for site assessment surveys to 500 meters (m) for all large whales and 1,000 m for North Atlantic right whales and require a 1,000-m acoustic clearance zone (*i.e.,* necessitating the use of PAM for HRG surveys); and require that any unidentified large whale within 1,000 m of the vessel be considered a North Atlantic right whale.

Response: NMFS disagrees with several of the suggestions provided by the commenters. As described in the proposed rule and this final rule, the required 500-m shutdown zone for North Atlantic right whales exceeds the modeled distance to the largest 160-dB Level B harassment isopleth (50.05 m during Compressed High Intensity Radiated Pulse (CHIRP) use) by a large margin, minimizing the likelihood that they will be harassed in any manner by this activity. For other ESA-listed species (*e.g.,* fin and sei whales), NMFS Greater Atlantic Regional Fisheries Office's (GARFO's) 2021 Offshore Wind Site Assessment Survey Programmatic ESA consultation (*https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic*) determined that a 100-m shutdown zone is sufficient to minimize exposure to noise that could be disturbing. Accordingly, NMFS has adopted this shutdown zone size for all baleen whale species other than the North Atlantic right whale. Commenters do not provide scientific information for NMFS to consider to support their recommendation to expand the shutdown zone. Given that these surveys are relatively low impact and NMFS has prescribed a precautionary North Atlantic right whale shutdown zone that is larger (500 m) than the largest estimated harassment zone (50.05 m), NMFS has determined that an increase in the size of the shutdown zone during HRG surveys is not warranted.

Regarding the use of acoustic monitoring to implement the shutdown zones, NMFS does not consider acoustic monitoring an effective tool for use with HRG surveys for the reasons discussed below and therefore, has not required it in this final rule. As described in the Mitigation section, NMFS has determined that the prescribed mitigation requirements are sufficient to effect the least practicable adverse impact on all affected species or stocks.

The commenters do not provide additional scientific information for NMFS to consider to support their recommendation to require PAM during site assessment surveys. NMFS disagrees that this measure is warranted because it is not expected to be effective for use in detecting the species of concern. It is generally accepted that, even in the absence of additional acoustic sources, using a towed passive acoustic sensor to detect baleen whales (including North Atlantic right whales) is not typically effective because the noise from the vessel, the flow noise, and the cable noise are in the same frequency band and will mask the vast majority of baleen whale calls. Vessels produce low-frequency noise, primarily through propeller cavitation, with main energy in the 5–300 hertz (Hz) frequency range. Source levels range from about 140 to 195 decibels (dB) referenced to 1 (re 1) µPa (micropascal) at 1 m (National Research Council (NRC), 2003; Hildebrand, 2009), depending on factors such as ship type, load, and speed, and ship hull and propeller design. Studies of vessel noise show that it appears to increase background noise levels in the 71–224 Hz range by 10–13 dB (Hatch *et al.,* 2012; McKenna *et al.,* 2012; Rolland *et al.,* 2012). PAM systems employ hydrophones towed in streamer cables approximately 500 m behind a vessel. Noise from water flow around the cables and from strumming of the cables themselves is also low frequency and typically masks signals in the same range. Experienced PAM operators (Thode *et al.,* 2017) emphasized that a PAM operation could easily report no acoustic encounters, depending on species present, simply because background noise levels rendered any acoustic detection impossible. The same report stated that a typical eight-element array towed 500 m behind a vessel could be expected to detect delphinids, sperm whales, and beaked whales at the required range, but not baleen whales, due to expected background noise levels (*e.g.,* seismic noise, vessel noise, and flow noise).

Further, there are several additional reasons why we disagree that use of PAM is warranted for HRG surveys, specifically. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances (*e.g.,* foundation installation), its utility in further

reducing impacts during HRG survey activities is limited. First, for this activity, the area expected to be ensonified above the Level B harassment threshold is relatively small (a maximum of 50.05 m); this reflects the fact that the source level is comparatively low and the intensity of any resulting impacts would be lower level. Further, it means that inasmuch as PAM will only detect a portion of any animals exposed within a zone, the overall probability of PAM detecting an animal in the harassment zone is low. Together, these factors support the limited value of PAM for use in reducing take for activities/sources with smaller zones. Also, PAM is only capable of detecting animals that are actively vocalizing, while many marine mammal species vocalize infrequently or during certain activities, which means that only a subset of the animals within the range of the PAM would be detected (and potentially have reduced impacts). Additionally, localization and range detection can be challenging under certain scenarios. For example, odontocetes are fast moving and often travel in large or dispersed groups which makes localization difficult.

Given that the effects to marine mammals from the types of HRG surveys authorized in this final rulemaking are expected to be limited to low level behavioral harassment even in the absence of mitigation, the limited additional benefit anticipated by adding this detection method (especially for North Atlantic right whales and other low frequency cetaceans, species for which PAM has limited efficacy during this activity), and the cost and impracticability of implementing a full-time PAM program, we have determined the current requirements for visual monitoring are sufficient to ensure the least practicable adverse impact on the affected species or stocks and their habitat during HRG surveys.

Comment 5: The Commission noted that the proposed rule does not require a second vessel to implement the various mitigation measures and that PSOs would only be required on the pile driving vessel. The Commission further noted that these measures are not consistent with other offshore wind rules.

Response: In response to the Commission's comment and the ESA consultation discussion, Empire Wind may propose an alternative monitoring technology that has been demonstrated to have a greater visual monitoring capability compared to 3 PSOs on a dedicated PSO vessel in place of a requirement to have a second dedicated PSO vessel during impact pile driving activities to implement mitigation measures. The proposed alternative monitoring technology must be approved by NMFS. A minimum of three PSOs on duty at any given time will be required to conduct monitoring from each vessel. These requirements are included in the final rule and described in further detail in § 217.285(b)(4).

Comment 6: Commenters recommended that NMFS require clearance and shutdown zones for North Atlantic right whales specifically, including: (1) a minimum of 5,000 m for the visual clearance, acoustic clearance, and shutdown zones in all directions from the driven pile location; and (2) an acoustic shutdown zone that would extend at least 2,000 m in all directions from the driven pile location.

Commenters also recommended that NMFS require pile-driving clearance and shutdown zones for large whales (other than North Atlantic right whale) that are large enough to avoid all take by Level A harassment and minimize Level B harassment to the most practicable extent.

Response: NMFS agrees with this comment and is now requiring both clearance and shutdown zones for North Atlantic right whales that are activated at any distance of detection.

The commenters do not provide additional scientific information for NMFS to consider to support their recommendation to expand clearance and shutdown zones to effect the least practicable adverse impact on marine mammals, particularly large whales, excluding the North Atlantic right whale. The required shutdown and clearance zones (equally sized) for large whales (other than North Atlantic right whale) are based on the largest exposure range calculated for any mysticete, other than humpback whales, that represents the distance to the Level A harassment cumulative sound exposure level (SEL_{cum}) isopleth for the low frequency hearing group, rounded up to the nearest hundred for PSO clarity. Required monitoring and mitigation for these zones will minimize Level A harassment and Level B harassment to the extent practicable and avoid most Level A harassment of large whales (all species of large whales have six or fewer takes by Level A harassment across all 5 years of the rule). Further enlargement of these zones could interrupt and delay the Project such that a substantially higher number of days would be needed to complete the construction activities, which would incur additional costs, but importantly, also potentially increase the number of days that marine mammals are exposed to the disturbance. Accordingly, NMFS has determined that enlargement of these zones is not warranted, and that the existing required clearance and shutdown zones support a suite of measures that will effect the least practicable adverse impact on other large whales.

Comment 7: Commenters noted that the final rule should clarify that if weather or other conditions limit the range of observation, then shutdown zones will be initiated. Commenters also questioned the feasibility of the shutdown mitigation requirements in real-world conditions and what would occur if the authorized take levels were exceeded. In addition, commenters state concerns on the required mitigation measures, assessing the effectiveness of the mitigation measures, and reporting the use of the mitigation measures in real-time.

Response: NMFS disagrees that additional clarification should be added to describe the initiation of shutdown zones if weather conditions limit the range of observation. With respect to weather and other conditions that could impede observations, NMFS has clearly explained and established in the proposed and final rule a minimum visibility zone that must be visually clear of marine mammals before and during pile driving. If this area cannot be visually monitored, pile driving must not be initiated or must cease. In addition to visual monitoring, Empire Wind is required to conduct PAM which is not influenced by poor visibility conditions.

In regard to a scenario where Empire Wind exceeds their authorized take levels, any further take would be unauthorized and, therefore, prohibited under the MMPA. All mitigation measures stated in this notice and in the issued LOA are considered feasible. NMFS works with each ITA applicant, including Empire Wind, to ensure that project-specific mitigation measures are possible in real-world conditions. This includes shutdown zones when there is reduced visibility. As stated in the rule condition § 217.285(b)(5), Empire Wind must ensure certain equipment is provided to PSOs, such as thermal (*i.e.,* infrared) cameras, to allow PSOs to adequately complete their duties, including in reduced-visibility conditions. NMFS does not agree that additional wording is necessary within the rule to further describe the requirement and implementation of shutdown zones. Further, pursuant to the adaptive management provisions in the rule, NMFS may modify the required mitigation or monitoring measures, if doing so creates a

reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring. NMFS disagrees that the rule's mitigation measures are insufficient.

NMFS reviews required reporting (see Monitoring and Reporting) and uses the information to evaluate the mitigation measure effectiveness. Additionally, the mitigation measures included in Empire Wind's rule are not unique, and data from prior rules support the effectiveness of these mitigation measures. NMFS finds the level of reporting currently required is sufficient for managing the issued rule and monitoring the affected stocks of marine mammals.

Comment 8: A commenter suggested that PSOs complement their survey efforts using additional technologies, such as infrared detection devices, when in low-light conditions.

Response: NMFS agrees with the commenter regarding this suggestion and a requirement to utilize a thermal (infrared) device during low-light conditions was included in the proposed rule. That requirement is included as a requirement of the final rule.

Comment 9: A commenter suggested that NMFS require: (1) at least 15 dB of sound attenuation from pile driving, with a minimum of 10 dB to be required; (2) field measurements be conducted on the first pile installed and the data must be collected from a random sample of piles through the construction period, although the commenter specifically notes that they do not support field testing of unmitigated piles; and (3) that all sound source validation reports of field measurements be evaluated by both NMFS and BOEM prior to additional piles being installed and that these reports be made publicly available. Another commenter has suggested that NMFS strengthen its requirement to maximize the level of noise reduction possible for the Project, utilizing 10 dB as the minimum only, but meeting upwards of 20 dB of noise reduction. To support their assertion, they cited datasets by Bellmann *et al.* (2020, 2022). They also recommended that NMFS require the ''best commercially available combined [noise attenuation system] technology'' to achieve noise reduction and attenuation.

A commenter also suggested that NMFS require Empire Wind to use HRG acoustic sources at the lowest practicable source levels needed to meet the objectives of the site characterization surveys.

Response: NMFS agrees that previous measurements indicate that the deployment of double big bubble curtains should result in noise reductions beyond the assumed 10 dB. As described in both the proposed and final rule, NMFS has included requirements for sound attenuation methods that successfully (evidenced by required sound field verification measurements) reduce real-world noise levels produced by impact pile driving of foundation installation to, at a minimum, the levels modeled assuming 10-dB reduction, as analyzed in this rulemaking. While NMFS is requiring that Empire Wind reduce sound levels to at or below the model outputs analyzed (assuming a reduction of 10 dB), we are not requiring greater reduction as it is currently unclear (based on measurements to date) whether greater reductions are consistently practicable for these activities, even if multiple noise attenuation systems (NASs) are used.

In response to the recommendation by the commenters for NMFS to confirm that a 10-dB reduction is achieved, NMFS clarifies that, because no unattenuated piles would be driven, there is no way to confirm a 10-dB reduction; rather, *in-situ* SFV measurements will be required to confirm that sound levels are at or below those modeled assuming a 10-dB reduction.

However, when SFV measurements are conducted during construction, several factors come into play in determining how well modeled levels/isopleths correspond to those measured in the field, such as the level at the source, how well the noise travels in the environment, and the effectiveness of the deployed NAS across a broad range of frequencies. For these reasons, NMFS believes assuming only a 10-dB noise reduction is conservative. Furthermore, if SFV measurements consistently demonstrate that more than a 10-dB reduction is achievable, adjustments in monitoring and mitigation can be made by NMFS, upon request by Empire Wind. We reiterate that there is no requirement to achieve 10-dB attenuation as no unattenuated piles would be driven (in order to minimize impacts and noting as supported by one of the commenters here and on past similar actions); therefore, it is not possible to collect the data necessary to enforce this requirement. However, we are requiring the developer to meet the noise levels modeled, assuming 10-dB attenuation. NMFS is also actively engaged with other agencies and offshore wind developers on furthering quieting technologies.

It is important to note that the assumed 10-dB reduction is not a limit, but rather a conservative estimate of the likely achievable noise reduction, which along with all other modeling assumptions, allows for estimation of marine mammal impacts and informs monitoring and mitigation. However, we have incorporated requirements to add or modify NAS in the event that noise levels exceed those modeled. NMFS is required to authorize the requested incidental take if it finds such incidental take of small numbers of marine mammals by the requestor while engaging in the specified activities within the specified geographic region will have a negligible impact on such species or stock and, where applicable, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses.

NMFS notes that Empire Wind must conduct SFV on 3 monopiles and on all OSS foundations (24 pin piles total) and, at this time, NMFS does not support unmitigated field testing for pile installation. If SFV acoustic measurements indicate that ranges to isopleths corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10 dB of attenuation), Empire Wind may request a modification of the clearance and shutdown zones for foundation pile driving of monopiles. If requested and upon receipt of an interim SFV report, NMFS may adjust zones (*i.e.,* Level A harassment, Level B harassment, clearance, shutdown, and/or minimum visibility zone) to reflect SFV measurements.

In addition to the SFV requirements in the proposed rule, we added to this final rule the requirement that Empire Wind must conduct abbreviated SFV monitoring (consisting of a single acoustic recorder placed at an appropriate distance from the pile) on all foundation installations for which the complete SFV monitoring, as required in the proposed rule, is not carried out to be consistent with the Biological Opinion. NMFS is requiring that these SFV results must be included in the weekly reports. Any indications that distances to the identified Level A harassment and Level B harassment thresholds for whales were exceeded must be addressed by Empire Wind including an explanation of factors that contributed to the exceedance and corrective actions that were taken to avoid exceedance on subsequent piles.

As part of the updates to the final rule, in response to these comments regarding sufficient NAS, NMFS will also require maintenance checks and testing of NAS systems before each use to ensure the NAS is usable and the

system is able to achieve the modeled reduction, this information would be required to be reported to NMFS within 72 hours of an installation and before the next installation occurs.

NMFS agrees that the final SFV reports that have undergone quality assurance/quality control by the agencies and include all of the required information to support full understanding of the results will be made publicly available. NMFS will make all final reports available on our website. NMFS agrees with the recommendation that Empire Wind should utilize its HRG acoustic sources at the lowest practicable source level to meet the survey objective, and has incorporated this requirement into the final rule.

Comment 11: To minimize the risk of vessel strikes for all whales, and especially in recognition of the imperiled state of North Atlantic right whales, commenters do not believe that mitigation measures to reduce the risk of vessel strike are strong enough and have instead suggested that NMFS require a mandatory 10-knot (kn) (5.14 m/s) speed restriction for all project vessels (including PSO survey vessels) at all times, except for reasons of safety, and in all places except in limited circumstances where the best available scientific information demonstrates that whales do not occur in the area.

Alternatively, commenters suggested that project proponents could work with NMFS to develop an ''Adaptive Plan'' that modifies vessel speed restrictions if the monitoring methods are proven to be effective when vessels are traveling 10 kn (5.14 m/s) or less. One commenter further suggested that if the Adaptive Plan is scientifically proven to be equally or more effective than a 10-kn speed restriction, that the Adaptive Plan could be used as an alternative to the 10-kn speed restriction.

In a related comment, a commenter encouraged NMFS to proactively work to reduce the risk of vessel strike across maritime industries by conducting research to better understand large whale habitat use in the New York Bight through targeted research studies focusing on habitat use at the surface and at depth in order to inform development of vessel strike reduction measures for large whale species.

Response: NMFS acknowledges that vessel strikes pose a risk to marine wildlife, including North Atlantic right whales, but disagrees with the commenter that the mitigation measures to prevent vessel strike are insufficient. Under the MMPA, NMFS must prescribe regulations setting forth other means of effecting the least practicable adverse impact of the requestor's specified activities on species or stocks and its habitat. In both the proposed and final rules, we analyzed the potential for vessel strike resulting from the planned activities. We determined that the risk of vessel strike is low, based on the nature of the activities, including the number of vessels involved in those activities and the relative slower speed of most of those vessels, and the fact that high speed vessels are mostly used for activities (*e.g.,* crew transfer during foundation installation) that occur when large whale presence is lower than during the foundation pile driving seasonal restriction. In addition, vessels associated with the construction activities will add a discountable amount of vessel traffic to the specific geographic region.

To further reduce the already low risk, NMFS has required several mitigation measures specific to vessel strike avoidance. With the implementation of these measures, NMFS has determined that the potential for vessel strike is so low as to be discountable and vessel strike is reasonably considered to be avoidable. Whales and other marine mammal species are present within the Project Area year-round. However, many large whale species (*e.g.,* North Atlantic right whales) are less frequently found within the Project Area during the months when foundation installation, which requires the most use of higher-speed vessels, would occur (*i.e.,* May through November; Roberts *et al.,* 2023). As described in the proposed rule and included in this final rule, NMFS is requiring Empire Wind to reduce speeds to 10 kn (5.14 m/s) or less in circumstances when North Atlantic right whales are known to be present or more likely to be in the area where vessels are transiting, which include, but are not limited to, all Slow Zones (Dynamic Management Area (DMA) or acoustic Slow Zone), when traveling between ports in New Jersey, New York, Maryland, or Virginia from November 1 to April 30, and if a North Atlantic right whale is detected visually or acoustically at any distance or reported within 10 kilometers (km). Vessels are also required to slow and maintain separation distances for all marine mammals. As described in the proposed rule, all vessels must have a dedicated, trained crew member or PSO onboard. Furthermore, vessels towing survey gear travel at very slow speeds (*e.g.,* roughly 4–5 kn (7.4–9.3 km/hour)) and any vessels engaged in construction activities would be primarily stationary during the pile-driving event. Additionally, aside from any requirements of this rule, Empire Wind is required to comply with all spatial and temporal approach (500 m) and speed restrictions outlined in existing regulations (50 CFR 224.105 and 222.32).

While we acknowledge that a year-round 10-kn requirement could potentially fractionally reduce the already discountable probability of a vessel strike, this theoretical reduction would not be expected to manifest in measurable real-world differences in impact. Further, additional limitations on speed or requiring a PSO on all transiting vessels have significant practicability impacts on applicants, in that, given the distance of Empire Wind's Lease Area offshore of New York, vessel trips to and from shore would significantly increase in duration to the extent that delays to the Project and planned construction schedule would be likely to occur, which could extend the number of days necessary to complete all pile driving of foundations. Furthermore, Empire Wind has committed to the use of PAM within the vessel transit corridor to further aid in the detection of marine mammals. NMFS has determined that these and other included measures ensure the least practicable adverse impact on species or stocks and their habitat. Therefore, we are not requiring project-related vessels to travel 10 kn (5.14 m/s) or less at all times.

Regarding an ''Adaptive Plan'' to allow the developer to travel over 10 kn (5.14 m/s) where they would otherwise not be allowed, there are adaptive management provisions in the rule that allows for modification to mitigation measures, when warranted. Should Empire Wind request modifications to the vessel strike avoidance measures, NMFS would consider the request and act accordingly.

In addition to the vessel strike avoidance measures, NMFS has also included a requirement that all vessels be equipped with automatic identification system (AIS) to facilitate compliance checks with the speed limit requirements. Lastly, we disagree with the commenter that the final rule and LOA must include a vessel traffic plan beyond the extensive measures outlined here. At least 180 days prior to the start of vessel operations commencing, Empire Wind must submit both a Vessel Strike Avoidance Plan, including plans for conducting PAM in the transit corridors should Dominion Energy determine they wish to travel over 10 kn (18.5 km/hr) in the transit corridors, to NMFS for review and approval.

NMFS acknowledges the commenter's recommendation for NMFS to work to reduce the risk of vessel strike to large whales by conducting targeted research to better understand large whale habitat use in the New York Bight. Although the initiation of targeted research studies is beyond the scope of this authorization, NMFS uses the best available data to assess large whale distributions and risk of vessel strike, and applies mitigation measures to reduce this risk to effect the least practicable impact to all marine mammal species and stocks.

Comment 12: Commenters suggested that NMFS prohibit pile driving during periods of highest risk for North Atlantic right whales, which they define as times of the highest relative density of animals during foraging and migration, and times where mom-calf pairs, pregnant females, surface active groups (that are foraging or socializing), or aggregations of three or more whales, are not expected to be present. Citing multiple information sources, commenters further specifically recommended the seasonal restriction for pile driving be expanded to November 1 through April 30 to reflect the period of highest detections of vocal activity, sightings, and abundance estimates of North Atlantic right whales. Multiple commenters requested for the seasonal restriction of pile driving to be expanded to November 1 through May 31 to provide additional protection for North Atlantic right whales. Commenters also recommended prohibiting pile driving during seasons when protected species are known to be present or migrating in the Project Area, in addition to any dynamic restrictions due to the presence of North Atlantic right whale or other endangered species.

Response: NMFS disagrees that extending the seasonal restriction on pile driving to include May or November is appropriate or warranted. NMFS has restricted foundation installation pile driving from January through April, which represent the times of year when North Atlantic right whales are most likely to be in the Project Area. We recognize that the density of whales begins to elevate in December (based upon Roberts *et al.,* 2023); however, it is not until January when density greatly increases. Empire Wind has indicated that to complete the Project, pile driving is needed from May through November and may be required in December. In this final rule, NMFS has included an additional measure where pile driving in December must be avoided to the maximum extent practicable but may occur if necessary, provided Empire Wind receives NMFS' prior approval. We also note that any time of year when foundation installation is occurring, a sighting or acoustic detection of a North Atlantic right whale at any distance triggers a pile driving delay or shutdown. We also reiterate that Empire Wind is required to implement a minimum visibility zone, as reflected by the results of JASCO Applied Sciences' (JASCO) underwater sound propagation modeling. With the application of these enhanced mitigation and monitoring measures, impacts to the North Atlantic right whale will be further reduced, if any are encountered when transiting through the migratory corridor.

As noted and acknowledged by NMFS in both the proposed and final rules, North Atlantic right whale distribution is changing due to climate change and other factors, and they are present year-round in the vicinity of the Project. However, as shown in Roberts *et al.* (2023), which NMFS considers the best available scientific information regarding marine mammal densities in the Atlantic Ocean, it is not until January that densities begin to significantly increase. Further, North Atlantic right whales are not likely to be engaged in feeding behaviors in the Project Area, from May to November or during any other time period, as the Project Area is primarily a migratory corridor for North Atlantic right whales. While some opportunistic foraging may occur, the waters off of New York do not include known foraging habitat for North Atlantic right whales. As described in the Description of Marine Mammals in the Geographic Area section, foraging habitat is located in colder, more northern waters including southern New England, the Gulf of Maine, and Canada. In addition, Roberts *et al.,* (2023) density data indicates much lower densities of North Atlantic right whales in the Project Area during the months of May (0.025 animals/100 km^2) and November (0.016 animals/100 km^2) as compared to the months of January through April (0.088, 0.116 animals/100 km^2). For these reasons, and given the inclusion of December in the seasonal impact pile driving restriction without NMFS's prior approval, NMFS finds that further expansion of the seasonal impact pile driving restrictions (beyond December through April) would be impracticable and is unwarranted.

The comment was not specific and may be suggesting prohibiting pile driving when any protected species are present; however, such a restriction would not be practicable to implement as there is no time of year when some species of marine mammals are not present.

Comment 13: A commenter suggested that when HRG surveys are allowed to resume after a shutdown event, the surveys should be required to use a ramp-up procedure to encourage any nearby marine life to leave the area.

Response: NMFS agrees with this recommendation and included in the proposed rule (88 FR 22696, April 13, 2023) and this final rule a stipulation that when technically feasible, survey equipment must be ramped up at the start or restart of survey activities. Ramp-up must begin with the power of the smallest acoustic equipment at its lowest practical power output appropriate for the survey. When technically feasible the power must then be gradually turned up and other acoustic sources added in a way such that the source level would increase gradually. NMFS notes that ramp-up is not required for short periods where acoustic sources were shut down (*i.e.,* less than 30 minutes) if PSOs have maintained constant visual observation and no detections of marine mammals occurred within the applicable shutdown zones.

Comment 14: A commenter asserted that the LOA must include requirements for all vessels associated with the Project, including vessels owned by the developer, contractors, employees, and others regardless of ownership, operator, and contract. They stated that exceptions and exemptions will create enforcement uncertainty and incentives to evade regulations through reclassification and redesignation. They recommended that NMFS simplify this by requiring all vessels to abide by the same requirements, regardless of size, ownership, function, contract or other specifics.

Response: NMFS agrees with the commenter and the proposed rule and final rule have general conditions to hold Empire Wind and its designees (including vessel operators and other personnel) accountable while performing operations under the authority of this final rule. The final rule indicates that the conditions contained therein apply to Empire Wind and its designees and requires that a copy of the LOA must be in the possession of Empire Wind, the vessel operators, the lead PSO, and any other relevant designees of Empire Wind. The final rule also states that Empire Wind must ensure that the vessel operator and other relevant vessel personnel, including the PSO team, are briefed on all responsibilities, communication procedures, marine mammal monitoring protocols, operational procedures, and

requirements prior to the start of project activities, and when relevant new personnel join the construction and survey operations.

Comment 15: The Commission noted that NMFS' proposed minimum visibility zone (1.2 km) is insufficient given that the shutdown zone for mysticetes and sperm whales during impact installation of monopiles (1.5 km) is greater than this distance. The Commission further noted that this is not consistent with other offshore wind rules.

Response: NMFS appreciates the suggestion by the Commission and agrees with the proposed expansion of the minimum visibility zone. In response to the Commission's comment and ESA consultation discussion, the minimum visibility zone for impact pile driving has been increased from 1.2 km to 1.5 km for mysticetes and sperm whales. This updated measure is included in the final rule.

Comment 16: Commenters recommended that NMFS should restrict pile driving at night and during periods of low visibility to protect all large whale species. This would include no pile driving being allowed to begin after 1.5 hours before civil sunset or during times where the visual clearance zone and shutdown zone (called the ''exclusion zone'' in the appendix) cannot be visually monitored, as determined by the Lead PSO.

A commenter expressed that pile driving should only be allowed to continue after dark if the activity was started during daylight hours and must continue due to human safety or installation feasibility (*i.e.,* stability) concerns, but that nighttime monitoring protocols be required. A commenter suggested that if pile driving must continue after dark, Empire Wind should be required to notify NMFS with these reasons and an explanation for exemption. Additionally, a commenter stated that a summary of the frequency of these exceptions must be made publicly available to ensure that these are indeed exceptions, rather than the norm, for the Project.

Response: NMFS recognizes the need to protect marine mammals that may be exposed to pile-driving noise, as well as the challenges of detecting marine mammals in low-light and nighttime conditions. However, we note that while it may be more difficult to detect marine mammals at night, there are benefits to completing the pile driving in a shorter total amount of time, and exposing marine mammals to fewer days of pile-driving noise. Given this, NMFS disagrees that no activities should occur during reduced visibility, as long as the use of alternative technologies allow sufficient monitoring of the clearance and shutdown zones, including the minimum visibility zone.

However, in this case, Empire Wind has not requested, nor has NMFS included a provision for pile driving to begin outside the civil sunset/civil sunrise temporal restrictions; therefore, Empire Wind will not be able to initiate pile driving at night. In the proposed rule, we indicated that Empire Wind must initiate pile driving prior to 1.5 hours before civil sunset and not before 1 hour after civil sunrise unless they submit to NMFS, for approval, an Alternative Monitoring Plan for nighttime pile-driving activities. This requirement has been carried over to this final rule.

Regarding the reporting requirement specified by the commenter, we are already requiring weekly and monthly reports during foundation installation, which would contain information that would inform on how long and when pile driving occurred as Empire Wind is required to document the daily start and stop times of all pile-driving activities. At minimum, a final annual report with this information will be made available to the public, as recommended by the commenter.

Comment 17: A commenter stated that NMFS should require acoustic and visual monitoring to begin at least 60 minutes prior to the commencement or resumption of pile driving and should be conducted throughout the duration of the pile-driving activity. The commenter further suggested that visual observation of the clearance zone should continue until 30 minutes after completion of pile driving, and that the LOA should prohibit initiating pile driving within 1.5 hours of civil sunset or in times of low visibility when the visual clearance zone cannot be monitored.

Response: NMFS agrees with the commenter and has included in the final rule the requirement for that visual monitoring to begin at least 60 minutes prior to commencement or resumption of impact pile driving of foundation piles. Moreover, PAM must be conducted for at least 24 hours immediately prior to foundation installation impact pile driving activities. The PAM operator must review all detections from the previous 24-hour period immediately prior to pile driving activities. Foundation pile driving may only begin once the clearance zones have been clear for 30 minutes immediately prior to commencing the activity. Visual monitoring must begin at least 30 minutes prior to commencement or resumption of vibratory pile driving associated with cable landfall construction and marina activities, which is located in coastal waters and is relatively quiet compared to foundation installation. PAM is not required for cable landfall and marina pile driving. Visual monitoring and PAM (where required) will continue for 30 minutes post completion of both impact and vibratory pile driving.

Monitoring, Reporting, and Adaptive Management

Comment 18: The Commission noted that the proposed rule did not specify the information that must be included in any interim or final SFV report, and that this is inconsistent with previous proposed rules.

Response: In response to the Commission's comment and ESA consultation discussion, NMFS has included more specific requirements for reporting SFV measurements. This includes comprehensive requirements for both interim and final SFV reports.

A discussion, which includes any observations which are suspected to have a significant impact on the results including but not limited to: observed noise mitigation system issues, obstructions along the measurement transect, and technical issues with hydrophones or recording devices, must be included in the final SFV report as well. Details on the information NMFS is requiring in SFV reports can be found in § 217.285(f)(9) and (11).

Comment 19: Multiple commenters expressed concern for the accountability, fairness, and transparency regarding how cumulative impacts to the marine ecosystem would be measured. A commenter further suggested NMFS include a requirement for all phases of construction to subscribe to the highest level of transparency, including frequent reporting to Federal agencies, requirements to report all visual and acoustic detections of North Atlantic right whales and any dead, injured, or entangled marine mammals to the Fisheries Service or the Coast Guard as soon as possible and not later than the end of the PSO shift. To foster stakeholder relationships and allow public engagement and oversight of the permitting, the commenter suggested that the LOA should require all reports and data to be accessible on a publicly available website. Another commenter recommended that NMFS improve the transparency of the ITA process by moving away from a ''segmented phase-by-phase and project-by-project approach'' to authorizations.

Response: NMFS agrees with the need for reporting and indeed, the MMPA

calls for LOAs to incorporate reporting requirements. As included in the proposed rule, the final rule includes requirements for reporting that supports the commenter's recommendations. Empire Wind is required to submit a monitoring report to NMFS within 90 days after completion of project activities that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring. PSO datasheets or raw sightings data must also be provided with the draft and final monitoring report.

Further, the draft rule and final rule stipulate that if a North Atlantic right whale is observed at any time by any vessels, during construction work or during vessel transit, Empire Wind must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System within 2 hours of occurrence, when practicable, or no later than 24 hours after occurrence. Empire Wind may also report the sighting to the U.S. Coast Guard. Additionally, Empire Wind must report any discoveries of injured or dead marine mammals, including entangled animals, to the Office of Protected Resources, NMFS, and to the New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. All final reports submitted to NMFS will be included on the website for availability to the public.

In regards to improving transparency by moving away from a ''segmented phase-by-phase and project-by-project approach, the MMPA, and its implementing regulations allow, upon request, the incidental take of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region. NMFS authorizes the requested incidental take of marine mammals if it finds that the taking would be of small numbers, have no more than a ''negligible impact'' on the marine mammal species or stock, and not have an ''unmitigable adverse impact'' on the availability of the species or stock for subsistence use. NMFS emphasizes that an ITA does not authorize the activity itself but authorizes the take of marine mammals incidental to the ''specified activity'' for which incidental take coverage is being sought. In this case, NMFS is responding to Empire Wind's request—as required by the statute—to incidentally take marine mammals while engaged in construction activities and marine site characterization surveys. NMFS determines whether the necessary findings can be made based on Empire Wind's application. NMFS does not have the authority to force project proponents to batch or aggregate multiple activities into a single MMPA take authorization request. Similarly, while the BOEM's Environmental Impact Statement (EIS), which NMFS adopted, evaluates the cumulative effects of the activity (*i.e.,* the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions) on the human environment in order to support multiple decisions, the findings necessary for issuance of an MMPA authorization are based on an assessment of the impacts on marine mammals and their habitat, and do not require measurement of impacts on the ''marine ecosystem.'' In addition, the ESA consultation assesses impacts to listed species from Empire Wind's proposed action, added to the baseline of offshore wind actions that had previously been approved.

Comment 20: Commenters expressed interest in understanding the outcome if the number of actual takes exceed the number authorized during construction of an offshore wind project (*i.e.,* if the Project would be stopped mid-construction or operation), and how offshore wind developers will be held accountable for impacts to protected species instead of impacts being mistakenly assigned to fishermen. The commenter further maintained that the offshore wind industry must be accountable for incidental takes from construction and operations separately from the take authorizations for managed commercial fish stocks.

Response: NMFS carefully reviews models and take estimate methodology to authorize a number of takes, by species and manner of take, that is a likely outcome of the Project. There are several conservative assumptions built into the models to ensure the number of takes authorized is sufficient based on the description of the Project. Empire Wind would be required to submit frequent reports which would identify the number of takes applied to the Project.

In the unexpected event that Empire Wind exceeds the number of takes authorized for a given species, the MMPA and its implementing regulations state that NMFS shall withdraw or suspend the LOA issued under these regulations, after notice and opportunity for public comment, if it finds the methods of taking or the mitigation, monitoring, or reporting measures are not being substantially complied with, or the taking allowed is having, or may have, more than a negligible impact on the species or stock concerned (16 U.S.C. 1371(a)(5)(B); 50 CFR 216.206(e)). Additionally, failure to comply with the requirements of the LOA may result in civil monetary penalties and knowing violations may result in criminal penalties (16 U.S.C. 1375; 50 CFR 216.206(g)).

Moreover, as noted previously, fishing impacts, and NMFS assessment of them, generally center on entanglement in fishing gear, which is a very acute, visible, and severe impact (*i.e.,* mortality or serious injury). In contrast, the impacts incidental to the specified activities are primarily acoustic in nature and limited to Level A harassment and Level B harassment, there is no anticipated or authorized serious injury or mortality that the fishing industry could theoretically be held accountable for. Any take resulting from the specified activities would not be associated with take authorizations related to commercial fish stocks. The impacts of commercial fisheries on marine mammals and incidental take for said fishing activities are managed separately from those of non-commercial fishing activities such as offshore wind site characterization surveys, under MMPA section 118.

Comment 21: A commenter suggested that NMFS require Empire Wind to utilize direct-drive turbines instead of gearboxes.

Response: NMFS disagrees with the commenter's suggestion to require Empire Wind to utilize direct-drive turbines instead of gearboxes. Empire Wind included the use of turbines that may contain gearboxes in the description of their specified activity, and NMFS has evaluated the activity as charged and made the determinations necessary to support the issuance of incidental take regulations. Although direct-drive technology is newer, gearboxes are effective and frequently used in the offshore wind industry, and it is outside of the scope of NMFS' authority to require the use of direct-drive turbines over gearboxes.

Comment 22: A commenter asserted that the requirement of having PSOs onboard project vessels is insufficient to prevent harm to North Atlantic right whales as right whales can be difficult to spot from a boat and poor weather or low light conditions make detecting right whales challenging.

Response: NMFS recognizes that visual detection based mitigation approaches are not 100 percent effective. Animals are missed because they are underwater (*i.e.,* availability bias) or because they are available to be seen but are missed by observers (*i.e.,* perception and detection biases) (*e.g.,* Marsh and Sinclair, 1989). However, visual observation remains one of the

best available methods for marine mammal detection. For North Atlantic right whales in particular, the required Clearance Zones are any distance (impact pile driving), 1,600 m (vibratory pile driving/marine activities), and 500 m (HRG surveys) and, therefore, it is unlikely that an individual would approach the harassment zone undetected.

In addition, as described in the proposed rule, NMFS is requiring that Empire Wind employ both visual and PAM methods for monitoring, as both approaches aid and complement each other (Van Parijs *et al.,* 2021). The use of PAM will augment visual detections for foundation pile driving, especially for activities with the largest zones. NMFS is requiring the use of PAM to monitor 10 km zones around the piles and that the systems be capable of detecting marine mammals during pile driving within this zone. In this final rule, table 39 clearly specifies this 10 km PAM monitoring zone. For further detail on the requirements for the use of PAM, see comments 4 and 17.

Comment 23: A commenter recommended that the LOA should require all vessels supporting site characterization to be equipped with and using Class A AIS devices at all times while on the water. A commenter suggested this requirement should apply to all vessels, regardless of size, associated with the survey.

Response: NMFS acknowledges that vessel strikes pose a risk to marine wildlife, including North Atlantic right whales. For the final rule, NMFS has included a requirement that all vessels be equipped with AIS to facilitate compliance checks with the speed limit requirements.

Comment 24: Several commenters recommended that NMFS increase the frequency of information review for adaptive management to at least once a quarter and to have a mechanism in place to undertake review and adaptive management on an ad hoc basis if a serious issue is identified (*e.g.,* if unauthorized levels of Level A take of marine mammals are reported or if serious injury or mortality of an animal occurs).

Response: We disagree that the frequency at which information is reviewed should be defined in the Adaptive Management provision. The purpose of the Adaptive Management provision is to allow for the incorporation of new information as it becomes available, which could mean advancements and new information becomes available quickly (*i.e.,* days or weeks) that would necessitate NMFS to consider adapting the issued LOA, or over long periods of time as robust and conclusive information becomes available (*i.e.,* months or years). NMFS will be reviewing interim reports as they are submitted, hence, the quarterly review, as suggested by the commenter, is not necessary. NMFS retains the ability to make decisions as information becomes available, and after discussions with Empire Wind about feasibility and practicability.

We do not agree with the suggestion by the commenter for ad hoc changes in the event that additional take by Level A harassment or take via serious injury/mortality of a marine mammal occurs. NMFS has included two relevant provisions in its final ITA, one prohibiting take by mortality of serious injury (''Take by mortality or serious injury of any marine mammal species is not authorized'') and another prohibiting the taking of marine mammals in any manner other than what is specified in the LOA (''It is unlawful for any person to . . . take any marine mammal specified in the LOA in any manner other than as specified in the LOA.'') We refer the commenter to the Prohibitions portion of the final regulations text (see § 217.293). If the Project takes any marine mammal in a manner that has not been specified in the final rule and LOA (*i.e.,* unauthorized take by Level A harassment), or project vessels strike a marine mammal, Empire Wind would be in violation of its LOA and NMFS would undertake appropriate actions, as determined to be necessary.

Effects Assessment

Comment 25: Multiple commenters stated that NMFS must make an assessment of which activities, technologies, and strategies are truly necessary to achieve site characterization to inform development of the offshore wind projects and which strategies are not critical. In addition, commenters asserted that NMFS should prescribe the appropriate survey techniques and mitigate any potential stressors to effect the least practicable impact on all affected species and stocks. Commenters further encouraged NMFS to require that the LOA holder minimize the impacts of underwater noise to the fullest extent feasible, including through the use of best available technology and methods to minimize sound levels from geophysical surveys such as through the use of technically and commercially feasible and effective noise reduction and attenuation measures. One commenter emphasized that there should be a focus on reducing impacts to species with extreme sensitivity to noise (*e.g.,* harbor porpoises) and species experiencing UMEs (*e.g.,* harbor seals).

Response: The MMPA requires that an LOA include measures that will effect the least practicable adverse impact on the affected species and stocks, and, in practice, NMFS agrees that the LOA should include conditions for the activities that will first avoid adverse effects on marine mammal species in and around the Project Area, where practicable, and minimize the effects that cannot be avoided. NMFS has determined that the ITR and LOA meet this requirement to effect the least practicable adverse impact. As part of the analysis for all ITRs, NMFS evaluates the effects expected as a result of the specified activity, makes the necessary findings, and prescribes mitigation requirements sufficient to achieve the least practicable adverse impact on the affected species and stocks of marine mammals.

Comment 26: A commenter asserted that NMFS must fully consider the discrete effects of each activity and the cumulative effects of the suite of approved, proposed, and potential activities on marine mammals (particularly North Atlantic right whales) and ensure that the cumulative effects are not excessive before issuing an incidental take authorization (ITA). Other commenters encouraged NMFS to consider the total takes of all species alongside takes that NMFS has authorized for other wind-related activities, and noted that the cumulative impacts of offshore wind activities on marine mammals are not yet known. Commenters objected to NMFS's conclusion that the application's take limit of 29 North Atlantic right whales for construction activities in the coastal waters between off New York will have a ''negligible impact'' on the species and fulfills the requirement for ''small numbers'' of takes, especially in light of the North Atlantic right whale's critically endangered status, the ongoing UME that this species is experiencing and, consequently, the asserted existential threat posed to the species by obstacles to even one individual's survival—and they emphasized this comment in combination with the need to consider the take from multiple projects.

Response: NMFS is required to authorize the requested incidental take if it finds the total incidental take of small numbers of marine mammals by U.S. citizens ''while engaging in that (specified) activity'' within a specified geographic region during the 5-year period (or less) will have a negligible impact on such species or stock and, where applicable, will not have an

unmitigable adverse impact on the availability of such species or stock for subsistence uses (16 U.S.C. 1371(a)(5)(A)). Negligible impact is defined 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 effect on annual rates of recruitment or survival'' (50 CFR 216.103). Neither the MMPA nor its implementing regulations require consideration of unrelated activities and their impacts on marine mammal populations in the negligible impact determination. Consistent with the preamble of NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are factored into the baseline, which is used in the negligible impact analysis. Here, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline (*e.g.,* as reflected in the density/distribution and status of the species, population size and growth rate, and other relevant stressors).

The preamble of NMFS' implementing regulations also addresses cumulative effects from future, unrelated activities. Such effects are not considered in making the negligible impact determination under MMPA section 101(a)(5). NMFS considers: (1) cumulative effects that are reasonably foreseeable when preparing a National Environmental Policy Act (NEPA) analysis; and (2) reasonably foreseeable cumulative effects under section 7 of the ESA for ESA-listed species, as appropriate. Accordingly, NMFS has adopted and reviewed BOEM's EIS and as part of its inter-agency coordination. This EIS addresses cumulative impacts related to the Project and substantially similar activities in similar locations. Cumulative impacts regarding the promulgation of the regulations and issuance of an LOA for construction activities planned by Empire Wind, have been adequately addressed in the adopted EIS that supports NMFS' determination that this action has been appropriately analyzed under NEPA. Separately, the cumulative effects of the Project on ESA-listed species, including the North Atlantic right whale, were analyzed under section 7 of the ESA when NMFS engaged in formal inter-agency consultation with the NOAA GARFO. The Biological Opinion for the Project determined that NMFS' promulgation of the rulemaking and issuance of an LOA for construction activities associated with leasing, individually and cumulatively, are likely to adversely affect, but not jeopardize, listed marine mammals.

NMFS disagrees that the authorized take of 29 North Atlantic right whales by Level B harassment incidental to the Project will have a non-negligible impact on the species and notes that the commenter did not provide additional scientific information supporting this claim for NMFS to consider. Take by injury, serious injury, or mortality is not authorized. NMFS emphasizes that the authorized incidental take is limited to Level B harassment (*i.e.,* behavioral disturbance). As described in the proposed rule and this final rule (see Negligible Impact Analysis and Determination section), NMFS has determined that the Level B harassment of North Atlantic right whales will not result in impacts to the population through effects on annual rates or recruitment or survival. The Project Area occurs offshore of New York, which does not include habitat where North Atlantic right whales are known to concentrate in foraging or reproductive behaviors. The Project Area is a known migratory corridor. Hence, it is likely that most of the authorized takes represent an exposure to a different individual, which means that the behavioral impacts to North Atlantic right whales are limited to behavioral disturbance occurring on 1 or 2 days within a year—an amount that would not be expected to impact reproduction or survival. Across all years, while it is possible an animal migrating through could have been exposed during a previous year, the low amount of take authorized during the 5-year period (n=29 takes of North Atlantic right whales by Level B harassment) of the rule makes this scenario unlikely. Any disturbance to North Atlantic right whales due to Empire Wind's activities is expected to result in temporary avoidance of the immediate area of construction but not abandonment of its migratory path. Slight displacement (but not abandonment) of a migratory pathway is unlikely to result in energetic consequences that could affect reproduction or survival of any individuals. Other impacts such as masking, Temporary Threshold Shift (TTS), and temporary communication and foraging disruption may occur (again noting that North Atlantic right whales concentrate foraging far north of the Project Area (*e.g.,* southern New England, Gulf of Maine, and Canada). However, these impacts would also be temporary and unlikely to lead to survival or reproduction impacts of any individual, especially when the extensive suite of mitigation, including numerous measures targeted specifically towards minimizing impacts to North Atlantic right whales, are considered.

NMFS also disagrees with the commenter's arguments on the topic of small numbers. In the Empire Wind proposed rule, NMFS describes that when the predicted number of individuals to be taken is less than one-third of the species or stock abundance, the take is considered to be of small numbers. The small number of takes being authorized is incidental to the specified activities. NMFS has provided a reasoned approach to small numbers, as described in the ''Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico'' final rule (86 FR 5322 at 5438, April 19, 2021). Utilizing that approach, NMFS has made the necessary small numbers finding for all affected species and stocks in this case (see Small Numbers section for more detail).

Comment 27: A commenter stated that some of the specified activities will increase the number of vessels in the ocean in the Project Area, which will lead to an increased threat of harm by vessel strikes to marine mammals, specifically North Atlantic right whales.

Response: NMFS acknowledges that vessel strikes can result in injury or mortality of marine mammals. We analyzed the potential for vessel strike resulting from Empire Wind's activities (including the anticipated number of vessels in the area) and determined that based on the nature of the activity and the required mitigation measures specific to vessel strike avoidance included in this rulemaking, the potential for vessel strike is so low as to be discountable. The required mitigation measures, all of which were included in the proposed rulemaking and are now required in the final regulations, include: a requirement that all vessel operators comply with 10 kn (18.5 km/hour) or less speed restrictions in any Seasonal Management Area (SMA), DMA, or Slow Zone while underway, and check daily for information regarding the establishment of mandatory or voluntary vessel strike avoidance areas (SMAs, DMAs, Slow Zones) and information regarding North Atlantic right whale sighting locations; a requirement that all vessels, regardless of size, operating from November 1 through April 30 operate at speeds of 10 kn (18.5 km/hour) or less; a requirement that all vessel operators reduce vessel speed to 10 kn (18.5 km/hour) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-

delphinid cetaceans are observed near the vessel; a requirement that all project vessels maintain a separation distance of 500 m or greater from North Atlantic right whales; a requirement that, if underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 kn (18.5 km/hr) or less until the 500-m minimum separation distance has been established; a requirement that, if a North Atlantic right whale is sighted in a vessel's path, or within 500 m of an underway vessel, the underway vessel must reduce speed and shift the engine to neutral; and, a requirement that all vessels underway must maintain a minimum separation distance of 100 m or 50 m from all other marine mammals (species-dependent and excluding North Atlantic right whales), with an understanding that at times this may not be possible (*e.g.,* for animals that approach the vessel). Based on these, we have determined that the vessel strike avoidance measures in the rulemaking are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat.

Comment 28: A commenter expressed concern about the use of multiple vessels concurrently performing the HRG survey work may increase take potential, and that only one ship at a time should be permitted to actively emit sound for survey data collection within 200 nautical miles (nmi) of other ships working in other lease areas.

Response: The commenter does not provide information supporting their statement that multiple HRG survey vessels would increase the potential for take. The amount of take requested by Empire Wind and authorized by NMFS considers the total amount of HRG effort that would occur. Further, the commenter does not provide information supporting their comment that an Empire Wind HRG vessel should operate more than 200 miles from other HRG vessels for other projects. NMFS is not requiring this recommendation because it is not practicable.

Comment 29: Commenters stated that NMFS must utilize the best available science in their analysis. A commenter stated that NMFS must use the most recent and best available science in evaluating impacts to North Atlantic right whales, including updated population estimates, recent habitat usage patterns for the Project Area, and a revised discussion of the acute and cumulative stress on whales in the region. A commenter identified that the North Atlantic right whale population abundance is less than that cited in the proposed rule and that the current mitigation plan would not give assurance that endangered and critically endangered species would be protected. In addition, a commenter noted concerns regarding the number of species that could be impacted by the activities, as well as a lack of baseline data being available for species in the area. The commenter stated that NMFS did not adequately address the potential for cumulative impacts to bottlenose dolphins from Level B harassment over several years of project activities and that there is not sufficient baseline information about how harbor seals use the water of the Lease Area to conclude that the activities covered by rule will have a negligible impact on harbor seals.

Response: The MMPA and its implementing regulations require that ITRs be established based on the best available information, which does not always mean the most recent information. NMFS considered all relevant information regarding North Atlantic right whale, including the information cited by the commenters. In the context of stock abundance, NMFS generally considers the information in the most recent U.S. Atlantic and Gulf of Mexico Stock Assessment Report (SAR; Hayes *et al.,* 2023) to be the best available information for a particular marine mammal stock because of the MMPA's rigorous stock assessment report (SAR) procedural requirements, which includes peer review by a statutorily established Scientific Review Group. Since issuance of the proposed rule, NMFS has finalized the 2022 SAR indicating the North Atlantic right whale population abundance is estimated at 338 individuals (confidence interval: 325–350; 88 FR 4162, January 24, 2023). NMFS has used this most recent best available information in the analysis of this final rule. This new estimate, which is based on the analysis from Pace *et al.* (2017) and subsequent refinements found in Pace (2021), is included by reference in the draft and final 2022 SARs (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment reports*) and provides the most recent and best available estimate, including improvements to NMFS' right whale abundance model. More recently, in October 2023, NMFS released a technical report identifying that the North Atlantic right whale population size based on sighting history through 2022 was 356 whales, with a 95 percent credible interval ranging from 346 to 363 (Linden, 2023). NMFS conservatively relies on the lower SAR abundance estimate in this final rule. The finalization of the draft to final 2022 SAR did not change the estimated take of North Atlantic right whales or authorized take numbers, nor affect our ability to make the required findings under the MMPA for Empire Wind's construction activities.

NMFS relied upon the best scientific evidence available, including, but not limited to, the draft 2022 SAR, scientific literature, and Duke University's density model (Roberts *et al.,* 2023), in analyzing the impacts of Empire Wind's specified activities on marine mammals. The MMPA requires us to evaluate the effects of the specified activities in consideration of the best scientific evidence available and, if the necessary findings are made, to issue the requested take authorization. The MMPA does not allow us to delay decision making to wait for additional information may become available in the future. While commenters suggest generally that NMFS consider the best scientific evidence available, none of the commenters provided additional scientific information for NMFS to consider. Furthermore, NMFS notes that it has previously addressed discussions on cumulative impact analyses in previous comments and references the commenter back to these specific responses in this final rule.

Regarding the commenter's concern about the lack of baseline information for harbor seals, NMFS applied data from the Atlantic Marine Assessment Program for Protected Species (AMAPPS; *https://www.fisheries.noaa.gov/new-england-mid-atlantic/population-assessments/atlantic-marine-assessment-program-protected*) annual reports available from 2010 to 2020 (*https://www.fisheries.noaa.gov/resource/publication-database/atlantic-marine-assessment-program-protected-species*) that represents that best available data for harbor seal distribution across the Atlantic Ocean. NMFS has considered this AMAPPS data in our analysis as well as datasets from the Oceanographic Biodiversity Information System (OBIS, 2023; Smith, 2014) to assess impacts to harbor seals.

Regarding cumulative impacts to bottlenose dolphins across years of project activities, the estimated take by Level B harassment of each stock is not likely representative of the number of individuals that would be taken each year. Repeated takes of the same individuals are likely due to the ranging patterns of each stock. The Project Area also covers a small portion of each stock's range and comparable habitat would be available to dolphins across years. For further discussion of cumulative effects of marine mammals, please see our response in comment 26.

In addition, NMFS has further considered take of the bottlenose dolphin stocks affected by this action, and has adjusted its attribution of such take regarding the Northern Migratory Coastal stock of bottlenose dolphins in the negligible impact and small numbers analyses included in this rule.

Comment 30: Commenters stated that there is a lack of basic research about the impacts of offshore wind energy development on large whales, especially in terms of *in situ* data and interactions between whales and turbines. They asserted that scientific baselines are necessary for assessing potential impacts to whales and that NMFS has failed to include critical scientific assessments and consultations.

Response: The MMPA requires NMFS to evaluate the effects of the specified activities in consideration of the best scientific evidence available and to issue the requested ITR if it makes the necessary findings. The MMPA does not allow NMFS to delay issuance of the requested authorization on the presumption that new information will become available in the future. If new information becomes available in the future, NMFS may modify the mitigation and monitoring measures in an LOA issued under these regulations through the adaptive management provisions. Furthermore, NMFS is required to withdraw or suspend an LOA if, after notice and public comment, and unless an emergency exists, it determines the authorized incidental take may be having more than a negligible impact on a species or stock.

NMFS has duly considered the best scientific evidence available in its effects analysis. The ''Potential Effects of Underwater Sound on Marine Mammals'' section of the proposed rule included a broad overview of the potential impacts on marine mammals from anthropogenic noise and provided summaries of several studies regarding the impacts of noise from several different types of sources (*e.g.,* airguns, Navy sonar, vessels) on large whales, including North Atlantic right whales. Offshore wind farm construction generates noise that is similar, or, in the case of vessel noise, identical, to noise sources included in these studies (*e.g.,* impact pile driving and airguns both produce impulsive, broadband sounds where the majority of energy is concentrated in low frequency ranges), and the breadth of the data from these studies helps us predict the impacts from wind activities. In addition, as described in the proposed rule, it is general scientific consensus that behavioral responses to sound are highly variable and context-specific and are impacted by multiple factors including, but not limited to, behavioral state, proximity to the source, and the nature and novelty of the sound. Overall, the ecological assessments from offshore wind farm development in Europe and peer-reviewed literature on the impacts of noise on marine mammals both in the United States and worldwide provides the information necessary to conduct an adequate analysis of the impacts of offshore wind construction and operation on marine mammals in the Atlantic OCS. NMFS acknowledges that studies in Europe typically focus on smaller porpoise and pinniped species, as those are more prevalent in the North Sea and other areas where offshore wind farms have been constructed, and notes that the commenter did not provide additional scientific information for NMFS to consider.

Comment 31: Commenters expressed concern regarding ocean noise and the interference it has on communication between whales. Commenters were specifically concerned with the low-frequency noise from large vessels involved in the construction activities overlapping North Atlantic right whale communication.

Response: As discussed in the Negligible Impact Analysis and Determination section (specifically the *Auditory Masking or Communication Impairment* section) of both the proposed and final rule, the level of masking that could occur from Empire Wind's activities will have a negligible impact on marine mammals, including North Atlantic right whales. Inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the sound source are in close enough proximity for the effect to occur. In addition, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency). As our analysis (both quantitative and qualitative components) indicates, because of the relative movement of whales and vessels, as well as the stationary nature of a majority of the activities, we do not expect these exposures with the potential for masking to be of a long duration within a given day. Further, because of the relatively low density of North Atlantic right whales during months when most of Empire Wind's activities would be occurring (*i.e.,* May through November in most cases), and the relatively large area over which the vessels will travel and where the activities will occur, we do not expect any individual North Atlantic right whales to be exposed to potentially masking levels from these surveys for more than a few days in a year. Furthermore, as many of the activities are occurring in clusters and specific areas rather than sporadically dispersed in the Project Area (*i.e.,* foundation installation all occurs in the same general area, nearshore cable installation activities occur in relatively similar and nearby areas), animals are likely to temporarily avoid these locations during periods where activities are occurring but are expected to return once activities have ceased.

As noted above, any masking effects of Empire Wind's activities are expected to be limited in duration, if present. For HRG surveys, given the likelihood of significantly reduced received levels beyond short distances from the transiting survey vessel, the short duration of potential exposure, the lower likelihood of extensive additional contributors to background noise offshore and within these short exposure periods, and the fact that the frequency of HRG signals are primarily above those used in social communication or for detection of other important clues, we believe that the incremental addition of the survey vessel is unlikely to result in more than minor and short-term masking effects. For pile driving, and especially foundation installation, masking effects are more likely given the larger zones and longer durations, and animals that approach the source could experience temporary masking of some lower frequency cues. However, any such effects would be localized to the areas around these stationary activities, which means that whales transiting through the area could adjust their transit away from the construction location and return once the activity has completed. As described in the ''Potential Effects of the Activities on Marine Mammals'' section of the proposed rule, NMFS acknowledges the noise contributions of vessels to the soundscape and the potential for larger vessels such as commercial shipping vessels, especially, to mask mysticete communication. For the activity as a whole, including the operation of supporting vessels for Empire Wind's activities, any masking that might potentially occur would likely be incurred by the same animals predicted to be exposed above the behavioral harassment threshold, and thereby accounted for in the analysis. NMFS notes that the commenter did not provide additional scientific information for NMFS to consider to support its concern.

Other

Comment 32: A commenter noted that this proposed rule is for two separate offshore wind energy projects: Empire Wind 1 and 2 and the associated export cable areas. The commenter further recommends that ITR and LOA requests for each energy project be submitted and reviewed separately. Another commenter encouraged NMFS to issue LOAs on an annual basis, rather than a single 5-year LOA, to allow for the continuous incorporation of the best available scientific and commercial information, modify mitigation and monitoring measures as necessary and in a timely manner, and to account for the quickly evolving situation for the North Atlantic right whale.

Response: NMFS disagrees with these comments. The MMPA allows for the authorization of incidental take within a specified geographical region, provided all the necessary findings are made. The applicant identifies the activities for which it is requesting authorization, and NMFS analyzes the request, including consideration of any germane factors that affect the analysis and may vary from one part of the Project Area to another, such as physical, biological, or chemical features. For example, the difference in the density of marine mammals between Empire Wind 1 and 2 is fully factored into the analysis. Further, it is generally considered more beneficial to evaluate the impacts of multiple activities together, where possible, as it allows for a more comprehensive assessment of the impacts and a more holistic approach to the mitigation and monitoring of those impacts. Here, Empire Wind would be responsible for conducting all construction and site characterization activities for Empire Wind 1 and 2. Some of these activities for each project would take place within the same year. For example, site characterization surveys are planned to occur during each of the 5 years across the Project Areas. In addition, impact pile driving of monopile foundations is expected to occur in Empire Wind 1 and Empire Wind 2 across years 2 and 3 of the Project. Further, the final rule includes requirements for annual reports, in addition to weekly and monthly requirements, to support annual evaluation of the activities and monitoring results, and the final rule includes an Adaptive Management provision (see § 217.297(c)) that allows NMFS to make modifications to the mitigation, monitoring, and reporting measures found in the LOA if new information supports the modifications and doing so creates a reasonable likelihood of more effectively accomplishing the goals of the measures. As requested, and supported by the findings herein, NMFS will issue a single 5-year LOA to Empire Wind for activities for both Empire Wind 1 and 2.

Comment 33: Multiple commenters urged NMFS to deny the proposed project and/or postpone any offshore wind activities until NMFS determines effects of all offshore wind (OSW) activities on marine mammals in the region and determines that the recent whale deaths are not related to OSW activities, especially in light of recent UMEs. Similarly, some commenters provided general concerns regarding recent whale stranding events on the Atlantic Coast, including speculation that the strandings may be related to wind energy development-related activities. However, the commenters did not provide any specific information supporting these concerns.

Response: NMFS authorizes take of marine mammals incidental to construction activities and marine site characterization surveys, provided the necessary findings are made, but does not authorize the activities themselves. Therefore, while NMFS has the authority to modify, suspend, or revoke an LOA if the LOA holder fails to abide by the conditions prescribed therein (*e.g.,* failure to comply with monitoring or reporting requirements), or if NMFS determines that (1) the authorized taking is having or is likely to have more than a negligible impact on the species or stocks of affected marine mammals, or (2) the prescribed measures are likely not or are not effecting the least practicable adverse impact on the affected species or stocks and their habitat, it is not within NMFS' jurisdiction to impose a moratorium on offshore wind development or to require activities to cease.

NMFS reiterates that there is no evidence that noise resulting from offshore wind development-related construction activities or site characterization surveys could potentially cause marine mammal stranding, and there is no evidence linking recent large whale mortalities and currently ongoing site characterization surveys. The commenters offer no such evidence. NMFS will continue to gather data to help us determine the cause of death for these stranded whales. We note the Marine Mammal Commission's recent statement: ''There continues to be no evidence to link these large whale strandings to offshore wind energy development, including no evidence to link them to sound emitted during wind development-related site characterization surveys, known as HRG surveys. Although HRG surveys have been occurring off New England and the mid-Atlantic coast, HRG devices have never been implicated or causatively-associated with baleen whale strandings'' (Marine Mammal Commission Newsletter, Spring 2023).

There is an ongoing UME for humpback whales along the Atlantic coast from Maine to Florida, which includes animals stranded since 2016. Partial or full necropsy examinations were conducted on approximately half of the whales. Necropsies were not conducted on other carcasses because they were too decomposed, not brought to land, or stranded on protected lands (*e.g.,* national and state parks) with limited or no access. Of the roughly 90 whales examined, about 40 percent had evidence of human interaction (*i.e.,* vessel strike or entanglement). Vessel strikes and entanglement in fishing gear are the greatest human threats to large whales. The remaining 50 necropsied whales either had an undetermined cause of death due to a limited examination or decomposition of the carcass, or had other causes of death (*e.g.,* parasite-caused organ damage and starvation).

As discussed herein, impact and vibratory pile driving may result in minor Permanent Threshold Shift (PTS) or TTS, as well as behavioral disturbance. HRG sources may behaviorally disturb marine mammals (*e.g.,* avoidance of the immediate area). These HRG surveys are very different from seismic airguns used in oil and gas surveys or tactical military sonar. They produce much smaller impact zones because, in general, they have lower source levels and produce output at higher frequencies. The area within which HRG sources might behaviorally disturb a marine mammal is orders of magnitude smaller than the impact areas for seismic airguns or military sonar. Any marine mammal exposure would be at significantly lower levels and shorter duration, which is associated with less severe impacts to marine mammals.

Comment 34: A commenter expressed concern regarding the potential for increased uncertainty in estimates of marine mammal abundance resulting from wind turbine presence during low aerial surveys and potential effects of NMFS' ability to continue using current low-flying survey methods to fulfill its mission of precisely and accurately assessing protected species.

Response: NMFS and BOEM have collaborated to establish the ''Federal Survey Mitigation Strategy for the Northeast U.S. Region'' (Hare *et al.,*

2022). This interagency effort is intended to guide the development and implementation of a program to mitigate impacts of wind energy development on fisheries surveys. For more information on this effort, please see *https://repository.library.noaa.gov/view/noaa/47925.*

Comment 35: Referencing the low Potential Biological Removal (PBR) for North Atlantic right whales, a commenter stated that all industrial full-scale construction for offshore wind energy should be paused until the Federal agencies determine how best to eliminate or avoid all impacts, Level A harassment, and Level B harassment on the North Atlantic right whale.

Response: NMFS is required to authorize the requested incidental take if it finds the total incidental take of small numbers of marine mammals by U.S. citizens while engaging in a specified activity within a specified geographic region during a 5-year period (or less) will have a negligible impact on such species or stock and, where applicable, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses (16 U.S.C. 1371(a)(5)(A)). While the ITA must be based on the best scientific information available, the MMPA does not allow NMFS to delay issuance of the requested authorization on the presumption that new information will become available in the future. NMFS has made the required findings based on the best scientific information available and has included mitigation measures to effect the least practicable adverse impacts on North Atlantic right whales. Many of these mitigation measures are found in the Draft Strategy (Strategy) for construction activities. While NMFS continues to work together with BOEM towards the goals identified in the Strategy, finalizing the Strategy (or similar efforts) or completing specific goals identified in the strategy are not a prerequisite for the issuance of an ITA.

While NMFS agrees that the North Atlantic right whale population abundance is alarmingly low (with entanglement in fishing gear and vessel strikes being the leading causes of North Atlantic right whale mortality), NMFS disagrees that the type of harassment authorized in this rulemaking will have a non-negligible impact (*i.e.,* adversely affect the species through effects on annual rates of recruitment or survival). NMFS emphasizes that no mortality, serious injury, or Level A harassment is anticipated or authorized for North Atlantic right whales from Empire Wind's specified activities. Further, the impacts of Level B harassment (*i.e.,* behavioral disturbance) are expected to have a negligible impact on the North Atlantic right whale population. The magnitude of behavioral harassment authorized is very low and the severity of any behavioral responses is expected to be primarily limited to temporary displacement and avoidance of the area when some activities that have the potential to result in harassment are occurring (see Negligible Impact Analysis and Determination section for our full analysis). No impacts to the reproductive success or survival of any individual North Atlantic right whales are expected to result from these disturbances and, as such, no impacts to the population are expected to result. In its comment, the commenter conflates PBR level and Level B harassment and suggests that Level B harassment can have population level impacts. The PBR level is defined as the maximum number of animals, not including natural mortalities, that may be *removed* from a stock while allowing that stock to reach or maintain its optimum sustainable population (16 U.S.C. 1362(20)). Thus, PBR is only germane in the discussion of ''removals'' of individual North Atlantic right whales from the population and, therefore, PBR is not applicable in this discussion since no impact to reproduction or survival of any individuals is anticipated or authorized. Further, the commenter did not suggest mitigation measures to eliminate and avoid all impacts to North Atlantic right whales for NMFS to evaluate or consider.

Changes From the Proposed to Final Rule

Since the publication of the proposed rule in the **Federal Register** (88 FR 22696, April 13, 2023), NMFS has made changes, where appropriate, that are reflected in the regulatory text and preamble text of this final rule. These changes are briefly identified below, with more information included in the indicated sections of this final rule:

Changes in Information Provided in the Preamble

As described in the response to public comments section, NMFS received 328 comments regarding this rulemaking, specifically including numerous comments that requested greater protections for marine mammals through the mitigation and monitoring measures or clarification on implementation of those measures. NMFS continues to receive information generated by current offshore wind development, which helps further inform our incorporation of these public comments into the rule. We have made certain changes described below in response to public comment or as needed for clarity. In addition, the information found in the preamble of the proposed rule was based on the best available information at the time of publication. Since publication of the proposed rule, new information has become available including NMFS' final 2022 SARs (Hayes *et al.,* 2023), which has been used to update the final rule as appropriate.

The following changes were made to the Purpose and Need for Regulatory Action section of the preamble to this final rule:

We have added regulatory definitions under Legal Authority for the Final Action for the sake of clarity.

The following changes are reflected in the Description of Marine Mammals in the Geographic Area section of the preamble to this final rule:

Given the release of NMFS' final 2022 SARs (Hayes *et al.,* 2023), we have updated the total mortality/serious injury (M/SI) amount for North Atlantic right whales from 8.1 to 31.2. This increase is due to the inclusion of undetected annual M/SI in the total annual serious injury/mortality. In addition, NMFS recently released a technical report identifying that the North Atlantic right whale population size based on sighting history through 2022 was 356 whales, with a 95-percent credible interval ranging from 346 to 363. This information has also been included in the stock abundance column in table 2, ''Marine mammal species that may occur in the Project Area and be taken, by harassment.''

Given the availability of new information, we have made updates to the UME summaries for multiple species.

The following changes are reflected in the Estimated Take section of the preamble to this final rule:

In consideration of comments received from the Commission, we have increased the amount of take authorized for fin whales during impact pile driving, by Level A harassment, from one to four (based on two group sizes from the AMAPPS dataset) in year 2 and from one to two (based on one group size from AMAPPS) in year 3. Prior to adding this requirement, NMFS considered this proposed increase in take and considered this measure practicable. This decision was additionally supported by an increased number of sightings of fin whales in the Project Area during June, July, and August 2023 (Empire Wind, 2023).

We have also updated our methodology for estimating take authorized for harbor seals, grays seals, long-finned pilot whales, and short-

finned pilot whales, by Level B harassment, and subsequently, updated take by Level B harassment authorized for seal species. Pilot whale and seal guild densities were scaled by local abundances based upon occurrence data (OBIS, 2023; Smith, 2014) to identify the proportion of the guild densities that should be attributed to each species. Species-specific densities were used to calculate exposure estimates for each pilot whale and seal species. Based upon this updated methodology, pilot whale exposure estimates and take estimates have not changed. Updated seal exposure estimates and take estimates are described in tables 22 and 23.

After considering a comment from Clean Ocean Action concerning the take by Level B harassment of bottlenose dolphins and a comment from the Commission regarding attribution of take between the offshore and coastal stocks of bottlenose dolphins on the Ocean Wind 1 project, which was incorporated by reference here in the Commission's comment letter, NMFS has updated the description of take by Level B harassment for the northern migratory coastal stock of bottlenose dolphins, incidental to HRG surveys. While take numbers have not changed, we have taken a finer look at calculating the percentage of take attributed to the two affected bottlenose dolphin stocks. We have included a detailed description of estimating take by Level B harassment, incidental to HRG surveys, for the northern migratory coastal bottlenose dolphin stock in the Negligible Impact and Small Numbers sections of this rule.

The following changes are reflected in the Mitigation section of the preamble to this final rule:

NMFS has re-organized and simplified this section to avoid repeating entirely the requirements provided in the regulatory text.

In response to multiple commenters' concerns regarding noise attenuation, we have added a general requirement that noise levels must not exceed those modeled assuming 10 dB of attenuation and all project vessels must utilize AIS.

In consideration of a recommendation from the Commission and a requirement to increase the minimum visibility zone in the Biological Opinion (BiOp), NMFS has increased the minimum visibility zone for mysticetes for impact pile driving from 1.2 km to 1.5 km to be consistent with the shutdown zone for mysticetes. In the BiOp, the minimum visibility zone was also increased to 1.5 km.

Based on a recommendation by a commenter and a requirement to increase the visual shutdown zone for North Atlantic right whales in the BiOp, NMFS has increased the visual shutdown zone for North Atlantic right whales for impact pile driving from 1.5 km to any distance. NMFS has also increased the PAM clearance and shutdown zones for North Atlantic right whales to any distance. Prior to increasing the shutdown and clearance zones, NMFS considered these measures internally, and found these measures to be practicable.

Based on multiple commenters' concerns regarding noise attenuation, and as informed by preliminary sound measurements from South Fork Wind, NMFS has added a requirement that two functional noise attenuation devices that reduce noise levels to the modeled harassment isopleths, assuming a 10-dB attenuation, must be used during foundation pile driving. A single bubble curtain alone will not be allowed for use in mitigation.

We clarify that the mitigation measure restricting Project vessels from traveling over 10 kn (5.14 m/s) in the transit corridor, unless Empire Wind conducts real-time acoustic monitoring to detect large whales (including North Atlantic right whales), applies only when other speed restrictions are not in place.

Based on multiple commenters' concerns regarding impacts to North Atlantic right whales from pile driving, we added the requirement that Empire Wind must delay or shutdown if a North Atlantic right whale is acoustically detected at any distance within the 10 km PAM monitoring zone.

Because Empire Wind identified that the soft-start procedure in the proposed rule was concerning regarding engineering feasibility and practicability, we have removed the specific soft-start procedure identified in the proposed rule (but not the requirement to conduct a soft-start) and will provide a practicable soft-start procedure in the LOA.

The following changes are reflected in the Monitoring and Reporting section of the preamble to this final rule:

We have updated the process for obtaining NMFS approval for PSO and PAM Operators to be similar to requirements typically included for seismic (*e.g.,* airgun) surveys and have clarified education, training, and experience necessary to obtain NMFS approval.

In consideration of a recommendation by the Commission and based upon NMFS' internal consideration that this would be a practicable measure, we have added a requirement that the Lead PSO must have a minimum of 90 days of at-sea experience and must have obtained this experience within the last 18 months.

We have added a requirement to have at least three active PSOs on duty on the pile driving vessel rather than two PSOs, as was originally described in the proposed rule. Addition of this requirement is based on commenters' concerns regarding sufficient marine mammal monitoring and NMFS' evaluation that three PSOs (each covering 120 degrees) will improve the reliability of detection from the pile driving platform.

In response to multiple comments seeking augmented noise reduction technologies, including comments from Oceana, the Natural Resources Defense Council, and the Commission, we have added a requirement stating that Empire Wind must use at least two functional noise attenuation devices that reduce noise levels to the modeled harassment isopleths, assuming 10-dB attenuation, and clarify that a single bubble curtain must not be used. Second, we added requirements that SFV must be conducted on every pile until measured noise levels are at or below the modeled noise levels, assuming 10 dB, for at least three consecutive monopiles and abbreviated SFV monitoring must be conducted on all additional foundation installations to align with the requirements in the BiOp. Third, we have added a requirement that Empire Wind must deploy at least eight hydrophones at four locations (one bottom and one mid-water column at each location) along an azimuth that is likely to see lowest propagation loss and two hydrophones (one bottom and one mid-water) at 750 m, 90 degrees from the primary azimuth during installation of all piles where SFV monitoring is required.

NMFS has changed the submission date from 90 to 180 days prior to the start of pile driving commencement for the Pile Driving Marine Mammal Monitoring Plan and the PAM Plan (noting the Vessel Strike Avoidance and Vibratory Pile Driving Plans retain the 90-day requirement as these activities are very nearshore) to align with the requirements of the BiOp.

In response to a comment from the Natural Resources Defense Council, we have removed the requirements for reviewing data on an annual and biennial basis for adaptive management and instead will make adaptive management decisions as frequently as new information warrants it.

Changes in the Regulatory Text

As described above regarding changes made to the preamble, we have made the following corresponding and

additional changes to the regulatory text in response to public comment, especially those numerous public comments requesting greater mitigation and monitoring measures, or for clarity, as informed by comment and continuing information generated by current offshore wind projects.

For clarity and consistency, we revised three paragraphs in § 217.280, ''Specified activity and specified geographical region,'' of the regulatory text to fully describe the specified activity, specified geographical region, and requirements imposed on the LOA Holder (Empire Wind).

Due to a change in the Empire Wind final rule and LOA issuance schedule, we updated the effective dates for these regulations in § 217.281.

For clarity, we revised one paragraph in § 217.282, ''Permissible methods of taking,'' to fully describe the specified geographical area.

In response to several commenters' concerns regarding strengthening mitigation and monitoring measures, NMFS has added a requirement for confirmation of all required training to be documented on a training course log sheet and reported to NMFS before initiating project activities. A description of the training program must be provided to NMFS at least 60 days prior to the initial training before in-water activities begin.

NMFS has also added a requirement that the marine mammal monitoring team must monitor available sources of information on North Atlantic right whale presence in or near the Project Area no less than every 4 hours.

In § 217.284(a)(4), NMFS has clarified that any visual observation of marine mammals, as opposed to ESA-listed marine mammals, must be communicated to PSOs and vessel captains.

NMFS has added additional clarification on the authority of PSOs and PAM operators in § 217.284(a)(7) to ensure compliance and proper implementation of the regulations.

NMFS has specified that any visual or acoustic detection of a North Atlantic right whale must trigger a delay in commencement of pile driving and HRG surveys.

In consideration of multiple commenters' concerns regarding vessel transparency, including those concerns expressed by Oceana, NMFS has added a requirement that all project vessels must utilize AIS.

NMFS has included a requirement for Empire Wind to consent to onsite observations and inspections by Federal personnel during project activities.

NMFS has added a prohibition to interfering with PSO or PAM operator responsibilities.

NMFS has clarified that all underway vessels requiring a dedicated visual observer would be transiting within the specified geographic area.

NMFS has added a requirement for any large whale sighting to be communicated to all project-associated vessels, and for a large whale sighting log sheet to be retained for the vessel captain's review each day.

NMFS has clarified the requirement in § 217.284(b)(8) in the proposed rule to specify that this measure applies to vessels traveling in the specified geographic region.

In consideration of several commenters' concerns regarding strengthening mitigation measures to avoid vessel strike, NMFS has removed the requirement in § 217.284(b)(16) in the proposed rule for any underway vessel to avoid speed over 10 kn (18.5 km/hr) or abrupt changes in course direction until an animal is on a path away from the separation distance. The current requirement in § 217.284(b) requires vessels to reduce speed and shift engine to neutral if an animal is within the separation distance.

NMFS has updated the requirement in § 217.284(b)(17) in the proposed rule that a North Atlantic right whale detection triggers a speed restriction for all vessels (previously only crew transfer vessels) within 10 km for a 24-hour period (previously 12-hour period).

NMFS has updated the requirement for submission of a North Atlantic vessel strike avoidance plan from 90 to 180 days prior to commencement of vessel use.

For clarity, NMFS has updated the term ''foundation impact pile driving'' to ''foundation pile driving.''

Because Empire Wind identified that the soft-start procedure in the proposed rule was concerning regarding engineering feasibility and practicability, we have removed the specific soft-start procedure identified in the proposed rule (but not the requirement to conduct a soft-start) and will provide a practicable soft-start procedure in the LOA.

NMFS has clarified boundaries for observations of North Atlantic right whales that trigger a delay in the commencement of pile driving.

In response to multiple comments seeking augmented noise reduction technologies, including those from Oceana, the Natural Resources Defense Council, and the Commission, NMFS has added a requirement that two functional noise attenuation devices that reduce noise levels to the modeled harassment isopleths, assuming 10-dB attenuation must be used during impact pile driving, and a single bubble curtain may not be used.

NMFS has clarified requirements for PAM systems, including a requirement for the PAM system to be able to detect a vocalization of North Atlantic right whales up to 10 km away.

NMFS has increased the minimum requirement for PSOs on the pile driving platform. As described above, addition of this requirement is based on commenters' concerns regarding sufficient marine mammal monitoring and NMFS' evaluation that 3 PSOs (each covering 120 degrees) will improve the reliability of marine mammal detection from the pile driving platform.

NMFS has added a requirement for Empire Wind to conduct abbreviated SFV measurements on all piles for which thorough SFV monitoring is not being conducted to align with requirements of the BiOp and public requests for noise abatement. In consideration of a comment from the MMC, NMFS has also added more specific requirements for SFV measurements and reporting, including the submission of interim reports and description of information required for reports, conducting additional in-situ measurements, and equipment calibration.

In consideration of Oceana's comment regarding frequent reporting to federal agencies, NMFS has added a requirement for Empire Wind to submit 48-hour interim reports after each foundation is measured using thorough SFV. Abbreviated SFV reports are due weekly.

NMFS has clarified requirements applying to HRG surveys operating sub-bottom profilers (SBPs) in § 217.284(e) to ensure compliance and proper implementation of the regulations.

In consideration of multiple commenters' concerns regarding HRG survey acoustic impacts and effective mitigation measures, NMFS has added a requirement for acoustic source ramp-ups to be scheduled in order to minimize the time spent with the source activated.

For fishery monitoring surveys, NMFS has added multiple requirements designed to further augment mitigation and minimization of impacts to marine mammals in alignment with public comment, including quick emptying of gear after retrieval, labeling all gear, and marine mammal avoidance requirements.

The following changes are reflected in § 217.285, ''Requirements for monitoring and reporting,'' and the

associated Monitoring and Reporting section of the preamble to this final rule:

NMFS has added a requirement for all PSOs and PAM operators to have successfully completed a relevant training course within the last 5 years and to submit the certificate of course completion in order to further clarify PSO requirements to ensure compliance.

NMFS has further clarified PAM operator qualifications as well as PSO and PAM training requirements in § 217.285 to ensure compliance and proper implementation of regulations. This additional clarification includes detailed requirements for prior experience, being independent observers, ability for PAM operators to review and classify acoustic detections in real-time, PSO marine mammal identification and behavior training to focus on species specific to the North Western Atlantic Ocean, and PSO and PAM training to have been completed within the past 5 years and have included a certificate of course completion. NMFS has specified that Empire Wind must submit the names of NMFS previously approved PSOs and PAM operators at least 30 days prior to commencement of the specified activities and 15 days prior to when new PSOs/PAM operators are required after activities have commenced.

NMFS has specified the following additional details in § 217.285(b) to clarify PSO and PAM operator requirements in order to ensure compliance and proper implementation of regulations: PAM operators may be located remotely or on-shore, and must assists PSOs in ensuring full coverage of the clearance and shutdown zones; PSOs must monitor for marine mammals prior to, during, and following impact pile driving, vibratory pile driving, and HRG surveys that use sub-bottom profilers and monitoring must be done while free from distractions; all on-duty PSOs and PAM operator(s) are to remain in real-time contact with the on-duty construction personnel responsible for implementing mitigations; and the PAM operator must inform the Lead PSO(s) on duty of animal detections approaching or within applicable ranges of interest to the activity occurring via the data collection software system.

NMFS has clarified the following requirements for monitoring during fishery surveys to ensure compliance and proper implementation of regulations: All captains and crew conducting fishery surveys must be trained in marine mammal detection and identification and marine mammal monitoring must be conducted within 1 nmi from the planned survey location by the trained captain and/or a member of the scientific crew for 15 minutes prior to deploying gear, throughout gear deployment and use, and for 15 minutes after haul back. In addition, NMFS has specified that any dates in reports for NMFS must be in the MM/DD/YYYY format, and location information must be provided in Decimal Degrees and with the coordinate system information.

NMFS has added additional requirements for inclusion in SFV reports in consideration of the MMC's concerns for the information included in any SFV report to be specified.

NMFS has clarified that final annual reports must be prepared and submitted within 30 calendar days following the receipt of any comments from NMFS on the draft report. If no comments are received from NMFS within 60 calendar days of NMFS' receipt of the draft report, the report must be considered final.

In consideration of the Commission's concerns for underestimating takes by Level A harassment and Level B harassment, NMFS has added a requirement that if at any time during the Project Empire Wind becomes aware of any issue or issues which may (to any reasonable subject-matter expert, including the persons performing the measurements and analysis) call into question the validity of any measured Level A harassment or Level B harassment isopleths to a significant degree, Empire Wind must inform NMFS Office of Protected Resources within one business day of becoming aware of this issue or before the next pile is driven, whichever comes first.

NMFS has added specific regional contact information for reporting North Atlantic right whale sightings and stranded, entangled, injured, or dead marine mammals.

NMFS had added a requirement to report observations of any large whale (other than North Atlantic right whales) to the WhaleAlert app.

NMFS has added a requirement that Empire Wind must report any lost gear associated with the fishery surveys to the NMFS GARFO Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*) as soon as possible or within 24 hours of the documented time of missing or lost gear.

Description of Marine Mammals in the Geographic Area

As noted in the Changes from the Proposed to Final Rule section, updates have been made to the abundance estimate for North Atlantic right whales and to the UME summaries of multiple species. These changes are described in detail in the sections below and, otherwise, the marine mammal information has not changed since the proposed rule.

Thirty-eight marine mammal species under NMFS' jurisdiction have geographic ranges within the western North Atlantic OCS (Hayes *et al.,* 2023). Sections 3 and 4 of Empire Wind's ITA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species (Empire Wind, 2022). Additional information regarding population trends and threats may be found in NMFS's SARs (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species and stocks for which take is expected and authorized for this action, and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA, and provides the PBR, where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (16 U.S.C. 1362(20)), as described in NMFS's SARs. While no mortality is anticipated or authorized, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic and Gulf of Mexico SARs. All values presented in table 2 are the most recent available at the time of publication and are available in NMFS' 2022 draft SARs available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports.*

TABLE 2—MARINE MAMMAL SPECIES THAT MAY OCCUR IN THE PROJECT AREA AND BE TAKEN BY HARASSMENT

Common name [1]	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [2]	Stock abundance (CV, N_{min}, most recent abundance survey) [3]	PBR	Annual M/SI [4]
Order Artiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenidae:						
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic	E, D, Y	338 (0; 332; 2020), 356 (346–363, 2022) [5].	0.7	[6] 31.2
Family Balaenopteridae (rorquals):						
Fin whale	*Balaenoptera physalus*	Western North Atlantic	E, D, Y	6,802 (0.24; 5,573; 2016)	11	1.8
Sei whale	*Balaenoptera borealis*	Nova Scotia	E, D, Y	6,292 (1.02; 3,098; 2016)	6.2	0.8
Minke whale	*Balaenoptera acutorostrata*	Canadian Eastern Coastal	-, -, N	21,968 (0.31; 17,002; 2016).	170	10.6
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-, -, N	1,396 (0; 1,380; 2016)	22	12.15
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	North Atlantic	E, D, Y	4,349 (0.28; 3,451; 2016)	3.9	0
Family Delphinidae:						
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic	-, -, N	93,233 (0.71; 54,433; 2016).	544	27
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic	-, -, N	39,921 (0.27; 32,032; 2016).	320	0
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic Offshore.	-, -, N	62,851 (0.23; 51,914; 2016).	519	28
		Northern Migratory Coastal	-, -, Y	6,639 (0.41; 4,759; 2016)	48	12.2–21.5
Long-finned pilot whales	*Globicephala melas*	Western North Atlantic	-, -, N	39,215 (0.3; 30,627; 2016).	306	29
Short-finned pilot whales	*Globicephala macrorhynchus*	Western North Atlantic	-, -, N	28,924 (0.24; 23,637; 2016).	236	136
Risso's dolphin	*Grampus griseus*	Western North Atlantic	-, -, N	35,215 (0.19; 30,051; 2016).	301	34
Common dolphin	*Delphinus delphis*	Western North Atlantic	-, -, N	172,897 (0.21; 145,216; 2016).	1,452	390
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-, -, N	95,543 (0.31; 74,034; 2016).	851	16
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Gray seal [7]	*Halichoerus grypus*	Western North Atlantic	-, -, N	27,300 (0.22; 22,785; 2016).	1,458	4,453
Harbor seal	*Phoca vitulina*	Western North Atlantic	-, -, N	61,336 (0.08; 57,637; 2018).	1,729	339
Harp seal [8]	*Pagophilus grownlandicus*	Western North Atlantic	-, -, N	7,600,000 (UNK, 7,100,000).	426,000	178,573

[1] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://www.marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies;* Committee on Taxonomy, 2022).

[2] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[3] NMFS marine mammal SARs online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments* (Hayes *et al.,* 2023). CV is the coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[4] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike).

[5] The current SAR includes an estimated population (N_{best} 338) based on sighting history through November 2020 (Hayes *et al.,* 2023). In October 2023, NMFS released a technical report identifying that the North Atlantic right whale population size based on sighting history through 2022 was 356 whales, with a 95-percent credible interval ranging from 346 to 363 (Linden, 2023).

[6] Total annual average observed North Atlantic right whale mortality during the period 2016–2020 was 8.1 animals and annual average observed fishery mortality was 5.7 animals. Numbers presented in this table (31.2 total mortality and 22 fishery mortality) are 2015–2019 estimated annual means, accounting for undetected mortality and serious injury.

[7] NMFS' stock abundance estimate (and associated PBR value) applies to the U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,431. The annual M/SI value given is for the total stock.

[8] Harp seals are rare in the region; however, stranding data suggest this species may be present during activities that may take marine mammals.

All 38 species that could potentially occur in the Project Area are included in table 12 of the Empire Wind ITA application and are discussed therein (Empire Wind, 2022). While the majority of these species have been documented or sighted off the New York coast in the past, for the species and stocks not listed in table 2, NMFS considers it unlikely that their occurrence would overlap the activity in a manner that would result in harassment, either because of their spatial occurrence (*i.e.,* more northern or southern ranges) and/or with the geomorphological characteristics of the underwater environment (*i.e.,* water depth in the development area).

A detailed description of the species likely to be affected by Empire Wind's project, including brief introductions to the species and relevant stocks, information regarding population trends and threats, and information regarding

local occurrence, were provided in the proposed rule (88 FR 22696, April 13, 2023). Since that time, we are not aware of any changes in the status of the species and stocks listed in table 2; therefore, detailed descriptions are not provided here. Please refer to the proposed rule for these descriptions (88 FR 22696, April 13, 2023). Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Since the publication of the proposed rule, the following updates have occurred to the below species in regards to general information or their active UMEs.

North Atlantic Right Whale

In August 2023, NMFS released its final 2022 SARs, which updated the population estimate (N_{best}) of North Atlantic right whales from 368 to 338 individuals and the annual M/SI value from 8.1 to 31.2 due to the addition of estimated undetected mortality and serious injury, as described above, which had not been previously included in the SAR. The population estimate is slightly lower than the ''North Atlantic Right Whale Consortium's 2022 Report Card'', which identifies the population estimate as 340 individuals (Pettis *et al.,* 2023). In October 2023, NMFS released a technical report identifying that the North Atlantic right whale population size based on sighting history through 2022 was 356 whales, with a 95-percent credible interval ranging from 346 to 363 (Linden, 2023). The Northeast Fisheries Science Center (NEFSC) completed both technical and policy reviews of this report. Elevated North Atlantic right whale mortalities have occurred since June 7, 2017, along the United States and Canadian coast, with the leading category for the cause of death for this UME determined to be ''human interaction,'' specifically from entanglements or vessel strikes. As of November 30, 2023, there have been 36 confirmed mortalities (dead stranded or floaters), 0 pending mortalities, and 34 seriously injured free-swimming whales for a total of 70 whales. As of October 14, 2022, the UME also considers animals (n=51) with sublethal injury or illness (*i.e.,* ''morbidity'') bringing the total number of whales in the UME to 121. More information about the North Atlantic right whale UME is available online at: *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event.*

Humpback Whale

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine to Florida. This event was declared a UME in April 2017. As of November 30, 2023 (*i.e.,* updated since the proposed rule), partial or full necropsy examinations have been conducted on approximately half of the 212 known cases. Of the approximately 90 whales examined, about 40 percent had evidence of human interaction, either by vessel strike or entanglement (refer to *https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2023-humpback-whale-unusual-mortality-event-along-atlantic-coast*). While a portion of the whales have shown evidence of pre-mortem vessel strike, this finding is not consistent across all whales examined and more research is needed. NOAA is consulting with researchers that are conducting studies on the humpback whale populations, and these efforts may provide information on changes in whale distribution and habitat use that could provide additional insight into how these vessel interactions occurred. More information is available at: *https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2023-humpback-whale-unusual-mortality-event-along-atlantic-coast.*

Minke Whale

Since January 2017, elevated minke whale mortalities detected along the Atlantic coast from Maine through South Carolina resulted in the declaration of a UME. As of November 30, 2023 (*i.e.,* updated since the proposed rule), a total of 160 minke whales have stranded during the UME. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings have shown evidence of human interactions or infectious disease in several of the whales, but these findings are not consistent across all of the whales examined and more research is needed. This UME has been declared non-active and is pending closure. More information is available at: *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-minke-whale-unusual-mortality-event-along-atlantic-coast.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65-dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kilohertz (kHz).
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, Kogia, river dolphins, cephalorhynchid, Lagenorhynchus cruciger & L. australis).	275 Hz to 160 kHz.

TABLE 3—MARINE MAMMAL HEARING GROUPS—Continued

[NMFS, 2018]

Hearing group	Generalized hearing range *
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65-dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

NMFS notes that in 2019a, Southall *et al.* recommended new names for hearing groups that are widely recognized. However, this new hearing group classification does not change the weighting functions or acoustic thresholds (*i.e.,* the weighting functions and thresholds in Southall *et al.* (2019a) are identical to NMFS 2018 Revised Technical Guidance). When NMFS updates our Technical Guidance, we will be adopting the updated Southall *et al.* (2019a) hearing group classification.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the Project activities have the potential to result in the harassment of marine mammals in the vicinity of the Project Area. The proposed rule (88 FR 22696, April 13, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from the Project activities on marine mammals and their habitat. That information and analysis is adopted by reference into this final rule determination and is not repeated here. Please refer to the proposed rule (88 FR 22696, April 13, 2023).

Since the publication of the proposed rule, new scientific information has become available that provides additional insight into the sound fields produced by turbine operation (HDR, Inc., 2023; Holme *et al.,* 2023). Recently, Holme *et al.* (2023) stated that Tougaard *et al.* (2020) and Stöber and Thomsen (2021) extrapolated levels for larger turbines and should be interpreted with caution since both studies relied on data from smaller turbines (0.45 to 6.15 MW) collected over a variety of environmental conditions. They demonstrated that the model presented in Tougaard *et al.* (2020) tends to overestimate levels (up to approximately 8 dB) measured to those in the field, especially with measurements closer to the turbine for larger turbines. Holme *et al.* (2023) measured operational noise from larger turbines (6.3 and 8.3 MW) associated with three wind farms in Europe and found no relationship between turbine activity (*i.e.,* power production, which is proportional to the blade's revolutions per minute) and noise level. However, it was noted that this missing relationship may have been masked by the area's relatively high ambient noise sound levels. Sound levels (*i.e.,* root-mean-square (RMS)) of a 6.3 MW direct-drive turbine were measured to be 117.3 dB at a distance of 70 meters. However, measurements from 8.3 MW turbines were inconclusive as turbine noise was deemed to have been largely masked by ambient noise.

In addition, operational turbine measurements from the Coastal Virginia Offshore Wind pilot pile project indicated that noise levels from two, 7.8 m monopiles WTGs were higher when compared to Block Island wind farm, likely due to vibrations associated with the monopiles structure (HDR, Inc., 2023). We note that this updated information does not change our assessment for impacts of turbine operational sound on marine mammals. As described in the proposed rule, NMFS will require Empire Wind to measure operational noise levels, however, is not authorizing take incidental to operational noise from WTGs.

Estimated Take

This section provides an estimate of the number of incidental takes authorized through this rulemaking, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Minor changes to the estimated and authorized take for several species have been made since publication of the proposed rule based on recommendations received during the public comment period and the best available science. These changes are described in the Changes from the Proposed to Final Rule section above and in the sections below. Otherwise, the methodology for, and amount of, estimated take has not changed since the proposed rule.

Authorized takes would primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* impact and vibratory pile driving and site characterization surveys) have the potential to result in disruption of marine mammal behavioral patterns due to exposure to elevated noise levels. Impacts such as masking and TTS can contribute to behavioral disturbances. There is also some potential for auditory injury constituting Level A harassment to occur in select marine mammal species incidental to the specified activities (*i.e.,* impact pile driving). For this action, this potential is limited to mysticetes due to their hearing sensitivities and the nature of the activities. As described below, the larger distances to the PTS thresholds, when considering marine mammal weighting functions, demonstrate this potential. For mid-frequency hearing sensitivities, when thresholds and weighting and the associated PTS zone sizes are considered, the potential for PTS from the noise produced by the Project is negligible. The required mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no serious injury or mortality is anticipated or authorized for this project. Below, we describe how the take was estimated.

Generally speaking, NMFS estimates take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively

inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the authorized take estimates.

Marine Mammal Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment). Thresholds have also been developed identifying the received level of in-air sound above which exposed pinnipeds would likely be behaviorally harassed. A summary of all NMFS' thresholds can be found at (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance*).

Level B harassment— Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* other noises in the area) and the state of the receiving animals (*e.g.,* hearing, motivation, experience, demography, life stage, depth), and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021; Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (re 1 μPa) for continuous (*e.g.,* vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources (table 4). Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (*e.g.,* conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

Empire Wind's construction activities include the use of continuous (*e.g.,* vibratory pile driving) and intermittent (*e.g.,* impact pile driving and HRG acoustic sources) sources; therefore, the 120 and 160 dB re 1 μPa (RMS) thresholds are applicable.

Level A harassment— NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0; Technical Guidance, 2018) identifies dual criteria to assess auditory injury constituting Level A harassment to five different marine mammal groups based on hearing sensitivity as a result of exposure to noise from two different types of sources (*i.e.,* impulsive or non-impulsive sources). As dual metrics, NMFS considers onset of PTS constituting Level A harassment to have occurred when either one of the two metrics is exceeded (*i.e.,* metric resulting in the largest isopleth). The Project includes the use of impulsive and non-impulsive sources.

These thresholds are provided in table 4 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—ONSET OF PTS

[NMFS, 2018]

Hearing group	PTS onset thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{p,0\text{-}pk,flat}$: 219 dB; $L_{E,p,\ LF,24h}$: 183 dB	*Cell 2:* $L_{E,p,\ LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{p,0\text{-}pk,flat}$: 230 dB; $L_{E,p,\ MF,24h}$: 185 dB	*Cell 4:* $L_{E,p,\ MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{p,0\text{-}pk,flat}$: 202 dB; $L_{E,p,HF,24h}$: 155 dB	*Cell 6:* $L_{E,p,\ HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{p,0\text{-}pk.flat}$: 218 dB; $L_{E,p,PW,24h}$: 185 dB	*Cell 8:* $L_{E,p,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{p,0\text{-}pk,flat}$: 232 dB; $L_{E,p,OW,24h}$: 203 dB	*Cell 10:* $L_{E,p,OW,24h}$: 219 dB.

* Dual metric thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds are recommended for consideration.

Note: Peak sound pressure level ($L_{p,0\text{-}pk}$) has a reference value of 1 μPa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1μPa^2s. In this table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO, 2017). The subscript ''flat'' is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.,* 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these thresholds will be exceeded.

Below, we discuss the acoustic modeling, marine mammal density information, and take estimation for each of Empire Wind's construction activities. NMFS has carefully considered all information and analysis presented by the applicant as well as all other applicable information and, based on the best available science, concurs that the applicant's estimates of the types and amounts of take for each species and stock are complete and accurate.

Marine Mammal Densities

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

Habitat-based density models produced by the Duke University Marine Geospatial Ecology Laboratory and the Marine-life Data and Analysis Team, based on the best available marine mammal data from 1992 to 2022 obtained in a collaboration between Duke University, the Northeast Regional Planning Body, the University of North Carolina Wilmington, the Virginia Aquarium and Marine Science Center, and NOAA (Roberts *et al.,* 2016a, 2016b, 2017, 2018, 2020, 2021a, 2021b, 2023), represent the best available science regarding marine mammal densities in the Project Area. More recently, these data have been updated with new modeling results and include density estimates for pinnipeds (Roberts *et al.,* 2016b, 2017, 2018, 2023). Density data are subdivided into five separate raster data layers for each species, including: Abundance (density); 95 percent Confidence Interval of Abundance; 5 percent Confidence Interval of Abundance; Standard Error of Abundance; and Coefficient of Variation of Abundance.

Empire Wind's initial densities and take estimates were included in the ITA application that was considered Adequate & Complete on August 11, 2022, in line with NMFS' standard ITA guidance (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/apply-incidental-take-authorization*). However, on June 20, 2022, the Duke Marine Geospatial Ecology Laboratory released a new, and more comprehensive, set of marine mammal density models for the area along the East Coast of the United States (Roberts *et al.,* 2023). The differences between the new density data and the older data necessitated the use of updated marine mammal densities and, subsequently, revised marine mammal take estimates. This information was provided to NMFS as an addendum to the application on January 25, 2023, after continued discussion between Empire Wind and NMFS, and NMFS has considered it in this analysis. The application addendum was made public on NMFS' website (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1?check_logged_in=1*).

For foundation installation, the width of the perimeter around the activity area used to select density data from the Duke models was based on the largest 10-dB attenuated exposure range (the Level B harassment range) applicable to that activity and then rounded up to the nearest 0.5-km increment (10 km), which reflects the spatial resolution of the Roberts *et al.* (2023) density models. Empire Wind determined the mean density for each month by calculating the unweighted mean of all 5 x 5 km grid cells partially or fully within the analysis polygon (Roberts *et al.,* 2023). The monthly densities for an entire year were calculated to coincide with possible planned activities.

Empire Wind assumed that a maximum of 24 monopiles could be installed per month, with a maximum of 96 WTG monopiles and two OSS foundations installed in year 2 (2025) and the remaining 51 WTG monopile foundations installed in year 3 (2026). In year 2 (2025), Empire Wind assumed that 24 monopiles would be installed in the four highest-density months for each species during the May to December period and the two OSSs would be installed in the highest and second-highest-density months. Empire Wind also assumed that all 17 difficult-to-drive piles would be installed in the first year of pile driving but the distribution would be spread relatively evenly among the four highest months (*i.e.,* four piles per month except the highest-density month which assumed 5 difficult-to-drive piles for a total of 17 piles). In the second year of pile driving, 24 monopiles would be installed in the two highest-density months and the remaining 3 monopiles would be installed in the third-highest-density month. Thus, each species was presumed to be exposed to the maximum amount of pile driving based on their monthly densities (table 6). This was determined to be the most conservative approach to generate potential installation schedules for animal exposure calculation.

For cofferdam and goal post density estimates, Empire Wind used the modeled acoustic range distance to the Level B harassment threshold to calculate the ensonified area around the source of the cofferdam or goal post installation activity (see the *Temporary Cofferdam and/or Goal Post Installation and Removal (Vibratory Pile Driving) Take Estimates* section below). Empire Wind averaged the maximum monthly densities by season as reported by Roberts *et al.* (2023): Spring (March through May), summer (June through August), fall (September through November), and winter (December through February). To be conservative, the maximum average seasonal density for each species was then carried forward in the take calculations.

To estimate densities for the HRG surveys occurring both within the Lease Area and within the export cable routes, Empire Wind mapped density data from Roberts *et al.* (2023) within the boundary of the Project Area using geographic information systems. Empire Wind averaged maximum monthly densities (as reported by Roberts *et al.,* 2023) by season over the survey duration (for winter (December through February), spring (March through May), summer (June through August), and fall (September through November)) within the HRG survey area. The maximum average seasonal density, for each species, was then carried forward in the take calculations (table 6).

NMFS notes several exceptions to the determination of the relevant densities for some marine mammal species to the method described above. These are described here in greater detail. For several marine mammal species, Roberts *et al.* (2023) does not differentiate by stock. This is true for the bottlenose dolphins, for which take has been authorized for two stocks (coastal migratory and offshore stock) for Empire Wind. This is also true for long-finned and short-finned pilot whales (pilot whale spp.) and harbor and gray seals (seals), where a pooled density is the only value available from the data that is not partitioned by stock.

To account for this, the coastal migratory and offshore stocks of bottlenose dolphins were adjusted based on the 20-m isobath cutoff, such that take predicted to occur in any area less than 20 m in depth was apportioned to the coastal stock only and take predicted to occur in waters of greater than 20 m of depth was apportioned to the offshore stock. Given the noise from cofferdam installation would not extend beyond the 20-m isobath, where the coastal stock of bottlenose dolphins predominates, it is expected that only the coastal stock is likely to be taken by this activity. As the density models do not account for group size and the resulting calculated exposures were very small, the predicted take for cofferdam installation and removal

activities was increased to account for the exposure of one average-sized group per day each of bottlenose and common dolphins.

In order to calculate exposures for gray seals, harbor seals, short-finned pilot whales, and long-finned pilot whales, the guild densities were scaled by relative local abundances of each species in each guild, using the best available estimates of local abundance, to get species-specific density estimates for the Project Area for impact pile driving activities. In estimating local abundances, all distribution data for gray seals, harbor seals, and both species of pilot whales were downloaded from the OBIS data repository (*https://www.obis.org*). After reviewing the available datasets, Empire Wind determined that data available in OBIS from the Mystic Aquarium of marine mammal strandings along the north shore of the Long Island Sound represent the best available data of relative abundances of gray seals, harbor seals, and both pilot whale species in the Project Area due to their proximity to the Project Area and a lack of sightings data for these species in offshore waters near the Lease Area. For the seals, Empire Wind used the Smith (2014) dataset to scale seal densities. The Mystic Aquarium reported 107 observations of gray seals and 209 observations of harbor seals. Empire Wind used the proportions of 0.34 (which is equal to 107 gray seal observations divided by 316 total gray and harbor seal observations) and 0.66 (which is equal to 209 harbor seal observations divided by 316 total gray and harbor seal observations) to scale seal guild densities. The limited number of observations of gray and harbor seals near the Project Area (*i.e.,* two gray seal sightings, three harbor seal sightings) in the larger OBIS database supports this method (OBIS, 2023), and NMFS agrees with this approach. For pilot whales, the animal movement modeling showed no exposures above any threshold, so scaling was not necessary.

For some species and activities, observational data from PSOs aboard HRG and geotechnical survey vessels indicate that the density-based exposure estimates may be insufficient to account for the number of individuals of a species that may be encountered during the planned activities. A review of Empire Wind's PSO sightings data ranging from 2018 to 2023 for the Project Area indicated that exposure estimates based on the exposure modeling methodology for some species were likely underestimates for humpback whales, fin whales, and pilot whales. These findings are described in greater detail below.

For other less-common species, the predicted densities from Roberts *et al.* (2023) are very low, and the resulting density-based exposure estimate is less than a single animal or a typical group size for the species. In such cases, the mean group size or PSO data was considered. Mean group sizes for each species were calculated from recent aerial and/or vessel-based surveys, as shown in table 5. Group size data were also used to estimate take from marina activities given there is no density data available for the area given its inshore location. Additional detail regarding the density and occurrence as well as the assumptions and methodology used to estimate take for specific activities is included in the activity-specific subsections below.

Tables 5 and 6, below demonstrate all of the densities used in the exposure and take analyses. Table 7 shows the average marine mammal group sizes used to adjust take estimate calculations.

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Table 5 -- Mean Monthly Marine Mammal Density Estimates within a 10-km Buffer Around OCS-A 0512 Lease Area

Species	Monthly densities (animals/100 km^2)[1]												Annual Mean
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
Fin whale	0.172	0.139	0.113	0.137	0.174	0.171	0.157	0.1	0.055	0.04	0.038	0.13	0.119
Humpback whale	0.091	0.061	0.076	0.119	0.133	0.113	0.03	0.022	0.054	0.101	0.13	0.113	0.087
Minke whale	0.071	0.06	0.072	0.936	1.485	0.803	0.198	0.107	0.066	0.111	0.026	0.059	0.333

North Atlantic right whale	0.1	0.116	0.115	0.088	0.025	0.006	0.003	0.003	0.004	0.008	0.016	0.05	0.045
Sei whale	0.029	0.016	0.033	0.071	0.055	0.011	0.002	0.002	0.005	0.013	0.037	0.049	0.027
Sperm whale	0.007	0.002	0.002	0.004	0.005	0.011	0.011	0.015	0.003	0	0.008	0.005	0.006
Atlantic white-sided dolphin	0.642	0.399	0.356	0.846	1.373	1.237	0.117	0.049	0.279	0.892	0.863	0.99	0.67
Atlantic spotted dolphin	0.001	0	0.001	0.003	0.01	0.019	0.033	0.072	0.177	0.26	0.133	0.013	0.06
Common dolphin	5.664	1.852	1.246	2.457	3.474	2.835	1.566	1.917	1.623	3.495	7.244	9.177	3.546
Bottlenose dolphin	0.851	0.247	0.205	0.629	2.005	3.232	3.534	2.953	2.552	2.898	2.772	2.52	2.033
Risso's dolphin	0.042	0.005	0.003	0.021	0.034	0.014	0.014	0.007	0.008	0.01	0.056	0.186	0.033
Long-finned pilot whale	0.028	0.028	0.028	0.028	0.028	0.028	0.028	0.028	0.028	0.028	0.028	0.028	0.028
Short-finned pilot whale	0.021	0.021	0.021	0.021	0.021	0.021	0.021	0.021	0.021	0.021	0.021	0.021	0.021
Harbor porpoise	5.469	5.73	5.916	7.066	2.421	0.347	0.435	0.215	0.13	0.144	0.342	3.757	2.664
Gray seals	4.762	4.505	3.689	4.337	5.968	1.093	0.071	0.049	0.104	0.684	1.625	4.407	2.608

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TABLE 6—THE HIGHEST AVERAGE SEASONAL MARINE MAMMAL DENSITIES (ANIMALS PER 100 km^2) USED FOR ANALYSIS OF EMPIRE WIND'S HRG SURVEY EFFORT FOR THE PROJECT AREA FROM JANUARY THROUGH DECEMBER

Marine mammal species	Project area highest average seasonal density (No./100 km^2)
Fin whale [a]	0.097
Humpback whale	0.099
Minke whale	0.526
North Atlantic right whale [a]	0.073
Sei whale [a]	0.030
Sperm whale [a]	0.006
Atlantic spotted dolphin	0.058
Atlantic white-sided dolphin	0.469
Bottlenose dolphin [b]	6.299
Common dolphin	2.837
Pilot whale spp	0.019 (Annual)
Risso's dolphin	0.035
Harbor porpoise	3.177
Gray seal	13.673
Harbor seal	13.673
Harp seal	n/a.

[a] Species is listed as endangered under the ESA.
[b] Bottlenose dolphin density values from Duke University (Roberts *et al.,* 2023) reported as ''bottlenose dolphin'' and not identified to stock. HRG survey activities were not differentiated by region relative to the 20-m isobath and therefore bottlenose dolphin takes were not identified to stock.

TABLE 7—AVERAGE MARINE MAMMAL SPECIES GROUP SIZES USED IN TAKE ESTIMATE CALCULATIONS

Marine mammal species	Average group size	Information source
Fin whale	1.25	Palka *et al.,* 2021.
North Atlantic right whale	1–2 [1]	Roberts *et al.,* 2023.
Atlantic spotted dolphin	45	Kenney & Vigness-Raposa, 2010.
Atlantic white-sided dolphin	52	Jefferson *et al.,* 2015.
Bottlenose dolphin	15	Jefferson *et al.,* 2015.
Common dolphin	30	Reeves *et al.,* 2002.
Risso's dolphin	100	Jefferson *et al.,* 2015.
Sperm whale	3	Barkaszi *et al.,* 2012.

[1] For North Atlantic right whales, an average group size of one was used for months with mean monthly densities less than 0.01 (June–October). An average group size of two was used for months with mean monthly densities greater than 0.01 to reflect the potential for a mother calf pair (May, November, and December). Densities are based upon Roberts *et al.* (2023). Exposure estimates for impact pile driving were rounded accordingly for these months.

Modeling and Take Estimation

Below, we describe the three methods that were used to estimate take in consideration of the acoustic thresholds and marine mammal densities described above and the three different activities: WTG and OSS foundation installation, temporary cofferdam and goal post installation/removal, and HRG surveys. The take estimates for the three different activities, as well as the combined total, are presented.

WTG and OSS Foundation Installation

As described above, Empire Wind plans to install up to 147 WTGs and 2 OSSs in the Lease Area. Empire Wind modeled three WTG monopile scenarios that could occur during construction, and each was considered in the acoustic modeling conducted to estimate the potential number of marine mammal exposures above relevant harassment thresholds:

(1) 9.6-m monopiles in which typical monopile WTG foundation locations are those where the standard hammer energy would be sufficient to complete installation of the foundation to the target penetration depth;

(2) 9.6-m monopiles in which difficult-to-drive WTG foundation locations would require higher hammer energies and/or additional hammer strikes to complete foundation installation to the target penetration depth; and

(3) 11-m monopiles in which typical monopile WTG foundation locations are those where the standard hammer energy would be sufficient to complete installation of the foundation to the target penetration depth.

Empire Wind assumed various hammer schedules based upon the different WTG monopile scenarios. The various hammer schedules included the hammer energies and number of strikes predicted at various penetration depths during the pile driving process and different soil conditions. Difficult-to-drive scenarios would only utilize 9.6-m piles as the larger 11-m piles could not be driven to target penetration depth in the soil conditions associated with difficult-to-drive turbine positions. Empire Wind estimates that a maximum of 17 total foundations may be difficult-to-drive (including as many as 7 difficult-to-drive foundations for Empire Wind 1 and as many as 10 difficult-to-drive foundations for Empire Wind 2). The actual number of difficult-to-drive piles will be informed by additional analysis of geotechnical data and other studies that will occur prior to construction but would not be greater than 17 foundations.

The amount of sound generated during pile driving varies with the energy required to drive piles to a desired depth and depends on the sediment resistance encountered. Sediment types with greater resistance require hammers that deliver higher energy strikes and/or an increased

number of strikes relative to installations in softer sediment. Maximum sound levels usually occur during the last stage of impact pile driving where the greatest resistance is encountered (Betke, 2008). Empire Wind developed hammer energy schedules for typical and difficult-to-drive 9.6-m piles and for three different seabed penetration depths for the 11-m diameter piles to represent the various soil conditions that may be encountered in the Lease Area (*i.e.,* normal soil conditions (identified as ''T1''), harder soil conditions (identified as ''R3''), and outlier softer soil conditions (identified as ''U3''). One OSS foundation scenario was modeled; however, this scenario was modeled at two locations (representing locations in Empire Wind 1 and Empire Wind 2) resulting in two hammer schedules. Empire Wind anticipates the different locations will require different hammer schedules depending on site-specific soil conditions.

Key modeling assumptions for the WTG monopiles and OSS foundation pin piles are listed in table 8 (additional modeling details and input parameters can be found in Küsel *et al.,* 2022). Hammer energy schedules for WTG monopiles (9.6 m and 11 m) and OSS foundation pin piles are provided in tables 9, 10, and 11 respectively.

TABLE 8—KEY PILING ASSUMPTIONS USED IN THE SOURCE MODELING

Foundation type	Modeled maximum impact hammer energy (kJ)	Pile length (m)	Pile wall thickness (mm)	Seabed penetration (m)	Number of piles per day
9.6-m Monopile	[4] 2,300/5,500	78.5	73–101	38	1–2
11-m Monopile R3 [1]	2,000	75.3	8.5	35	1–2
11-m Monopile T1 [2]	2,500	84.1	8.5	40	1–2
11-m Monopile U3 [3]	1,300	97.5	85	55	1–2
OSS Jacket (2.5-m pin pile)	3,200	57–66	50	47–56	2–3

[1] R3 = harder soil conditions.
[2] T1 = normal soil conditions.
[3] U3 = softer soil conditions.
[4] Typical 2,300; difficult-to-drive 5,500.

TABLE 9—HAMMER ENERGY SCHEDULES FOR MONOPILES UNDER THE TWO 9.6-M PILE DRIVING SCENARIOS

[9.6-m Diameter pile; IHC S–5500 hammer]

''Typical'' pile driving scenario (9.6-m diameter pile)			''Difficult-to-drive'' pile driving scenario (9.6-m diameter pile)		
Energy level (kJ)	Strike count	Pile penetration depth (m)	Energy level (kJ)	Strike count	Pile penetration depth (m)
Initial sink depth	0	2	Initial sink depth	0	2
450	1,607	12	450	1,607	12
800	731	5	800	731	5
1,400	690	4	1,400	690	4
1,700	1,050	6	1,700	1,050	6
2,300	1,419	9	2,300	1,087	4
5,500	0	0	5,500	2,000	5
Total	5,497	38	Total	7,615	38
Strike rate (strikes/min)	30		Strike rate (strikes/min)	30	

TABLE 10—HAMMER ENERGY SCHEDULE AND NUMBER OF STRIKES PER MONOPILES UNDER THREE PILE DRIVING SCENARIOS

[11-m Diameter pile; IHC S–5500 hammer]

Energy level (kJ)	R3-harder soil conditions (11-m monopile)		T1-normal soil conditions (11-m monopile)		U3-softer soil conditions (11-m monopile)	
	Strike count	Pile penetration depth (m)	Strike count	Pile penetration depth (m)	Strike count	Pile penetration depth (m)
Initial Sink Depth	.....	1	.....	3	.....	5
450	.....	.....	.....	.....	622	6
500	1,168	14	1,339	14	.....	.....
750	433	3	857	6	2,781	20
1,000	.....	.....	632	4	1,913	12
1,100	265	2	.....	.....	.....	.....
1,300	.....	.....	.....	.....	2,019	12
1,500	.....	.....	1,109	7	.....	.....
2,000	2159	15	326	2	.....	.....

TABLE 10—HAMMER ENERGY SCHEDULE AND NUMBER OF STRIKES PER MONOPILES UNDER THREE PILE DRIVING SCENARIOS—Continued

[11-m Diameter pile; IHC S–5500 hammer]

Energy level (kJ)	R3-harder soil conditions (11-m monopile)		T1-normal soil conditions (11-m monopile)		U3-softer soil conditions (11-m monopile)	
	Strike count	Pile penetration depth (m)	Strike count	Pile penetration depth (m)	Strike count	Pile penetration depth (m)
2,500	.....	.....	656	4	.....	.....
Totals	4,025	35	4,919	40	7,335	55

TABLE 11—HAMMER ENERGY SCHEDULES FOR PIN PILES SUPPORTING THE JACKET FOUNDATIONS LOCATED AT OSS 1 AND OSS 2, WITH AN IHC S–4000 HAMMER

OSS 1 Location			OSS 2 Location		
Energy level (kJ)	Strike count	Pile penetration depth (m)	Energy level (kJ)	Strike count	Pile penetration depth (m)
Initial sink depth	0	8	Initial sink depth	0	5
500	1,799	30	500	1,206	22
750	1,469	12	750	1,153	9
2,000	577	4	1,100	790	7
3,200	495	2	3,200	562	4
Total	4,340	56	3,711	47	
			Total		
Strike rate (strikes/min)	30		Strike rate (strikes/min)	30	

Both monopiles and pin piles were assumed to be vertically aligned and driven to a maximum penetration depth of 38 m (125 ft) for typical and difficult-to-drive 9.6-m monopiles, 55 m (180 ft) for typical 11-m monopiles, and 56 m (184 ft) for pin piles. While pile penetration depths may vary slightly, these values were chosen as reasonable penetration depths during modeling. All acoustic modeling was performed assuming that concurrent pile driving of either monopiles or pin piles would not occur. While multiple piles may be driven within any single 24-hour period, these installation activities would not occur simultaneously. Below we describe the assumptions inherent to the modeling approach and those by which Empire Wind would not exceed:

Modeling assumptions for the Project are as follows:

- Maximum of two, 9.6-m or 11-m monopiles installed per day (3.5 hours per monopile with a 1-hour pre-clearance period; 9 hours total with 7 hours of active pile driving time), although only one monopile may be installed on some days;
- No concurrent monopile and/or pin pile driving and no overlap in pile-driving activities between Empire Wind 1 and Empire Wind 2 would occur;
- Monopiles would be 73–101 millimeters (mm) thick and would be composed of steel;
- Impact Pile Driving for monopiles: IHC S–5500 kilojoules (kJ) rated energy;
- Impact hammers would have a maximum energy capacity of 5,500 kJ;
- Up to three, 2.5-m pin piles installed per day (5 hours per pin pile), although only two pin piles may be installed on some days;
- Pin piles would be 50 mm thick; and
- Impact Pile driving: IHC S–4000 kJ rated energy.

Sound fields produced during impact pile driving were modeled by first characterizing the sound signal produced during pile driving using the industry standard GRL Wave Equation Analysis Program (GRLWEAP) (*i.e.,* the wave equation analysis of pile driving) model and JASCO Pile Driving Source Model (PDSM). We provide a summary of the modeling effort below but the full JASCO modeling report can be found in section 6 and appendix A of Empire Wind's ITA application (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1?check_logged_in=1*).

To estimate sound propagation, JASCO used the Marine Operations Noise Model (MONM) and Full Range Wave Dependent Acoustic Model (FWRAM; Küsel *et al.,* 2022, appendix E.4) to combine the outputs of the source model with spatial and temporal environmental factors (*e.g.,* location, oceanographic conditions, and seabed type) to get time-domain representations of the sound signals in the environment and estimate sound field levels. The lower frequency bands were modeled using MONM and FWRAM, which are based on the parabolic equation (PE) method of acoustic propagation modeling. For higher frequencies, additional losses resulting from absorption were added to the propagation loss model. See appendix G in Empire Wind's application for a more detailed description of JASCO's propagation models. FWRAM is based on the wide-angle PE algorithm (Collins, 1993). Because the foundation pile is represented as a linear array and FWRAM employs the array starter method to accurately model sound propagation from a spatially distributed source (MacGillivray and Chapman, 2012), using FWRAM ensures accurate characterization of vertical directivity effects in the near-field zone (1 km). Due to seasonal changes in the water column, sound propagation is likely to differ at different times of the year. The speed of sound in seawater depends on the temperature (degrees Celsius),

salinity (parts per thousand), and depth (m) and can be described using sound speed profiles. Oftentimes, a homogeneous or mixed layer of constant velocity is present in the first few meters. It corresponds to the mixing of surface water through surface agitation. There can also be other features, such as a surface channel, which corresponds to sound velocity increasing from the surface down. This channel is often due to a shallow isothermal layer appearing in winter conditions, but can also be caused by water that is very cold at the surface. In a negative sound gradient, the sound speed decreases with depth, which results in sound refracting downwards which may result in increased bottom losses with distance from the source. In a positive sound gradient, as is predominantly present in the winter season, sound speed increases with depth and the sound is, therefore, refracted upwards, which can aid in long distance sound propagation. To capture this variability, acoustic modeling was conducted using an average sound speed profile for a ''summer'' period including the months of May through November, and a ''winter'' period including December through April. FWRAM computes pressure waveforms via Fourier synthesis of the modeled acoustic transfer function in closely spaced frequency bands. Examples of decidecade spectral levels for each foundation pile type, hammer energy, and modeled location, using average summer sound speed profile are provided in Küsel *et al.* (2022).

Sounds produced by installation of the 9.6- and 11-m monopiles were modeled at nine representative locations as shown in figure 2 in Küsel *et al.* (2022). Sound fields from pin piles were modeled at the two planned jacket foundation locations: OSS 1 and 2. Modeling locations are shown in figure 8 in Küsel *et al.* (2022). The modeling locations were selected as they represent the range of soil conditions and water depths in the Lease Area.

Empire Wind estimated both acoustic ranges and exposure ranges. Acoustic ranges represent the distance to a harassment threshold based on sound propagation through the environment (*i.e.,* independent of any receiver) while exposure range represents the distance at which an animal can accumulate enough energy to exceed a Level A harassment threshold in consideration of how it moves through the environment (*i.e.,* using movement modeling). In both cases, the sound level estimates are calculated from three-dimensional sound fields and then, at each horizontal sampling range, the maximum received level that occurs within the water column is used as the received level at that range. These maximum-over-depth (R_{max}) values are then compared to predetermined threshold levels to determine acoustic and exposure ranges to Level A harassment and Level B harassment zone isopleths. However, the ranges to a threshold typically differ among radii from a source, and also might not be continuous along a radii because sound levels may drop below threshold at some ranges and then exceed threshold at farther ranges. To minimize the influence of these inconsistencies, 5 percent of the farthest such footprints were excluded from the model data. The resulting range, $R_{95\%}$, was chosen to identify the area over which marine mammals may be exposed above a given threshold, because, regardless of the shape of the maximum-over-depth footprint, the predicted range encompasses at least 95 percent of the horizontal area that would be exposed to sound at or above the specified threshold. The difference between R_{max} and $R_{95\%}$ depends on the source directivity and the heterogeneity of the acoustic environment. $R_{95\%}$ excludes ends of protruding areas or small isolated acoustic foci not representative of the nominal ensonified zone. For purposes of calculating Level A harassment take, Empire Wind applied $R_{95\%}$ exposure ranges, not acoustic ranges, to estimate take and determine mitigation distances for the reasons described below.

In order to best evaluate the SEL_{cum} harassment thresholds for PTS, it is necessary to consider animal movement, as the results are based on how sound moves through the environment between the source and the receiver. Applying animal movement and behavior within the modeled noise fields provides the exposure range, which allows for a more realistic indication of the distances at which PTS acoustic thresholds are reached that considers the accumulation of sound over different durations (note that in all cases the distance to the peak threshold is less than the SEL-based threshold).

As described in section 2.6 of JASCO's acoustic modeling report for Empire Wind (Küsel *et al.,* 2022), for modeled animals that have received enough acoustic energy to exceed a given Level A harassment threshold, the exposure range for each animal is defined as the closest point of approach (CPA) to the source made by that animal while it moved throughout the modeled sound field, accumulating received acoustic energy. The resulting exposure range for each species is the 95th percentile of the CPA distances for all animals that exceeded threshold levels for that species ($ER_{95\%}$). The $ER_{95\%}$ ranges are species-specific rather than categorized only by any functional hearing group, which allows for the incorporation of more species-specific biological parameters (*e.g.,* dive durations, swim speeds, *etc.*) for assessing the impact ranges into the model. Furthermore, because these $ER_{95\%}$ ranges are species-specific, they can be used to develop mitigation monitoring or shutdown zones.

Tables 12 through 19 provide exposure ranges for the 9.6-m monopile (typical and difficult-to-drive), 11-m monopile, and OSS foundation pin piles, respectively, assuming 10 dB of attenuation for summer and winter. For tables 12 through 17, a single monopile and two monopiles per day are provided (the two per day ranges are shown in the parenthesis). For tables 18 and 19, two pin piles and three pin piles per day are provided. NMFS notes that monopiles foundations constructed for Empire Wind are applicable to all WTGs and may be applicable to OSS structures, depending on the finalized buildout. Please see appendix A of the Empire Wind ITA application, and appendix M of the Empire Wind Construction and Operations Plan (COP) for further details on the acoustic modeling methodology.

Displayed in tables 12 through 20 below, Empire Wind would also employ a noise abatement system during all impact pile driving of monopiles and pin piles. Noise abatement systems (*e.g.,* bubble curtains) are sometimes used to decrease the sound levels radiated from a source. Additional information on sound attenuation devices is discussed in the *Noise Abatement Systems* section under the Mitigation section. In modeling the sound fields for Empire Wind's planned activities, hypothetical broadband attenuation levels of 0 dB, 6 dB, 10 dB, 15 dB, and 20 dB were modeled to gauge the effects on the ranges to thresholds given these levels of attenuation. The results for 10 dB of sound attenuation are shown below and the other attenuation levels (0 dB, 6 dB, 15 dB, and 20 dB) can be found in the ITA application.

As shown in the tables below, exposure ranges associated with the 9.6-m diameter typical monopile scenario were predominantly greater than for the 11-m diameter monopile scenarios. While larger diameter monopiles can be associated with greater resulting sound fields than smaller diameter piles, in this case, the 11-m diameter monopile scenarios resulted in smaller modeled acoustic ranges than the 9.6-m diameter

monopile scenarios likely because the 11-m monopile would only be installed in softer sediments which would require less hammer energy and/or number of hammer strikes for installation than the 9.6-m diameter pile in harder sediments. Hence, the 9.6-m diameter monopile scenario was carried forward to the exposure analysis to be conservative, for all ''typical'' monopiles.

TABLE 12—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT PTS (SEL_{cum}) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING OF 9.6-M DIAMETER ''TYPICAL'' AND ''DIFFICULT-TO-DRIVE'' MONOPILE FOUNDATIONS (SUMMER), ASSUMING 10-dB ATTENUATION [b]

Species	''Typical'' (in km)				''Difficult-to-drive'' (in km)			
	One pile per day		Two piles per day		One pile per day		Two piles per day	
	Level A harassment (SEL; dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:								
Fin Whale	0.86	3.18	0.94	3.09	1.35	4.74	1.84	4.51
Minke Whale [a]	0.22	3.13	0.54	3.02	0.89	4.46	0.90	4.45
Humpback Whale [a]	0.24	3.15	0.33	3.01	0.74	4.47	0.69	4.53
North Atlantic Right Whale [a]	0.33	2.89	0.47	2.87	1.09	4.33	1.13	4.30
Sei Whale [a]	0.43	3.09	0.54	3.07	1.04	4.47	1.21	4.52
MF:								
Atlantic White-sided Dolphin	0	2.98	0	2.94	0	4.24	0	4.30
Atlantic Spotted dolphin	0	0	0	0	0	0	0	0
Common Dolphin	0	3.07	0	2.92	0	4.48	0	4.42
Bottlenose Dolphin	0	2.46	0	2.41	0	3.77	0	3.83
Risso's Dolphin	0	3.07	0	2.93	0	4.73	0	4.41
Long-Finned Pilot Whale	0	0	0	0	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0	0	0	0	0
Sperm Whale	0	3.25	0	2.96	0	4.59	0	4.47
HF:								
Harbor Porpoise	0	3.07	0	3.05	0	4.52	0	4.37
PW:								
Gray Seal	0	3.33	<0.01	3.26	<0.01	4.91	<0.01	4.87
Harbor Seal	0	3.02	0	2.97	0	4.68	0	4.38

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as ''migrating'' in the analysis.
[b] The values here were found in tables I–19, I–20, I–23, and I–24 in Küsel *et al.,* 2022 (appendix I).

TABLE 13—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT PTS (SEL_{cum}) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING OF 9.6-m DIAMETER ''TYPICAL'' AND ''DIFFICULT-TO-DRIVE'' MONOPILE FOUNDATIONS (WINTER), ASSUMING 10-dB ATTENUATION [c]

Species	''Typical'' (in km)				''Difficult-to-drive'' (in km)			
	One pile per day		Two piles per day		One pile per day		Two piles per day	
	Level A harassment (SEL; dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A v (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:								
Fin Whale	0.88	3.40	1.01	3.46	1.80	5.24	1.95	4.87
Minke Whale [a]	0.26	3.31	0.48	3.29	0.89	4.88	1.05	4.66
Humpback Whale [a]	0.24	3.38	0.36	3.31	0.74	5.10	0.83	5.07
North Atlantic Right Whale [a]	0.43	3.04	0.47	3.11	1.13	4.73	1.19	4.62
Sei Whale [a]	0.43	3.28	0.58	3.43	1.24	4.95	1.29	4.85
MF:								
Atlantic White-sided Dolphin	0	3.30	0	3.19	0	4.73	0	4.72
Atlantic Spotted dolphin	0	0	0	0	0	0	0	0
Common Dolphin	0	3.28	0	3.08	0	4.89	0	4.73
Bottlenose Dolphin	0	2.73	0	2.77	0	4.23	0	4.12
Risso's Dolphin	0	3.39	0	3.32	0	5.14	0	4.92
Long-Finned Pilot Whale	0	0	0	0	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0	0	0	0	0
Sperm Whale	0	3.40	0	3.19	0	4.96	0	4.92
HF:								
Harbor Porpoise	0	3.15	0	3.22	0	5.04	0	4.75
PW:								
Gray Seal	0	3.54	<0.01	3.50	<0.01	[b] 5.35	<0.01	5.19
Harbor Seal	0	3.28	0	3.29	0	4.93	0	4.71

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as ''migrating'' in the analysis.
[b] These values represent the maximum Level B.
[c] The values here were found in tables I–21, I–22, I–25, and I–26 in Küsel *et al.,* 2022 (appendix I).

TABLE 14—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT (PTS (SEL_{cum})) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING 11-M DIAMETER MONOPILE FOUNDATIONS (SUMMER) IN NORMAL (T1) SOIL CONDITIONS, ASSUMING 10-dB ATTENUATION [b]

Species	Normal (T1) Soil Conditions (in km)			
	One pile per day		Two piles per day	
	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:				
Fin Whale	0.87	3.32	0.83	3.16
Humpback Whale [a]	0.25	3.01	0.16	3.1
Minke Whale [a]	0.17	3.1	0.35	2.98
North Atlantic Right Whale [a]	0.20	3.09	0.44	2.93
Sei Whale [a]	0.44	3.19	0.27	3.26
MF:				
Atlantic White-sided Dolphin	0	2.97	0	2.98
Atlantic Spotted dolphin	0	0	0	0
Common Dolphin	0	3.08	0	2.94
Bottlenose Dolphin	0	2.6	0	2.62
Risso's Dolphin	0	3.21	0	3.11
Long-finned Pilot Whale	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0
Sperm Whale	0	3.4	0	3.19
HF:				
Harbor Porpoise	0	3.06	0	3.04
PW:				
Gray Seal	0	3.39	0	3.4
Harbor Seal	0	3.25	0	3.09

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as "migrating" in the analysis.
[b] The values here were found in tables I–31 and I–32 in Küsel *et al.,* 2022 (appendix I).

TABLE 15—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT (PTS (SEL_{cum})) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING OF 11-m DIAMETER MONOPILE FOUNDATIONS (WINTER) IN NORMAL (T1) SOIL CONDITIONS, ASSUMING 10-dB ATTENUATION [b]

Species	Normal (T1) soil conditions (in km)			
	One pile per day		Two piles per day	
	Level A harassment (dB re 1 μPa2·s)	Level B harassment behavior (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:				
Fin Whale	0.87	3.56	0.82	3.53
Humpback Whale [a]	0.25	3.24	0.16	3.4
Minke Whale [a]	0.27	3.29	0.35	3.31
North Atlantic Right Whale [a]	0.2	3.17	0.44	3.28
Sei Whale [a]	0.44	3.33	0.41	3.53
MF:				
Atlantic White-sided Dolphin	0	3.28	0	3.31
Atlantic Spotted dolphin	0	0	0	0
Common Dolphin	0	3.26	0	3.16
Bottlenose Dolphin	0	2.73	0	2.93
Risso's Dolphin	0	3.48	0	3.44
Long-finned Pilot Whale	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0
Sperm Whale	0	3.48	0	3.35
HF:				
Harbor Porpoise	0	3.41	0	3.35
PW:				
Gray Seal	0	3.66	0	3.66
Harbor Seal	0	3.36	0	3.36

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as "migrating" in the analysis.
[b] The values here were found in tables I–33 and I–34 in Küsel *et al.,* 2022 (appendix I).

TABLE 16—EXPOSURE RANGES ($ER_{95\%}$) TO PTS (SEL_{cum}) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING OF 11-m WTG MONOPILE FOUNDATIONS (SUMMER) IN SOFT (R3) AND SOFTER (U3) SOIL CONDITIONS, ASSUMING 10-dB ATTENUATION [b]

Species	Soft (R3) soil conditions (in km)				Softer (U3) soil conditions (in km)			
	One pile per day		Two piles per day		One pile per day		Two piles per day	
	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level Bvharassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:								
Fin Whale	0.87	3.02	0.43	2.89	0.9	2.65	0.58	2.48
Humpback Whale [a]	0.14	2.68	0.15	2.79	<0.01	2.26	0.11	2.31
Minke Whale [a]	0.16	2.78	0.26	2.82	0.02	2.32	0.16	2.27
North Atlantic Right Whale [a]	0.2	2.72	0.37	2.67	0.37	2.21	0.28	2.2
Sei Whale [a]	0.31	2.96	0.27	2.91	0.13	2.33	0.23	2.47
MF:								
Atlantic White-sided Dolphin	0	2.75	0	2.73	0	2.24	0	2.23
Atlantic Spotted dolphin	0	0	0	0	0	0	0	0
Common Dolphin	0	2.86	0	2.76	0	2.38	0	2.41
Bottlenose Dolphin	0	2.29	0	2.32	0	1.92	0	1.95
Risso's Dolphin	0	2.86	0	2.79	0	2.41	0	2.4
Long-finned Pilot Whale	0	0	0	0	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0	0	0	0	0
Sperm Whale	0	2.77	0	2.86	0	2.36	0	2.26
HF:								
Harbor Porpoise	0	2.76	0	2.73	0	2.19	0	2.28
PW:								
Gray Seal	0	2.87	0	3.01	0	2.60	<0.01	2.58
Harbor Seal	0	2.91	0	2.75	0	2.50	0	2.36

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as ''migrating'' in the analysis.
[b] The values for U3 were found in tables I–27 and I–28 in Küsel *et al.,* 2022 (appendix I). The values for R3 were found in tables I–35 and I–36 in Küsel *et al.,* 2022 (appendix I).

TABLE 17—EXPOSURE RANGES ($ER_{95\%}$) TO PTS (SEL_{cum}) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING OF 11-m WTG MONOPILE FOUNDATIONS (WINTER) IN SOFT (R3) AND SOFTER (U3) SOIL CONDITIONS, ASSUMING 10-dB ATTENUATION [b]

Species	Soft (R3) soil conditions (in km)				Softer (U3) soil conditions (in km)			
	One pile per day		Two piles per day		One pile per day		Two piles per day	
	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:								
Fin Whale	0.87	3.17	0.48	3.14	0.89	2.71	0.82	2.54
Humpback Whale [a]	0.14	3.04	0.19	2.96	<0.01	2.46	0.11	2.54
Minke Whale [a]	0.19	3.12	0.28	3.02	0.2	2.5	0.23	2.59
North Atlantic Right Whale [a]	0.2	2.93	0.37	2.89	0.49	2.37	0.32	2.38
Sei Whale [a]	0.46	3.09	0.27	3.11	0.13	2.6	0.28	2.56
MF:								
Atlantic White-sided Dolphin	0	2.9	0	2.98	0	2.43	0	2.4
Atlantic Spotted dolphin	0	0	0	0	0	0	0	0
Common Dolphin	0	3.08	0	3.08	0	2.5	0	2.53
Bottlenose Dolphin	0	2.63	0	2.41	0	2.07	0	2.11
Risso's Dolphin	0	3.04	0	3.08	0	2.63	0	2.53
Long-finned Pilot Whale	0	0	0	0	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0	0	0	0	0
Sperm Whale	0	3.1	0	3.04	0	2.6	0	2.38
HF:								
Harbor Porpoise	0	3.07	0	3.09	0	2.53	0	2.51
PW:								
Gray Seal	0	3.25	0	3.25	0	2.7	<0.01	2.67
Harbor Seal	0	3.09	0	3.03	0	2.58	0	2.54

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as ''migrating'' in the analysis.
[b] The values for U3 were found in tables I–29 and I–30 in Küsel *et al.,* 2022 (appendix I). The values for R3 were found in tables I–37 and I–38 in Küsel *et al.,* 2022 (appendix I).

TABLE 18—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT (PTS (SEL_{cum})) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING OF 2.5-m DIAMETER OSS FOUNDATIONS (SUMMER), ASSUMING 10-dB ATTENUATION [b]

Species	OSS 1 Foundation (km)				OSS 2 Foundation (km)			
	Two pin piles per day		Three pin piles per day		Two pin piles per day		Three pin piles per day	
	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:								
Fin Whale	0	1.04	0	1.1	0	1.1	0	0.99
Humpback Whale [a]	0	1.02	0	1.02	0	0.94	0	0.93
Minke Whale [a]	0	1	0	0.99	0	1.01	0	1.01
North Atlantic Right Whale [a]	0	0.85	0	0.89	0	1.06	0	1.01
Sei Whale [a]	<0.01	1.08	<0.01	1.04	0	0.94	0	0.91
MF:								
Atlantic White-sided Dolphin	0	0.98	0	0.98	0	0.82	0	0.84
Atlantic Spotted dolphin	0	0	0	0	0	0	0	0
Common Dolphin	0	1.03	0	1.03	0	0.96	0	0.96
Bottlenose Dolphin	0	0.82	0	0.81	0	0.72	0	0.74
Risso's Dolphin	0	1.08	0	1.05	0	0.87	0	0.86
Long-finned Pilot Whale	0	0	0	0	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0	0	0	0	0
Sperm Whale	0	0.88	0	0.95	0	1.03	0	1.02
HF:								
Harbor Porpoise	0	0.95	0	1.02	0	0.94	0	0.92
PW:								
Gray Seal	0	1.15	0	1.14	0	0.78	0	0.77
Harbor Seal	0	1.12	0	0.99	0	1.05	0	1.04

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as ''migrating'' in the analysis.
[b] The values here were found in tables I–39, I–40, I–43, and I–44 in Küsel *et al.,* 2022 (appendix I).

TABLE 19—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT (PTS (SEL_{cum})) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING OF 2.5-m DIAMETER OSS FOUNDATIONS (WINTER), ASSUMING 10-dB ATTENUATION [b]

Species	OSS 1 Jacket Foundation (km)				OSS 2 Jacket Foundation (km)			
	Two pin piles per day		Three pin piles per day		Two pin piles per day		Three pin piles per day	
	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)	Level A harassment (dB re 1 μPa2·s)	Level B harassment (dB re 1 μPa)
LF:								
Fin Whale	0	1.08	0.18	1.04	0	1.1	0	0.99
Humpback Whale [a]	0	1.02	0	1.02	0	0.94	0	0.92
Minke Whale [a]	0	1.01	0	1.01	0	1.06	0	1.03
North Atlantic Right Whale [a]	0	0.79	0	0.88	0	1.06	0	1.04
Sei Whale [a]	0	1.08	<0.01	1.05	0	0.94	0	0.90
MF:								
Atlantic White-sided Dolphin	0	0.93	0	0.96	0	0.86	0	0.86
Atlantic Spotted dolphin	0	0	0	0	0	0	0	0
Common Dolphin	0	0.96	0	0.86	0	0.96	0	0.96
Bottlenose Dolphin	0	0.85	0	0.84	0	0.80	0	0.74
Risso's Dolphin	0	0.92	0	0.89	0	0.87	0	0.86
Long-finned Pilot Whale	0	0	0	0	0	0	0	0
Short-Finned Pilot Whale	0	0	0	0	0	0	0	0
Sperm Whale	0	0.91	0	0.89	0	1.03	0	1.02
HF:								
Harbor Porpoise	0	0.95	0	0.95	0	0.94	0	0.92
PW:								
Gray Seal	0	1.08	0	1.1	0	0.78	0	0.77
Harbor Seal	0	1.08	0	0.95	0	1.04	0	1.04

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Species was considered as ''migrating'' in the analysis.
[b] The values here were found in tables I–41, I–42, I–45, and I–46 in Küsel *et al.,* 2022 (appendix I).

JASCO's Animal Simulation Model Including Noise Exposure (JASMINE) animal movement model was used to predict the number of marine mammals exposed to impact pile driving sound above NMFS' injury and behavioral harassment thresholds. Sound exposure models like JASMINE use simulated animals (also known as ''animats'') to forecast behaviors of animals in new situations and locations based on previously documented behaviors of those animals. The predicted 3D sound fields (*i.e.,* the output of the acoustic modeling process described earlier) are sampled by animats using movement rules derived from animal observations. The output of the simulation is the exposure history for each animat within the simulation.

The precise location of animats and their pathways are not known prior to a project; therefore, a repeated random sampling technique (*i.e.,* Monte Carlo) is used to estimate exposure probability with many animats and randomized starting positions. The probability of an animat starting out in or transitioning into a given behavioral state can be defined in terms of the animat's current behavioral state, depth, and the time of day. In addition, each travel parameter and behavioral state has a termination function that governs how long the parameter value or overall behavioral state persists in the simulation.

The output of the simulation is the exposure history for each animat within the simulation, and the combined history of all animats gives a probability density function of exposure during the Project. Scaling the probability density function by the real-world density of animals results in the mean number of animats expected to be exposed to a given threshold over the duration of the Project. Due to the probabilistic nature of the process, fractions of animats may be predicted to exceed threshold. If, for example, 0.1 animats are predicted to exceed threshold in the model, that is interpreted as a 10-percent chance that one animat will exceed a relevant threshold during the Project, or equivalently, if the simulation were re-run 10 times, 1 of the 10 simulations would result in an animat exceeding the threshold. Similarly, a mean number prediction of 33.11 animats can be interpreted as re-running the simulation where the number of animats exceeding the threshold may differ in each simulation but the mean number of animats over all of the simulations is 33.11. A portion of an individual marine mammal cannot be taken during a project, so it is common practice to round mean number animat exposure values to integers using standard rounding methods. However, for low-probability events it is more precise to provide the actual values.

Sound fields were input into the JASMINE model, as described above, and animats were programmed based on the best available information to ''behave'' in ways that reflect the behaviors of the 17 marine mammal species (18 stocks) expected to occur in the Project Area during the proposed activity. The various parameters for forecasting realistic marine mammal behaviors (*e.g.,* diving, foraging, surface times, *etc.*) are determined based on the available literature (*e.g.,* tagging studies). When literature on these behaviors was not available for a particular species, it was extrapolated from a similar species for which behaviors would be expected to be similar to the species of interest. The parameters used in JASMINE describe animat movement in both the vertical and horizontal planes (*e.g.,* direction, travel rate, ascent and descent rates, depth, bottom following, reversals, inter-dive surface interval).

Animats were modeled to move throughout the three-dimensional sound fields produced by each construction schedule for the entire construction period. For PTS exposures, both SPL_{pk} and SEL_{cum} were calculated for each species based on the corresponding acoustic criteria. Once an animat is taken within a 24-hour period, the model does not allow it to be taken a second time in that same period, but rather resets the 24-hour period on a sliding scale across 7 days of exposure. Specifically, an individual animat's accumulated energy levels (SEL_{cum}) are summed over that 24-hour period to determine its total received energy, and then compared to the PTS threshold. Takes by behavioral harassment are predicted when an animat enters an area ensonified by sound levels exceeding the associated behavioral harassment threshold.

It is important to note that the calculated or predicted takes represent a take instance or event within 1 day and likely overestimate the number of individuals taken for some species. Specifically, as the 24-hour evaluation window means that individuals exposed on multiple days are counted as multiple takes. For example, 10 takes may represent 10 takes of 10 different individual marine mammals occurring within 1 day each, or it may represent take of 1 individual on 10 different days; information about the species' daily and seasonal movement patterns helps to inform the interpretation of these take estimates. Also note that animal aversion was not incorporated into the JASMINE model runs that were the basis for the take estimate for any species.

Empire Wind also calculated acoustic ranges which represent the distance to a harassment threshold based on sound propagation through the environment (*i.e.,* independent of any receiver). As described above, applying animal movement and behavior within the modeled noise fields allows for a more realistic indication of the distances at which PTS acoustic thresholds are reached that considers the accumulation of sound over different durations. Acoustic ranges ($R_{95\%}$) to the Level A harassment SEL_{cum} metric thresholds are considered overly conservative, as the accumulation of acoustic energy does not account for animal movement and behavior and therefore assumes that animals are essentially stationary at that distance for the entire duration of the pile installation, a scenario that does not reflect realistic animal behavior. The acoustic ranges to the SEL_{cum} Level A harassment thresholds for WTG and OSS foundation installation can be found in tables 16–18 in Empire Wind's application but will not be discussed further in this analysis. Because NMFS Level B harassment threshold is an instantaneous exposure, acoustic ranges are more relevant to the analysis and are used to derive mitigation and monitoring measures. Acoustic ranges to the Level B harassment threshold for each activity are provided in the activity-specific subsections below. The differences between exposure ranges and acoustic ranges for Level B harassment are minimal given it is an instantaneous method. Of note, in some cases (*e.g.,* 9.6 m difficult-to-drive piles), distances to PTS peak thresholds exceed SEL_{cum} thresholds. However, those distances are small (less than 1 km) and only applicable to harbor porpoise. Please see tables 34–37 in Küsel *et al.* (2022) for more peak threshold modeling results.

TABLE 20—MAXIMUM ACOUSTIC RANGES ($R_{95\%}$) TO LEVEL A HARASSMENT (PTS (PEAK)) AND LEVEL B HARASSMENT THRESHOLDS (160 dB SPL) FOR 9.6-m WTG MONOPILE (TYPICAL AND DIFFICULT-TO-DRIVE SCENARIOS), 11-m WTG MONOPILE, AND 2.5-m OSS PIN PILES (SUMMER AND WINTER), ASSUMING 10-dB ATTENUATION

Foundation type	Modeled maximum impact hammer energy (kJ)	Marine mammal group	Level A harassment Pk (in km)		Level B harassment 160 dB SPL (in km)	
			$R_{95\%}$ (summer)	$R_{95\%}$ (winter)	$R_{95\%}$ (summer)	$R_{95\%}$ (winter)
WTG—9.6-m monopile	2,300 kJ (5,500 kJ)	LF	-[b] (-[b])	-[b] (-[b])	3.51[g] (5.05[i])	3.77[g] (5.49[i])

TABLE 20—MAXIMUM ACOUSTIC RANGES ($R_{95\%}$) TO LEVEL A HARASSMENT (PTS (PEAK)) AND LEVEL B HARASSMENT THRESHOLDS (160 dB SPL) FOR 9.6-m WTG MONOPILE (TYPICAL AND DIFFICULT-TO-DRIVE SCENARIOS), 11-m WTG MONOPILE, AND 2.5-m OSS PIN PILES (SUMMER AND WINTER), ASSUMING 10-dB ATTENUATION—Continued

Foundation type	Modeled maximum impact hammer energy (kJ)	Marine mammal group	Level A harassment Pk (in km)		Level B harassment 160 dB SPL (in km)	
			$R_{95\%}$ (summer)	$R_{95\%}$ (winter)	$R_{95\%}$ (summer)	$R_{95\%}$ (winter)
		MF	-[b] (-[b])	-[b] (-[b])		
		HF	0.1[c] (0.15[d])	0.11[c] (0.17[d])		
		PW	-[b] (-[b])	-[b] (-[b])		
WTG—11-m monopiles	2,500 kJ	LF	-[b]	-[b]	[h] 3.64	[h] 3.92
		MF	-[b]	-[b]		
		HF	[e] 0.11	[e] 0.12		
		PW	-[b]	-[b]		
OSS—2.5-m pin pile[a]	3,200 kJ	LF	-[b]	-[b]	[i] 1.19	[i] 1.17
		MF	-[b]	-[b]		
		HF	[f] 0.01	[f] 0.01		
		PW	-[b]	-[b]		

LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.
[a] Assumes a 2-dB post-piling shift.
[b] A dash (-) indicates that the threshold was not exceeded.
[c] Found in table H–11 in Küsel *et al.,* 2022 (appendix H).
[d] Found in table H–47 in Küsel *et al.,* 2022 (appendix H).
[e] Found in table H–31 in Küsel *et al.,* 2022 (appendix H).
[f] Found in table H–51 in Küsel *et al.,* 2022 (appendix H).
[g] Found in table H–343 in Küsel *et al.,* 2022 (appendix H).
[h] Found in table H–439 in Küsel *et al.,* 2022 (appendix H).
[i] Found in table H–495 in Küsel *et al.,* 2022 (appendix H).
[j] Found in table H–479 in Küsel *et al.,* 2022 (appendix H).

To conservatively estimate the number of animals likely to be exposed above thresholds, Empire Wind assumed that a maximum of 24 monopiles could be installed per month, with a maximum of 96 WTG monopiles and two OSS foundations installed in the first year of pile driving (2025) and the remaining 51 WTG monopile foundations installed in year 2 of pile driving (2026). In year 1 of pile driving, Empire Wind assumed that 24 monopiles would be installed in the four highest-density months for each species during the May to December period, and that the two OSSs would be installed in the highest and second-highest-density months. Empire Wind also assumed that all 17 difficult-to-drive piles would be installed in the first year, but that the distribution would be spread relatively evenly among the four highest months (*i.e.,* four piles per month except the highest-density month which assumed 5 difficult-to-drive piles, for a total of 17 piles). In the second year, 24 monopiles would be installed in the two highest-density months and the remaining 3 monopiles would be installed in the third-highest-density month. This approach is reflected in table 21. Thus, each species was presumed to be exposed to the maximum amount of pile driving based on their monthly densities.

TABLE 21—MOST CONSERVATIVE CONSTRUCTION SCHEDULE FOR ESTIMATING LEVEL B HARASSMENT

[One monopile per day/two pin piles per day] [1]

Foundation type	Year 1				Year 2			
	Days of impact pile driving				Days of impact pile driving			
	1st highest density month	2nd highest density month	3rd highest density month	4th highest density month	1st highest density month	2nd highest density month	3rd highest density month	4th highest density month
WTG monopile—typical	19	20	20	20	24	24	3	0
WTG monopile—difficult	5	4	4	4	0	0	0	0
OSS 1 pin pile	0	6	0	0	0	0	0	0
OSS 2 pin pile	6	0	0	0	0	0	0	0
Total # of piles	30	30	24	24	24	24	3	0

[1] Maximum number of piles to be driven per month for each foundation type in each of the four highest-density months for each species during the May to December period.

In summary, exposures were estimated as follows:

(1) The characteristics of the sound output from the proposed pile-driving activities were modeled using the GRLWEAP (*i.e.,* wave equation analysis of pile driving) model and JASCO's PDSM;

(2) Acoustic propagation modeling was performed within the exposure model framework using JASCO's MONM and FWRAM that combined the

outputs of the source model with the spatial and temporal environmental context (*e.g.,* location, oceanographic conditions, seabed type) to estimate sound fields;

(3) Animal movement modeling integrated the estimated sound fields with species-typical behavioral parameters in the JASMINE model to estimate received sound levels for the animals that may occur in the operational area; and

(4) The number of potential exposures above Level A Harassment and Level B harassment thresholds were calculated.

Empire Wind modeled all possible construction scenarios (see Küsel *et al.,* 2022). Construction Schedule 1, consisting of one monopile and two pin piles per day, was determined to be the most conservative due to the highest modeled exposure estimates for ESA-listed species (*i.e.,* fin and sei whales), and was carried forward to the take analysis. The results of marine mammal exposure modeling for each year of pile driving (2025, 2026) based upon Construction Schedule 1 are shown in tables 22 and 23 below. These values were presented by Empire Wind after the habitat-based density models were updated; please see the ''Revised Density and Take Estimate Memo'' available at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1?check_logged_in=1.*

Based on the exposure estimates for impact-pile-driving activities related to WTGs and OSS installation (monopile foundations and jacket foundations with pin piles), the authorized take is shown below in tables 22 and 23. To determine the authorized take numbers, the calculated exposures were rounded to the next whole number if the calculated exposure was greater than 0.5 animals. Where the calculated take was less than 0.5 animals, the proposed take was reduced to zero.

A review of Empire Wind's PSO sightings data ranging from 2018 to 2021 for the Project Area indicated that exposure estimates based on the exposure modeling methodology above were likely an underestimate for humpback whales, fin whales, and pilot whales (A.I.S. Inc., 2019; Alpine Ocean Seismic Survey, 2018; Gardline, 2021a, 2021b; Geoquip Marine, 2021; Marine Ventures International, 2021; RPS, 2021; Smultea Environmental Sciences, 2019, 2020, 2021). For these species, the highest daily averages per day were multiplied by the maximum potential number of days of pile driving associated with wind turbine and OSS foundation installation. In the event that one monopile or one pin pile is installed per day, up to 120 days of pile driving (*i.e.,* 96 days of monopile installation and 24 days of pin pile installation) could occur in 2025, and up to 51 days of pile driving (*i.e.,* 51 days of monopile installation) could occur in 2026.

For certain species for which the exposure modeling methodology described previously above may result in potential underestimates of take, and for which Empire Wind's PSO sightings data were relatively low, adjustments to the authorized take were made based on the best available information on marine mammal group sizes to ensure conservatism. For species considered rare with the potential to occur in the Project Area, authorized take by Level B harassment was adjusted to one group size per year. NMFS concurs with this assessment and has authorized take by Level B harassment of 3 sperm whales per year in 2026 and 2026 (Barkaszi *et al.,* 2012); 45 Atlantic spotted dolphins per year in 2025 and 2026 (Kenney and Vigness-Raposa, 2010); and 100 Risso's dolphins per year in 2025 and 2026 (100 individuals; Jefferson *et al.,* 2015).

For species considered relatively common in the Project Area, authorized take by Level B harassment was adjusted to one group size per month. These include Atlantic white-sided dolphins (52 individuals, Jefferson *et al.,* 2015) and North Atlantic right whales. The group size determination for North Atlantic right whales was derived based on consultation with NOAA Fisheries. A group size of one animal was used for months with mean monthly densities less than 0.01, while a group size of two animals, reflective of the potential for a mother and calf, was used for months with mean monthly densities greater than 0.01 (based on the Roberts *et al.* (2023) predictive densities). For the months when pile-driving activities may occur (May through December), those criteria result in a group size of one animal for the months of June through October, and two animals for the months of May, November, and December. This group size determination is intended to account for the potential presence of mother-calf pairs. Therefore, Empire Wind requested and NMFS has authorized 11 takes of North Atlantic right whale by Level B harassment per year in 2025 and 2026 and 416 takes of Atlantic white-sided dolphin by Level B harassment per year in 2025 and 2026.

Common dolphins and bottlenose dolphins are considered common in the Project Area as well. For these species, authorized take by Level B harassment was adjusted to one group size per day. These include common dolphins (30 individuals, Reeves *et al.,* 2002), and bottlenose dolphins (15 individuals, Jefferson *et al.,* 2015). Empire Wind has requested, and NMFS has authorized, 3,600 and 1,530 takes of common dolphins by Level B harassment per year in 2025 and 2026. Empire Wind has also requested, and NMFS has authorized, 1,800 and 765 takes of bottlenose dolphins by Level B harassment per year in 2025 and 2026, respectively.

TABLE 22—CALCULATED EXPOSURES AND AUTHORIZED TAKE FROM LEVEL A HARASSMENT AND LEVEL B HARASSMENT RESULTING FROM MONOPILE AND OSS JACKET FOUNDATION IMPACT PILE DRIVING INSTALLATION

[Year 2]

Hearing group	Species	Calculated exposures		Calculated exposures	Authorized take	Authorized take
		Level A harassment		Level B harassment	Level A harassment	Level B harassment
		LE	LpK	Lp		
LF	Fin [a]	1.15	0	8.78	[b] 4	[c] 133
	Humpback	0.36	<0.01	8.12	0	[c] 60
	Minke	3.72	0	65.05	4	65
	North Atlantic Right Whale [a]	0.1	0	2.36	0	[f] 11
	Sei [a]	0.27	<0.01	2.78	0	3
MF	Atlantic white-sided dolphin	0	0	116.00	0	[f] 416
	Atlantic spotted dolphin	0	0	0	0	[d] 45

TABLE 22—CALCULATED EXPOSURES AND AUTHORIZED TAKE FROM LEVEL A HARASSMENT AND LEVEL B HARASSMENT RESULTING FROM MONOPILE AND OSS JACKET FOUNDATION IMPACT PILE DRIVING INSTALLATION—Continued

[Year 2]

Hearing group	Species	Calculated exposures		Calculated exposures	Authorized take	Authorized take
		Level A harassment		Level B harassment	Level A harassment	Level B harassment
		LE	LpK	Lp		
	Common dolphin	0	0	902.19	0	[d] 3,600
	Bottlenose dolphin	0	0	226.02	0	[d] 1,800
	Risso's dolphin	0	0	5.96	0	[d] 100
	Pilot whales	0	0	0	0	[c] 161
	Sperm whale [a]	0	0	0.56	0	[d] 3
HF	Harbor porpoise	0	0.09	133.70	0	134
PW	Gray seal [g]	0.18	0	179.34	0	179
	Harbor seal [g]	0	0	339.96	0	340

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.

[a] Listed as Endangered under the ESA.

[b] Based upon the average group size of fin whales in the Project Area (1.25 whales; Palka *et al.,* 2021), NMFS has increased estimated take by Level A harassment to four fin whales (two groups) from one whale in 2025 and two fin whales (one group) from one whale in 2026.

[c] Requested take adjusted based on PSO sighting data from 2018 to 2021 (A.I.S., 2019; Alpine Ocean Seismic Survey, 2018; Gardline, 2021a, 2021b; Geoquip Marine, 2021; Marine Ventures International, 2021; RPS, 2021; Smultea Environmental Sciences, 2019, 2020, 2021); 0.5 humpback whales per day, 1.11 fin whales per day, 1.34 pilot whales per day.

[d] Requested take adjusted based on 1 group size per year as follows: 3 sperm whales (Barkaszi *et al.,* 2012), 45 Atlantic spotted dolphins (Kenney and Vigness-Raposa, 2010), and 100 Risso's dolphins (Jefferson *et al.,* 2015).

[e] Requested take adjusted by 1 group size per day as follows: 30 short-beaked common dolphins (Reeves *et al.,* 2002), 15 bottlenose dolphins (Jefferson *et al.,* 2015).

[f] Requested take adjusted by 1 group size per month of 52 Atlantic white-sided dolphins (Jefferson *et al.,* 2015) and 1 (monthly density <0.01) or 2 (monthly density >0.01) of North Atlantic right whales (Roberts and Halpin, 2022).

[g] Gray seal and harbor seal exposure estimates and take have been updated since the proposed rule based upon updated methodology.

TABLE 23—CALCULATED EXPOSURES AND AUTHORIZED TAKE FROM LEVEL A HARASSMENT AND LEVEL B HARASSMENT RESULTING FROM MONOPILE AND OSS JACKET FOUNDATION IMPACT PILE DRIVING INSTALLATION

[Year 3]

Hearing group	Species	Calculated exposures		Calculated exposures	Authorized take	Authorized take
		Level A harassment		Level B harassment	Level A harassment	Level B harassment
		LE	LpK	Lp		
LF	Fin whale [a]	0.52	0	4	[c] 2	[d] 57
	Humpback whale	0.14	0	3.82	0	[d] 26
	Minke whale	2.18	0	47.73	2	48
	North Atlantic Right whale [a]	0.05	0	1.57	[b] 0	[g] 11
	Sei whale [a]	0.16	0	1.66	0	2
MF	Atlantic white-sided dolphin	0	0	59.23	0	[g] 416
	Atlantic spotted dolphin	0	0	0	0	[e] 45
	Common dolphin	0	0	560.75	0	[f] 1,530
	Bottlenose dolphin	0	0	110.28	0	[f] 765
	Risso's dolphin	0	0	4.09	0	[e] 100
	Pilot whales	0	0	0	0	[d] 68
	Sperm whale [a]	0	0	0.29	0	[e] 3
HF	Harbor porpoise	0	0	98.43	0	98
PW	Gray seal [h]	0	0	123.58	0	124
	Harbor seal [h]	0	0	219.26	0	219

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.

[a] Listed as Endangered under the ESA.

[b] JASCO's modeling estimated 0.01 Level A harassment exposures for North Atlantic right whales in 2025 and 0.05 Level A harassment exposures for North Atlantic right whales in 2026, but due to mitigation measures (see the Mitigation section), no Level A harassment takes are expected or authorized.

[c] Based upon the average group size of fin whales in the Project Area (1.25 whales; Palka *et al.,* 2021), NMFS has increased estimated take by Level A harassment to two fin whales (one group) from one whale in 2026.

[d] Authorized take adjusted based on PSO sighting data from 2018 to 2021 (A.I.S., 2019; Alpine Ocean Seismic Survey, 2018; Gardline, 2021a, 2021b; Geoquip Marine, 2021; Marine Ventures International, 2021; RPS, 2021; Smultea Environmental Sciences, 2019, 2020, 2021); 0.5 humpback whales per day, 1.11 fin whales per day, 1.34 pilot whales per day.

[e] Authorized take adjusted based on 1 group size per year as follows: 3 sperm whales (Barkaszi *et al.,* 2012), 45 Atlantic spotted dolphins (Kenney and Vigness-Raposa, 2010), and 100 Risso's dolphins (Jefferson *et al.,* 2015).

[f] Authorized take adjusted by 1 group size per day as follows: 30 common dolphins (Reeves *et al.,* 2002), 15 bottlenose dolphins (Jefferson *et al.,* 2015).

[g] Authorized take adjusted by 1 group size per month of 52 Atlantic white-sided dolphins (Jefferson *et al.,* 2015) and 1 (when monthly density <0.01) or 2 (when monthly density >0.01) of North Atlantic right whales (Roberts *et al.,* 2023).

[h] Gray seal and harbor seal exposure estimates and take have been updated since the proposed rule based upon updated methodology.

Temporary Cofferdam and/or Goal Post Installation and Removal (Vibratory Pile Driving) Take Estimates

As many as two temporary cofferdams may be installed for Empire Wind 1 and as many as three temporary cofferdams may be installed for Empire Wind 2. For vibratory pile driving of cofferdams, Empire Wind estimated source levels and frequency spectra assuming a 1,800-kilonewton (kN) vibratory force. Modeling was accomplished using adjusted one-third-octave band vibratory pile driving source levels cited for similar vibratory pile-driving activities conducted during cofferdam installation for the Block Island Wind Farm (Tetra Tech, 2012; Schultz-von Glahn *et al.,* 2006). The assumed sound source level for vibratory pile driving corresponded to 195 dB SEL re 1 µPa and 195 dB rms at 10 m (Schultz-von Glahn *et al.,* 2006). The frequency distribution of the vibratory pile driving sound source is displayed in figure 5 in Küsel *et al.* (2022). A transmission loss coefficient of 15logR (cylindrical spreading) was assumed for both cofferdams and goal posts. The anticipated duration is 1 hour of active pile driving per day.

Underwater sound propagation modeling for cofferdam installation was completed using dBSea, a software for the prediction of underwater noise in a variety of environments. The 3D model is built by importing bathymetry data and placing noise sources in the environment. Each source can consist of equipment chosen from either the standard or user-defined databases. Noise mitigation methods may also be included. The user has control over the seabed and water properties including sound speed profile (SSP), temperature, salinity, and current.

The dBSeaPE solver uses the PE method. For high frequencies, the dBSeaRay ray tracing solver is used, which forms a solution by tracing rays from the source to the receiver. Many rays leave the source covering a range of angles, and the sound level at each point in the receiving field is calculated by coherently summing the components from each ray. This is currently the only computationally efficient method at high frequencies. The underwater acoustic modeling analysis used a split solver, with a specific, parabolic equation model (*i.e.,* dBSeaPE) evaluating the 12.5 Hz to 800 Hz and dBSeaRay addressing 1,000 to 20,000 Hz.

Given the short duration of the activity and shallow, near coast location, animat exposure modeling was not conducted for cofferdams and goal posts installation and removal to determine potential exposures from pile driving. Rather, the modeled acoustic range distances to isopleths corresponding to the relatively small Level A harassment and Level B harassment threshold values were used to calculate the area (*i.e.,* the Ensonified Area) around the cofferdams and goal posts predicted to be ensonified daily to levels that exceed the thresholds. The Ensonified Area is calculated as the following:

Ensonified Area = πr^2,

where *r* is the linear acoustic range distance from the source to the isopleth to Level A harassment or Level B harassment thresholds. Resulting distances to NMFS harassment isopleths for cofferdam installation and ensonified areas for Level B harassment isopleths are provided in table 24 (note that very shallow water depths (3–4 m) at the cofferdam pile driving site is responsible for the limited acoustic propagation of vibratory driving noise).

TABLE 24—DISTANCES (METERS) TO THE LEVEL A AND LEVEL B HARASSMENT THRESHOLD ISOPLETHS FOR VIBRATORY PILE DRIVING FOR COFFERDAMS AND ESTIMATED AREA OF LEVEL B HARASSMENT ZONE

Location	PTS onset by hearing group (m)				Behavioral harassment	Area within estimated Level B harassment zone (km^2)
	LF	MF	HF	PW	ALL	
	199 $L_{E,\ 24\ hr}$	198 $L_{E,\ 24\ hr}$	173 $L_{E,\ 24\ hr}$	201 $L_{E,\ 24\ hr}$	120 SPL RMS	
Empire Wind 1	122	0	44	62	1,985	2.679
Empire Wind 2	13	0	12	11	1,535	1.672

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.

Installation of goal posts would be done using a traditional impact hammer. The casing pipe may be installed using a pneumatic hammer; hence, the number of strikes would be considered high. Empire Wind estimated distances to Level A harassment and Level B harassment thresholds using the NMFS' Multi-Species Calculator Tool (NMFS, 2018) and parameter inputs are shown in table 25 below. Modeling for impact driving of goal posts assumed a single strike SEL of 174 dB. Empire Wind did not propose to employ any noise mitigation during impact pile driving of goal posts or vibratory driving for cofferdams. NMFS does not require noise mitigation in the Mitigation section; therefore, no abatement is applied or assumed. The resulting distances to NMFS thresholds for casing pipe and goal post installation are provided in table 26.

TABLE 25—ESTIMATED SOURCE LEVELS (AT 10 m) AND INSTALLATION RATES FOR CASING PIPE AND GOAL POST INSTALLATION

Structure	dB SEL	dB rms	#strikes per pile	Piles per day	Transmission loss
Casing pipe	166	182	43,200	1	15 log.
Goal Posts	174	184	2,000	2	

TABLE 26—DISTANCES (METERS) TO THE LEVEL A AND LEVEL B HARASSMENT THRESHOLD ISOPLETHS FOR CASING PIPE AND GOAL POST IMPACT PILE DRIVING

Scenario	PTS onset by hearing group (m)								Behavioral harassment SPL (m)
	LF		MF		HF		PW		
	peak	SEL	peak	SEL	peak	SEL	peak	SEL	
Pile	219	183	230	185	202	155	218	185	160
42-inch casing pipe	0.3	904.5	0.1	32.2	4.6	1,077.4	0.4	484	293
12-inch steel goal post	0	632.1	0	22.5	7.4	752.9	0	338.3	398.1

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.

As described above, either cofferdams or goal post and casing pipe installation may occur as part of cable landfall activities, but not both. For goal post installation, 2 hours per goal post (2 piles), for 3 goal posts (6 piles) per HDD, for a total of 18 piles and 36 total hours of pile driving are anticipated. For cofferdams, there is 1 hour per day for 6 days (installation and removal) per cofferdam for a total of 18 hours pile driving anticipated. While modeled distances to the Level A harassment threshold for goal post pile driving were larger than for cofferdam vibratory driving based on the SEL_{cum} metric, it should be noted that modeled distances based on the SEL_{cum} metric are based on the assumption that an individual animal remains at that distance for the entire duration of pile driving in order to incur PTS. This is not considered realistic as marine mammals are highly mobile. As modeled distances to the Level B harassment threshold and zones of influence for Level B harassment were orders of magnitude larger for cofferdam vibratory driving compared to goal post pile driving (compare tables 24 and 26), the amount of take resulting from cofferdam vibratory driving activities were determined to be greater than that of the alternative goal post and casing pipe scenario. Therefore, to be conservative the cofferdam scenario was carried forward for the analysis of potential takes by harassment from cable landfall activities. As such, goal post pile driving is not analyzed further.

Animal movement and exposure modeling was not performed by JASCO to determine potential exposures from vibratory pile driving. Rather, Empire Wind considered the ensonified areas and density estimates to calculate potential exposures (table 28). Empire Wind overlaid the Robert *et al.* (2023) densities on the modeled Level B harassment zones to estimate exposures. The maximum monthly densities for each marine mammal species were averaged by season (table 27; Roberts *et al.,* 2023): spring (March through May), summer (June through August), fall (September through November), and winter (December through February). To be conservative, the maximum average seasonal density for each species was then carried forward in the take calculations. As the noise from cofferdam installation would not extend beyond the 20-m isobath where the coastal bottlenose dolphin stock predominates, it is expected that only the coastal stock of bottlenose dolphins is likely to be taken by this activity.

TABLE 27—AVERAGE SEASONAL MARINE MAMMAL DENSITIES (ANIMALS PER 100 km^2) FOR VIBRATORY PILE DRIVING OF EMPIRE WIND'S COFFERDAM INSTALLATION AND REMOVAL

Marine mammal species	Empire Wind 1 cofferdams (2024) and Empire Wind 2 cofferdams (2024–2025) average seasonal density
Fin whale [a]	0.097
Humpback whale	0.099
Minke whale	0.526
North Atlantic right whale [a]	0.073
Sei whale [a]	0.03
Sperm whale [a]	0.006
Atlantic spotted dolphin	0.058
Atlantic white-sided dolphin	0.469
Bottlenose dolphin (coastal stock) [b]	6.299
Common dolphin	2.837
Pilot whale spp. [c]	0.019
Risso's dolphin	0.034
Harbor porpoise	3.177
Gray seal [d]	13.673
Harbor seal [d]	13.673

[a] Species listed under the ESA.
[b] Bottlenose dolphin density values from Duke University (Roberts *et al.,* 2023) reported as ''bottlenose'' and not identified to stock. Given the noise from cofferdam installation would not extend beyond the 20 m isobath, where the coastal stock predominates, it is expected that all estimated takes by Level B harassment of bottlenose dolphins from cofferdam installation will accrue to the coastal stock.
[c] Pilot whale density values from Duke University (Roberts *et al.,* 2023) reported as ''*Globicephala* spp.'' and not species-specific.
[d] Pinniped density values from Duke University (Roberts *et al.,* 2022) are reported as ''seals'' and are not species-specific.

Estimates of take are computed according to the following formula as provided by NOAA Fisheries (Personal Communication, November 24, 2015):

$$\text{Estimated Take} = D \times ZOI \times d,$$

where:

D = average highest seasonal species density (number per km^2)

ZOI = maximum ensonified area to MMPA threshold for impulsive noise (160 dB RMS 90 percent re 1 μPa)
d = number of days

The area ensonified to the Level B harassment threshold, as well as the projected duration of cofferdam installation and removal at each respective vibratory pile driving location, was then used to produce the results of take calculations provided in table 28. As previously stated, Empire Wind anticipates that cofferdam or casing pipe or goal post installation and removal would occur during years 1 and 2 (2024–2025; refer to table 1). It is expected to take 3 days to install and 3 days to remove each cofferdam. Therefore, 6 days of vibratory pile driving/removal at each location were included. It should be noted that calculations do not take into account whether a single animal is harassed multiple times or whether each exposure is a different animal. Therefore, the numbers in table 28 represent the predicted number of exposures above the Level B harassment threshold using the methods and assumptions described above.

TABLE 28—ESTIMATED LEVEL B HARASSMENT EXPOSURES FROM VIBRATORY PILE INSTALLATION AND REMOVAL RELATED TO COFFERDAMS

Species	Estimated Level B harassment exposures		Total estimated Level B harassment exposures
	Empire Wind 1 cofferdams (2024)	Empire Wind 2 cofferdams (2024–2025)	
Fin Whale	0.03	0.03	0.06
Humpback Whale	0.03	0.03	0.06
Minke Whale	0.17	0.16	0.33
North Atlantic Right Whale	0.02	0.02	0.04
Sei Whale	0.01	0.01	0.02
Sperm Whale	0	0	0
Bottlenose dolphin (Western N.A. Northern Migratory Coastal Stock)[a]	2.03	1.9	3.93
Atlantic Spotted Dolphin	0.02	0.02	0.04
Common dolphin	0.91	0.85	1.76
Atlantic White-sided Dolphin	0.15	0.14	0.29
Risso's dolphin	0.01	0.01	0.02
Pilot whales spp.[b]	0.01	0.01	0.02
Harbor porpoise	1.02	0.96	1.98
Harbor seal[c]	2.2	2.06	4.26
Gray seal[c]	2.2	2.06	4.26

[a] Bottlenose dolphin density values from Duke University (Roberts *et al.,* 2023) reported as ''bottlenose'' and not identified to stock. Given the noise from cofferdam installation would not extend beyond the 20 m isobath, where the coastal stock predominates, it is expected that all estimated takes by Level B harassment of bottlenose dolphins from cofferdam installation will accrue to the coastal stock.
[b] Pilot whale density values from Duke University (Roberts *et al.,* 2022) reported as ''*Globicephala* spp.'' and not species-specific.
[c] Pinniped density values from Duke University (Roberts *et al.,* 2023) are reported as ''seals'' and are not species-specific, therefore, 50 percent of estimated exposures are expected to accrue to harbor seals and 50 percent to gray seals.

For some species, group size data demonstrate that the density-based exposure calculations underestimate the potential for take. Hence, the amount of authorized take varies from exposure estimates (table 29). As the density models do not account for group size and the resulting calculated exposures were very small, the predicted take was increased to account for the exposure of one average-sized group per day each of bottlenose and common dolphins. Due to the presence of several seal haul outs in the cable landfall area, the Roberts *et al.* (2023), density-based exposure estimates may underestimate potential seal occurrence, and 10 takes of seals by Level B harassment per day over the course of 9 days were estimated. Table 29 includes the maximum number of takes that are reasonably likely to occur during vibratory pile driving.

TABLE 29—AUTHORIZED LEVEL B HARASSMENT TAKE RESULTING FROM VIBRATORY PILE DRIVING ASSOCIATED WITH THE INSTALLATION AND REMOVAL OF TEMPORARY COFFERDAMS OVER 2 YEARS

Species	Authorized take by Level B harassment		
	Empire Wind 1 cofferdams (2024)	Empire Wind 2 cofferdams (2024–2025)	Total authorized take
Fin Whale	0	0	0
Humpback Whale	0	0	0
Minke Whale	0	0	0
North Atlantic Right Whale	0	0	0
Sei Whale	0	0	0
Sperm Whale	0	0	0
Bottlenose dolphin (Western N.A. Northern Migratory Coastal Stock)[a]	180	270	450
Atlantic Spotted Dolphin	0	0	0
Common dolphin[b]	360	540	900
Atlantic White-sided Dolphin	0	0	0
Risso's dolphin	0	0	0
Pilot whales spp.[c]	0	0	0

TABLE 29—AUTHORIZED LEVEL B HARASSMENT TAKE RESULTING FROM VIBRATORY PILE DRIVING ASSOCIATED WITH THE INSTALLATION AND REMOVAL OF TEMPORARY COFFERDAMS OVER 2 YEARS—Continued

Species	Authorized take by Level B harassment		
	Empire Wind 1 cofferdams (2024)	Empire Wind 2 cofferdams (2024–2025)	Total authorized take
Harbor porpoise	1	1	2
Harbor seal [d]	60	90	150
Gray seal [d]	60	90	150

[a] Bottlenose dolphin authorized take was adjusted to account for one group size, 15 individual bottlenose dolphins (Jefferson *et al.,* 2015) per day (18 days).
[b] Common dolphin authorized take was adjusted to account for one group size, 30 individual common dolphins (Reeves *et al.,* 2002) per day (18 days).
[c] Pilot whale density values (Roberts *et al.,* 2023) reported as ''*Globicephala* spp.'' and not species-specific.
[d] Pinniped density values (Roberts *et al.,* 2023) reported as ''seals'' and not species-specific, therefore, 50 percent of expected takes by Level B harassment are expected to accrue to harbor seals and 50 percent to gray seals. Due to the presence of several seal haul outs in the area, authorized level B harassment seal takes were calculated by estimating 10 individuals per day (9 days) (Woo and Biolsi, 2018), divided evenly between harbor seals and gray seals.
[e] Data was not available for harp seals for which take was authorized.

Marina Activities

Pile driving at the onshore substation C constitutes a small amount of work. Empire Wind assumed source levels during pile driving sheet piles at onshore substation C would be similar to that during installation of the cofferdams for cable landfall construction. Since densities are not available for the specific inshore region where the activity will occur, potential take by harassment for marine mammals using density could not be calculated. Instead, to be conservative, 10 takes by Level B harassment of seals per day (49 days) were estimated based on pinniped observations in New York City between 2011 and 2017 (Woo and Biolsi, 2018), which were split evenly between harbor and gray seals (table 6). Similarly, the authorized take of bottlenose dolphins was adjusted to account for one group size of 15 individuals (Jefferson *et al.,* 2015) per day for 49 days.

TABLE 30—DISTANCES (METERS) TO THE LEVEL A AND LEVEL B HARASSMENT THRESHOLD ISOPLETH DISTANCES FOR VIBRATORY DRIVING AT ONSHORE SUBSTATION C LOCATION MARINA

Location	PTS onset by hearing group (Level A harassment)				Behavioral response (Level B harassment)
	LF	MF	HF	PW	All
	199 $L_{E,\ 24hr}$	199 $L_{E,\ 24hr}$	199 $L_{E,\ 24hr}$	199 $L_{E,\ 24hr}$	120 SPL RMS
Marina Bulkhead Work (Sheet pile installation)	43.2	3.8	63.8	26.2	1,000
Marina Berthing Pile Removal	43.5	3.9	64.3	26.5	1,600

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans; HF = high-frequency cetaceans; PW = pinnipeds in water.

TABLE 31—AUTHORIZED TAKES BY LEVEL B HARASSMENT FROM MARINA PILE DRIVING

Species	Marina work (2024)
	Authorized take by Level B harassment
Bottlenose dolphin (Western N.A. Northern Migratory Coastal Stock) [a]	735
Harbor seal [b]	245
Gray seal [b]	245

[a] Given the noise from cofferdam installation would not extend beyond the 20 m isobath, where the coastal stock predominates, it is expected that all estimated takes by Level B harassment of bottlenose dolphins from cofferdam installation will accrue to the coastal stock. The authorized take was adjusted to account for one group size, 15 individuals (Jefferson *et al.,* 2015) per day of bottlenose.
[b] Pinniped density values from Duke University (Roberts *et al.,* 2023) are reported as ''seals'' and are not species-specific, therefore, 50 percent of expected takes by Level B harassment are expected to accrue to harbor seals and 50 percent to gray seals.

HRG Surveys

Empire Wind's planned HRG survey activity includes the use of non-impulsive sources (*i.e.,* CHIRP sub bottom profiler (SBP)) that have the potential to harass marine mammals. Of the list of equipment described in table 2 of the proposed rule (88 FR 22696, April 13, 2023), Ultra-Short BaseLine (USBL), multibeam echosounder (MBES), side scan sonar (SSS), and the Innomar SBP were removed from further analysis due to either the extremely low likelihood of the equipment resulting in marine mammal harassment (*i.e.,* USBL, MBES, select SSS) or due to negligible calculated isopleth distances corresponding to the Level B harassment threshold (<2 m) (*i.e.,* select SSS and Innomar SBP). No boomers or sparkers will be used.

Authorized takes will be by Level B harassment only in the form of disruption of behavioral patterns for

individual marine mammals resulting from exposure to noise from certain HRG acoustic sources. Based primarily on the characteristics of the signals produced by the acoustic sources planned for use, Level A harassment is neither anticipated, even absent mitigation, nor authorized. Therefore, the potential for Level A harassment is not evaluated further in this document. Empire Wind did not request, and NMFS has not authorized, take by Level A harassment incidental to HRG surveys. No serious injury or mortality is anticipated to result from HRG survey activities.

Specific to HRG surveys, in order to better consider the narrower and directional beams of the sources, NMFS has developed a tool for determining the sound pressure level (SPL_{rms}) at the 160-dB isopleth for the purposes of estimating the extent of Level B harassment isopleths associated with HRG survey equipment (NMFS, 2020). This methodology incorporates frequency-dependent absorption and some directionality to refine estimated ensonified zones. Empire Wind used NMFS' methodology with additional modifications to incorporate a seawater absorption formula and account for energy emitted outside of the primary beam of the source. For sources that operate with different beamwidths, the maximum beam width was used, and the lowest frequency of the source was used when calculating the frequency-dependent absorption coefficient.

The isopleth distances corresponding to the Level B harassment threshold for each type of HRG equipment with the potential to result in harassment of marine mammals were calculated per ''NOAA Fisheries' Interim Recommendation for Sound Source Level and Propagation Analysis for High Resolution Geophysical Sources.'' The distances to the 160-dB RMS re 1 µPa isopleth for Level B harassment are presented in table 32. Please refer to section 6.3.2 of the LOA application for a full description of the methodology and formulas used to calculate distances to the Level B harassment threshold.

TABLE 32—ISOPLETH DISTANCES IN METERS (m) CORRESPONDING TO LEVEL B HARASSMENT THRESHOLD FOR HRG EQUIPMENT

HRG survey equipment	Source level (SL_{RMS}) (dB re 1µPa)	Lateral distance (m) to Level B harassment threshold
Edgetech DW106	194	50
Edgetech 424	180	8.75
Teledyne Benthos Chirp III—TTV 170	219	50.05

The survey activities that have the potential to result in Level B harassment (160 $dB_{RMS90\%}$ re 1 µPa) include the noise produced by various non-parametric sub-bottom profilers (table 32), of which the Teledyne Benthos Chirp III results in the greatest calculated distance to the Level B harassment criteria at 50.05 m (164 ft). Therefore, to be conservative, Empire Wind has applied the estimated distance of 50.05 m (164 ft) to the 160 $dB_{RMS90\%}$ re 1 µPa Level B harassment criteria as the basis for determining potential take from all HRG sources.

The basis for the take estimate is the number of marine mammals that would be exposed to sound levels in excess of the Level B harassment threshold (160 dB). Typically, this is determined by estimating an ensonified area for the activity, by calculating the area associated with the isopleth distance corresponding to the Level B harassment threshold. This area is then multiplied by marine mammal density estimates in the Project Area and then corrected for seasonal use by marine mammals, seasonal duration of Project-specific noise-generating activities, and estimated duration of individual activities when the maximum noise-generating activities are intermittent or occasional.

The estimated distance of the daily vessel track line was determined using the estimated average speed of the vessel and the 24-hour operational period within each of the corresponding survey segments. All noise-producing survey equipment is assumed to be operated concurrently. Using the distance of 50.05 m (164 ft) to the 160 $dB_{RMS90\%}$ re 1 µPa Level B harassment isopleth (table 32), the estimated daily vessel track of approximately 177.792 km (110.475 mi) for 24-hour operations, inclusive of an additional circular area to account for radial distance at the start and end of a 24-hour cycle, estimates of the total area ensonified to the Level B harassment threshold per day of HRG surveys were calculated (table 33).

TABLE 33—ESTIMATED NUMBER OF SURVEY DAYS, ESTIMATED SURVEY DISTANCE PER DAY, AND ESTIMATED DAILY ENSONIFIED AREA FOR HRG SURVEYS, FROM 2024 THROUGH 2029

Survey segment	Number of active survey vessel days	Estimated distance per day (km)	Calculated daily ensonified area (km^2)
2024 Survey Effort	41	177.792	17.805
2025 Survey Effort	191		
2026 Survey Effort	150		
2027 Survey Effort	100		
2028 to January 2029 Survey Effort	100		

As described in the LOA application, density data were mapped within the boundary of the Project Area (figure 1 in the LOA application) using geographic information systems; these data were updated based on the revised data from Roberts *et al.* (2023) (table 6). Maximum monthly densities as reported by Roberts *et al.* (2023) were averaged by season over the survey duration, for winter (December through February), spring (March through May), summer (June through August), and fall (September through November), for the entire HRG Project Area. To be

conservative, the maximum average seasonal density within the HRG survey schedule for each species (table 7), was then carried forward in the take calculations to generate exposure estimates (table 34).

TABLE 34—CALCULATED ANNUAL MAXIMUM LEVEL B HARASSMENT EXPOSURES OF MARINE MAMMALS RESULTING FROM ANNUAL DAYS OF HRG SURVEYS

Species	2024—Calculated exposures	2025—Calculated exposures	2026—Calculated exposures	2027—Calculated exposures	2028 to January 2029—calculated exposures
Fin Whale	0.707	3.295	2.588	1.725	1.725
Humpback Whale	0.722	3.363	2.641	1.761	1.761
Minke Whale	3.836	17.87	14.034	9.356	9.356
North Atlantic Right Whale	0.532	2.48	1.948	1.298	1.298
Sei Whale	0.219	1.019	0.8	0.534	0.534
Sperm Whale	0.044	0.204	0.16	0.107	0.107
Pilot whales spp	0.139	0.645	0.507	0.338	0.338
Bottlenose dolphin [a]	45.937	213.997	168.06	112.04	112.04
Atlantic White-sided Dolphin	3.42	15.933	12.513	8.342	8.342
Common dolphin	20.689	96.382	75.693	50.462	50.462
Atlantic Spotted Dolphin	0.423	1.97	1.547	1.032	1.032
Risso's dolphin	0.255	1.189	0.934	0.623	0.623
Harbor porpoise	23.169	107.933	84.764	56.509	56.509
Harbor seal [b]	48.857	232.258	182.401	121.601	121.601
Gray seal [b]	48.857	232.258	182.401	121.601	121.601

[a] Estimated take is not distinguished between bottlenose dolphin coastal and offshore stocks as degree of survey effort cannot be differentiated in relation to the 20-m isobath.

[b] Pinniped density values from Duke University (Roberts *et al.,* 2023) reported as ''seals,'' so take allocated by 50 percent accrued to harbor seals and 50 percent accrued to gray seals.

The calculated exposure estimates based on the exposure modeling methodology described above were compared with the best available information on marine mammal group sizes and with Empire Wind's PSO sightings data ranging from 2018 to 2021 for the Project Area to ensure authorized take numbers associated with HRG survey activities were conservative and based on best available information. As a result of this comparison, it was determined that the calculated number of potential takes by Level B harassment based on the exposure modeling methodology above may be underestimates for some species and therefore warranted adjustment to ensure conservatism in requested take numbers. Despite the relatively small modeled Level B harassment zone (50 m) for HRG survey activities, it was determined that adjustments to the requested numbers of take by Level B harassment for some dolphin species was warranted in some cases to be conservative, based on the expectation that dolphins may approach or bow ride near the survey vessel. No adjustments were made to take requests for large whale species as a result of HRG survey activities due to the relatively small Level B harassment zone (50 m) and the low likelihood that large whales would be encountered within such a short distance of the vessel except in rare circumstances.

For certain species for which the density-based methodology described above may result in potential underestimates of take and Empire Wind's PSO sightings data were relatively low, adjustments to the exposure estimates were made based on the best available information on marine mammal group sizes to ensure conservatism. For species considered common in the Project Area, authorized takes by Level B harassment were adjusted to one group size per HRG survey day (n-191) that may occur anytime from January through December. These species include bottlenose dolphins (15 individuals; Jefferson *et al.,* 2015) and common dolphins (30 individuals; Reeves *et al.,* 2002). Note that these adjustments to take estimates were made previously and are included in the LOA application. For species considered less common in the Project Area, requested takes by Level B harassment were adjusted to one group size per month of HRG surveys. These species include Atlantic white-sided dolphins (52 individuals; Jefferson *et al.,* 2015). For species considered rare but which still have the potential to occur in the Project Area, authorized takes by Level B harassment were adjusted to one group size per year of HRG surveys. These species include Atlantic spotted dolphin (45 individuals; Kenney & Vigness-Raposa, 2010) and Risso's dolphin (100 individuals; Jefferson *et al.,* 2015). The authorized take for pilot whales was adjusted based on PSO data by multiplying the maximum reported daily density (1.34 individuals; Geoquip Marine, 2021) by the annual days of operation.

TABLE 35—AUTHORIZED LEVEL B HARASSMENT TAKE RESULTING FROM HRG SITE CHARACTERIZATION SURVEYS OVER 5 YEARS

Species	2024—Authorized take	2025—Authorized take	2026—Authorized take	2027—Authorized take	2028 to January 2029—authorized take	Total authorized take across 5 years
Fin Whale	1	3	3	2	2	11
Humpback Whale	1	3	3	2	2	11
Minke Whale	4	18	14	9	9	54
North Atlantic Right Whale	1	2	2	1	1	7
Sei Whale	0	1	1	1	1	4

TABLE 35—AUTHORIZED LEVEL B HARASSMENT TAKE RESULTING FROM HRG SITE CHARACTERIZATION SURVEYS OVER 5 YEARS—Continued

Species	2024—Authorized take	2025—Authorized take	2026—Authorized take	2027—Authorized take	2028 to January 2029—authorized take	Total authorized take across 5 years
Sperm Whale	0	0	0	0	0	0
Pilot whales spp	55	256	201	134	134	[a] 780
Bottlenose dolphin [b]	615	2,865	2,250	1,500	1,500	[b] 8,730
Atlantic White-sided Dolphin	71	331	260	173	173	[c] 1,008
Common dolphin	1,230	5,730	4,500	3,000	3,000	17,460
Atlantic Spotted Dolphin	45	45	45	45	45	[d] 225
Risso's dolphin	100	100	100	100	100	[d] 500
Harbor porpoise	23	108	85	57	57	330
Harbor seal [e]	50	232	182	122	122	708
Gray seal [e]	50	232	182	122	122	708

[a] Authorized take adjusted based on PSO sighting data from 2018 to 2021 (A.I.S., 2019; Alpine Ocean Seismic Survey, 2018; Gardline, 2021a, 2021b; Geoquip Marine, 2021; Marine Ventures International, 2021; RPS, 2021; Smultea Environmental Sciences, 2019, 2020, 2021).

[b] Bottlenose dolphin density values from Duke University (Roberts *et al.,* 2023) reported as ''bottlenose dolphin'' and not identified to stock. HRG survey activities were not differentiated by region relative to the 20-m isopleth and therefore bottlenose takes are not identified to stock. As Roberts and Halpin does not account for group size, the estimated take was adjusted to account for one group size, 15 individual bottlenose dolphins (Jefferson *et al.,* 2015) per day and 30 individual common dolphins (Reeves *et al.,* 2002), per day.

[c] As Roberts *et al.* (2023) does not account for group size, the authorized take was adjusted to account for one group size, 52 individuals (Jefferson *et al.,* 2015) per month of Atlantic white-sided dolphins.

[d] As Roberts *et al.* (2023) does not account for group size, the authorized take was adjusted to account for one group size, 100 individuals (Jefferson *et al.,* 2015), per year of Risso's dolphins and 45 individuals (Kenney and Vigness-Raposa, 2010) per year of Atlantic spotted dolphins.

[e] Pinniped density values from Duke University (Roberts *et al.,* 2023) reported as ''seals,'' so take allocated by 50 percent accrued to harbor seals and 50 percent accrued to gray seals.

Total Takes Across All Activity Types

The amount of Level A harassment and Level B harassment NMFS is authorizing incidental to all project activities combined (*i.e.,* impact pile driving to install WTG and OSS monopile and jacket foundations, vibratory pile driving to install and remove temporary cofferdams, marina activities, and HRG surveys) are shown in table 34. The annual amount of take that would occur in each year based on Empire Wind's current schedules is provided in table 36. NMFS notes that while HRG surveys are expected to occur across all 5 years (2024–2029) of the effective period of the rulemaking (a total of 582 days across all 5 years), survey effort will vary. Year 1 (2024) take estimates include 41 days of HRG surveys, cofferdams or goal posts installation and removal, and marine activities. Year 2 (2025) includes 191 days of HRG surveys, WTG impact installation using monopile foundations, OSS impact installation using pin piles for jacket foundations, and cofferdams or goal post installation and removal. Year 3 (2026) includes 150 days of HRG surveys, WTG impact installation using monopile foundations, and OSS impact installation using pin piles for jacket foundations. Years 4 and 5 include 100 days each of HRG surveys. All activities are expected to be completed by 2029, equating to the five years of activities, as described in this preamble.

For the species for which modeling was conducted, the authorized take is considered conservative for a number of reasons. The amount of authorized take assumes the most impactful scenario with respect to project design and schedules. As described in the Description of Specific Activities section, Empire Wind plans to use monopile and jacket foundations for all permanent structures (*i.e.,* WTGs and OSSs). If Empire Wind decides to use suction-buckets or gravity-based foundations to install bottom-frame WTG and OSS foundations, take would not occur as noise levels would not be elevated to the degree there is a potential for take (*i.e.,* no pile driving is involved with installing suction buckets or gravity-based foundations). The authorized take for impact pile driving assumed a maximum piling schedule of two monopiles and three pin piles installed per 24-hour period. The authorized take from vibratory pile driving assumed temporary cofferdams using sheet piles would be installed, versus the alternative installation of a gravity-cell cofferdam, for which no take would be expected nor authorized. The authorized take numbers for pile driving are conservatively based on the maximum densities across the construction months. The authorized take numbers for Level A harassment do not fully account for the likelihood that marine mammals would avoid a stimulus when possible before the individual accumulates enough acoustic energy to potentially cause auditory injury, nor do these numbers account for the effectiveness of the required mitigation measures. Lastly, the amount of authorized take for nearshore installation of cofferdams and goal posts is based on a simple calculation (density × area × number of days of activity), which is thought to already be inherently conservative.

Authorized takes by Level A harassment and Level B harassment for the combined activities of impact pile driving during the impact installation of monopiles and pin piles (assuming 10 dB of sound attenuation), vibratory pile driving and removal for the temporary cofferdams, vibratory removal of berthing piles and installation of sheet piles at the Onshore Substation C marina, and HRG surveys are provided in table 36. NMFS also presents the percentage of each marine mammal stock estimated to be taken based on the total amount of annual take in table 38. Table 37 provides the total authorized take from the entire 5-year effective period of the rulemaking and issued LOA. NMFS recognizes that schedules may shift due to a number of planning and logistical constraints such that take may be redistributed throughout the 5 years. However, the total 5-year amount of take for each species, shown in table 37, and the maximum amount of take in any one year (table 35) would not be exceeded. Additionally, to reduce impacts to marine mammals, NMFS has required several mitigation and

monitoring measures, provided in the Mitigation and Monitoring and Reporting sections, which are activity-specific and are designed to minimize acoustic exposures to marine mammal species.

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Table 36 -- Level A Harassment and Level B Harassment Takes for All Activities Authorized During the Construction and Development of the Project

Marine Mammal Species	NMFS Stock Abundance	2024 (Year 1)		2025 (Year 2)		2026 (Year 3)		2027 (Year 4)		2028 (Year 5)	
		Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment
Mysticetes											
Fin Whale*	6,802	0	1	4	136	2	60	0	2	0	2
Humpback Whale	1,396	0	1	0	63	0	29	0	2	0	2
Minke Whale	21,968	0	4	4	83	2	62	0	9	0	9
North Atlantic Right Whale*	338	0	1	0	13	0	13	0	1	0	1
Sei Whale*	6,292	0	0	0	4	0	3	0	1	0	1
Odontocetes											
Atlantic Spotted Dolphin	39,921	0	45	0	90	0	90	0	45	0	45
Atlantic White-sided Dolphin	93,233	0	71	0	747	0	676	0	178	0	173

Bottlenose dolphin (Western North Atlantic, Offshore stock)[a]	62,851	0	0	0	1,800	0	765	0	0	0	0
Bottlenose dolphin (Western North Atlantic, Coastal Stock)[a]	6,639	0	1,185	0	270	0	0	0	0	0	0
Bottlenose dolphin (Western North Atlantic, Offshore and Coastal Stocks)[b]	69,490	0	615	0	2,865	0	2,250	0	1,500	0	1,500
Common Dolphin	172,974	0	2,130[f]	0	9,870	0	6,030	0	3,000	0	3,000
Harbor Porpoise	95,543	0	25	0	243	0	183	0	57	0	57
Pilot Whale[c]	68,139	0	55	0	417	0	269	0	134	0	134
Risso's Dolphin	35,215	0	100	0	200	0	200	0	100	0	100
Sperm Whale*	1,180	0	0	0	3	0	3	0	0	0	0
Phocid (pinnipeds)											

Gray Seal[d]	27,300	0	455	0	501	0	306	0	122	0	122
Harbor Seal[d]	61,336	0	455	0	662	0	401	0	122	0	122
Harp Seal[e]	7.6 M	0	4	0	4	0	4	0	4	0	4

* Denotes species listed under the ESA.

a - Represents estimated take from impact pile driving, vibratory driving for cofferdams, and marina construction activities. For year 1, estimated take for the bottlenose dolphin coastal stock includes cofferdam construction from years 1 and 2 as a portion of year 2 construction may occur in year 1.

b - Bottlenose dolphin density values from Duke University (Roberts *et al.*, 2023) reported as "bottlenose dolphin" and not identified to stock. Given the noise from cofferdam installation would not extend beyond the 20-m isobath, where the coastal stock predominates, all estimated takes by Level B harassment of bottlenose dolphins from cofferdam installation were attributed to the coastal stock. Takes from impact pile driving were attributed to each stock (coastal and offshore) according to delineation along the 20-m isobath during the animat modeling process. Takes from HRG survey activities were not differentiated.

c - Pilot whale density values from Duke University (Roberts *et al.*, 2023) reported as "*Globicephala* spp." and not species-specific.

d - Pinniped density values from Duke University (Roberts *et al.*, 2023) reported as "seals" and not species-specific, so take allocated by 50 percent accrued to harbor seals and 50 percent accrued to gray seals for cable landfall construction, marina construction, and HRG surveys. Scaling based on local occurrence was used for WTG and OSS foundation installation. For year 1, estimated take by Level B harassment also includes cofferdam activities for year 2 for harbor and gray seals, as a portion of the year 2 cofferdam activities may take place during year 1.

e - Harp seal occurrence is anticipated to be rare. Anecdotal stranding data indicate only a few harp seals are sighted within the vicinity of the Project each year. Therefore, four harp seal Level B takes have been requested per year of the Project.

f - Estimated take by Level B harassment also includes estimated take for cofferdam construction during year 2 as a portion of these activities may take place during year 1.

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TABLE 37—TOTAL 5-YEAR AUTHORIZED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) FOR ALL ACTIVITIES DURING THE CONSTRUCTION AND DEVELOPMENT OF THE PROJECT

Marine mammal species	NMFS stock abundance	5-Year totals		
		Authorized Level A harassment	Authorized Level B harassment	5-Year sum (Level A harassment + Level B harassment)
Mysticetes				
Fin Whale *	6,802	6	201	207
Humpback Whale	1,396	0	97	97
Minke Whale	21,968	6	167	173
North Atlantic Right Whale *	336	0	29	29
Sei Whale *	6,292	0	9	9
Odontocetes				
Atlantic Spotted Dolphin	39,921	0	315	315
Atlantic White-sided Dolphin	93,221	0	1,840	1,840
Bottlenose Dolphin (Western North Atlantic Offshore) [a]	62,851	0	2,565	2,565
Bottlenose Dolphin (Northern Migratory Coastal) [a]	6,639	0	1,455	1,455
Bottlenose Dolphin (WNA Offshore and Northern Migratory Coastal) [a]	69,490	0	8,730	8,730
Common Dolphin	172,974	0	24,030	24,030
Harbor Porpoise	95,543	0	565	565
Pilot Whales	68,139	0	1,009	1,009

TABLE 37—TOTAL 5-YEAR AUTHORIZED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) FOR ALL ACTIVITIES DURING THE CONSTRUCTION AND DEVELOPMENT OF THE PROJECT—Continued

Marine mammal species	NMFS stock abundance	5-Year totals		
		Authorized Level A harassment	Authorized Level B harassment	5-Year sum (Level A harassment + Level B harassment)
Risso's Dolphin	35,215	0	700	700
Sperm Whale *	4,349	0	6	6
Phocid (pinnipeds)				
Gray Seal	27,300	0	1,496	1,496
Harbor Seal	61,336	0	1,752	1,752
Harp Seal [b]	UNK	0	20	20

* Denotes species listed under the ESA.

[a] Total estimated 5-year take by Level B harassment represents estimated take from HRG surveys, estimated take for the offshore stock, and estimated take for the coastal stock. The estimated take for the coastal stock of year 2 cofferdam construction (270) is subtracted from the total 5-year take as this estimate is incorporated into cofferdam estimated take for years 1 and 2.

[b] Harp seal occurrence is anticipated to be rare. Anecdotal stranding data indicate only a few harp seals are sighted within the vicinity of the Project each year. Therefore, four harp seal Level B harassment takes have been requested per year of the Project.

In making the negligible impact determination and the necessary small numbers finding, NMFS assesses the greatest number of takes of marine mammals that could occur within any one year (which in the case of this rule is based on the predicted year 2 for all species), although the negligible impact determination also examines the cumulative impact over the 5-year period. In this calculation, the maximum estimated number of Level A harassment takes in any one year is summed with the maximum estimated number of Level B harassment takes in any one year for each species to yield the highest number of estimated take that could occur in any year (table 38). We recognize that certain activities could shift within the 5-year effective period of the rule; however, the rule allows for that flexibility and the takes are not expected to exceed those shown in table 38 in any year.

TABLE 38—MAXIMUM NUMBER OF AUTHORIZED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) IN ANY ONE YEAR OF THE PROJECT AND THE PERCENT STOCK THAT WOULD BE TAKEN BASED ON THE MAXIMUM ANNUAL AUTHORIZED TAKE

Marine mammal species	NMFS stock abundance	Maximum annual take authorized			
		Maximum Level A harassment	Maximum Level B harassment	Maximum annual take [a]	Total percent stock taken based on maximum annual take [b]
Mysticetes					
Fin Whale *	6,802	4	136	140	2.06.
Humpback Whale	1,396	0	63	63	4.51.
Minke Whale	21,968	4	83	87	0.40.
North Atlantic Right Whale *	338	0	13	13	3.85.
Sei Whale *	6,292	0	4	4	0.06
Odontocetes					
Sperm Whale *	4,349	0	3	3	0.07.
Atlantic Spotted Dolphin	39,921	0	90	90	0.23.
Atlantic White-sided Dolphin	93,221	0	747	747	0.80.
Bottlenose Dolphin (Western North Atlantic Offshore) [c].	62,851	0	1,800 (pile driving only).	1,800 (pile driving only).	2.86.
Bottlenose Dolphin (Northern Migratory Coastal) [c].	6,639	0	1,185 (pile driving only).	1,185 (pile driving only).	17.85.
Bottlenose Dolphin (WNA Offshore and Northern Migratory Coastal) [d].	62,851 Western North Atlantic Offshore; 6,639 Northern Migratory Coastal.	0	2,865 (HRG survey).	2,865 (HRG survey).	See text description in the Small Numbers section.
Common Dolphin	172,974	0	9,870	9,870	5.71.
Harbor Porpoise	95,543	0	243	243	0.25.
Pilot Whale spp	68,139	0	417	417	1.06.
Risso's Dolphin	35,215	0	200	200	0.57.

TABLE 38—MAXIMUM NUMBER OF AUTHORIZED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) IN ANY ONE YEAR OF THE PROJECT AND THE PERCENT STOCK THAT WOULD BE TAKEN BASED ON THE MAXIMUM ANNUAL AUTHORIZED TAKE—Continued

Marine mammal species	NMFS stock abundance	Maximum annual take authorized			
		Maximum Level A harassment	Maximum Level B harassment	Maximum annual take [a]	Total percent stock taken based on maximum annual take [b]
Phocid (pinnipeds)					
Gray Seal	27,300	0	501	501	1.84.
Harbor Seal	61,336	0	662	662	1.08.
Harp Seal	7,600,000	0	4	4	0.00005.

* Denotes species listed under the ESA.

[a] Calculations of the maximum annual take are based on the maximum requested Level A harassment take in any one year + the total requested Level B harassment take in any one year.

[b] Calculations of percentage of stock taken are based on the maximum requested Level A harassment take in any one year + the total requested Level B harassment take in any one year and then compared against the best available abundance estimate. For this action, the best available abundance estimates are derived from the NMFS SARs (Hayes *et al.,* 2023).

[c] Bottlenose dolphin density values from Duke University (Roberts *et al.,* 2023) reported as ''bottlenose dolphin'' and not identified to stock. Given the noise from cofferdam installation would not extend beyond the 20-m isobath, where the coastal stock predominates, all estimated takes by Level B harassment of bottlenose dolphins from cofferdam installation were attributed to the coastal stock. Takes from impact pile driving were attributed to each stock (coastal and offshore) according to delineation along the 20-m isobath during the animat modeling process. Takes from HRG survey activities were not differentiated.

[d] The values presented here assume that all of the take from HRG surveys (n=2,865) that could occur in any given year to either the offshore stock or the Northern Migratory coastal stock would occur to the offshore stock. While NMFS does not believe this is a likely outcome given Empire Wind would conduct an undefined amount of HRG work outside of the offshore stock's habitat, we have presented it here as is for simplicity.

Mitigation

As noted in the Changes from the Proposed to Final Rule section, NMFS has added several new mitigation requirements and clarified a few others and has increased the minimum visibility zone for mysticetes and shutdown zone for North Atlantic right whales. These changes are described in detail in the sections below. Besides these changes, the required measures remain the same as those described in the proposed rule. However, NMFS has also re-organized and simplified the section to avoid full duplication of the specific requirements that are fully described in the regulatory text.

In order to promulgate a rulemaking under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS' regulations require applicants for ITAs to include information about the availability and feasibility (*e.g.,* economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (*e.g.,* likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (*i.e.,* the probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (*i.e.,* the probability if implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider factors such as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The mitigation strategies described below are consistent with those required and successfully implemented under previous ITAs issued in association with in-water construction activities (*e.g.,* soft-start, establishing shutdown zones). Additional measures have also been incorporated to account for the fact that the construction activities would occur offshore. Modeling was performed to estimate harassment zones, which were used to inform mitigation measures for the Project's activities to minimize Level A harassment and Level B harassment to the extent practicable, while providing estimates of the areas within which Level B harassment might occur.

Generally speaking, the mitigation measures considered and required here fall into three categories: temporal (*i.e.,* seasonal and daily) and spatial work restrictions, real-time measures (*e.g.,* shutdown, clearance, and vessel strike avoidance), and noise attenuation/reduction measures. Temporal and spatial work restrictions are designed to avoid or minimize operations when marine mammals are concentrated or engaged in behaviors that make them more susceptible or make impacts more likely, in order to reduce both the number and severity of potential takes, and are effective in reducing both chronic (longer-term) and acute effects. Real-time measures, such as implementation of shutdown and clearance zones, as well as vessel strike avoidance measures, are intended to reduce the probability or severity of harassment by taking steps in real time once a higher-risk scenario is identified (*e.g.,* once animals are detected within an impact zone). Noise attenuation

measures such as bubble curtains are intended to reduce the noise at the source, which reduces both acute impacts, as well as the contribution to aggregate and cumulative noise that may result in longer term chronic impacts.

Below, we briefly describe the required training, coordination, and vessel strike avoidance measures that apply to all activity types, and in the following subsections we describe the measures that apply specifically to foundation installation, nearshore installation and removal activities for cable laying and marina activities, and HRG surveys. Details on specific requirements can be found in 50 CFR part 217, subpart CC, set out at the end of this rulemaking.

Training and Coordination

NMFS requires all Empire Wind employees and contractors conducting activities on the water, including but not limited to, all vessel captains and crew to be trained in marine mammal detection and identification, communication protocols, and all required measures to minimize impacts on marine mammals and support Empire Wind's compliance with the LOA, if issued. Additionally, all relevant personnel and the marine mammal species monitoring team(s) are required to participate in joint, onboard briefings prior to the beginning of project activities. The briefing must be repeated whenever new relevant personnel (*e.g.,* new PSOs, construction contractors, relevant crew) join the Project before work commences. During this training, Empire Wind is required to instruct all project personnel regarding the authority of the marine mammal monitoring team(s). For example, the HRG acoustic equipment operator, pile driving personnel, *etc.,* is required to immediately comply with any call for a delay or shutdown by the Lead PSO. Any disagreement between the Lead PSO and the Project personnel must only be discussed after delay or shutdown has occurred. In particular, all captains and vessel crew must be trained in marine mammal detection and vessel strike avoidance measures to ensure marine mammals are not struck by any project or project-related vessel.

Prior to the start of in-water construction activities, vessel operators and crews will receive training about marine mammals and other protected species known or with the potential to occur in the Project Area, making observations in all weather conditions, and vessel strike avoidance measures. In addition, training will include information and resources available regarding applicable Federal laws and regulations for protected species. Empire Wind will provide documentation of training to NMFS. Since the proposed rule, NMFS has added requirements for a description of the training program to be provided to NMFS at least 60 days prior to the initial training before in-water activities begin and for confirmation of all required training to be documented on a training course log sheet and reported to NMFS Office of Protected Resources prior to initiating project activities. These measures were added in response to several commenters' concerns regarding strengthening mitigation and monitoring measures.

North Atlantic Right Whale Awareness Monitoring

Empire Wind must use available sources of information on North Atlantic right whale presence, including daily monitoring of the Right Whale Sightings Advisory System, monitoring of Coast Guard VHF Channel 16 throughout each day to receive notifications of any sightings, and information associated with any regulatory management actions (*e.g.,* establishment of a zone identifying the need to reduce vessel speeds). Maintaining daily awareness and coordination affords increased protection of North Atlantic right whales by understanding North Atlantic right whale presence in the area through ongoing visual and PAM efforts and opportunities (outside of Empire Wind's efforts), and allows for planning of construction activities, when practicable, to minimize potential impacts on North Atlantic right whales. The vessel strike avoidance measures apply to all vessels associated with the Project within U.S. waters and on the high seas.

Vessel Strike Avoidance Measures

This final rule contains numerous vessel strike avoidance measures that reduce the risk that a vessel and marine mammal could collide. While the likelihood of a vessel strike is generally low, they are one of the most common ways that marine mammals are seriously injured or killed by human activities. Therefore, enhanced mitigation and monitoring measures are required to avoid vessel strikes to the extent practicable. While many of these measures are proactive intending to avoid the heavy use of vessels during times when marine mammals of particular concern may be in the area, several are reactive and occur when a marine mammal is sighted by project personnel. The mitigation requirements are described generally here and in detail in the regulatory text at the end of this final rule (see 50 CFR 217.284(b)). Empire Wind will be required to comply with these measures, except under circumstances when doing so would create an imminent and serious threat to a person or vessel, or to the extent that a vessel is unable to maneuver and, because of the inability to maneuver, the vessel cannot comply.

While underway, Empire Wind is required to monitor for and maintain a safe distance from marine mammals, and operate vessels in a manner that reduces the potential for vessel strike. Regardless of the vessel's size, all vessel operators, crews, and dedicated visual observers (*i.e.,* PSO or trained crew member) must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course as appropriate to avoid striking any marine mammal. The dedicated visual observer, equipped with suitable monitoring technology (*e.g.,* binoculars, night vision devices), must be located at an appropriate vantage point for ensuring vessels are maintaining required vessel separation distances from marine mammals (*e.g.,* 500 m from North Atlantic right whales).

In the event that any project-related vessel, regardless of size, observes any large whale, any mother/calf pair, or large assemblages of non-delphinid cetaceans within 500 m of the vessel, the vessel is required to immediately reduce speeds to 10 kn or less. Additionally, all project vessels, regardless of size, must maintain a 100-m minimum separation zone from sperm whales and non-North Atlantic right whale baleen species. Vessels are also required to keep a minimum separation distance of 50 m from all delphinid cetaceans and pinnipeds, with an exception made for those species that approach the vessel (*i.e.,* bow-riding dolphins). If any of these non-North Atlantic right whale marine mammals are sighted, the underway vessel must shift its engine to neutral and the engines must not be engaged until the animal(s) have been observed to be outside of the vessel's path and beyond 100 m (for sperm whales and non-North Atlantic right whale large whales) or 50 m (for delphinids and pinnipeds).

All of the Project-related vessels are required to comply with existing NMFS vessel speed restrictions for North Atlantic right whales and the measures within this rulemaking for operating vessels around North Atlantic right whales and other marine mammals. When NMFS vessel speed restrictions are not in effect and a vessel is traveling at greater than 10 kn, in addition to the

required dedicated visual observer, Empire Wind is required to monitor the transit corridor in real-time with PAM prior to and during transits. To maintain awareness of North Atlantic right whale presence in the Project Area, vessel operators, crew members, and the marine mammal monitoring team will monitor U.S. Coast Guard VHF Channel 16, WhaleAlert, the Right Whale Sighting Advisory System (RWSAS), and the PAM system. Any North Atlantic right whale or large whale detection will be immediately communicated to PSOs, PAM operators, and all vessel captains. All vessels will be equipped with an AIS and Empire Wind must report all Maritime Mobile Service Identify (MMSI) numbers to NMFS Office of Protected Resources prior to initiating in-water activities. The requirement for vessels to be equipped with AIS has been added since the proposed rule to increase the accountability of project vessels. Empire Wind will submit a NMFS-approved North Atlantic right whale vessel strike avoidance plan at least 90 days prior to commencement of vessel use.

Compliance with these measures would reduce the likelihood of vessel strike by increasing awareness of marine mammal presence in the Project Area (*e.g.,* monitoring, communication), reducing vessel speed when marine mammals are detected (by PSOs, PAM, and/or through another source (*e.g.,* RWSAS)), and maintaining separation distances when marine mammals are encountered. While visual monitoring is useful, reducing vessel speed is one of the most effective, feasible options available to minimize the likelihood of a vessel strike and, if a strike does occur, decreases the potential for serious injury or lethal outcomes. Numerous studies have indicated that slowing the speed of vessels reduces the risk of lethal vessel collisions, particularly in areas where right whales are abundant, vessel traffic is common, and vessels are traveling at high speeds (Vanderlaan and Taggart, 2007; Conn and Silber, 2013; Van der Hoop *et al.,* 2014; Martin *et al.,* 2015; Crum *et al.,* 2019).

Given the vessel strike avoidance measures included herein, NMFS considers the potential for vessel strike to be *de minimis* and does not authorize take from this activity.

Seasonal and Daily Restrictions

Temporal restrictions in places where marine mammals are concentrated, engaged in biologically important behaviors, and/or present in sensitive life stages are effective measures for reducing the magnitude and severity of human impacts. The temporal restrictions required here are built around the protection of North Atlantic right whales. Based upon the best scientific information available (Roberts *et al.,* 2023), the highest densities of North Atlantic right whales in the Project Area are expected during the months of January through April, with an increase in density starting in December. However, North Atlantic right whales may be present in the Project Area throughout the year, although the numbers of North Atlantic right whales would not be as large as would be expected in a foraging or calving ground.

NMFS is requiring seasonal work restrictions to minimize the risk of noise exposure to North Atlantic right whales incidental to certain specified activities to the extent practicable. These seasonal work restrictions are expected to greatly reduce the number of takes of North Atlantic right whales. These seasonal restrictions also afford protection to other marine mammals that are known to use the Project Area with greater frequency during winter months, including other baleen whales.

As described previously, no impact-pile-driving activities may occur January 1 through April 30. A new measure included in this final rule requires that Empire Wind install the foundations as quickly as possible and avoid pile driving in December to the maximum extent practicable; however, pile driving may occur in December if it is unavoidable upon approval from NMFS. Furthermore, pile driving will be limited to daylight hours only, subject to the exceptions described below, to reduce impacts on migrating species (*e.g.,* North Atlantic right whales) and to ensure that visual PSOs can confirm appropriate clearance of the site prior to pile-driving activities.

No more than two foundation monopiles or three pin piles for jacket foundations would be installed per day. Monopiles must be no larger than 11-m in diameter and pin piles must be no larger than 2.5-m in diameter. For all monopiles and pin piles, the minimum amount of hammer energy necessary to effectively and safely install and maintain the integrity of the piles must be used. Hammer energies must not exceed 5,500 kJ for monopile installation or 3,200 kJ for pin pile installation.

Impact pile driving will be initiated only during daylight hours no earlier than 1 hour after civil sunrise. Impact pile driving will not be initiated later than 1.5 hours before civil sunset. Generally, pile driving may continue after dark when the installation of the same pile began during daylight (1.5 hours before civil sunset), when clearance zones were fully visible for at least 30 minutes and must proceed for human safety or installation feasibility reasons. The exception to this would be if Empire Wind submits, and NMFS approves, an Alternative Monitoring Plan as part of the Pile Driving and Marine Mammal Monitoring Plan that reliably demonstrates the efficacy of detecting marine mammals at night with its proposed devices. Impact pile driving will not be initiated when the minimum visibility zones cannot be fully visually monitored, as determined by the lead PSO on duty.

Empire Wind has planned to construct the cofferdams or a casing pipe with goal posts anytime within the year during the first and second years of the effective period of the regulations and LOA. However, NMFS is not requiring any seasonal restrictions due to the relatively short durations in which work would occur (*i.e.,* low associated impacts). Although North Atlantic right whales do migrate in coastal waters, they do not typically migrate very close to shore off of New York and/or within New York bays where work would be occurring. Given the distance to the Level B harassment isopleth is conservatively modeled at approximately 2 km, any exposure to vibratory pile driving during cofferdams would be at levels closer to the 120-dB Level B harassment threshold and not at louder source levels. Empire Wind will be required, however, to conduct vibratory pile driving associated with cofferdams or casing pipe and goal post installation during daylight hours only.

Given the very small harassment zones resulting from HRG surveys and that the best available science indicates that any harassment from HRG surveys, should a marine mammal be exposed, the exposure would manifest as minor behavioral harassment only (*e.g.,* potentially some avoidance of the vessel). Thus, NMFS is not requiring any seasonal and daily restrictions for HRG surveys.

More information on activity-specific seasonal and daily restrictions can be found in the regulatory text at the end of this rulemaking.

Noise Abatement Systems

Empire Wind is required to employ noise abatement systems (NASs) during all foundation installation (*i.e.,* impact pile driving) activities to reduce the sound pressure levels that are transmitted through the water in an effort to reduce ranges to acoustic thresholds and minimize any acoustic impacts resulting from these activities.

Empire Wind is required to use at least two NASs to ensure that measured sound levels do not exceed the levels modeled for a 10-dB sound level reduction for foundation installation, which is likely to include a double big bubble curtain, as well as the adjustment of operational protocols to minimize noise levels. This requirement has been updated since the proposed rule as a single bubble curtain, alone or in combination with another NAS device, may not be used for either pile driving as received SFV data reveals this approach is unlikely to attenuate sounds to the degree distances to harassment thresholds are at or smaller than those modeled assuming 10 dB of attenuation. As part of adaptive management should the research and development phase of newer systems demonstrate effectiveness, Empire Wind may submit data on the effectiveness of these systems and request approval from NMFS to use them during foundation installation activities.

Two categories of NASs exist: primary and secondary. A primary NAS would be used to reduce the level of noise produced by foundation installation activities at the source, typically through adjustments on to the equipment (*e.g.,* hammer strike parameters). Primary NASs are still evolving and will be considered for use during mitigation efforts when the NAS has been demonstrated as effective in commercial projects. However, as primary NASs are not fully effective at eliminating noise, a secondary NAS would be employed. The secondary NAS is a device or group of devices that would reduce noise as it was transmitted through the water away from the pile, typically through a physical barrier that would reflect or absorb sound waves and therefore, reduce the distance the higher energy sound propagates through the water column. Together, these systems must reduce noise levels to those not exceeding modeled ranges to Level A harassment and Level B harassment isopleths corresponding to those modeled assuming 10-dB sound attenuation, pending results of SFV (see the *Sound Field Verification* section below and 50 CFR part 217).

Noise abatement systems, such as bubble curtains, are used to decrease the sound levels radiated from a source. Bubbles create a local impedance change that acts as a barrier to sound transmission. The size of the bubbles determines their effective frequency band, with larger bubbles needed for lower frequencies. There are a variety of bubble curtain systems, confined or unconfined bubbles, and some with encapsulated bubbles or panels. Attenuation levels also vary by type of system, frequency band, and location. Small bubble curtains have been measured to reduce sound levels but effective attenuation is highly dependent on depth of water, current, and configuration and operation of the curtain (Austin *et al.,* 2016; Koschinski and Lüdemann, 2013). Bubble curtains vary in terms of the sizes of the bubbles and those with larger bubbles tend to perform a bit better and more reliably, particularly when deployed with two separate rings (Bellmann, 2014; Koschinski and Lüdemann, 2013; Nehls *et al.,* 2016). Encapsulated bubble systems (*e.g.,* Hydro Sound Dampers (HSDs)), can be effective within their targeted frequency ranges (*e.g.,* 100–800 Hz), and when used in conjunction with a bubble curtain appear to create the greatest attenuation. The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and difficulty in properly installing and operating in-water attenuation devices. Dähne *et al.* (2017) found that single bubble curtains that reduce sound levels by 7 to 10 dB reduced the overall sound level by approximately 12 dB when combined as a double bubble curtain for 6-m steel monopiles in the North Sea. During installation of monopiles (consisting of approximately 8-m in diameter) for more than 150 WTGs in comparable water depths (>25 m) and conditions in Europe indicate that attenuation of 10 dB is readily achieved (Bellmann, 2019; Bellmann *et al.,* 2020) using single BBCs for noise attenuation. When a double big bubble curtain is used (noting a single bubble curtain is not allowed), Empire Wind is required to maintain numerous operational performance standards. These standards are defined in the regulatory text at the end of this rulemaking, and include, but are not limited to, construction contractors must train personnel in the proper balancing of airflow to the bubble ring and Empire Wind must submit a performance test and maintenance report to NMFS within 72 hours following the performance test. Corrections to the attenuation device to meet regulatory requirements must occur prior to use during foundation installation activities. In addition, a full maintenance check (*e.g.,* manually clearing holes) must occur prior to each pile being installed. If Empire Wind uses a noise mitigation device in addition to a double big bubble curtain, similar quality control measures are required. Should the research and development phase of newer systems demonstrate effectiveness, as part of adaptive management, Empire Wind may submit data on the effectiveness of these systems and request approval from NMFS to use them during foundation installation activities.

Empire Wind is required to submit an SFV plan to NMFS for approval at least 180 days prior to installing foundations. They are also required to submit interim and final SFV data results to NMFS and make corrections to the NASs in the case that any SFV measurements demonstrate noise levels are above those modeled assuming 10 dB. These frequent and immediate reports allow NMFS to better understand the sound fields to which marine mammals are being exposed and require immediate corrective action should they be misaligned with anticipated noise levels within our analysis.

Noise abatement devices are not required during HRG surveys, cofferdam (*i.e.,* sheet pile), goal post (*i.e.,* pipe pile) installation/removal, and marina piling activities. Regarding cofferdam sheet pile and goal post pipe pile installation and removal as well as marina piling activities, NAS is not practicable to implement due to the physical nature of linear sheet piles and angled pipe piles, and is of low risk for impacts to marine mammals due to the short work duration and lower noise levels produced during the activities. Regarding HRG surveys, NAS cannot practicably be employed around a moving survey ship, but Empire Wind is required to make efforts to minimize source levels by using the lowest energy settings on equipment that has the potential to result in harassment of marine mammals (*e.g.,* CHIRPs) and turning off equipment when not actively surveying. Overall, minimizing the amount and duration of noise in the ocean from any of the Project's activities through use of all means necessary (*e.g.,* noise abatement, turning off power) will effect the least practicable adverse impact on marine mammals.

Clearance and Shutdown Zones

NMFS requires the establishment of both clearance and, where technically feasible, shutdown zones during project activities that have the potential to result in harassment of marine mammals. The purpose of ''clearance'' of a particular zone is to minimize potential instances of auditory injury and more severe behavioral disturbances by delaying the commencement of an activity if marine mammals are near the activity. The purpose of a shutdown is to prevent a

specific acute impact, such as auditory injury or severe behavioral disturbance of sensitive species, by halting the activity.

All relevant clearance and shutdown zones during project activities would be monitored by NMFS-approved PSOs and PAM operators as described in the regulatory text at the end of this rulemaking. At least one PAM operator must review data from at least 24 hours prior to foundation installation and must actively monitor hydrophones for 60 minutes prior to commencement of impact-pile-driving activities. Any North Atlantic right whale sighting at any distance by foundation installation PSOs, or acoustically detected within the PAM monitoring zone (10 km), triggers a delay to commencing pile driving and shutdown. Any large whale sighted by a PSO or acoustically detected by a PAM operator that cannot be identified as a non-North Atlantic right whale must be treated as if it were a North Atlantic right whale.

Prior to the start of certain specified activities (*i.e.,* foundation installation, cofferdam install and removal, HRG surveys, and marina activities), Empire Wind must ensure designated areas (*i.e.,* clearance zones as provided in tables 39–41) are clear of marine mammals prior to commencing activities to minimize the potential for and degree of harassment. For foundation installation, PSOs must visually monitor clearance zones for marine mammals for a minimum of 60 minutes. During this period, the clearance zones will be monitored by both PSOs and a PAM operator. Prior to the start of impact-pile-driving activities, Empire Wind will ensure the area is clear of marine mammals, per the clearance zones in table 39, to minimize the potential for, and the degree of, harassment. All clearance zones must be confirmed to be free of marine mammals for 30 minutes immediately prior to starting a soft-start of pile driving. If a marine mammal is observed within a clearance zone during the pre-start clearance period, impact pile driving will be delayed and may not begin until the animal(s) has been observed exiting its respective zone, or until an additional time period has elapsed with no further sightings (*i.e.,* 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other species). In addition, impact pile driving will be delayed upon a confirmed PAM detection of a North Atlantic right whale if the PAM detection is confirmed to have been located within the 5 km North Atlantic right whale PAM Clearance zone. Any large whale sighted by a PSO within 1,000 m of the pile that cannot be identified to species must be treated as if it were a North Atlantic right whale. PSO and PAM must continue throughout the duration of monopile installation and for 30 minutes post-completion of installation.

Clearance and shutdown zones have been developed in consideration of modeled distances to relevant PTS thresholds with respect to minimizing the potential for take by Level A harassment. The clearance and shutdown zones for North Atlantic right whales during monopile and OSS foundation installation is any distance from PSOs or any acoustic detection within the PAM monitoring zone (10km). The visual and acoustic clearance zones for large whales other than North Atlantic right whales are 2,000 m, which corresponds to the largest modeled exposure range ($ER_{95\%}$) distances to Level A harassment thresholds (SEL and peak) under all scenarios for all whales, rounded up to the nearest 0.5 km (tables 12 and 13). The visual and acoustic shutdown zones for large whales other than North Atlantic right whales are 1,500 m for all typical piles and one difficult-to-drive pile for all other large whales, and 2,000 m for two difficult-to-drive piles for all other large whales. These distances are also larger than the largest Level A harassment modeled exposure range ($ER_{95\%}$). For other species, the clearance and shutdown zones represent the lowest practicable adverse impact (LPAI) and minimize the amount of take by Level B harassment. For North Atlantic right whales, there is an additional requirement that the clearance zone may only be declared clear if no confirmed North Atlantic right whale acoustic detections (in addition to visual) have occurred during the 60-minute monitoring period.

Once an activity begins, any marine mammal entering their respective shutdown zone would trigger the activity to cease. In the case of pile driving, the shutdown requirement may be waived if is not practicable due to imminent risk of injury or loss of life to an individual, risk of damage to a vessel that creates risk of injury or loss of life for individuals, or where the lead engineer determines there is pile refusal or pile instability. In situations when shutdown is called for during impact pile driving, but Empire Wind determines shutdown is not practicable due to aforementioned emergency reasons, reduced hammer energy must be implemented when the lead engineer determines it is practicable. Specifically, pile refusal or pile instability could result in not being able to shut down pile driving immediately. Pile refusal occurs when the pile driving sensors indicate the pile is approaching refusal and a shut-down would lead to a stuck pile which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals. Pile instability occurs when the pile is unstable and unable to stay standing if the piling vessel were to ''let go.'' During these periods of instability, the lead engineer may determine a shut-down is not feasible because the shut-down combined with impending weather conditions may require the piling vessel to ''let go'', which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals. Empire Wind must document and report to NMFS all cases where the emergency exemption is taken.

After shutdown, impact pile driving may be reinitiated once all clearance zones are clear of marine mammals for the minimum species-specific periods, or, if required to maintain pile stability, at which time the lowest hammer energy must be used to maintain stability. If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving must not restart until the North Atlantic right whale has neither been visually or acoustically detected by pile driving PSOs and PAM operators for 30 minutes. Upon re-starting pile driving, soft-start protocols must be followed if pile driving has ceased for 30 minutes or longer.

The clearance and shutdown zone sizes vary by species and are shown in tables 39, 40, and 41. Empire Wind is allowed to request modification to these zone sizes pending results of SFV (see the regulatory text at the end of this rulemaking). Any changes to zone size would be part of adaptive management and would require NMFS' approval. The 10 km PAM monitoring zone for North Atlantic right whales has been added to this final rule. In addition, the visual shutdown, PAM clearance, and PAM shutdown zones for North Atlantic right whales have been increased to any distance to align with the North Atlantic right whale visual clearance zone and with the updated BiOp requirements. The increase to these zones also increases protections for North Atlantic right whales during impact pile driving. A 10-km distance is a reasonable distance for a PAM system to monitor; thus, 10 km was added as the requirement for the PAM monitoring zone.

In addition to the clearance and shutdown zones that would be

monitored both visually and acoustically, Empire Wind will establish a minimum visibility zone to ensure both visual and acoustic methods are used in tandem to detect marine mammals, resulting in maximum detection capability. For foundation installation, the minimum visibility zone would extend 1.5 km from the pile driving source (table 39). This value corresponds to the largest modeled $ER_{95\%}$ distance to the Level A harassment isopleth of all marine mammals when up to two typical piles per day are installed (summer or winter; see tables 12 and 13) or one difficult-to-drive pile is installed in summer (*i.e.,* when Empire intends to complete all pile driving; see table 12), rounded up to the closest 0.5 km for PSO implementation ease. This distance also corresponds to approximately the Level B harassment isopleth for OSS foundation installation, assuming 10-dB attenuation. The minimum visibility zone has been increased from 1.2 km, as was provided in the proposed rule, to 1.5 km to be consistent with the shutdown zone for mysticetes as well as to be consistent with the increase in the minimum visibility zone in the BiOp. The entire minimum visibility zone must be visible (*i.e.,* not obscured by dark, rain, fog, *etc.*) for a full 30 minutes immediately prior to commencing impact pile driving.

TABLE 39—MINIMUM VISIBILITY, CLEARANCE, SHUTDOWN, AND LEVEL B HARASSMENT ZONES DURING IMPACT PILE DRIVING FOR MONOPILES AND PIN PILES

Monitoring zones	North Atlantic right whales	Other mysticetes/sperm whales (m)	Pilot whales and delphinids (m)	Harbor porpoises (m)	Seals (m)
Minimum Visibility Zone [1]	1,500				
Clearance Zone [2]	Any visual distance	2,000	200	400	200
PAM Clearance Zone [2]	Any distance	2,000	200	400	200
Shutdown Zone [3]	Any visual distance	1,500 (2,000)	200	400	200
PAM Shutdown Zone [3]	Any distance	1,500 (2,000)	n/a	n/a	n/a
PAM Monitoring Zone	10,000 m				
Maximum Level B Harassment (Exposure Range, $R_{95percent}$)	Monopiles: 5.35 km; Pin Piles: 1.14 km				

[1] The minimum visibility zone corresponds to the largest modeled $ER_{95percent}$ distances to the Level A harassment isopleth of all marine mammals when up to two typical piles per day are installed (summer or winter, see tables 12 and 13) or one difficult-to-drive pile is installed in summer (when Empire intends to complete all pile driving; see table 12), rounded up to the closest 0.5 km (for PSO implementation ease).

[2] The large whale (other than North Atlantic right whale) clearance zone corresponds to the largest modeled exposure range ($ER_{95percent}$) distances to Level A harassment thresholds (SEL and peak) under all scenarios for all whales, rounded up to the nearest 0.5 km. The clearance zones for pilot whales and delphinids, harbor porpoises, and seals represent LPAI and minimize the amount of take by Level B harassment.

[3] The large whale (other than North Atlantic right whale) shutdown zone of 2,000 m applies during days of installing two difficult-to-drive piles by impact pile driving. Otherwise, the 1,500 m shutdown zone is in effect. These zones correspond to the largest Level A harassment distance ($ER_{95percent}$) for all large whales under these scenarios. The shutdown zones for pilot whales and delphinids, harbor porpoises, and seals represent LPAI and minimize the amount of take by Level B harassment.

For cofferdam and goal post pile driving, HRG surveys, and marina activities, monitoring must be conducted for 30 minutes prior to initiating activities, and the clearance zones must be free of marine mammals during that time. For vibratory pile-driving activities associated with sheet pile installation and impact/pneumatic hammering for casing pipe installation, Empire Wind will establish clearance and shutdown zones, as shown in table 40. PSOs would monitor the clearance zone for 30 minutes before the start of cable landfall activities, during pile driving associated with cable landfall, and for 30 minutes after pile driving of cable landfall. If a marine mammal is observed entering or is observed within the respective zones, activities will not commence until the animal has exited the zone or a specific amount of time has elapsed since the last sighting (*i.e.,* 30 minutes for large whales and 15 minutes for dolphins, porpoises, and pinnipeds). If a marine mammal is observed entering or is within the respective shutdown zone after vibratory pile driving or pneumatic hammering has begun, the PSO will call for a temporary cessation of the activity. Pile driving or hammering must not be restarted until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually confirmed beyond that clearance zone or when specific time periods have elapsed with no further sightings or acoustic detections have occurred (*i.e.,* 15 minutes for small odontocetes and 30 minutes for all other marine mammal species). Because a vibratory hammer can grip a pile without operating, pile instability should not be a concern and no caveat for re-starting pile driving due to pile instability is planned.

TABLE 40—CLEARANCE AND SHUTDOWN ZONES FOR SHEET PILE VIBRATORY DRIVING FOR COFFERDAMS AND IMPACT/PNEUMATIC HAMMERING FOR CASING PIPES FOR GOAL POSTS (m)

Hearing group (species)	Clearance zone (m) [1]	Shutdown zone (m) [1]
Low-Frequency (North Atlantic right whale, all other mysticetes) [2]	1,600	1,600
High-Frequency (harbor porpoise) [3]	100	100
Mid-Frequency (dolphins and pilot whales) [3]	50	50
Phocid Pinniped (seals) [4]	100	100

[1] Clearance and shutdown zones apply to both cofferdam and goal post installation.

[2] For low-frequency cetaceans, the clearance and shutdown zones are larger than the distance to the Level B harassment threshold for Empire Wind 2.

[3] For mid-frequency cetaceans and harbor porpoises, the clearance and shutdown zones are larger than the distance to the Level A harassment threshold.

[4] The shutdown zone and clearance zone for pinnipeds has been increased from 50 m to 100 m to encompass the distance to PTS onset for these activities (62 m) as pinniped take by Level A harassment is not authorized.

For HRG surveys, there are no mitigation measures prescribed for sound sources operating at frequencies greater than 180 kHz, as these would be expected to fall outside of marine mammal hearing ranges and would not result in harassment. However, all HRG survey vessels would be subject to the aforementioned vessel strike avoidance measures described earlier in this section. Furthermore, due to the frequency range and characteristics of some of the sound sources, shutdown, clearance, and ramp-up procedures are not planned to be conducted during HRG surveys utilizing only non-impulsive sources (*e.g.,* USBL and other parametric sub-bottom profilers), with exception to usage of SBPs and other non-parametric sub-bottom profilers. PAM would not be required during HRG surveys. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances, its utility in further reducing impacts during HRG survey activities is limited. We have provided a thorough description of our reasoning for not requiring PAM during HRG surveys in several **Federal Register** notices (*e.g.,* 87 FR 40796, July 8, 2022; 87 FR 52913, August 3, 2022; 87 FR 51356, August 22, 2022).

Empire Wind will be required to implement a 30-minute clearance period of the clearance zones (table 39) immediately prior to the commencing of the survey, or when there is more than a 30-minute break in survey activities and PSOs have not been actively monitoring. If a marine mammal is observed within a clearance zone during the clearance period, ramp up (described below) may not begin until the animal(s) have been observed voluntarily exiting its respective clearance zone or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for all other species). When the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (*i.e.,* infrared (IR)/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.,* no delay is required) despite periods of inclement weather and/or loss of daylight.

Once the survey has commenced, Empire Wind would be required to shut down SBPs if a marine mammal enters a respective shutdown zone (table 39). In cases where the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.,* no shutdown is required) so long as no marine mammals have been detected. The use of SBPs will not be allowed to commence or resume until the animal(s) has been confirmed to have left the shutdown zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting. Any large whale sighted by a PSO within 1,000 m of the SBPs that cannot be identified as a non-North Atlantic right whale would be treated as if it were a North Atlantic right whale.

Once the survey has commenced, Empire Wind would be required to shut down SBPs if a marine mammal enters a respective shutdown zone (table 39). In cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.,* no shutdown is required) so long as no marine mammals have been detected. The use of SBPs will not be allowed to commence or resume until the animal(s) has been confirmed to have left the shutdown zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting. Any large whale sighted by a PSO within 1,000 m of the SBPs that cannot be identified as a non-North Atlantic right whale would be treated as if it were a North Atlantic right whale.

If a SBP is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, it would be allowed to be activated again without ramp-up only if (1) PSOs have maintained constant observation, and (2) no additional detections of any marine mammal occurred within the respective shutdown zones. If a SBP was shut down for a period longer than 30 minutes, then all clearance and ramp-up procedures would be required, as previously described.

TABLE 41—LEVEL B HARASSMENT THRESHOLD RANGES AND MITIGATION ZONES DURING HRG SURVEYS

Marine mammal species	Level B harassment zone (m) for CHIRPs	Clearance zone (m)	Shutdown zone (m)
Low-frequency cetacean (North Atlantic right whale)	50.05	500	500
Other ESA-listed marine mammals (*i.e.,* fin, sei, sperm whale)		500	100
All other marine mammal species [1]		100	100

[1] With the exception of seals and delphinid(s) from the genera *Delphinus, Lagenorhynchus, Stenella,* or *Tursiops,* as described above.

For any other in-water construction heavy machinery activities (*e.g.,* trenching, cable laying, *etc.*), if a marine mammal is on a path towards or comes within 10 m (32.8 ft) of equipment, Empire Wind is required to cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment.

Soft-Start/Ramp-Up

The use of a soft-start or ramp-up procedure is believed to provide additional protection to marine mammals by warning them or providing them with a chance to leave the area, prior to the hammer or HRG equipment operating at full capacity. Soft-start typically involves initiating hammer operation at a reduced energy level relative to full operating capacity followed by a waiting period. NMFS notes that it is difficult to specify a reduction in energy for any given hammer because of variation across drivers and installation conditions. Typically, NMFS requires a soft-start procedure of the applicant performing four to six strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes. NMFS notes that it is difficult to specify a reduction in energy for any given hammer because of variation across drivers and installation conditions. Empire Wind has expressed concern with this approach as it could potentially damage the impact pile driving hammer as well as result in safety issues, particularly if pile driving stops before target pile penetration depth is reached which may result in pile refusal. As such, while general soft start requirements are incorporated into the regulatory text, specific soft start protocols considering final design details, including site-specific soil

properties and other considerations, are not included in the regulatory text but will be incorporated into the LOA. Empire Wind, with approval from NMFS, may also modify the soft start procedures through adaptive management.

HRG survey operators are required to ramp-up sources when the acoustic sources are used unless the equipment operates on a binary on/off switch. The ramp-up would involve starting from the smallest setting to the operating level over a period of approximately 30 minutes.

Soft-start and ramp-up will be required at the beginning of each day's activity and at any time following a cessation of activity of 30 minutes or longer. Prior to soft-start or ramp-up beginning, the operator must receive confirmation from the PSO that the clearance zone is clear of any marine mammals.

Fishery Monitoring Surveys

While the likelihood of Empire Wind's fishery monitoring surveys impacting marine mammals is minimal, NMFS requires Empire Wind to adhere to gear and vessel mitigation measures to reduce potential impacts to the extent practicable. In addition, all crew undertaking the fishery monitoring survey activities are required to receive protected species identification training prior to activities occurring and attend the aforementioned onboarding training. The specific requirements that NMFS has set for the fishery monitoring surveys can be found in the regulatory text at the end of this rulemaking.

Based on our evaluation of the mitigation measures, as well as other measures considered by NMFS, NMFS has determined that these measures will provide the means of affecting the least practicable adverse impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

As noted in the Changes from the Proposed to Final Rule section, we have added, modified, or clarified a number of monitoring and reporting measures since the proposed rule. These changes are described in detail below. Since the proposed rule, we have increased the number of required active PSOs per platform (*i.e.,* pile driving vessel or dedicated PSO vessel, if used) during impact pile driving from two to three PSOs. This requirement will increase monitoring effort to promote more effective detection of marine mammals during impact-pile-driving activities. In addition, we have added specific requirements for SFV monitoring.

In order to promulgate a rulemaking for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (*i.e.,* individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (*i.e.,* behavioral or physiological) to acoustic stressors (*i.e.,* acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and/or
- Mitigation and monitoring effectiveness.

Separately, monitoring is also regularly used to support mitigation implementation (*i.e.,* mitigation monitoring) and monitoring plans typically include measures that both support mitigation implementation and increase our understanding of the impacts of the activity on marine mammals.

During the planned activities, visual monitoring by NMFS-approved PSOs would be conducted before, during, and after all impact pile driving, vibratory pile driving, and HRG surveys. PAM would also be conducted during all impact pile driving. Visual observations and acoustic detections would be used to support the activity-specific mitigation measures (*e.g.,* clearance zones). To increase understanding of the impacts of the activity on marine mammals, PSOs must record all incidents of marine mammal occurrence at any distance from the piling locations and near the HRG acoustic sources. PSOs would document all behaviors and behavioral changes, in concert with distance from an acoustic source. The required monitoring is described below, beginning with PSO measures that are applicable to all the aforementioned activities, followed by activity-specific monitoring requirements.

Protected Species Observer and PAM Operator Requirements

Empire Wind is required to employ NMFS-approved PSOs and PAM operators. PSOs are trained professionals who are tasked with visually monitoring for marine mammals during pile driving and HRG surveys. The primary purpose of a PSO is to carry out the monitoring, collect data, and, when appropriate, call for the implementation of mitigation measures. In addition to visual observations, NMFS requires Empire Wind to conduct PAM by PAM operators during impact pile driving and vessel transit.

The inclusion of PAM, which would be conducted by NMFS-approved PAM operators, following a standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind, alongside visual data collection is valuable to provide the most accurate record of species presence as possible. These two monitoring methods are well understood to provide best results when combined (*e.g.,* Barlow and Taylor, 2005; Clark *et al.,* 2010; Gerrodette *et al.,* 2011; Van Parijs *et al.,* 2021). Acoustic monitoring, in addition to visual monitoring, increases the likelihood of detecting marine mammals within the shutdown and clearance zones of project activities, which when applied in combination of required shutdowns helps to further reduce the risk of marine mammals being exposed to sound levels that could otherwise result in acoustic injury or more intense behavioral harassment.

The exact configuration and number of PAM systems depends on the size of the zone(s) being monitored, the amount of noise expected in the area, and the characteristics of the signals being monitored. More closely-spaced hydrophones would allow for more directionality and range to the vocalizing marine mammals. Larger baleen cetacean species (*i.e.,* mysticetes), which produce loud and lower-frequency vocalizations, may be able to be heard with fewer hydrophones spaced at greater distances. However, smaller cetaceans (*e.g.,* mid-frequency delphinids; odontocetes) may necessitate more hydrophones and to be spaced closer together given the shorter range of the shorter, mid-frequency acoustic signals (*e.g.,* whistles and echolocation clicks). As there are no ''perfect fit'' single-optimal-array configurations, these set-ups would need to be considered on a case-by-case basis.

NMFS does not formally administer any PSO or PAM operator training programs or endorse specific providers but will approve PSOs and PAM operators that have successfully completed courses that meet the curriculum and training requirements referenced below and further specified in the regulatory text at the end of this rulemaking. PSOs can act as PAM operators or visual PSOs (but not simultaneously) as long as they demonstrate that their training and experience are sufficient to perform each task.

NMFS will provide PSO and PAM operator approvals in the context of the need to ensure that PSOs and PAM operators have the necessary training and/or experience to carry out their duties competently. In order for PSOs and PAM operators to be approved, NMFS must review and approve PSO and PAM operator resumes indicating successful completion of an acceptable training course. PSOs and PAM operators must have previous experience observing marine mammals and must have the ability to work with all required and relevant software and equipment. NMFS may approve PSOs and PAM operators as conditional or unconditional. A conditional approval may be given to one who is trained but has not yet attained the requisite experience. An unconditional approval is given to one who is trained and has attained the necessary experience. The specific requirements for conditional and unconditional approval can be found in the regulatory text at the end of this rulemaking.

Conditionally-approved PSOs and PAM operators would be paired with an unconditional-approved PSO (or PAM operator, as appropriate) to ensure that the quality of marine mammal observations and data recording is kept consistent. Additionally, activities requiring PSO and/or PAM operator monitoring must have a lead on duty. The visual PSO field team, in conjunction with the PAM team (*i.e.,* marine mammal monitoring team), would have a lead member (designated as the ''Lead PSO'' or ''Lead PAM operator'') who would be required to meet the unconditional approval standard. NMFS has added a requirement that the Lead PSO must also have a minimum of 90 days of at-sea experience and must have obtained this experience within the last 18 months. This requirement was added to ensure that Lead PSOs have adequate and recent observer experience.

Empire Wind is required to request PSO and PAM operator approvals 60 days prior to those personnel commencing work. An initial list of previously approved PSO and PAM operators must be submitted by Empire Wind at least 30 days prior to the start of the Project. Should Empire Wind require additional PSOs or PAM operators throughout the Project, Empire Wind must submit a subsequent list of pre-approved PSOs and PAM operators to NMFS at least 15 days prior to planned use of that PSO or PAM operator. A PSO may be trained and/or experienced as both a PSO and PAM operator and may perform either duty, pursuant to scheduling requirements.

A minimum number of PSOs would be required to actively observe for the presence of marine mammals during certain project activities, with more PSOs being required as the mitigation zone sizes increase. A minimum number of PAM operators would be required to actively monitor for the presence of marine mammals during foundation installation. The types of equipment required (*e.g.,* big eyes on the pile driving vessel) are also designed to increase marine mammal detection capabilities. Specifics on these types of requirements can be found in the regulations at the end of this rulemaking. At least three PSOs must be on duty at a time on the impact pile driving vessel. A minimum of three PSOs must be active on a dedicated PSO vessel or an alternate monitoring technology (*e.g.,* unmanned aircraft system (UAS)) must be used that has been demonstrated as having greater visual monitoring capability compared to three PSOs on a dedicated PSO vessel and is approved by NMFS. If a dedicated PSO vessel is selected, the vessel must be located at the best vantage point to observe and document marine mammal sightings in proximity to the clearance and shutdown zones. If an alternate monitoring technology is used in place of a dedicated PSO vessel, the technology must be described in the pile driving monitoring plan and demonstrate a greater visual monitoring capability as described above. In summary, at least three PSOs and one PAM operator per acoustic data stream (*i.e.,* equivalent to the number of acoustic buoys) must be on-duty and actively monitoring per platform during impact foundation installation.

At least two PSOs must be on-duty during vibratory pile driving and impact/pneumatic hammering during cable landfall and marina construction activities. At least one PSO must be on-duty during HRG surveys conducted during daylight hours; and at least two PSOs must be on-duty during HRG surveys conducted during nighttime.

In addition to monitoring duties, PSOs and PAM operators are responsible for data collection. The data collected by PSO and PAM operators and subsequent analysis provide the necessary information to inform an estimate of the amount of take that occurred during the Project, better understand the impacts of the Project on marine mammals, address the effectiveness of monitoring and mitigation measures, and to adaptively manage activities and mitigation in the future. Data reported includes information on marine mammal sightings, activity occurring at time of sighting, monitoring conditions, and if mitigative actions were taken. Specific data collection requirements are contained within the regulations at the end of this rulemaking.

Empire Wind is required to submit a Pile Driving Monitoring Plan and a PAM Plan to NMFS 180 days in advance of foundation installation activities. The Plan must include details regarding PSO and PAM monitoring protocols and equipment proposed for use, as described in the regulatory text at the end of this rulemaking. NMFS must approve the plan prior to foundation installation activities commencing. Specific details on NMFS' PSO or PAM operator qualifications and requirements can be found in 50 CFR part 217, subpart CC, set out at the end of this rulemaking. Additional information can be found in Empire Wind's Protected Species Mitigation and Monitoring Plan (PSMMP; appendix B) found on NMFS' website at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1?check_logged_in=1.*

Sound Field Verification

Empire Wind must conduct SFV measurements during all impact-pile-driving activities associated with the installation of, at minimum, the first three monopile foundations. SFV measurements must continue until at least three consecutive piles demonstrate distances to thresholds that are at or below those modeled assuming 10 dB of attenuation. Subsequent SFV measurements are also required should larger piles be installed or additional piles be driven that are anticipated to produce longer distances to harassment isopleths than those previously measured (*e.g.,* higher hammer energy, greater number of strikes, *etc.*). Abbreviated SFV monitoring must be performed on all foundation installations for which the complete SFV monitoring described above is not conducted. In addition, SFV measurements must be conducted upon commencement of turbine operations to estimate turbine operational source levels, in accordance with a NMFS-approved Foundation Installation Pile Driving SFV Plan. The measurements and reporting associated with SFV can be found in the regulatory text at the end of this rulemaking. The requirements are extensive to ensure monitoring is conducted appropriately and the reporting frequency is such that Empire Wind is required to make adjustments quickly (*e.g.,* ensure bubble curtain hose maintenance, check bubble curtain air pressure supply, add additional sound attenuation, *etc.*) to ensure marine mammals are not experiencing noise levels above those considered in this analysis. For recommended SFV protocols for impact pile driving, please consult International Organization for Standardization (ISO) 18406, ''Underwater acoustics—Measurement of radiated underwater sound from percussive pile driving'' (2017).

Reporting

Prior to any construction activities occurring, Empire Wind will provide a report to NMFS Office of Protected Resources that demonstrates that all Empire Wind personnel, including the vessel crews, vessel captains, PSOs, and PAM operators, have completed all required trainings.

NMFS will require standardized and frequent reporting from Empire Wind during the life of the regulations and the LOA. All data collected relating to the Project will be recorded using industry-standard software (*e.g.,* Mysticetus or a similar software) installed on field laptops and/or tablets. Empire Wind is required to submit weekly, monthly, annual, and situational reports. The specifics of what we require to be reported can be found in the regulatory text at the end of this final rule.

Weekly Report—During foundation installation activities, Empire Wind would be required to compile and submit weekly marine mammal monitoring reports for foundation installation pile driving to NMFS Office of Protected Resources that document the daily start and stop of all pile-driving activities, the start and stop of associated observation periods by PSOs, details on the deployment of PSOs, a record of all visual and acoustic detections of marine mammals, any mitigation actions (or if mitigation actions could not be taken, provide reasons why), and details on the noise abatement system(s) (*e.g.,* system type, distance deployed from the pile, bubble rate, *etc.*). Weekly performance reports should also be included for abbreviated SFV monitoring. Weekly reports will be due on Wednesday for the previous week (Sunday–Saturday). The weekly reports are also required to identify which turbines become operational and when, and a map must be provided. Once all foundation pile installation is complete, weekly reports would no longer be required.

Monthly Report—Empire Wind is required to compile and submit monthly reports to NMFS Office of Protected Resources that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, all detections of marine mammals, and any mitigative actions taken. Monthly reports would be due on the 15th of the month for the previous month. The monthly report would also identify which turbines become operational and when, and a map must be provided. Once all foundation pile installation is complete, monthly reports would no longer be required.

Annual Reporting—Empire Wind is required to submit an annual marine mammal monitoring (for both PSOs and PAMs) report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year describing, in detail, all of the information required in the monitoring section above. A final annual report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report.

Final 5-Year Reporting—Empire Wind must submit its draft 5-year report(s) to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted under the LOA within 90 calendar days of the completion of activities occurring under the LOA. A final 5-year report must be prepared and submitted within 60 calendar days following receipt of any NMFS comments on the draft report. Information contained within this report is described at the beginning of this section.

Situational Reporting—Specific situations encountered during the development of the Project require immediate reporting. For instance, if a North Atlantic right whale is observed at any time by PSOs or project personnel, the sighting must be immediately reported to NMFS, or, if not feasible, as soon as possible and no longer than 24 hours after the sighting. If a North Atlantic right whale is acoustically detected at any time via a project-related PAM system, the detection must be reported as soon as possible and no longer than 24 hours after the detection to NMFS via the 24-hour North Atlantic right whale Detection Template (*https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates*). Calling the hotline is not necessary when reporting PAM detections via the template.

If a sighting of a stranded, entangled, injured, or dead marine mammal occurs, the sighting would be reported within 24 hours to NMFS Office of Protected Resources, the NMFS Greater Atlantic Stranding Coordinator for the New England/Mid-Atlantic area (866–755–6622) in the Northeast Region (if in the Southeast Region (NC to FL), contact 877–942–5343), and the U.S. Coast Guard within 24 hours. In the event of a vessel strike of a marine mammal by any vessel associated with the Project or if project activities cause a non-auditory injury or death of a marine mammal, Empire Wind must immediately report the incident to NMFS. If in the Greater Atlantic Region (Maine to Virginia), Empire Wind must call the NMFS Greater Atlantic Stranding Hotline. Separately, Empire Wind must also and immediately report the incident to NMFS Office of Protected Resources and GARFO. Empire Wind must immediately cease all on-water activities, including pile driving, until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the MMPA. NMFS Office of Protected Resources may impose additional measures covered in the adaptive management provisions of this rule to

minimize the likelihood of further prohibited take and ensure MMPA compliance. Empire Wind may not resume their activities until notified by NMFS.

In the event of any lost gear associated with the fishery surveys, Empire Wind must report to as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

Sound Field Verification—Empire Wind is required to submit interim SFV reports after each foundation installation monitored as soon as possible but within 48 hours for thorough SFV. Abbreviated SFV reports must be included in the weekly monitoring reports. A final SFV report for all monopile foundation installation will be required within 90 days following completion of acoustic monitoring.

Adaptive Management

These regulations contain an adaptive management component. Our understanding of the effects of offshore wind construction activities (*e.g.,* acoustic stressors) on marine mammals continues to evolve, which makes the inclusion of an adaptive management component both valuable and necessary within the context of 5-year regulations.

The monitoring and reporting requirements in this final rule provide NMFS with information that helps us to better understand the impacts of the Project's activities on marine mammals and informs our consideration of whether any changes to mitigation and monitoring are appropriate. The use of adaptive management allows NMFS to consider new information and modify mitigation, monitoring, or reporting requirements, as appropriate, with input from Empire Wind regarding practicability, if such modifications will have a reasonable likelihood of more effectively accomplishing the goal of the measures.

The following are some of the possible general sources of new information to be considered through the adaptive management process: (1) results from monitoring reports, including the weekly, monthly, situational, and annual reports, as required; (2) results from marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOA. Also, specifically here, mitigation measures for HRG surveys are based upon the required project design criteria (PDCs) outlined by GARFO's Protected Resources Division (PRD) BOEM 2021 ESA section 7 consultation on offshore wind site assessment and site characterization activities. As mitigation measures are based upon the PDCs, and compliance with PDCs is required to ensure activities do not adversely affect ESA-listed species, updates to the PDCs may result in updates to mitigation measures for HRG surveys as well. During the course of the rule, Empire Wind (and other LOA Holders conducting offshore wind development activities) is required to participate in one or more adaptive management meetings convened by NMFS and/or BOEM, in which the above information will be summarized and discussed in the context of potential changes to the mitigation or monitoring measures.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' by mortality, serious injury, or by Level A harassment and Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

In the Estimated Take section, we estimated the maximum number of takes by Level A harassment and Level B harassment that are reasonably likely to occur from Empire Wind's specified activities based on the methods described. The impact that any given take would have is dependent on many case-specific factors that need to be considered in the negligible impact analysis (*e.g.,* the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, *etc.*). In this final rule, we evaluate the likely impacts of the enumerated harassment takes that are authorized in the context of the specific circumstances surrounding these predicted takes. We also collectively evaluate this information, as well as other more taxa-specific information and mitigation measure effectiveness, in group-specific discussions that support our negligible impact conclusions for each stock. As described above, no serious injury or mortality is expected or authorized for any species or stock.

The Description of the Specified Activities section describes Empire Wind's specified activities that may result in take of marine mammals and an estimated schedule for conducting those activities. Empire Wind has provided a realistic construction schedule although we recognize schedules may shift for a variety of reasons (*e.g.,* weather or supply delays). However, the total amount of take would not exceed the 5-year totals and maximum annual total in any given year indicated in tables 34 and 35, respectively.

We base our analysis and negligible impact determination on the maximum number of takes that are reasonably likely to occur and are authorized annually and across the effective period of these regulations and extensive qualitative consideration of other contextual factors that influence the degree of impact of the takes on the affected individuals and the number and context of the individuals affected. As stated before, the number of takes, both maximum annual and 5-year total, alone are only a part of the analysis.

Last, we provide a negligible impact determination for each species or stock, providing species or stock-specific information or analysis, where appropriate, for example, for North Atlantic right whales given their population status. Organizing our analysis by grouping species or stocks that share common traits or that would respond similarly to effects of Empire Wind's activities and then providing species- or stock-specific information allows us to avoid duplication while ensuring that we have analyzed the

effects of the specified activities on each affected species or stock. It is important to note that in the group or species sections, we base our negligible impact analysis on the maximum annual take that is predicted under the 5-year rule and that the negligible impact determination also examines the total taking over the 5-year period; however, the majority of the impacts are associated with WTG foundation and OSS foundation installation, which would occur largely during years 2 and 3 (2025 through 2026). The estimated take in the other years is expected to be notably less, which is reflected in the total take that would be allowable under the rule (see tables 33, 34, and 35).

As described previously, no serious injury or mortality is anticipated or authorized in this rule. Any Level A harassment authorized would be in the form of auditory injury (*i.e.,* PTS). The amount of harassment Empire Wind has requested, and NMFS is authorizing, is based on exposure models that consider the outputs of acoustic source and propagation models and other data such as frequency of occurrence or group sizes. Several conservative parameters and assumptions are ingrained into these models, such as assuming forcing functions that consider direct contact with piles (*i.e.,* no cushion allowances) and application of the highest monthly sound speed profile to all months within a given season. The exposure model results do not reflect any mitigation measures (other than 10-dB sound attenuation) or avoidance response. The amount of take requested and authorized also reflects careful consideration of other data (*e.g.,* group size data) and for Level A harassment potential of some large whales, the consideration of mitigation measures. For all species, the amount of take authorized represents the maximum amount of Level A harassment and Level B harassment that is reasonably likely to occur.

Behavioral Disturbance

In general, NMFS anticipates that impacts on an individual that has been harassed are likely to be more intense when exposed to higher received levels and for a longer duration, though this is in no way a strictly linear relationship for behavioral effects across species, individuals, or circumstances, and less severe impacts result when exposed to lower received levels for a brief duration. However, there is also growing evidence of the importance of contextual factors such as distance from a source in predicting marine mammal behavioral response to sound (*i.e.,* sounds of a similar level emanating from a more distant source have been shown to be less likely to evoke a response of equal magnitude (DeRuiter and Doukara, 2012; Falcone *et al.,* 2017)). As described in the ''Potential Effects to Marine Mammals and their Habitat'' section of the proposed rule, the intensity and duration of any impact resulting from exposure to Empire Wind's activities is dependent upon a number of contextual factors including, but not limited to, sound source frequencies, whether the sound source is moving towards the animal, hearing ranges of marine mammals, behavioral state at time of exposure, status of individual exposed (*e.g.,* reproductive status, age class, health) and an individual's experience with similar sound sources. Southall *et al.* (2021), Ellison *et al.* (2012), and Moore and Barlow (2013), among others, emphasize the importance of context (*e.g.,* behavioral state of the animals, distance from the sound source) in evaluating behavioral responses of marine mammals to acoustic sources. Harassment of marine mammals may result in behavioral modifications (*e.g.,* avoidance, temporary cessation of foraging or communicating, changes in respiration or group dynamics, masking) or may result in auditory impacts such as hearing loss. In addition, some of the lower-level physiological stress responses (*e.g.,* change in respiration, change in heart rate) discussed previously would likely co-occur with the behavioral modifications, although these physiological responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. Takes by Level B harassment, then, may have a stress-related physiological component as well; however, we would not expect Empire Wind's activities to produce conditions of long-term and continuous exposure to noise leading to long-term physiological stress responses in marine mammals that could affect reproduction or survival.

In the range of behavioral effects that might be expected to be part of a response that qualifies as an instance of Level B harassment by behavioral disturbance (which by nature of the way it is modeled/counted, occurs within 1 day), the less severe end might include exposure to comparatively lower levels of a sound, at a greater distance from the animal, for a few or several minutes. A less severe exposure of this nature could result in a behavioral response such as avoiding an area that an animal would otherwise have chosen to move through or feed in for some amount of time, or breaking off one or a few feeding bouts. More severe effects could occur if an animal gets close enough to the source to receive a comparatively higher level, is exposed continuously to one source for a longer time, or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response and leaving a larger area for a day or more or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

Many species perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (*i.e.,* a 24-hour cycle). Behavioral reactions to noise exposure, when taking place in a biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat, are more likely to be significant if they last more than 1 day or recur on subsequent days (Southall *et al.,* 2007) due to diel and lunar patterns in diving and foraging behaviors observed in many cetaceans (Baird *et al.,* 2008; Barlow *et al.,* 2020; Henderson *et al.,* 2016; Schorr *et al.,* 2014). It is important to note the water depth in the Project Area is shallow (5 to 44 m) and deep diving species, such as sperm whales, are not expected to be engaging in deep foraging dives when exposed to noise above NMFS harassment thresholds during the specified activities. Therefore, we do not anticipate impacts to deep foraging behavior to be impacted by the specified activities.

It is also important to identify that the estimated number of takes does not necessarily equate to the number of individual animals Empire Wind expects to harass (which is lower) but rather to the instances of take (*i.e.,* exposures above the Level B harassment thresholds) that may occur. These instances may represent either brief exposures of seconds to minutes for HRG surveys or, in some cases, longer durations of exposure within a day (*e.g.,* pile driving). Some individuals of a species may experience recurring instances of take over multiple days throughout the year while some members of a species or stock may experience one exposure as they move through an area, which means that the number of individuals taken is smaller than the total estimated takes. In short, for species that are more likely to be migrating through the area and/or for which only a comparatively smaller number of takes are predicted (*e.g.,* some of the mysticetes), it is more likely that each take represents a different individual whereas for non-migrating species with larger amounts of predicted take, we expect that the total anticipated

takes represent exposures of a smaller number of individuals of which some would be taken across multiple days.

For Empire Wind, impact pile driving of foundation piles is most likely to result in a higher magnitude and severity of behavioral disturbance than other activities (*i.e.,* impact driving of casing pipe, vibratory pile driving, and HRG surveys). Impact pile driving has higher source levels and longer durations (on an annual basis) than any nearshore pile-driving activities. HRG survey equipment also produces much higher frequencies than pile driving, resulting in minimal sound propagation. While foundation installation impact pile driving is anticipated to be most impactful for these reasons, impacts are minimized through implementation of mitigation measures, including soft-starts, use of a sound attenuation system, the implementation of clearance zones that would facilitate a delay of pile driving commencement, and the implementation of shutdown zones. For example, given sufficient notice through the use of soft-start, marine mammals are expected to move away from a sound source that is disturbing prior to becoming exposed to very loud noise levels. The requirement to couple visual monitoring and PAM before and during all foundation installation will increase the overall capability to detect marine mammals compared to one method alone.

Occasional, milder behavioral reactions are unlikely to cause long-term consequences for individual animals or populations, and even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more severe response, if they are not expected to be repeated over numerous or sequential days, impacts to individual fitness are not anticipated. Also, the effect of disturbance is strongly influenced by whether it overlaps with biologically important habitats when individuals are present—avoiding biologically important habitats will provide opportunities to compensate for reduced or lost foraging (Keen *et al.,* 2021). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer *et al.,* 2018; Harris *et al.,* 2017; King *et al.,* 2015; National Academy of Science, 2017; New *et al.,* 2014; Southall *et al.,* 2007; Villegas-Amtmann *et al.,* 2015).

Temporary Threshold Shift

TTS is one form of Level B harassment that marine mammals may incur through exposure to Empire Wind's activities and, as described earlier, the takes by Level B harassment may represent takes in the form of behavioral disturbance, TTS, or both. As discussed in the ''Potential Effects of Specified Activities on Marine Mammals and their Habitat'' section of the proposed rule, in general, TTS can last from a few minutes to days, be of varying degree, and occur across different frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Impact and vibratory pile driving are broadband noise sources but generate sounds in the lower frequency ranges (with most of the energy below 1–2 kHz, but with a small amount energy ranging up to 20 kHz); therefore, in general and all else being equal, we would anticipate the potential for TTS is higher in low-frequency cetaceans (*i.e.,* mysticetes) than other marine mammal hearing groups, and would be more likely to occur in frequency bands in which they communicate. However, we would not expect the TTS to span the entire communication or hearing range of any species given that the frequencies produced by these activities do not span entire hearing ranges for any particular species. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalizations, the frequency range of TTS from Empire Wind's pile-driving activities would not typically span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. The required mitigation measures further reduce the potential for TTS in mysticetes.

Generally, both the degree of TTS and the duration of TTS would be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS was discussed previously (refer back to Estimated Take section). However, source level alone is not a predictor of TTS. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the required mitigation and the nominal speed of the receiving animal relative to the stationary sources such as impact pile driving. The recovery time is also of importance when considering the potential impacts from TTS. In TTS laboratory studies (as discussed in the ''Potential Effects of the Specified Activities on Marine Mammals and their Habitat'' section of the proposed rule), some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day or less (often in minutes) and we note that while the pile-driving activities last for hours a day, it is unlikely that most marine mammals would stay in the close vicinity of the source long enough to incur more severe TTS. Overall, given the small number of times that any individual might incur TTS, the low degree of TTS and the short anticipated duration, and the unlikely scenario that any TTS overlapped the entirety of a critical hearing range, it is unlikely that TTS (of the nature expected to result from the Project's activities) would result in behavioral changes or other impacts that would impact any individual's (of any hearing sensitivity) reproduction or survival.

Permanent Threshold Shift

NMFS is authorizing a very small amount of take by PTS to some marine mammal individuals. The numbers of authorized annual takes by Level A harassment are relatively low for all marine mammal stocks and species (table 33). The only activity incidental to which we anticipate PTS may occur is from exposure to impact pile driving, which produces sounds that are both impulsive and primarily concentrated in the lower frequency ranges (below 1 kHz) (David, 2006; Krumpel *et al.,* 2021).

There are no PTS data on cetaceans and only one recorded instance of PTS being induced in older harbor seals (Reichmuth *et al.,* 2019). However, available TTS data of mid-frequency hearing specialists exposed to mid- or high-frequency sounds (Southall *et al.,* 2007; NMFS, 2018; Southall *et al.,* 2019) suggest that most threshold shifts occur in the frequency range of the source up to one octave higher than the source. We would anticipate a similar result for PTS. Further, no more than a small degree of PTS is expected to be associated with any of the incurred Level A harassment, given that it is unlikely that animals would stay in the close vicinity of a source for a duration long enough to produce more than a small degree of PTS.

PTS would consist of minor degradation of hearing capabilities occurring predominantly at frequencies one-half to one octave above the frequency of the energy produced by pile driving (*i.e.,* the low-frequency region below 2 kHz) (Cody and Johnstone, 1981; McFadden, 1986; Finneran, 2015), which is not considered a severe hearing impairment.

If hearing impairment occurs from impact pile driving, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. Though it could happen, and we have analyzed the potential resulting impacts to any animals that incur PTS, given sufficient notice through use of soft-start prior to implementation of full hammer energy during impact pile driving, marine mammals are expected to move away from a sound source that is disturbing prior to it resulting in severe PTS.

Auditory Masking or Communication Impairment

The ultimate potential impacts of masking on an individual are similar to those discussed for TTS (*e.g.,* decreased ability to communicate, forage effectively, or detect predators), but an important difference is that masking only occurs during the time of the signal, versus TTS, which continues beyond the duration of the signal. Masking may also result from the sum of exposure to multiple signals, none of which might individually cause TTS. Fundamentally, masking is referred to as a chronic effect because one of the key potential harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency).

As our analysis has indicated, for this project we expect that impact pile driving foundations have the greatest potential to mask marine mammal signals, and this pile driving may occur for several, albeit intermittent, hours per day, for multiple days per year. Masking is fundamentally more of a concern at lower frequencies (which are pile-driving dominant frequencies) because low frequency signals propagate significantly further than higher frequencies. Low frequency signals are also more likely to overlap with the narrower low frequency calls of mysticetes, many non-communication cues related to fish and invertebrate prey, and geologic sounds that inform navigation. However, the area in which masking would occur for all marine mammal species and stocks (*e.g.,* predominantly in the vicinity of the foundation pile being driven) is small relative to the extent of habitat used by each species and stock.

In summary, the nature of Empire Wind's activities, paired with habitat use patterns by marine mammals, makes it unlikely that the level of masking that could occur would have the potential to affect reproductive success or survival would occur.

Impacts on Habitat and Prey

Construction activities may result in fish and invertebrate mortality or injury very close to the source, and all Empire Wind's activities may cause some fish to leave the area of disturbance. It is anticipated that any mortality or injury would be limited to a very small subset of available prey and the implementation of mitigation measures such as the use of a NAS during impact pile driving would further limit the degree of impact. Behavioral changes in prey in response to construction activities could temporarily impact marine mammals' foraging opportunities in a limited portion of the foraging range but, because of the relatively small area of the habitat that may be affected at any given time (*e.g.,* around a pile being driven), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Cable presence is not anticipated to impact marine mammal habitat as these would be buried, and any electromagnetic fields emanating from the cables are not anticipated to result in consequences that would impact marine mammals prey to the extent they would be unavailable for consumption.

The presence of wind turbines within the Lease Area could have longer-term impacts on marine mammal habitat, as the Project would result in the persistence of the structures within marine mammal habitat for more than 30 years. The presence of an extensive number of structures such as wind turbines are, in general, likely to result in local and broader oceanographic effects in the marine environment, and may disrupt dense aggregations and distribution of marine mammal zooplankton prey through altering the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Chen *et al.,* 2021; Johnson *et al.,* 2021; Christiansen *et al.,* 2022; Dorrell *et al.,* 2022). However, the scale of impacts is difficult to predict and may vary from hundreds of meters for local individual turbine impacts (Schultze *et al.,* 2020) to large-scale changes stretching hundreds of kilometers (Christiansen *et al.,* 2022).

As discussed in the ''Potential Effects of the Specified Activities on Marine Mammals and their Habitat'' section of the proposed rule, the Project would consist of no more than 149 foundations (147 WTGs and 2 OSSs) in the Lease Area, which will gradually become operational following construction completion, by the end of year 4 (2027) of the rule. While there are likely to be oceanographic impacts from the presence of the Project, meaningful oceanographic impacts relative to stratification and mixing that would significantly affect marine mammal habitat and prey over large areas in key foraging habitats during the effective period of the regulations is not anticipated. Although this area supports aggregations of zooplankton (*i.e.,* baleen whale prey) that could be impacted if long-term oceanographic changes occurred, prey densities are typically significantly less in the Project Area than in known baleen whale foraging habitats to the east and north (*e.g.,* south of Nantucket and Martha's Vineyard, Great South Channel). For these reasons, if oceanographic features are affected by the Project during the effective period of the regulations, the impact on marine mammal habitat and their prey is likely to be comparatively minor.

The Empire Wind Biological Opinion provided an evaluation of the presence and operation of the Project on, among other species, listed marine mammals and their prey. While the consultation considered the life of the Project (*i.e.,* 25+ years), we considered the potential impacts to marine mammal habitat and prey within the 5-year effective time frame of this rule. Overall, the Biological Opinion concluded that impacts from loss of soft bottom habitat from the presence of turbines and placement of scour protection as well as any beneficial reef effects, are expected to be so small that they cannot be meaningfully measured, evaluated, or detected and are, therefore, insignificant. The Biological Opinion also concluded that while the presence and operation of the wind farm may change the distribution of plankton with the wind farm, these changes are not expected to affect the oceanographic forces transporting zooplankton into the area. Therefore, the Biological Opinion concluded that an overall reduction in biomass of plankton is not an anticipated outcome of operating the Project. Thus, because changes in the biomass of zooplankton are not anticipated, any higher trophic level impacts are also not anticipated. That is, no effects to pelagic fish or benthic

invertebrates that depend on plankton as forage food are expected to occur. Zooplankton, fish, and invertebrates are all considered marine mammal prey and, as fully described in the Biological Opinion, measurable, detectable, or significant changes to marine mammal prey abundance and distribution from wind farm operation are not anticipated.

Mitigation To Reduce Impact on All Species

This rulemaking includes an extensive suite of mitigation measures designed to minimize impacts on all marine mammals, with a focus on North Atlantic right whales. For impact pile driving of foundation piles, ten overarching mitigation measures are required, which are intended to reduce both the number and intensity of marine mammal takes: (1) seasonal/time of day work restrictions; (2) use of multiple PSOs to visually observe for marine mammals (with any detection within specifically designated zones that would trigger a delay or shutdown); (3) use of PAM to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering delay or shutdown); (4) implementation of clearance zones; (5) implementation of shutdown zones; (6) use of soft-start; (7) use of noise attenuation technology; (8) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Empire Wind personnel must be reported to PSOs; (9) SFV monitoring; and (10) vessel strike avoidance measures to reduce the risk of a collision with a marine mammal and vessel. For cofferdam and goal post installation and removal, we are requiring five overarching mitigation measures: (1) time of day work restrictions; (2) use of multiple PSOs to visually observe for marine mammals (with any detection with specifically designated zones that would trigger a delay or shutdown); (3) implementation of clearance zones; (4) implementation of shutdown zones; and (5) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Empire Wind personnel must be reported to PSOs. Lastly, for HRG surveys, we are requiring six measures: (1) measures specifically for Vessel Strike Avoidance; (2) specific requirements during daytime and nighttime HRG surveys; (3) implementation of clearance zones; (4) implementation of shutdown zones; (5) use of ramp-up of acoustic sources; and (6) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Empire Wind personnel must be reported to PSOs.

For activities with large harassment isopleths, Empire Wind is committed to reducing the noise levels generated to the lowest levels practicable and is required to ensure that they do not exceed a noise footprint above that which was modeled, assuming a 10-dB attenuation. Use of a soft-start during impact pile driving will allow animals to move away from (*i.e.,* avoid) the sound source prior to applying higher hammer energy levels needed to install the pile (*i.e.,* Empire Wind will not use a hammer energy greater than necessary to install piles). Similarly, ramp-up during HRG surveys would allow animals to move away and avoid the acoustic sources before they reach their maximum energy level. For all activities, clearance zone and shutdown zone implementation, which are required when marine mammals are within given distances associated with certain impact thresholds for all activities, will reduce the magnitude and severity of marine mammal take. Additionally, the use of multiple PSOs (*e.g.,* WTG and OSS foundation installation, cable landfall activities, HRG surveys), PAM operators (for impact foundation installation), and maintaining awareness of marine mammal sightings reported in the region during all specified activities will aid in detecting marine mammals that would trigger the implementation of the mitigation measures. The reporting requirements including SFV reporting (for foundation installation and foundation operation), will assist NMFS in identifying if impacts beyond those analyzed in this final rule are occurring, potentially leading to the need to enact adaptive management measures in addition to or in place of the mitigation measures.

Mysticetes

Five mysticete species (comprising five stocks) of cetaceans (*i.e.,* North Atlantic right whale, humpback whale, fin whale, sei whale, and minke whale) may be taken by harassment. These species, to varying extents, utilize the specified geographic region, including the Project Area, for the purposes of migration, foraging, and socializing. Mysticetes are in the low-frequency hearing group.

Behavioral data on mysticete reactions to pile-driving noise are scant. Kraus *et al.* (2019) predicted that the three main impacts of offshore wind farms on marine mammals would consist of displacement, behavioral disruptions, and stress. Broadly, we can look to studies that have focused on other noise sources such as seismic surveys and military training exercises, which suggest that exposure to loud signals can result in avoidance of the sound source (or displacement if the activity continues for a longer duration in a place where individuals would otherwise have been staying, which is less likely for mysticetes in this area), disruption of foraging activities (if they are occurring in the area), local masking around the source, associated stress responses, impacts to prey, and TTS or PTS (in some cases).

Mysticetes encountered in the Project Area are expected to be migrating or foraging. The extent to which an animal engages in these behaviors in the area is species-specific and varies seasonally. Given that extensive feeding Biologically Important Areas (BIAs) for the North Atlantic right whale, humpback whale, fin whale, sei whale, and minke whale exist to the east and north of the Project Area (LaBrecque *et al.,* 2015; Van Parijs *et al,* 2015), many mysticetes are expected to predominantly be migrating through the Project Area towards or from these feeding grounds. While we acknowledged above that mortality, hearing impairment, or displacement of mysticete prey species may result locally from impact pile driving, given the very short duration of and broad availability of prey species in the area and the availability of alternative suitable foraging habitat for the mysticete species most likely to be affected, any impacts on mysticete foraging is expected to be minor. Whales temporarily displaced from the Project Area are expected to have sufficient remaining feeding habitat available to them and would not be prevented from feeding in other areas within the biologically important feeding habitats found further north. In addition, any displacement of whales or interruption of foraging bouts would be expected to be relatively temporary in nature.

The potential for repeated exposures is dependent upon the residency time of whales, with migratory animals unlikely to be exposed on repeated occasions and animals remaining in the area to be more likely exposed repeatedly. Here, for mysticetes, where relatively low amounts of species-specific take by Level B harassment are predicted (compared to the abundance of each mysticete species or stock, such as is indicated in table 33) and movement patterns in the area suggest that individuals would not necessarily linger in a particular area for multiple days, each predicted take likely represents an exposure of a different individual. The

behavioral impacts to any individual would, therefore, primarily be expected to occur within a single day within a year—an amount that would clearly not be expected to impact reproduction or survival.

In general, for this project, the duration of exposures would not be continuous throughout any given day and pile driving would not occur on all consecutive days within a given year, due to weather delays or any number of logistical constraints Empire Wind has identified. Species-specific analysis regarding potential for repeated exposures and impacts is provided below.

Fin and minke whales are the only mysticete species for which PTS is anticipated and authorized. As described previously, PTS for mysticetes from some project activities may overlap frequencies used for communication, navigation, or detecting prey. However, given the nature and duration of the activity, the mitigation measures, and likely avoidance behavior, any PTS is expected to be of a small degree, would be limited to frequencies where pile-driving noise is concentrated (*i.e.,* only a small subset of their expected hearing range) and would not be expected to impact reproductive success or survival.

North Atlantic Right Whale

North Atlantic right whales are listed as endangered under the ESA and as both a depleted and strategic stock under the MMPA. As described in the ''Potential Effects to Marine Mammals and Their Habitat'' section of the proposed rule, North Atlantic right whales are threatened by a low population abundance, higher than average mortality rates, and lower than average reproductive rates. Recent studies have reported individuals showing high stress levels (*e.g.,* Corkeron *et al.,* 2017) and poor health, which has further implications on reproductive success and calf survival (Christiansen *et al.,* 2020; Stewart *et al.,* 2021; Stewart *et al.,* 2022). As described below, a UME has been designated for North Atlantic right whales. Given this, the status of the North Atlantic right whale population is of heightened concern and, therefore, merits additional analysis and consideration. No injury or mortality is anticipated or authorized for this species.

For North Atlantic right whales, this rule authorizes up to 29 takes, by Level B harassment only, over the 5-year period, with a maximum annual allowable take of 13 (equating to approximately 3.85 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). The Project Area is known as a migratory corridor for North Atlantic right whales and given the nature of migratory behavior (*e.g.,* continuous path), as well as the low number of total takes, we anticipate that few, if any, of the instances of take would represent repeat takes of any individual.

The highest density of North Atlantic right whales in the Project Area occurs in the winter (table 7). The New York Bight, including the Project Area, may be a stopover site for migrating North Atlantic right whales moving to or from southeastern calving grounds. As described above, the Project Area represents part of an important migratory area for right whales. Quintana-Rizzo *et al.* (2021) noted that southern New England, northeast of the Project Area, may be a stopover site for migrating right whales moving to or from southeastern calving grounds. The right whales observed during the study period were primarily concentrated in the northeastern and southeastern sections of the MA WEA during the summer (June–August) and winter (December–February). Right whale distribution did shift to the west into the Rhode Island/Massachusetts Wind Energy Area (RI/MA WEA) in the spring (March–May). Overall, the Project Area contains habitat less frequently utilized by North Atlantic right whales than the more northerly southern New England region.

In general, North Atlantic right whales in the Project Area are expected to be engaging in migratory behavior. Given the species' migratory behavior in the Project Area, we anticipate individual whales would be typically migrating through the area during most months when foundation installation would occur, given the seasonal restrictions on foundation installation from January through April, rather than lingering in the Project Area for extended periods of time). Other work that involves either much smaller harassment zones (*e.g.,* HRG surveys) or is limited in amount (*e.g.,* cable landfall construction) may also occur during periods when North Atlantic right whales are using the habitat for migration. Therefore, it is likely that many of the takes would occur to separate individual whales, each exposed on no more than 1 day. It is important to note that the activities occurring from December through May that may impact North Atlantic right whales would be primarily HRG surveys and cable landfall construction, neither of which would result in very high received levels, if any at all, because mitigation and monitoring measures avoid or minimize impacts. Across all years, while it is possible an animal could have been exposed during a previous year, the low amount of take being authorized during the 5-year period of the rule makes this scenario possible but unlikely. However, if an individual were to be exposed during a subsequent year, the impact of that exposure is likely independent of the previous exposure and would cause no additive effect given the duration between exposures.

As described in the Description of Marine Mammals in the Geographic Area section, North Atlantic right whales are presently experiencing an ongoing UME (beginning in June 2017). Preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of North Atlantic right whales. Given the current status of the North Atlantic right whale, the loss of even one individual could significantly impact the population. No mortality, serious injury, or injury of North Atlantic right whales as a result of the Project is expected or authorized. Any disturbance to North Atlantic right whales due to Empire Wind's activities is expected to result in temporary avoidance of the immediate area of construction. As no injury, serious injury, or mortality is expected or authorized, and Level B harassment of North Atlantic right whales will be reduced to the level of least-practicable adverse impact through use of mitigation measures, the authorized number of takes of North Atlantic right whales would not exacerbate or compound the effects of the ongoing UME.

As described in the general *Mysticetes* section above, foundation installation is likely to result in the highest amount of annual take and is of greatest concern given loud source levels. This activity would likely be limited to up to 171 days over a maximum of 2 years, during times when, based on the best available scientific data, North Atlantic right whales are less frequently encountered due to their migratory behavior. The potential types, severity, and magnitude of impacts are also anticipated to mirror that described in the general *Mysticetes* section above, including avoidance (the most likely outcome), changes in foraging or vocalization behavior, masking, a small amount of TTS, and temporary physiological impacts (*e.g.,* change in respiration, change in heart rate). Importantly, the effects of the

activities are expected to be sufficiently low-level and localized to specific areas as to not meaningfully impact important behaviors such as migratory behavior of North Atlantic right whales. These takes are expected to result in temporary behavioral reactions, such as slight displacement (but not abandonment) of migratory habitat or temporary cessation of feeding. Further, given these exposures are generally expected to occur to different individual right whales migrating through (*i.e.,* many individuals would not be impacted on more than 1 day in a year), and with some subset potentially being exposed on no more than a few days within the year, they are unlikely to result in energetic consequences that could affect reproduction or survival of any individuals.

Overall, NMFS expects that any behavioral harassment of North Atlantic right whales incidental to the specified activities would not result in changes to their migration patterns or foraging success, as only temporary avoidance of an area during construction is expected to occur. As described previously, North Atlantic right whales migrating through the Project Area are not expected to remain in this habitat for extensive durations, and any temporarily displaced animals would be able to return to or continue to travel through and forage in these areas once activities have ceased.

Although acoustic masking may occur in the vicinity of the foundation installation activities, based on the acoustic characteristics of noise associated with pile driving (*e.g.,* frequency spectra, short duration of exposure) and construction surveys (*e.g.,* intermittent signals), NMFS expects masking effects to be minimal (*e.g.,* effects of impact pile driving) to none (*e.g.,* effects of HRG surveys). In addition, masking would likely only occur during the period of time that a North Atlantic right whale is in the relatively close vicinity of pile driving, which is expected to be intermittent within a day, and confined to the months in which North Atlantic right whales are at lower densities and primarily moving through the area, anticipated mitigation effectiveness, and likely avoidance behaviors. TTS is another potential form of Level B harassment that could result in brief periods of slightly reduced hearing sensitivity, affecting behavioral patterns by making it more difficult to hear or interpret acoustic cues within the frequency range (and slightly above) of sound produced during impact pile driving. However, any TTS would likely be of low amount, limited duration, and limited to frequencies where most construction noise is centered (*i.e.,* below 2 kHz). NMFS expects that right whale hearing sensitivity would return to pre-exposure levels shortly after migrating through the area or moving away from the sound source.

As described in the ''Potential Effects to Marine Mammals and Their Habitat'' section of the proposed rule, the distance of the receiver to the source influences the severity of response, with greater distances typically eliciting less severe responses. NMFS recognizes North Atlantic right whales migrating could be pregnant females (in the fall) and mothers with older calves (in the spring) and that these animals may slightly alter their migration course in response to any foundation pile driving. However, as described in the ''Potential Effects to Marine Mammals and Their Habitat'' section of the proposed rule, we anticipate that course diversion would be of small magnitude. Hence, while some avoidance of the pile-driving activities may occur, we anticipate any avoidance behavior of migratory North Atlantic right whales would be similar to that of gray whales (Tyack *et al.,* 1983), on the order of hundreds of meters up to 1 to 2 km. This diversion from a migratory path otherwise uninterrupted by the Project's activities is not expected to result in meaningful energetic costs that would impact annual rates of recruitment of survival. NMFS expects that North Atlantic right whales would be able to avoid areas during periods of active noise production while not being forced out of this portion of their habitat.

North Atlantic right whale presence in the Project Area is year-round. However, abundance during summer months is lower compared to the winter months, with spring and fall serving as ''shoulder seasons'' wherein abundance waxes (fall) or wanes (spring). Given this year-round habitat usage, in recognition that where and when whales may actually occur during project activities is unknown as it depends on the annual migratory behaviors, NMFS is requiring a suite of mitigation measures designed to reduce impacts to North Atlantic right whales to the maximum extent practicable. These mitigation measures (*e.g.,* seasonal/daily work restrictions, vessel separation distances, reduced vessel speed) would not only avoid the likelihood of vessel strikes but also would minimize the severity of behavioral disruptions by minimizing impacts (*e.g.,* through sound reduction using attenuation systems and reduced temporal overlap of project activities and North Atlantic right whales). This would further ensure that the number of takes by Level B harassment that are estimated to occur are not expected to affect reproductive success or survivorship by detrimental impacts to energy intake or cow/calf interactions during migratory transit. However, even in consideration of recent habitat-use and distribution shifts, Empire Wind would still be installing foundations when the presence of North Atlantic right whales is expected to be lower.

As described in the Description of Marine Mammals in the Geographic Area section, Empire Wind would be constructed within the North Atlantic right whale migratory corridor BIA, which represent areas and months within which a substantial portion of a species or population is known to migrate. The area over which North Atlantic right whales may be harassed is relatively small compared to the width of the migratory corridor. The width of the migratory corridor in this area is approximately 243.6 km while the width of the Lease Area, at the longest point, is approximately 37.6 km. North Atlantic right whales may be displaced from their normal path and preferred habitat in the immediate activity area primarily from pile-driving activities; however, we do not anticipate displacement to be of high magnitude (*e.g.,* beyond a few kilometers). Thereby, any associated bio-energetic expenditure is anticipated to be small. There are no known North Atlantic right whale feeding, breeding, or calving areas within the Project Area. Prey species are mobile (*e.g.,* calanoid copepods can initiate rapid and directed escape responses) and are broadly distributed throughout the Project Area (noting again that North Atlantic right whale prey is not particularly concentrated in the Project Area relative to nearby habitats). Therefore, any impacts to prey that may occur are also unlikely to impact North Atlantic right whales.

The most significant measure to minimize impacts to individual North Atlantic right whales during monopile installations is the seasonal moratorium on impact pile driving of monopiles from January 1 through April 30 when North Atlantic right whale abundance in the Project Area is expected to be highest. NMFS also expects this measure to greatly reduce the potential for mother/calf pairs to be exposed to impact pile driving noise above the Level B harassment threshold during their annual spring migration through the Project Area from calving grounds to primary foraging grounds (*e.g.,* Cape Cod Bay). Further, NMFS expects that exposures to North Atlantic right whales

would be reduced due to the additional mitigation measures that would ensure that any exposures above the Level B harassment threshold would result in only short-term effects to individuals exposed. Impact pile driving may only begin in the absence of North Atlantic right whales, as determined by visual and passive acoustic monitoring. If impact pile driving has commenced, NMFS anticipates North Atlantic right whales would avoid the area, utilizing nearby waters to carry on pre-exposure behaviors. However, impact pile driving must be shut down if a North Atlantic right whale is sighted at any distance, unless a shutdown is not feasible due to risk of injury or loss of life. Shutdown may occur anywhere if North Atlantic right whales are seen within or beyond the Level B harassment zone, further minimizing the duration and intensity of exposure. NMFS anticipates that if North Atlantic right whales go undetected and are exposed to impact pile driving noise, it is unlikely a North Atlantic right whale would approach the impact pile driving locations to the degree that they would purposely expose themselves to very high noise levels. These measures are designed to avoid PTS and also reduce the severity of Level B harassment, including the potential for TTS. While some TTS could occur, given the planned mitigation measures (*e.g.,* delay pile driving upon a sighting or acoustic detection and shutting down upon a sighting or acoustic detection), the potential for TTS to occur is low.

The clearance and shutdown measures are most effective when detection efficiency is maximized, as the measures are triggered by a visual or acoustic detection. To maximize detection efficiency, NMFS requires the combination of PAM and visual observers. NMFS is requiring communication protocols with other project vessels, and other heightened awareness efforts (*e.g.,* daily monitoring of North Atlantic right whale sighting databases) such that as a North Atlantic right whale approaches the source, and thereby could be exposed to higher noise energy levels, PSO detection efficacy would increase, the whale would be detected, and a delay to commencing foundation installation or shutdown (if feasible) would occur. In addition, the implementation of a soft-start for impact pile driving would provide an opportunity for whales to move away from the source if they are undetected, reducing their received levels. Further, Empire Wind will not install two monopile foundations or OSS foundations simultaneously. North Atlantic right whales would, therefore, not be exposed to concurrent impact pile driving on any given day and the area ensonified at any given time would be limited.

The temporary cofferdam Level B harassment zones are relatively small (*i.e.,* 1,985 m for Empire Wind 1 and 1,535 m for Empire Wind 2), and the cofferdams would be installed within Narragansett Bay over a short timeframe (*i.e.,* 56 hours total; 28 hours for installation and 28 hours for removal). Therefore, it is unlikely that any North Atlantic right whales would be exposed to vibratory installation noises.

For HRG surveys, the maximum distance to the Level B harassment threshold is 50.05 m. The estimated take, by Level B harassment only, associated with HRG surveys is to account for any North Atlantic right whale sightings PSOs may miss when HRG acoustic sources are active. However, because of the short maximum distance to the Level B harassment isopleth (50.05 m), the requirement that vessels maintain a distance of 500 m from any North Atlantic right whales, the fact whales are unlikely to remain in close proximity to an HRG survey vessel for any length of time, and that the acoustic source would be shut down if a North Atlantic right whale is observed within 500 m of the source, any exposure to noise levels above the harassment threshold (if any) would be very brief. To further minimize exposures, ramp-up of sub-bottom profilers must be delayed during the clearance period if PSOs detect a North Atlantic right whale, or any other ESA-listed species, within 500 m of the acoustic source. With implementation of the mitigation requirements, take by Level A harassment is unlikely and, therefore, not authorized. Potential impacts associated with Level B harassment would include low-level, temporary behavioral modifications, most likely in the form of avoidance behavior. Given the high level of precautions taken to minimize both the amount and intensity of Level B harassment on North Atlantic right whales, it is unlikely that the anticipated low-level exposures would lead to reduced reproductive success or survival.

As described above, no serious injury or mortality, or Level A harassment, of North Atlantic right whale is anticipated or authorized. Extensive North Atlantic right whale-specific mitigation measures beyond the robust suite required for all species are expected to further minimize the amount and severity of Level B harassment. Given the documented habitat use within the area, the majority of the individuals predicted taken (*i.e.,* no more than 29 instances of take, by Level B harassment only, over the course of the 5-year rule, with an annual maximum of no more than 13 takes) would be impacted on only 1, or maybe 2, days in a year, and any impacts to North Atlantic right whales are expected to be in the form of lower-level behavioral disturbance. Given the magnitude and severity of the impacts discussed above, and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take, by Level B harassment only, anticipated and authorized would have a negligible impact on the North Atlantic right whale.

Fin Whale

The fin whale is listed as Endangered under the ESA, and the western North Atlantic stock is considered both Depleted and Strategic under the MMPA. No UME has been designated for this species or stock. No serious injury or mortality is anticipated or authorized for this species.

The rule authorizes up to 207 takes, by harassment only, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 4 and 136, respectively. Combined, this annual take (n=140) equates to approximately 2.06 percent of the stock abundance, if each take were considered to be of a different individual, with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). As described previously, the Project Area is located 140 km southwest of a fin whale feeding BIA that is active from March to October. It is likely that some subset of the individual whales exposed could be taken several times annually. However, any impacts from any of the planned activities to feeding activities would be minor. In addition, monopile installations have seasonal work restrictions, such that the temporal overlap between these project activities and the active BIA timeframe would exclude the months of March or April. There is no spatial overlap of the Project Area and the feeding BIA.

Level B harassment is expected to be in the form of behavioral disturbance, primarily resulting in avoidance of the Project Area where foundation installation is occurring, and some low-level TTS and masking that may limit

the detection of acoustic cues for relatively brief periods of time. Any potential PTS would be minor (*i.e.,* limited to a few dB) and any TTS would be of short duration and concentrated at half or one octave above the frequency band of pile-driving noise with most sound below 2 kHz, which does not include the full predicted hearing range of fin whales.

Fin whales are present in the waters off of New York year-round and are one of the most frequently observed large whales and cetaceans in continental shelf waters, principally from Cape Hatteras in the Mid-Atlantic northward to Nova Scotia, Canada (Sergeant, 1977; Sutcliffe and Brodie, 1977; Cetacean and Turtle Assessment Program (CETAP), 1982; Hain *et al.,* 1992; Geo-Marine, 2010; BOEM, 2012; Edwards *et al.,* 2015; Hayes *et al.,* 2022).

Fin whales have high relative abundance in the New York Bight and Project Area with lower densities occurring during the fall (Roberts *et al.,* 2023). Fin whales typically feed in waters off of New England and within the Gulf of Maine, areas north of the Project Area (Hayes *et al.,* 2023), although feeding also takes place in the small feeding BIA, offshore of Montauk Point, described above (Hain *et al.,* 1992; LaBrecque *et al.,* 2015).

Given the documented habitat use within the area, some of the individuals taken would likely be exposed on multiple days. However, as described the Project Area does not include areas where fin whales are known to concentrate for feeding or reproductive behaviors and the predicted takes are expected to be in the form of lower-level impacts.

Given the magnitude and severity of the impacts discussed above, including no more than 207 takes by harassment only over the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of 4 and 136, respectively, and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the western North Atlantic stock of fin whales.

Humpback Whale

The West Indies DPS of humpback whales is not listed as threatened or endangered under the ESA. However, as described in the Description of Marine Mammals in the Geographic Area, humpback whales along the Atlantic Coast have been experiencing an active UME as elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately 40 percent had evidence of human interaction (*i.e.,* vessel strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts and take from vessel strike and entanglement is not authorized. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or DPS of which the Gulf of Maine stock is a part) remains stable at approximately 12,000 individuals.

The rule authorizes up to 97 takes by Level B harassment only over the 5-year period. No take by Level A harassment is authorized. The maximum annual allowable take by Level B harassment would be 63, respectively (this maximum annual take (n=63) equates to approximately 4.5 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). Among the activities analyzed, impact pile driving is likely to result in the highest amount of Level B harassment annual take (*i.e.,* 63) of humpback whales.

A recent study examining humpback whale occurrence in the New York Bight area has shown that humpback whales exhibit extended occupancy (mean 37.6 days) in the Bight area and were likely to return from one year to the next (mean 31.3 percent). Whales were also seen at a variety of other sites in the New York Bight within the same year, suggesting that they may occupy this broader area throughout the feeding season. The majority of whales were seen during summer (July–September, 62.5 percent), followed by autumn (October–December, 23.5 percent), and spring (April–June, 13.9 percent) (Brown *et al.,* 2022). These data suggest that the 0 and 63 maximum annual instances of predicted takes by Level A harassment and Level B harassment, respectively, could consist of individuals exposed to noise levels above the harassment thresholds once during migration through the Project Area and/or individuals exposed on multiple days if they are utilizing the area as foraging habitat. The Lease Area, which is 321 km^2, comprises only a minor portion of the New York Bight area (43,388 km^2), and a few repeated takes of the same individuals would be unlikely to meaningfully impact the energetics of any individuals given the availability of favorable foraging habitat across the Bight.

For all the reasons described in the *Mysticetes* section above, we anticipate any potential PTS and TTS would be concentrated at one half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz), which does not include the full predicted hearing range of baleen whales. If TTS is incurred, hearing sensitivity would likely return to pre-exposure levels relatively shortly after exposure ends. Any masking or physiological responses would also be of low magnitude and severity for reasons described above.

Given the magnitude and severity of the impacts discussed above, including no more than 97 takes over the course of the 5-year rule, and a maximum annual allowable take by Level B harassment of 63, and in consideration of the required mitigation measures and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the Gulf of Maine stock of humpback whales.

Minke Whale

Minke whales are not listed under the ESA, and the Canadian East Coast stock is neither considered depleted nor strategic under the MMPA. There are no known areas of specific biological importance in or adjacent to the Project Area. As described in the Description of Marine Mammals in the Geographic Area section, a UME has been designated for this species but is pending closure. No serious injury or mortality is anticipated or authorized for this species.

The rule authorizes up to 173 takes, by harassment only, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment would be 4 and 83, respectively (combined, this annual take (n=87) equates to approximately 0.4 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring).

Minke whales are common offshore the U.S. Eastern Seaboard with a strong seasonal component in the continental shelf and in deeper, off-shelf waters (CETAP, 1982; Hayes *et al.,* 2022). In the

Project Area, minke whales are predominantly migratory and their known feeding areas are to the north, including a feeding BIA in the southwestern Gulf of Maine and George's Bank. Therefore, they would be more likely to be moving through the Project Area, with each take representing a separate individual. However, it is possible that some subset of the individual whales exposed could be taken up to a few times annually.

As described in the Description of Marine Mammals in the Geographic Area section, there is a UME for Minke whales, along the Atlantic coast from Maine through South Carolina, with highest number of deaths in Massachusetts, Maine, and New York, and preliminary findings in several of the whales have shown evidence of human interactions or infectious diseases. However, we note that the population abundance is greater than 21,000 and the take authorized through this action is not expected to exacerbate the UME in any way.

We anticipate the impacts of this harassment to follow those described in the general *Mysticetes* section above. Any potential PTS would be minor (*i.e.,* limited to a few dB) and any TTS would be of short duration and concentrated at one half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz), which does not include the full predicted hearing range of minke whales. Level B harassment would be temporary, with primary impacts being temporary displacement of the Project Area but not abandonment of any migratory or foraging behavior.

Given the magnitude and severity of the impacts discussed above (including no more than 173 takes of the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of 4 and 83, respectively), and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the Canadian Eastern Coastal stock of minke whales.

Sei Whale

Sei whales are listed as Endangered under the ESA, and the Nova Scotia stock is considered both depleted and strategic under the MMPA. There are no known areas of specific biological importance in or adjacent to the Project Area and no UME has been designated for this species or stock. No serious injury or mortality is anticipated or authorized for this species.

The rule authorizes up to nine takes, by Level B harassment only, over the 5-year period. The maximum annual allowable take by Level B harassment, would be four (this annual take equates to approximately 0.6 percent of the stock abundance, if each take were considered to be of a different individual). NMFS is not authorizing take by Level A harassment. Similar to other mysticetes, we would anticipate the number of takes to represent individuals taken only once or, in rare cases two or three times, as most whales in the Project Area would be migrating. To a small degree, sei whales may forage in the Project Area, although the currently identified foraging habitats (BIAs) are 280 km northeast of the area in which Empire Wind's activities would occur (LaBrecque *et al.,* 2015).

With respect to the severity of those individual takes by behavioral Level B harassment, we would anticipate impacts to be limited to low-level, temporary behavioral responses with avoidance and potential masking impacts in the vicinity of the turbine installation to be the most likely type of response. Any potential PTS and TTS would likely be concentrated at half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz), which does not include the full predicted hearing range of sei whales. Moreover, any TTS would be of a small degree. Any avoidance of the Project Area due to the Project's activities would be expected to be temporary.

Given the magnitude and severity of the impacts discussed above (including no more than nine takes of the course of the 5-year rule, and a maximum annual allowable take by Level B harassment of four), and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the Nova Scotia stock of sei whales.

Odontocetes

In this section, we include information that applies to all of the odontocete species and stocks addressed below. Odontocetes include dolphins, porpoises, and all other whales possessing teeth, and we further divide them into the following subsections: sperm whales, small whales and dolphins, and harbor porpoises. These subsections include more specific information, as well as conclusions, for each stock represented.

All of the takes of odontocetes authorized incidental to Empire Wind's specified activities are by pile driving and HRG surveys. No Level A harassment, serious injury, or mortality is authorized. We anticipate that, given ranges of individuals (*i.e.,* that some individuals remain within a small area for some period of time), and non-migratory nature of some odontocetes in general and especially as compared to mysticetes, these takes are more likely to represent multiple exposures of a smaller number of individuals than is the case for mysticetes, though some takes may also represent one-time exposures to an individual. Foundation installation is likely to disturb odontocetes to the greatest extent compared to HRG surveys. While we expect animals to avoid the area during foundation installation, their habitat range is extensive compared to the area ensonified during these activities.

As described earlier, Level B harassment may include direct disruptions in behavioral patterns (*e.g.,* avoidance, changes in vocalizations (from masking) or foraging), as well as those associated with stress responses or TTS. Odontocetes are highly mobile species, and, similar to mysticetes, NMFS expects any avoidance behavior to be limited to the area near the sound source. While masking could occur during foundation installation, it would only occur in the vicinity of and during the duration of the activity, and would not generally occur in a frequency range that overlaps most odontocete communication or any echolocation signals. The mitigation measures (*e.g.,* use of sound attenuation systems, implementation of clearance and shutdown zones) would also minimize received levels such that the severity of any behavioral response would be expected to be less than exposure to unmitigated noise exposure.

Any masking or TTS effects are anticipated to be of low severity. First, the frequency range of pile driving, the most impactful activity to be conducted in terms of response severity, falls within a portion of the frequency range of most odontocete vocalizations. However, odontocete vocalizations span a much wider range than the low frequency construction activities planned for the Project. As described above, recent studies suggest odontocetes have a mechanism to self-mitigate (*i.e.,* reduce hearing sensitivity) the impacts of noise exposure, which

could potentially reduce TTS impacts. Any masking or TTS is anticipated to be limited and would typically only interfere with communication within a portion of an odontocete's range and as discussed earlier, the effects would only be expected to be of a short duration and, for TTS, which is a relatively small degree.

Furthermore, odontocete echolocation occurs predominantly at frequencies significantly higher than low frequency construction activities. Therefore, there is little likelihood that threshold shift would interfere with feeding behaviors. For HRG surveys, the sources operate at higher frequencies than foundation installation activities. However, sounds from these sources attenuate very quickly in the water column, as described above. Therefore, any potential for PTS and TTS and masking is very limited. Further, odontocetes (*e.g.,* common dolphins, spotted dolphins, and bottlenose dolphins) have demonstrated an affinity to bow-ride actively surveying HRG surveys. Therefore, the severity of any harassment, if it does occur, is anticipated to be minimal based on the lack of avoidance previously demonstrated by these species.

The waters off the coast of New York are used by several odontocete species. However, none except the sperm whale are listed under the ESA, and there are no known habitats of particular importance. In general, odontocete habitat ranges are far-reaching along the Atlantic coast of the United States, and the waters off of New York, including the Project Area, do not contain any particularly unique odontocete habitat features.

Sperm Whale

Sperm whales are listed as endangered under the ESA, and the North Atlantic stock is considered both Depleted and Strategic under the MMPA. The North Atlantic stock spans the East Coast out into oceanic waters well beyond the U.S. exclusive economic zone (EEZ). Although listed as endangered, the primary threat faced by the sperm whale across its range (*i.e.,* commercial whaling) has been eliminated. Current potential threats to the species globally include vessel strikes, entanglement in fishing gear, anthropogenic noise, exposure to contaminants, climate change, and marine debris. There is no currently reported trend for the stock and, although the species is listed as endangered under the ESA, there are no specific issues with the status of the stock that cause particular concern (*e.g.,* no UMEs). There are no known areas of biological importance (*e.g.,* critical habitat or BIAs) in or near the Project Area. No mortality or serious injury is anticipated or authorized for this species.

The rule authorizes up to six takes, by Level B harassment only, over the 5-year period. No Level A harassment, serious injury, or mortality is authorized. The maximum annual allowable take by Level B harassment would be three, which equates to approximately 0.07 percent of the stock abundance, if each take were considered to be of a different individual, with lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). Given sperm whale's preference for deeper waters, especially for feeding, it is unlikely that individuals will remain in the Project Area for multiple days, and therefore, the estimated takes likely represent exposures of different individuals on 1 day annually.

If sperm whales are present in the Project Area during any Project activities, they will likely be only transient visitors and not engaging in any significant behaviors. Further, the potential for TTS is low for reasons described in the general *Odontocetes* section, but if it does occur, any hearing shift would be small and of a short duration. Because whales are not expected to be foraging in the Project Area, any TTS is not expected to interfere with foraging behavior.

Given the magnitude and severity of the impacts discussed above (*i.e.,* no more than six takes, by Level B harassment only, over the course of the 5-year rule, and a maximum annual allowable take of three), and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the North Atlantic stock of sperm whales.

Dolphins and Small Whales (Including Delphinids)

The seven species and eight stocks included in this group (which are indicated in table 2 in the Delphinidae family) are not listed under the ESA; however, short-finned pilot whales are listed as Strategic under the MMPA. There are no known areas of specific biological importance in or around the Project Area for any of these species and no UMEs have been designated for any of these species. No serious injury or mortality is anticipated or authorized for these species.

The seven delphinid species with takes authorized for the Project are Atlantic spotted dolphin, Atlantic white-sided dolphin, common bottlenose dolphin, common dolphin, long-finned pilot whale, short-finned pilot whale, and Risso's dolphin. The rule would allow for the authorization of 315 to 24,030 takes (depending on species) by Level B harassment, over the 5-year period. The maximum annual allowable take for these species by Level B harassment, would range from 90 to 9,870, (this annual take equates to approximately 0.23 to 5.71 percent of the stock abundance, depending on each species, if each take were considered to be of a different individual), with far lower numbers than those expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). No Level A harassment, serious injury, or mortality is authorized.

For common dolphin, given the higher relative number of takes, while many of the takes likely represent exposures of different individuals on 1 day a year, some subset of the individuals exposed could be taken up to a few times annually. For the Northern Migratory coastal stock of bottlenose dolphins, given the higher number of takes relative to the stock abundance, it is likely that the takes represent exposures of different individuals on 1 day a year. However, it is also possible that some subset of the individuals exposed could be taken several times annually. Specifically, Empire Wind was able to estimate the number of takes per bottlenose dolphin stock (*i.e.,* Western North Atlantic offshore and Northern Migratory coastal stocks) incidental to pile driving given the work effort and area were known. For example, all takes incidental to cable landfall construction and marina work are allocated to the Northern Migratory coastal stock because noise from this activity does not extend into offshore stock habitat. NMFS is authorizing a maximum of 1,800 and 1,185 takes in any given year incidental to pile driving to the offshore stock and Northern Migratory coastal stock, respectively. However, Empire Wind was not able to differentiate the amount of take per stock incidental to HRG surveys due to the inability to differentiate between the Western North Atlantic offshore and Northern Migratory coastal stocks of bottlenose dolphin in the underlying density data and that the amount of HRG survey effort in each stock's preferred habitat is

unknown. The predicted maximum annual take by Level B harassment for these two stocks from HRG surveys combined is 2,865. The most likely scenario is that the take is split across the two stocks; however, both stocks can occur within the Project Area and it is challenging to predict with confidence the proportion of the takes that will be incurred to each stock. However, as described in the Small Numbers section below, the Project Area is located at the edge of the northern boundary of the Northern Migratory coastal stock's habitat, though bottlenose dolphins are using the New York-New Jersey Harbor estuary more frequently (*e.g.,* Trabue *et al.,* 2022) than in previous years, likely due to warming waters. In addition, the stock demonstrates strong migratory behavior patterns. Bottlenose dolphins have been rarely observed during cold water months in coastal waters north of the North Carolina/Virginia border (Hayes *et al.,* 2021); therefore, they are limited to the Project Area in warm water months. For these reasons, NMFS estimates approximately 930 takes by Level B harassment from the coastal stock may be expected incidental to HRG surveys, at an estimated group size of 15 per Jefferson *et al.* (2015), per day during warm water months (*i.e.,* 62 days, July and August) (see Small Numbers section below for more details). Overall, it is unlikely that all takes would occur to a different individual given work may occur on consecutive days (thereby increasing chance of repeated exposure if animals were to remain in the area) and, in particular for inshore waters (where cable landfall work and marina work would occur) dolphins are likely to be remaining in the area to forage (*e.g.,* Trabue *et al.,* 2022). Even for these stocks in which some individuals may be exposed on several days within the year, the anticipated intensity of a given exposure and the comparatively small number of annual exposures and their intermittency would not be expected to incur impacts that would affect reproductive success or survival.

Overall, the number of takes, likely movement patterns of the affected dolphin and small whale species, and the intensity of any Level B harassments, combined with the availability of alternate nearby foraging habitat suggests that the likely impacts would not impact the reproduction or survival of any individuals. While delphinids may be taken on several occasions, none of these species are known to have small home ranges significantly overlapping the Project Area or known to be particularly sensitive to anthropogenic noise. Some TTS can occur in delphinids, but it would be limited to the frequency ranges of the activity and any loss of hearing sensitivity is anticipated to return to pre-exposure conditions shortly after the animals move away from the source or the source ceases.

Given the magnitude and severity of the impacts discussed above and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on all of the dolphin and small whale species and stocks addressed in this section (*i.e.,* Atlantic spotted dolphin, Atlantic white-sided dolphin, bottlenose dolphin (western North Atlantic offshore stock and northern migratory coastal stock), common dolphin, short-finned pilot whale, long-finned pilot whale, and Risso's dolphin).

Harbor Porpoise

Harbor porpoises are not listed as Threatened or Endangered under the ESA, and the Gulf of Maine/Bay of Fundy stock is neither considered depleted or strategic under the MMPA. The stock is found predominantly in northern United States coastal waters, at less than 150 m depth and up into Canada's Bay of Fundy, between New Brunswick and Nova Scotia. Although the population trend is not known, there are no UMEs or other factors that cause particular concern for this stock.

The rule would allow for the authorization of up to 565 takes, by Level B harassment only, over the 5-year period. The maximum annual allowable take by Level B harassment would be 243 (this annual take equates to approximately 0.25 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). Given the number of takes, while many of the takes likely represent exposures of different individuals on 1 day a year, some subset of the individuals exposed could be taken up to a few times annually. No Level A harassment, serious injury, or mortality is authorized.

Regarding the severity of takes by Level B harassment, because harbor porpoises are particularly sensitive to noise, it is likely that a fair number of the responses could be of a moderate nature, particularly to pile driving. In response to pile driving, harbor porpoises are likely to avoid the area during construction, as previously demonstrated in Tougaard *et al.* (2009) in Denmark, in Dahne *et al.* (2013) in Germany, and in Vallejo *et al.* (2017) in the United Kingdom, although a study by Graham *et al.* (2019) may indicate that the avoidance distance could decrease over time. However, foundation installation is scheduled to occur off the coast of New York and, given alternative foraging areas, any avoidance of the area by individuals is not likely to impact the reproduction or survival of any individuals.

PTS is not anticipated or authorized. With respect to TTS, the effects on an individual are likely relatively low given the frequency bands of pile driving (most energy below 2 kHz) compared to harbor porpoise hearing (150 Hz to 160 kHz peaking around 40 kHz). Specifically, TTS is unlikely to impact hearing ability in their more sensitive hearing ranges, or the frequencies in which they communicate and echolocate.

As discussed in Hayes *et al.* (2023), harbor porpoises are seasonally distributed. During fall (October–December) and spring (April–June), harbor porpoises are widely dispersed from New Jersey to Maine, with lower densities farther north and south. During winter (January to March), intermediate densities of harbor porpoises can be found in waters off New Jersey to North Carolina, and lower densities are found in waters off New York to New Brunswick, Canada. In non-summer months they have been seen from the coastline to deep waters (*i.e.,* >1800 m; Westgate *et al.,* 1998), although the majority are found over the continental shelf. While harbor porpoises are likely to avoid the area during any of the Project's construction activities, as demonstrated during European wind farm construction, the time of year in which work would occur is when harbor porpoises are not in highest abundance, and any work that does occur would not result in the species' abandonment of the waters off of New York.

Given the magnitude and severity of the impacts discussed above, and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact

on the Gulf of Maine/Bay of Fundy stock of harbor porpoises.

Phocids (Harbor Seals, Gray Seals, and Harp Seals)

The harbor seal, gray seal, and harp seal are not listed under the ESA, and neither the western North Atlantic stock of gray seal, western North Atlantic stock of harp seal, nor the western North Atlantic stock of harbor seal are considered depleted or strategic under the MMPA. There are no known areas of specific biological importance in or around the Project Area. As described in the Description of Marine Mammals in the Geographic Area section, a UME has been designated for harbor seals and gray seals and is described further below. No serious injury or mortality is anticipated or authorized for these species.

For the three seal species, the rule authorizes up to between 20 and 1,752 takes for each species by Level B harassment only over the 5-year period. Level A harassment is not authorized. The maximum annual allowable take for these species by Level B harassment, would range from 4 (harp seals) to 501 (gray seals) to 662 (harbor seals) (this annual take equates to approximately 0.00005 percent of the stock abundance for harp seals, 1.84 percent of the stock abundance for gray seals, and 1.08 percent of the stock abundance for harbor seals, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). Though gray seals, harbor seals, and harp seals are considered migratory and no specific feeding areas have been designated in the area, the higher number of takes relative to the stock abundance suggests that while some of the takes likely represent exposures of different individuals on 1 day a year, it is likely that some subset of the individuals exposed could be taken several times annually.

Harbor and gray seals occur in New York waters most often in winter, when impact pile driving would not occur. Harp seals are anticipated to be rare but could still occur in the Project Area. Seals are more likely to be close to shore (*e.g.,* closer to the edge of the area ensonified above NMFS' harassment threshold), such that exposure to foundation installation would be expected to be at comparatively lower levels. There are no gray seal pupping colonies or known haul-out sites near the Project Area, although gray seals may haul out at known harbor seal haul out sites. The nearest known gray seal pupping sites are greater than 250 nautical miles (nmi) (463 km) away, at Muskeget Island in the Nantucket Sound, Monomoy National Wildlife Refuge, and in eastern Maine (Rough, 1995). Known haul out locations are located closer to Monomoy Refuge and on Nantucket in Massachusetts (Kenney and Vigness-Raposa, 2010). Harbor seals have the potential to occur in areas adjacent to the export cable corridors and landfall sites. Although there are no known harbor seal haul outs in the Project Area, harbor seals occur throughout the New York coastline and have the potential to haul out at many beach sites. As the closest documented pinniped haul out sites are located further than 463 km away from the Project Area, NMFS does not expect any harassment to occur and has not authorized any take from in-air impacts on hauled-out seals.

As described in the ''Potential Effects to Marine Mammals and Their Habitat'' section in the proposed rule, construction of wind farms in Europe resulted in pinnipeds temporarily avoiding construction areas but returning within short time frames after construction was complete (Carroll *et al.,* 2010; Hamre *et al.,* 2011; Hastie *et al.,* 2015; Russell *et al.,* 2016; Brasseur *et al.,* 2010). Effects on pinnipeds that are taken by Level B harassment in the Project Area would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals would simply move away from the sound source and be temporarily displaced from those areas (Lucke *et al.,* 2006; Edren *et al.,* 2010; Skeate *et al.,* 2012; Russell *et al.,* 2016). Given the low anticipated magnitude of impacts from any given exposure (*e.g.,* temporary avoidance), even potential repeated Level B harassment across a few days of some small subset of individuals, is unlikely to result in impacts on the reproduction or survival of any individuals. Moreover, pinnipeds would benefit from the mitigation measures described in 50 CFR part 217.

As described above, noise from pile driving is mainly low frequency. PTS is not anticipated or authorized. Any TTS that does occur would fall within the lower end of pinniped hearing ranges (*i.e.,* 50 Hz to 86 kHz), TTS would not occur at frequencies where pinniped hearing is most sensitive. In summary, any TSS would be of small degree and not occur across the entire, or even the most sensitive, hearing range. Hence, any impacts from TTS are likely to be of low severity and not interfere with behaviors critical to reproduction or survival.

Elevated numbers of harbor seal and gray seal mortalities were first observed in July 2018 and occurred across Maine, New Hampshire, and Massachusetts until 2020. Based on tests conducted so far, the main pathogen found in the seals belonging to that UME was phocine distemper virus, although additional testing to identify other factors that may be involved in this UME are underway. Currently, the only active UME is occurring in Maine with some harbor and gray seals testing positive for highly pathogenic avian influenza (HPAI) H5N1. Although elevated strandings continue, neither UME, alone or in combination, provides cause for concern regarding population-level impacts to any of these stocks. For harbor seals, the population abundance is over 61,000 and the annual mortality/serious injury (M/SI; 339) for the seals is well below PBR (*i.e.,* 1,729) (Hayes *et al.,* 2020). The population abundance for gray seals in the United States is over 27,000, with an estimated overall abundance, including seals in Canada, of approximately 450,000. In addition, the abundance of gray seals is likely increasing in the United States Atlantic, as well as in Canada (Hayes *et al.,* 2020). For harp seals, for which there is no recent UME, the total U.S. fishery-related mortality and serious injury for this stock is very low relative to the stock size and can be considered insignificant and approaching zero mortality and serious injury rate (Hayes *et al.,* 2022). The harp seal stock abundance appears to have stabilized (Hayes *et al.,* 2022).

Given the magnitude and severity of the impacts discussed above, and in consideration of the required mitigation and other information presented, Empire Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on harbor, gray, and harp seals.

Negligible Impact Determination

No mortality or serious injury is anticipated to occur or authorized. As described in the analysis above, the impacts resulting from the Project's activities cannot be reasonably expected to, and are not reasonably likely to, adversely affect any of the species or stocks through effects on annual rates of recruitment or survival. Based on the analysis contained herein of the likely effects of the specified activity on

marine mammals and their habitat, and taking into consideration the implementation of the required mitigation and monitoring measures, NMFS finds that the marine mammal take from all of Empire Wind's specified activities combined will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers; therefore, in practice, and where estimated numbers are available, NMFS compares the number of individuals estimated to be taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is less than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

NMFS is authorizing incidental take by Level A harassment and/or Level B harassment of 17 species of marine mammals (with 18 managed stocks). The maximum number of instances of takes by combined Level A harassment and Level B harassment possible within any 1 year relative to the best available population abundance is less than one-third for all species and stocks potentially impacted. Unless otherwise noted, the small numbers analysis conservatively assumes each take occurs to a different individual in the population.

For 16 stocks, less than 6 percent of the stock abundance is authorized for take by harassment. Specific to the North Atlantic right whale, the maximum amount of take per year, which is by Level B harassment only, is 13, or 3.85 percent of the stock abundance, assuming that each instance of take represents a different individual. Please see table 38 for information relating to this small numbers analysis.

For bottlenose dolphins, Empire Wind was able to identify the amount of take by all activities other than HRG surveys on a per stock basis (offshore or Northern Migratory coastal; see table 38). Taking into account public comment related to these issues, NMFS has taken a finer look at calculating the percentage of take expected for the two affected stocks of bottlenose dolphins.

The Project Area is located at the northern habitat boundary edge for the Northern Migratory coastal stock. As described in Hayes *et al.* (2021), this stock, as described in its name, migrates along the coast of the U.S. throughout the year. During warm water months (primarily July and August), this stock occupies coastal waters from the shoreline to approximately the 20-m isobath between Assateague, Virginia, and Long Island, New York. The stock occupies more southern coastal waters from approximately Cape Lookout, North Carolina, to the North Carolina/Virginia border during colder months; bottlenose dolphins have been rarely observed during cold water months in coastal waters north of the North Carolina/Virginia border (Hayes *et al.,* 2021). Empire Wind requested, and NMFS has authorized, take equating to one average group size (n=15) of bottlenose dolphins on each survey day (n=191) which could occur January through December. Habitat distribution alone precludes the Northern Migratory coastal stock from being present within or near the Project Area during cooler months. Therefore, to assume this stock could be taken year-round (*i.e.,* subject to harassment every day HRG surveys would occur) is not reasonable or based on the best available science.

For purposes of this analysis, NMFS has conservatively assumed that every day during summer months (July and August; as identified in Hayes *et al.,* 2021) when it is most likely this stock could occur in the Project Area, one average group size per day could be taken by harassment incidental to HRG surveys. That is, harassment could occur to the coastal stock on approximately 62 days, noting these 62 days could be spread out over a longer time period (*e.g.,* June through September) when waters are warm enough to host this stock. These assumptions equate to 930 takes (*i.e.,* 62 days × 15 dolphins per day) from HRG surveys. Combined with the take authorized incidental to pile driving (*i.e.,* 1,185 takes), the maximum total take authorized in a given year is 2,115. If one assumes that all takes are of a different individual, this equates to 31.9 percent of the population. However, the assumptions that all takes are of a different individual (*i.e.,* harassment on more than one day could occur to the same individual) and all takes could be attributed to the coastal stock are also not likely scenarios; therefore, in addition to the fact that the Project Area is the most northern boundary of known habitat, the actual percentage of stock taken by harassment is expected to be less than 31.9 percent.

Regarding the Western North Atlantic offshore stock of bottlenose dolphins, if one assumes that all take authorized for HRG surveys (2,865) occurs to the offshore stock, the total amount of take authorized in any given year (4,655) equates to 7.4 percent of the population (62,851). NMFS expects this percentage to also be an overestimate, given that this estimate assumes each take is of a different individual, an unlikely scenario as discussed above, and assumes that all of the expected bottlenose dolphin takes are attributed to the offshore stock, also a very unlikely scenario.

Based on the analysis contained herein of the activities (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Classification

Endangered Species Act

Section 7(a)(2) of the ESA of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the promulgation of rulemakings, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, and in this case, consulted with the NOAA GARFO.

The NMFS Office of Protected Resources has authorized the take of four marine mammal species, which are listed under the ESA: the North Atlantic right, sei, fin, and sperm whale. The Permit and Conservation Division requested initiation of section 7 consultation on April 12, 2023, with GARFO for the promulgation of the rulemaking. NMFS issued a Biological Opinion on September 8, 2023,

concluding that the promulgation of the rule and issuance of LOAs thereunder is not likely to jeopardize the continued existence of threatened and endangered species under NMFS' jurisdiction and is not likely to result in the destruction or adverse modification of designated or proposed critical habitat. The Biological Opinion is available at *https://repository.library.noaa.gov/view/noaa/55324.*

Empire Wind is required to abide by the promulgated regulations, as well as the reasonable and prudent measure and terms and conditions of the Biological Opinion and Incidental Take Statement, as issued by NMFS.

National Environmental Policy Act

To comply with NEPA (42 U.S.C. 4321 *et seq.*) and the NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* promulgation of regulation) and alternatives with respect to potential impacts on the human environment. NMFS participated as a cooperating agency on the BOEM 2023 Final EIS (FEIS), which was finalized on September 11, 2023, and is available at: *https://www.boem.gov/renewable-energy/state-activities/empire-wind-final-eis.* In accordance with 40 CFR 1506.3, NMFS independently reviewed and evaluated the 2023 Empire Wind FEIS and determined that it is adequate and sufficient to meet our responsibilities under NEPA for the promulgation of this rule and issuance of the associated LOA. NMFS, therefore, has adopted the 2023 Empire Wind 1 FEIS through a joint Record of Decision (ROD) with BOEM. The joint ROD for adoption of the 2023 Empire Wind FEIS and promulgation of this final rule and subsequent issuance of a LOA can be found at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Executive Order 12866

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOA, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS.

Coastal Zone Management Act

The Coastal Zone Management Act requires that any applicant for a required Federal license or permit to conduct an activity, within the coastal zone or within the geographic location descriptions (*i.e.,* areas outside the coastal zone in which an activity would have reasonably foreseeable coastal effects), affecting any land or water use or natural resource of the coastal zone be consistent with the enforceable policies of a state's federally approved coastal management program. As required, on June 24, 2021, Empire Wind submitted a Federal consistency certification to New York and voluntarily submitted a Federal consistency certification to New Jersey for approval of the COP by BOEM and the issuance of an Individual Permit by United States Army Corps of Engineers, under sections 10 and 14 of the Rivers and Harbors Act and section 404 of the Clean Water Act (15 CFR part 930, subpart E). New York began its review of the proposed activity pursuant to 15 CFR part 930, subpart D, on November 18, 2022.

NMFS determined that Empire Wind's application for MMPA ITRs is an unlisted activity under the State of New York's coastal management program and, thus, is not subject to Federal consistency requirements in the absence of the receipt and prior approval of an unlisted activity review request from the State by the Director of NOAA's Office for Coastal Management. Pursuant to 15 CFR 930.54, NMFS published a NOR of Empire Wind's application in the **Federal Register** on September 9, 2022 (87 FR 55409), and published the proposed rule on April 13, 2023 (88 FR 22696). The State of New York did not request approval from the Director of NOAA's Office for Coastal Management to review Empire Wind's application as an unlisted activity, and the time period for making such request has expired. Therefore, NMFS has determined the ITA is not subject to Federal consistency review.

Waiver of Delay in Effective Date

The Assistant Administrator for Fisheries has determined that there is a sufficient basis under the Administrative Procedure Act (APA) to waive the 30-day delay in the effective date of the measures contained in the final rule. Section 553 of the APA provides that the required publication or service of a substantive rule shall be made not less than 30 days before its effective date with certain exceptions, including (1) for a substantive rule that relieves a restriction or (2) when the agency finds and provides good cause for foregoing delayed effectiveness 5 U.S.C 553(d)(1) and (d)(3). Here, the issuance of regulations under section 101(a)(5)(A) of the MMPA is a substantive action that relieves the statutory prohibition on the taking of marine mammals, specifically, the incidental taking of marine mammals associated with Empire Wind's specified activities during the construction of the Project offshore of New York. Until the effective date of these regulations, Empire Wind is prohibited from taking marine mammals incidental to the Project.

In addition, good cause exists for waiving the delay in effective date. In order for Empire Wind to start cable landfall construction activities in Spring 2024, which is pertinent for construction activity sequencing and vessel and other services procurement and availability, Empire Wind must submit a certified verification agent reviewed and certified Fabrication and Installation Report, which includes all Federal, State, and local permits, to Bureau of Safety and Environmental Enforcement (BSEE) at least 60 days prior to the start of such activities (30 CFR 285.700).

Moreover, offshore wind projects, such as the Project, that are developed to generate renewable energy have great societal and economic importance, and delays in completing the Project are contrary to the public interest.

Finally, Empire Wind has informed NMFS that it does not require 30 days to prepare for implementation of the regulations and requests that this final rule take effect on or before February 22, 2024. For these reasons, the subject

regulations will be made effective on February 22, 2024.

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Endangered and threatened species, Fish, Fisheries, Marine mammals, Penalties, Reporting and recordkeeping requirements, Wildlife.

Dated: January 18, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart CC, consisting of §§ 217.280 through 217.289, to read as follows:

Subpart CC—Taking Marine Mammals Incidental to the Empire Wind Project Offshore of New York

Sec.

Subpart CC—Taking Marine Mammals Incidental to the Empire Wind Project, Offshore New York

§ 217.280 Specified activity and specified geographical region.

(a) Regulations in this subpart apply to activities associated with the Empire Wind Project (hereafter referred to as the ''Project'') by Empire Offshore Wind, LLC (hereafter referred to as ''LOA Holder''), and those persons it authorizes or funds to conduct activities on its behalf in the area outlined in paragraph (b) of this section. Requirements imposed on LOA Holder must be implemented by those persons it authorizes or funds to conduct activities on its behalf. (b) The specified geographical region is the Mid-Atlantic Bight, which includes, but is not limited to, the Bureau of Ocean Energy Management (BOEM) Lease Area Outer Continental Shelf (OCS)-A 0512 Commercial Lease of Submerged Lands for Renewable Energy Development, two export cable routes, and two sea-to-shore transition points located at South Brooklyn Marine Terminal, in Brooklyn, NY (Empire Wind 1), and Long Island, NY (Empire Wind 2).

(c) The specified activities are impact pile driving of up to 147 wind turbine generator (WTGs) and up to two offshore substation (OSSs) foundations; impact and vibratory pile driving associated with cable landfall construction and marina activities; high-resolution geophysical (HRG) site characterization surveys; vessel transit within the specified geographical region to transport crew, supplies, and materials; WTG operation; fishery and ecological monitoring surveys; placement of scour protection; and trenching, laying, and burial activities associated with the installation of the export cable route from OSSs to shore-based converter stations and inter-array cables between turbines.

§ 217.281 Effective dates.

The regulations in this subpart are effective from February 22, 2024, through February 21, 2029.

§ 217.282 Permissible methods of taking.

Under the LOA, issued pursuant to §§ 216.106 and 217.286, LOA Holder, and those persons it authorizes or funds to conduct activities on its behalf, may incidentally, but not intentionally, take marine mammals within the vicinity of BOEM Lease Area OCS–A 0512 Commercial Lease of Submerged Lands for Renewable Energy Development, along export cable routes, and at the two sea-to-shore transition points located at the South Brooklyn Marine Terminal, in Brooklyn, NY (Empire Wind 1), and Long Island, NY (Empire Wind 2), in the following ways, provided LOA Holder is in complete compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA:

(a) By Level B harassment associated with the acoustic disturbance of marine mammals by impact pile driving (WTG and OSS foundation installation), impact and vibratory pile driving during cable landfall and marina activities, and HRG site characterization surveys;

(b) By Level A harassment associated with the acoustic disturbance of marine mammals by impact pile driving of WTG and OSS foundations; (c) Take by mortality (death) or serious injury of any marine mammal species is not authorized; and (d) The incidental take of marine mammals by the activities listed in paragraphs (a) and (b) of this section is limited to the following species:

TABLE 1 TO PARAGRAPH (d)

Marine mammal species	Scientific name	Stock
Fin whale	*Balaenoptera physalus*	Western North Atlantic.
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine.
Minke whale	*Balaenoptera acutorostrata*	Canadian Eastern Coastal.
North Atlantic right whale	*Eubalaena glacialis*	Western North Atlantic.
Sei whale	*Balaenoptera borealis*	Nova Scotia.
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic.
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic.
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic, offshore.
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic, coastal.
Short-beaked common dolphin	*Delphinus delphis*	Western North Atlantic.
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy.
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic.
Short-finned pilot whale	*Globicephala macrorhynchus*	Western North Atlantic.
Risso's dolphin	*Grampus griseus*	Western North Atlantic.
Sperm whale	*Physeter macrocephalus*	North Atlantic.
Gray seal	*Halichoerus grypus*	Western North Atlantic.
Harbor seal	*Phoca vitulina*	Western North Atlantic.
Harp seal	*Pagophilus groenlandicus*	Western North Atlantic.

§ 217.283 Prohibitions.

Except for the takings described in § 217.282 and authorized by an LOA issued under § 217.286 or § 217.287, it is unlawful for any person to do any of the following in connection with the activities described in this subpart:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under § 217.286 or § 217.287;

(b) Take any marine mammal not specified in § 217.282(d);

(c) Take any marine mammal specified in the LOA in any manner other than as specified in the LOA; or

(d) Take any marine mammal specified in § 217.282(d), after NMFS Office of Protected Resources determines such taking results in more than a negligible impact on the species or stocks of such marine mammals.

§ 217.284 Mitigation requirements.

When conducting the activities identified in § 217.280(c) within the area described in § 217.280(b), LOA Holder must implement the mitigation measures contained in this section and any LOA issued under § 217.286 or § 217.287. These mitigation measures include, but are not limited to:

(a) *General conditions.* LOA Holder must comply with the following general measures:

(1) A copy of any issued LOA must be in the possession of LOA Holder and its designees, all vessel operators, visual protected species observers (PSOs), passive acoustic monitoring (PAM) operators, pile driver operators, and any other relevant designees operating under the authority of the issued LOA;

(2) LOA Holder must conduct training for construction, survey, and vessel personnel and the marine mammal monitoring team (PSO and PAM operators) prior to the start of all in-water construction activities in order to explain responsibilities, communication procedures, marine mammal detection and identification, mitigation, monitoring, and reporting requirements, safety and operational procedures, and authorities of the marine mammal monitoring team(s). This training must be repeated for new personnel who join the work during the Project. A description of the training program must be provided to NMFS at least 60 days prior to the initial training before in-water activities begin. Confirmation of all required training must be documented on a training course log sheet and reported to NMFS Office of Protected Resources prior to initiating project activities;

(3) Prior to, and when conducting, any in-water activities and vessel operations, LOA Holder personnel and contractors (*e.g.,* vessel operators, PSOs) must use available sources of information on North Atlantic right whale presence in or near the Project Area including daily monitoring of the Right Whale Sightings Advisory System, and monitoring of U.S. Coast Guard VHF Channel 16 throughout the day to receive notification of any sightings and/or information associated with any Slow Zones (*i.e.,* Dynamic Management Areas (DMAs) and/or acoustically-triggered slow zones) to provide situational awareness for both vessel operators, PSO(s), and PAM operator(s). The marine mammal monitoring team must monitor these systems no less than every 4 hours;

(4) Any marine mammal observed by project personnel must be immediately communicated to any on-duty PSOs, PAM operator(s), and all vessel captains. Any large whale observation or acoustic detection by PSOs or PAM operators must be conveyed to all vessel captains;

(5) For North Atlantic right whales, any visual detection by a PSO or acoustic detection by PAM operators at any distance (where applicable for the specified activities) must trigger a delay to the commencement of pile driving and HRG surveys;

(6) In the event that a large whale is sighted or acoustically detected that cannot be confirmed as a non-North Atlantic right whale, it must be treated as if it were a North Atlantic right whale for purposes of mitigation, unless a PSO or PAM operator confirms it is another type of whale;

(7) The LOA Holder must instruct all vessel personnel regarding the authority of the PSO(s). If a delay to commencing an activity is called for by the Lead PSO or PAM operator, LOA Holder must take the required mitigative action. If a shutdown of an activity is called for by the Lead PSO or PAM operator, LOA Holder must take the required mitigative action unless shutdown would result in imminent risk of injury or loss of life to an individual, pile refusal, or pile instability. Any disagreements between the Lead PSO, PAM operator, and the activity operator regarding delays or shutdowns would only be discussed after the mitigative action has occurred;

(8) If an individual from a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized take number has been met, is observed entering or within the relevant Level B harassment zone prior to beginning a specified activity, the activity must be delayed. If the activity is ongoing, it must be shut down immediately, unless shutdown would result in imminent risk of injury or loss of life to an individual, pile refusal, or pile instability. The activity must not commence or resume until the animal(s) has been confirmed to have left and is on a path away from the Level B harassment zone or after 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species with no further sightings;

(9) Any marine mammals observed within a clearance or shutdown zone must be allowed to remain in the area (*i.e.,* must leave of their own volition) prior to commencing pile driving activities or HRG surveys;

(10) For in-water construction heavy machinery activities listed in § 217.280(c), if a marine mammal is on a path towards or comes within 10 meters (m) (32.8 feet) of equipment, LOA Holder must cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment;

(11) All vessels must be equipped with a properly installed, operational Automatic Identification System (AIS) device and LOA Holder must report all Maritime Mobile Service Identity (MMSI) numbers to NMFS Office of Protected Resources;

(12) By accepting the issued LOA, LOA Holder consents to on-site observation and inspections by Federal agency personnel (including NOAA personnel) during activities described in this subpart, for the purposes of evaluating the implementation and effectiveness of measures contained within the LOA and this subpart; and

(13) It is prohibited to assault, harm, harass (including sexually harass), oppose, impede, intimidate, impair, or in any way influence or interfere with a PSO, PAM Operator, or vessel crew member acting as an observer, or attempt the same. This prohibition includes, but is not limited to, any action that interferes with an observer's responsibilities, or that creates an intimidating, hostile, or offensive environment. Personnel may report any violations to the NMFS Office of Law Enforcement.

(b) *Vessel strike avoidance measures.* LOA Holder must comply with the following vessel strike avoidance measures, unless an emergency situation presents a threat to the health, safety, or life of a person or when a vessel, actively engaged in emergency rescue or response duties, including vessel-in-distress or environmental crisis response, requires speeds in excess of 10 knots (kn) (18.5 kilometers per hour (km/hr)) to fulfill those

responsibilities, while in the specified geographical region. An emergency is defined as a serious event that occurs without warning and requires immediate action to avert, control, or remedy harm. All vessel speeds are referenced to speed over ground:

(1) Prior to the start of the Project's activities involving vessels, all vessel personnel must receive a protected species training that covers, at a minimum, identification of marine mammals that have the potential to occur where vessels would be operating; detection observation methods in both good weather conditions (*i.e.,* clear visibility, low winds, low sea states) and bad weather conditions (*i.e.,* fog, high winds, high sea states, with glare); sighting communication protocols; all vessel speed and approach limit mitigation requirements (*e.g.,* vessel strike avoidance measures); and information and resources available to the Project personnel regarding the applicability of Federal laws and regulations for protected species. This training must be repeated for any new vessel personnel who join the Project. Confirmation of the observers' training and understanding of the Incidental Take Authorization (ITA) requirements must be documented on a training course log sheet and reported to NMFS;

(2) All vessel operators must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course to avoid striking any marine mammal;

(3) All underway vessels operating at any speed, transiting within the specified geographic area (*i.e.,* the Mid-Atlantic Bight), must have a dedicated visual observer on duty at all times to monitor for marine mammals within a 180° direction of the forward path of the vessel (90° port to 90° starboard) located at an appropriate vantage point for ensuring vessels are maintaining appropriate separation distances. Dedicated visual observers may be third-party observers (*i.e.,* NMFS-approved PSOs) or trained crew members, as defined in paragraph (b)(1) of this section. Dedicated visual observers must be equipped with alternative monitoring technology (*e.g.,* night vision devices, infrared cameras) for periods of low visibility (*e.g.,* darkness, rain, fog, *etc.*). The dedicated visual observer must not have any other duties while observing and must receive prior training on protected species detection and identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements in this subpart;

(4) All vessel operators and/or the dedicated visual observer on each transiting vessel must continuously monitor the U.S. Coast Guard VHF Channel 16 at the onset of transiting through the duration of transiting, over which North Atlantic right whale sightings are broadcasted. At the onset of transiting and at least once every 4 hours, vessel operators and/or dedicated visual observer(s) must also monitor the Project's Situational Awareness System (if applicable), WhaleAlert, and relevant NOAA information systems such as the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales;

(5) Any large whale sighting by any project-personnel must be immediately communicated to all project-associated vessels;

(6) All vessel operators must abide by existing applicable vessel speed rule regulations at 50 CFR part 224 (nothing in this subpart exempts vessels from any other applicable marine mammal speed and approach regulations);

(7) Vessels must not travel over 10 kn (18.5 km/hr) from November 1 through April 30, annually, in the specified geographic region, within any active North Atlantic right whale Slow Zone (*i.e.,* DMAs or acoustically-triggered slow zone);

(8) If vessel(s) are traveling at speeds greater than 10 kn (18.5 km/hr) (*i.e.,* no speed restrictions are enacted) in a transit corridor (defined as from a port to the Lease Area or return), in addition to the required dedicated visual observer, LOA Holder must monitor the transit corridor in real-time with PAM prior to and during transits. If a North Atlantic right whale is detected via visual observation or PAM detection within or approaching the transit corridor, all vessels in the transit corridor must travel at 10 kn (18.5 km/hr) or less for 24 hours following the detection. Each subsequent detection shall trigger a 24-hour reset. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection in the transit corridor in the past 24 hours;

(9) All vessel operators, regardless of their vessel's size, must immediately reduce speed to 10 kn (18.5 km/hr) or less for at least 24 hours when a North Atlantic right whale is sighted at any distance by any project-related personnel or acoustically detected by any project-related PAM system. Each subsequent observation or acoustic detection in the Project Area shall trigger an additional 24-hour period. If a North Atlantic right whale is reported via any of the monitoring systems (refer back to paragraph (b)(4) of this section) within 10 km (6.2 miles (mi)) of a transiting vessel(s), that vessel must operate at 10 kn (18.5 km/hr) or less for 24 hours following the reported detection;

(10) All vessel operators, regardless of their vessel's size, must immediately reduce speed to 10 kn (18.5 km/hr) or less when any large whale (other than a North Atlantic right whale- refer back to paragraph (b)(7) of this section), mother/calf pairs, or large assemblages of cetaceans are sighted within 500 m of a transiting vessel;

(11) All vessels must maintain a minimum separation distance of 500 m from North Atlantic right whales. If underway, all vessels must steer a course away from any sighted North Atlantic right whale at 10 kn (18.5 km/hr) or less such that the 500-m minimum separation distance requirement is not violated. If a North Atlantic right whale is sighted within 500 m of an underway vessel, that vessel must reduce speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 500 m. If a whale is observed but cannot be confirmed as a species other than a North Atlantic right whale, the vessel operator must assume that it is a North Atlantic right whale and take the vessel strike avoidance measures described in this paragraph (b)(11);

(12) All vessels must maintain a minimum separation distance of 100 m (328 ft) from sperm whales and non-North Atlantic right whale baleen whales. If one of these species is sighted within 100 m of a transiting vessel, the vessel must reduce speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 100 m;

(13) All vessels must maintain a minimum separation distance of 50 m (164 ft) from all delphinid cetaceans and pinnipeds with an exception made for those that approach the vessel (*i.e.,* bow-riding dolphins). If a delphinid cetacean or pinniped is sighted within 50 m of a transiting vessel, the vessel must shift the engine to neutral, with an exception made for those that approach the vessel (*e.g.,* bow-riding dolphins). Engines must not be engaged until the animal(s) has moved outside of the vessel's path and beyond 50 m;

(14) When a marine mammal(s) is sighted while the vessel(s) is transiting, the vessel must take action as necessary to avoid violating the relevant separation distances (*e.g.,* attempt to remain parallel to the animal's course, slow down, and avoid abrupt changes in

direction until the animal has left the area);

(15) All vessels underway must not divert or alter course to approach any marine mammal;

(16) Vessel operators must check, daily, for information regarding the establishment of mandatory or voluntary vessel strike avoidance areas (*i.e.,* DMAs, Seasonal Management Areas (SMAs), Slow Zones) and any information regarding North Atlantic right whale sighting locations; and

(17) LOA Holder must submit a North Atlantic Right Whale Vessel Strike Avoidance Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to the planned start of vessel activity. The plan must provide details on the vessel-based observer and PAM protocols for transiting vessels. If a plan is not submitted or approved by NMFS prior to vessel operations, all project vessels must travel at speeds of 10 kn (18.5 km/hr) or less. LOA Holder must comply with any approved North Atlantic Right Whale Vessel Strike Avoidance Plan.

(c) *WTG and OSS foundation installation.* The following requirements apply to impact pile driving activities associated with the installation of WTG and OSS foundations:

(1) Foundation pile driving must not occur January 1 through April 30, annually. Foundation pile driving must not be planned and must be avoided to the maximum extent practicable in December; however, it may occur if necessary to complete the Project with prior approval by NMFS. Empire Wind must notify NMFS in writing by September 1 of that year that circumstances are expected to necessitate pile driving in December;

(2) Monopiles must be no larger than 11 m in diameter. Hammer energies must not exceed 5,500 kilojoules (kJ) for monopile installation. No more than two monopiles may be installed per day. Pin piles must be no larger than 2.5 m in diameter. Hammer energies must not exceed 3,200 kJ for pin pile installation. No more than three pin piles may be installed per day;

(3) LOA Holder must only perform foundation pile driving during daylight hours, defined as no later than 1.5 hours prior to civil sunset and no earlier than 1 hour after civil sunrise, and may only continue into darkness if stopping operations represents a risk to human health, safety, and/or pile stability and an Alternative Monitoring Plan, as part of the Pile Driving and Marine Mammal Monitoring Plan for Nighttime Pile Driving that reliably demonstrates the efficacy of their night vision methods, has been approved by NMFS. No new pile driving may begin when pile driving continues into darkness;

(4) LOA Holder must utilize a soft-start protocol as described in the LOA. Soft-start must occur at the beginning of impact driving and at any time following a cessation of impact pile driving of 30 minutes or longer;

(5) LOA Holder must establish clearance and shutdown zones, which must be measured using the radial distance from the pile being driven. PSOs must visually monitor clearance zones for marine mammals for a minimum of 60 minutes prior to commencing pile driving. At least one PAM operator must review data from at least 24 hours prior to pile driving and actively monitor hydrophones for 60 minutes prior to pile driving, at all times during pile driving, and for 30 minutes after pile driving. The entire minimum visibility zone must be visible (*i.e.,* not obscured by dark, rain, fog, etc.) for a full 60 minutes immediately prior to commencing impact pile driving. All clearance zones must be confirmed to be free of marine mammals for 30 minutes immediately prior to the beginning of soft-start procedures. PAM operators must immediately communicate all detections of marine mammals at any distance to the Lead PSO, including any determination regarding species identification, distance, and bearing and the degree of confidence in the determination. If a marine mammal is detected within, or is about to enter, the applicable clearance zones, during this 30-minute period, impact pile driving must be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings. The specific time periods are 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species;

(6) For North Atlantic right whales, any visual observation by a protected species observer at any distance or acoustic detection within the PAM Monitoring Zone must trigger a delay to the commencement of pile driving. The North Atlantic right whale clearance zone may only be declared clear if no North Atlantic right whale acoustic or visual detections have occurred during the 60-minute monitoring period. Any large whale sighting by a PSO or detected by a PAM operator that cannot be identified as a non-North Atlantic right whale must be treated as if it were a North Atlantic right whale;

(7) LOA Holder must deploy at least two functional noise attenuation devices that reduce noise levels to the modeled harassment isopleths, assuming 10-decibels (dB) attenuation, during all foundation pile driving, and comply with the following measures:

(i) A single bubble curtain must not be used;

(ii) The bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 m^3/(minute*m). The bubble curtains must surround 100 percent of the piling perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtains must adjust the air supply and operating pressure such that the maximum possible sound attenuation performance of the bubble curtain(s) is achieved;

(iii) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(iv) No parts of the ring or other objects may prevent full seafloor contact with a bubble curtain ring;

(v) Construction contractors must train personnel in the proper balancing of airflow to the bubble curtain ring. LOA Holder must provide NMFS Office of Protected Resources with a bubble curtain performance test and maintenance report to review within 72 hours after each pile using a bubble curtain is installed. Additionally, a full maintenance check (*e.g.,* manually clearing holes) must occur prior to each pile being installed; and

(vi) Corrections to the bubble rings to meet the performance standards in this paragraph (c)(7) must occur prior to impact pile driving of monopiles. For any noise mitigation device in addition to the bubble curtains, LOA Holder must inspect and carry out appropriate maintenance on the system and ensure the system is functioning properly prior to every pile driving event;

(8) LOA Holder must utilize NMFS-approved PAM systems, as described in paragraph (c)(15) of this section. The PAM system components (*i.e.,* acoustic buoys) must not be placed closer than 1 km to the pile being driven so that the activities do not mask the PAM system. LOA Holder must demonstrate and prove the detection range of the system they plan to deploy while considering potential masking from concurrent pile-driving and vessel noise. The PAM system must be able to detect a vocalization of North Atlantic right whales up to 10 km (6.2 mi);

(9) LOA Holder must utilize PSO(s) and PAM operator(s), as described in § 217.285(c). At least three on-duty PSOs must be on every impact pile driving platform(s);

(10) If a marine mammal is detected (visually or acoustically) entering or within the respective shutdown zone after pile driving has begun, the PSO or PAM operator must call for a shutdown of pile driving and LOA Holder must stop pile driving immediately, unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals, or the lead engineer determines there is a risk of pile refusal or pile instability. If pile driving is not shutdown in one of these situations, LOA Holder must reduce hammer energy to the lowest level practicable and the reason(s) for not shutting down must be documented and reported to NMFS Office of Protected Resources within the applicable monitoring reports (*e.g.,* weekly, monthly) (see 217.285(f));

(11) A visual observation or acoustic detection of a North Atlantic right whale at any distance by foundation installation PSOs or an acoustic detection within 10 km triggers shutdown requirements under paragraph (c)(10) of this section. If pile driving has been shut down due to the presence of North Atlantic right whales, pile driving may not restart until the North Atlantic right whale has neither been visually or acoustically detected by pile driving PSOs and PAM operators for 30 minutes;

(12) If pile driving has been shut down due to the presence of a marine mammal other than a North Atlantic right whale, pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability or to avoid pile refusal, at which time LOA Holder must use the lowest hammer energy practicable to maintain stability;

(13) LOA Holder must conduct thorough sound field verification (SFV) measurements during pile driving activities associated with the installation of, at minimum, the first three monopile foundations. SFV measurements must continue until at least three consecutive piles demonstrate noise levels are at or below those modeled, assuming 10 dB of attenuation. Subsequent SFV measurements are also required should larger piles be installed or if additional piles are driven that may produce louder sound fields than those previously measured (*e.g.,* higher hammer energy, greater number of strikes, *etc.*). In addition to thorough SFV monitoring, LOA Holder also must conduct abbreviated SFV for all foundations, using at least one acoustic recorder for every foundation for which thorough SFV monitoring is not conducted:

(i) Thorough SFV measurements must be made at a minimum of four distances from the pile(s) being driven, along a single transect, in the direction of lowest transmission loss (*i.e.,* projected lowest transmission loss coefficient), including, but not limited to, 750 m (2,460 ft) and three additional ranges selected such that measurement of Level A harassment and Level B harassment isopleths are accurate, feasible, and avoids extrapolation. At least one additional measurement at an azimuth 90 degrees from the array at 750 m must be made. At each location, there must be a near bottom and mid-water column hydrophone (measurement systems);

(ii) The recordings must be continuous throughout the duration of all pile driving of each foundation;

(iii) The SFV measurement systems must have a sensitivity appropriate for the expected sound levels from pile driving received at the nominal ranges throughout the installation of the pile. The frequency range of SFV measurement systems must cover the range of at least 20 hertz (Hz) to 20 kilohertz (kHz). The SFV measurement systems must be designed to have omnidirectional sensitivity so that the broadband received level of all pile driving exceeds the system noise floor by at least 10 dB. The dynamic range of the SFV measurement system must be sufficient such that at each location, and the signals avoid poor signal-to-noise ratios for low amplitude signals and avoid clipping, nonlinearity, and saturation for high amplitude signals;

(iv) All hydrophones used in SFV measurements systems are required to have undergone a full system, traceable laboratory calibration conforming to International Electrotechnical Commission (IEC) 60565, or an equivalent standard procedure, from a factory or accredited source to ensure the hydrophone receives accurate sound levels, at a date not to exceed 2 years before deployment. Additional *in-situ* calibration checks using a pistonphone are required to be performed before and after each hydrophone deployment. If the measurement system employs filters via hardware or software (*e.g.,* high-pass, low-pass, *etc.*), which is not already accounted for by the calibration, the filter performance (*i.e.,* the filter's frequency response) must be known, reported, and the data corrected before analysis;

(v) LOA Holder must be prepared with additional equipment (*e.g.,* hydrophones, recording devices, hydrophone calibrators, cables, batteries, *etc.*), which exceeds the amount of equipment necessary to perform the measurements, such that technical issues can be mitigated before measurement;

(vi) LOA Holder must submit interim reports within 48 hours after each foundation is measured (see § 217.285(f) section for interim and final reporting requirements);

(vii) LOA Holder must not exceed modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds, assuming 10-dB attenuation, for foundation installation. If any of the interim SFV measurement reports submitted for the first three monopiles indicate the modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds assuming 10-dB attenuation, then LOA Holder must implement additional sound attenuation measures on all subsequent foundations. LOA Holder must also increase clearance and shutdown zone sizes to those identified by NMFS until SFV measurements on at least three additional foundations demonstrate acoustic distances to harassment thresholds meet or are less than those modeled assuming 10-dB of attenuation. LOA Holder must optimize the sound attenuation systems (*e.g.,* ensure hose maintenance, pressure testing, *etc.*) to meet noise levels modeled, assuming 10-dB attenuation, within three piles or else foundation installation activities must cease until NMFS and LOA Holder can evaluate the situation and ensure future piles must not exceed noise levels modeled assuming 10-dB attenuation;

(viii) If, after additional measurements conducted pursuant to requirements of paragraph (c)(13)(vii) of this section, acoustic measurements indicate that ranges to isopleths corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10-dB attenuation), LOA Holder may request to NMFS Office of Protected Resources a modification of the clearance and shutdown zones. For NMFS Office of Protected Resources to consider a modification request for reduced zone sizes, LOA Holder must have conducted SFV measurements on

an additional three foundations and ensure that subsequent foundations would be installed under conditions that are predicted to produce smaller harassment zones than those modeled assuming 10-dB of attenuation;

(ix) LOA Holder must conduct SFV measurements upon commencement of turbine operations to estimate turbine operational source levels, in accordance with a NMFS-approved Foundation Installation Pile Driving SFV Plan. SFV must be conducted in the same manner as previously described in this paragraph (c)(13), with appropriate adjustments to measurement distances, number of hydrophones, and hydrophone sensitivities being made, as necessary; and

(x) LOA Holder must submit a SFV Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of foundation installation activities and abide by the Plan if approved. At minimum, the SFV Plan must describe how LOA Holder would ensure that the first three monopile foundation installation sites selected for SFV measurements are representative of the rest of the monopile installation sites such that future pile installation events are anticipated to produce similar sound levels to those piles measured. In the case that these sites/scenarios are not determined to be representative of all other pile installation sites, LOA Holder must include information in the SFV Plan on how additional sites/scenarios would be selected for SFV measurements. The SFV Plan must also include methodology for collecting, analyzing, and preparing SFV measurement data for submission to NMFS Office of Protected Resources and describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. SFV for pile driving may not occur until NMFS approves the SFV Plan for this activity;

(14) LOA Holder must submit a Foundation Installation Pile Driving Marine Mammal Monitoring Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of pile driving and abide by the Plan if approved. LOA Holder must obtain both NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division's concurrence with this Plan prior to the start of any pile driving. The Plan must include a description of all monitoring equipment and PAM and PSO protocols (including number and location of PSOs) for all pile driving. No foundation pile installation can occur without NMFS' approval of the Plan; and

(15) LOA Holder must submit a Passive Acoustic Monitoring Plan (PAM Plan) to NMFS Office of Protected Resources for review and approval at least 180 days prior to the planned start of foundation installation activities (impact pile driving) and abide by the Plan if approved. The PAM Plan must include a description of all proposed PAM equipment, address how the proposed passive acoustic monitoring must follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind. The Plan must describe all proposed PAM equipment, procedures, and protocols including proof that vocalizing North Atlantic right whales will be detected within the clearance and shutdown zones. No pile installation can occur if LOA Holder's PAM Plan does not receive approval from NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division.

(d) *Cable landfall construction and marina activities.* The following requirements apply to cable landfall and marina construction activities:

(1) Installation and removal of cofferdams and goal posts must not occur during nighttime hours (defined as the hours between 1.5 hours prior to civil sunset and 1 hour after civil sunrise);

(2) LOA Holder must establish and implement clearance zones for the installation and removal of cofferdams and goal posts using visual monitoring. These zones must be measured using the radial distance from the cofferdam and goal post being installed and/or removed;

(3) LOA Holder must utilize PSO(s), as described in § 217.285(d). At least two on-duty PSOs must monitor for marine mammals at least 30 minutes before, during, and 30 minutes after impact and vibratory pile driving associated with cofferdam and casing pipe installation and removal and marine activities; and

(4) If a marine mammal is observed entering or within the respective shutdown zone after pile driving has begun, the PSO must call for a shutdown of pile driving. LOA Holder must stop pile driving immediately unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or if there is a risk of damage to the vessel that would create a risk of injury or loss of life for individuals or if the lead engineer determines there is refusal or instability. In any of these situations, LOA Holder must document the reason(s) for not shutting down and report the information to NMFS Office of Protected Resources in the next available weekly report (as described in § 217.285(f)).

(5) Pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability at which time LOA Holder must use the lowest hammer energy practicable to maintain stability.

(e) *HRG surveys.* The following requirements apply to HRG surveys operating sub-bottom profilers (SBPs) (*i.e.,* boomers, sparkers, and Compressed High Intensity Radiated Pulse (CHIRPS)):

(1) LOA Holder must establish and implement clearance and shutdown zones for HRG surveys using visual monitoring, as described in paragraph (c) of this section;

(2) LOA Holder must utilize PSO(s), as described in § 217.285(e);

(3) LOA Holder must abide by the relevant Project Design Criteria (PDCs 4, 5, and 7) of the programmatic consultation completed by NMFS' Greater Atlantic Regional Fisheries Office on June 29, 2021 (revised September 2021), pursuant to section 7 of the Endangered Species Act (ESA). To the extent that any relevant Best Management Practices (BMPs) described in these PDCs are more stringent than the requirements in this subpart, those BMPs supersede the requirements in this subpart;

(4) SBPs (hereinafter referred to as ''acoustic sources'') must be deactivated when not acquiring data or preparing to acquire data, except as necessary for testing. Acoustic sources must be used at the lowest practicable source level to meet the survey objective, when in use, and must be turned off when they are not necessary for the survey;

(5) Prior to starting the survey and after receiving confirmation from the PSO, that the clearance zone is clear of any marine mammals, LOA Holder is required to ramp-up acoustic sources to half power for 5 minutes prior to commencing full power, unless the equipment operates on a binary on/off switch (in which case ramp-up is not required). LOA Holder must also ensure visual clearance zones are fully visible

(*e.g.,* not obscured by darkness, rain, fog, etc.) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to the initiation of survey activities using acoustic sources specified in the LOA;

(6) Ramp-up and activation must be delayed if a marine mammal(s) enters its respective shutdown zone. Ramp-up and activation may only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species, has elapsed with no further sightings;

(7) Prior to a ramp-up procedure starting or activating acoustic sources, the acoustic source operator (operator) must notify a designated PSO of the planned start of ramp-up as agreed upon with the Lead PSO. The notification time should not be less than 60 minutes prior to the planned ramp-up or activation in order to allow the PSOs time to monitor the clearance zone(s) for 30 minutes prior to the initiation of ramp-up or activation (pre-start clearance). During this 30-minute pre-start clearance period, the entire applicable clearance zone must be visible, except as indicated in paragraph (e)(13) of this section;

(8) Ramp-ups must be scheduled so as to minimize the time spent with the source activated;

(9) A PSO conducting pre-start clearance observations must be notified again immediately prior to reinitiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed;

(10) LOA Holder must implement a 30-minute clearance period of the clearance zones immediately prior to the commencing of the survey or when there is more than a 30-minute break in survey activities or PSO monitoring. A clearance period is a period when no marine mammals are detected in the relevant zone;

(11) If a marine mammal is observed within a clearance zone during the clearance period, ramp-up or acoustic surveys may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until a specific time period has elapsed with no further sighting. The specific time period is 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other species;

(12) In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (infrared (IR)/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.,* no delay is required) despite periods of inclement weather and/or loss of daylight. Ramp-up may occur at times of poor visibility, including nighttime, if appropriate visual monitoring has occurred with no detections of marine mammals in the 30 minutes prior to beginning ramp-up;

(13) Once the survey has commenced, LOA Holder must shut down acoustic sources if a marine mammal enters a respective shutdown zone, except in cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations may continue (*i.e.,* no shutdown is required) so long as no marine mammals have been detected. The shutdown requirement does not apply to small delphinids of the following genera: *Delphinus, Stenella, Lagenorhynchus,* and *Tursiops.* If there is uncertainty regarding the identification of a marine mammal species (*i.e.,* whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in this paragraph (e)(13) is detected in the shutdown zone;

(14) If an acoustic source has been shut down due to the presence of a marine mammal, the use of an acoustic source may not commence or resume until the animal(s) has been confirmed to have left the Level B harassment zone or until a full 15 minutes for small odontocetes and seals or 30 minutes for all other marine mammals have elapsed with no further sighting;

(15) LOA Holder must immediately shut down any acoustic source if a marine mammal is sighted entering or within its respective shutdown zones. If there is uncertainty regarding the identification of a marine mammal species (*i.e.,* whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in paragraph (e)(13) of this section is detected in the shutdown zone; and

(16) If an acoustic source is shut down for a period longer than 30 minutes, all clearance and ramp-up procedures must be repeated. If an acoustic source is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, acoustic sources may be activated again without ramp-up only if PSOs have maintained constant observation and no additional detections of any marine mammal occurred within the respective shutdown zones.

(17) If multiple HRG vessels are operating concurrently, any observations of marine mammals must be communicated to PSOs on all nearby survey vessels.

(f) *Fisheries monitoring surveys.* The following measures apply to fishery monitoring surveys:

(1) Survey gear must be deployed as soon as possible once the vessel arrives on station. Gear must not be deployed if there is a risk of interaction with marine mammals. Gear may be deployed after 15 minutes of no marine mammal sightings within 1 nautical mile (nmi; 1,852 m) of the sampling station;

(2) LOA Holder and/or its cooperating institutions, contracted vessels, or commercially-hired captains must implement the following ''move-on'' rule: if marine mammals are sighted within 1 nmi (1.85 km) of the planned location and 15 minutes before gear deployment, then LOA Holder and/or its cooperating institutions, contracted vessels, or commercially hired captains, as appropriate, must move the vessel away from the marine mammal to a different section of the sampling area. If, after moving on, marine mammals are still visible from the vessel, LOA Holder and its cooperating institutions, contracted vessels, or commercially hired captains must move again or skip the station;

(3) If a marine mammal is at risk of interacting with deployed gear, all gear must be immediately removed from the water. If marine mammals are sighted before the gear is fully removed from the water, the vessel must slow its speed and maneuver the vessel away from the animals to minimize potential interactions with the observed animal;

(4) LOA Holder must maintain visual marine mammal monitoring effort during the entire period of time that gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, LOA Holder will take the most appropriate action to avoid marine mammal interaction;

(5) All fisheries monitoring gear must be fully cleaned and repaired (if damaged) before each use/deployment;

(6) Trawl tows must be limited to a maximum of a 20-minute trawl time;

(7) All gear must be emptied as close to the deck/sorting area and as quickly as possible after retrieval;

(8) During trawl surveys, vessel crew must open the codend of the trawl net close to the deck in order to avoid injury to animals that may be caught in the gear;

(9) All in-water survey gear, including buoys, must be properly labeled with the scientific permit number or identification as LOA Holder's research gear. All labels and markings on the gear, buoys, and buoy lines must also be compliant with the Atlantic Large Whale Take Reduction Plan regulations at § 229.32, and all buoy markings must comply with instructions received by the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division;

(10) All captains and crew conducting fishery surveys will be trained in marine mammal detection and identification. Marine mammal monitoring will be conducted by the captain and/or a member of the scientific crew before (within 1 nmi (1.85 km) and 15 minutes prior to deploying gear), during, and after haul back;

(11) All survey gear must be removed from the water whenever not in active survey use (*i.e.,* no wet storage);

(12) All reasonable efforts, that do not compromise human safety, must be undertaken to recover gear; and

(13) Any lost gear associated with the fishery surveys must be reported to the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division within 24 hours.

§ 217.285 Requirements for monitoring and reporting.

(a) *Protected species observer (PSO) and passive acoustic monitoring (PAM) operator qualifications.* LOA Holder must implement the following measures applicable to PSOs and PAM operators:

(1) LOA Holder must use independent, NMFS-approved PSOs and PAM operators, meaning that the PSOs and PAM operators must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant crew with regard to the presence of protected species and mitigation requirements;

(2) All PSOs and PAM operators must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO or PAM operator has acquired the relevant skills through a suitable amount of alternate experience. Requests for such a waiver must be submitted to NMFS Office of Protected Resources and must include written justification containing alternative experience. Alternative experience that may be considered includes, but is not limited to: previous work experience conducting academic, commercial, or government-sponsored marine mammal visual and/or acoustic surveys; or previous work experience as a PSO/PAM operator. All PSOs and PAM operators should demonstrate good standing and consistently good performance of all assigned duties;

(3) PSOs must have visual acuity in both eyes (with correction of vision being permissible) sufficient enough to discern moving targets on the water's surface with the ability to estimate the target size and distance (binocular use is allowable); ability to conduct field observations and collect data according to the assigned protocols; sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations; writing skills sufficient to document observations, including but not limited to, the number and species of marine mammals observed, the dates and times of when in-water construction activities were conducted, the dates and time when in-water construction activities were suspended to avoid potential incidental take of marine mammals from construction noise within a defined shutdown zone, and marine mammal behavior; and the ability to communicate orally, by radio, or in-person, with project personnel to provide real-time information on marine mammals observed in the area;

(4) All PSOs must be trained in northwestern Atlantic Ocean marine mammal identification and behaviors and must be able to conduct field observations and collect data according to assigned protocols. Additionally, PSOs must have the ability to work with all required and relevant software and equipment necessary during observations (as described in paragraphs (b)(4) and (5) of this section);

(5) All PSOs and PAM operators must successfully complete a relevant training course within the last 5 years, including obtaining a certificate of course completion;

(6) PSOs and PAM operators are responsible for obtaining NMFS' approval. NMFS may approve PSOs and PAM operators as conditional or unconditional. A conditionally-approved PSO or PAM operator may be one who has completed training in the last 5 years but has not yet attained the requisite field experience. An unconditionally approved PSO or PAM operator is one who has completed training within the last 5 years and attained the necessary experience (*i.e.,* demonstrate experience with monitoring for marine mammals at clearance and shutdown zone sizes similar to those produced during the respective activity). Lead PSO or PAM operators must be unconditionally approved and have a minimum of 90 days in a northwestern Atlantic Ocean offshore environment performing the role (either visual or acoustic), with the conclusion of the most recent relevant experience not more than 18 months previous. A conditionally approved PSO or PAM operator must be paired with an unconditionally approved PSO or PAM operator;

(7) PSOs for cable landfall construction, marina activities, and HRG surveys may be unconditionally or conditionally approved. PSOs and PAM operators for foundation installation activities must be unconditionally approved;

(8) At least one on-duty PSO and PAM operator, where applicable, for each activity (*e.g.,* impact pile driving, vibratory pile driving, and HRG surveys) must be designated as the Lead PSO or Lead PAM operator. The Lead PSO should be unconditionally approved for Tiers 1–3;

(9) LOA Holder must submit NMFS previously approved PSO and PAM operator resumes to NMFS Office of Protected Resources for review and confirmation of their approval for specific roles at least 30 days prior to commencement of the activities requiring PSOs/PAM operators or 15 days prior to when new PSOs/PAM operators are required after activities have commenced;

(10) For prospective PSOs and PAM operators not previously approved, or for PSOs and PAM operators whose approval is not current, LOA Holder must submit resumes for approval at least 60 days prior to PSO and PAM operator use. Resumes must include information related to relevant education, experience, and training, including dates, duration, location, and description of prior PSO or PAM operator experience. Resumes must be accompanied by relevant documentation of successful completion of necessary training and include which specific roles and activities the PSOs/PAM operators are being requested for. PAM operator experience must also include the information described in paragraph (a)(11) of this section;

(11) PAM operators are responsible for obtaining NMFS' approval. To be approved as a PAM operator, the person must meet the following qualifications:

The PAM operator must demonstrate that they have prior large whale PAM experience with real-time acoustic detection systems and/or have completed specialized training for the PAM system(s) that will be used for the Project; PAM operators must demonstrate they are able to detect and identify Atlantic Ocean marine mammals sounds, in particular: North Atlantic right whale sounds, humpback whale sounds, and that they are able to deconflict humpback whale sounds from similar North Atlantic right whale sounds, and other co-occurring species' sounds in the area including sperm whales; must be able to distinguish between whether a marine mammal or other species sound is detected, possibly detected, or not detected; where localization of sounds or deriving bearings and distance are possible, the PAM operators need to have demonstrated experience in the localization of sounds or deriving bearings and distance; PAM operators must be independent observers (*i.e.,* not construction personnel); PAM operators must demonstrate experience with relevant acoustic software and equipment; PAM operators must have the qualifications and relevant experience/training to safely deploy and retrieve equipment and program the software, as necessary; PAM operators must be able to test software and hardware functionality prior to operation; and PAM operators must have evaluated their acoustic detection software using the PAM Atlantic baleen whale annotated data set available at National Centers for Environmental Information (NCEI) and provide evaluation/performance metrics;

(12) PAM operators must be able to review and classify acoustic detections in near real-time prioritizing North Atlantic right whales and noting detection of other cetaceans) during the real-time monitoring periods; and

(13) PSOs may work as PAM operators and vice versa, pending NMFS-approval; however, they may only perform one role at any one time and must not exceed work time restrictions, which must be tallied cumulatively.

(b) *General PSO and PAM operator requirements.* The following measures apply to PSOs and PAM operators and must be implemented by LOA Holder:

(1) All PSOs must be located at the best vantage point(s) on any platform, as determined by the Lead PSO, in order to obtain 360-degree visual coverage of the entire clearance and shutdown zones around the activity area, and as much of the Level B harassment zone as possible. PAM operators may be located on a vessel or remotely on-shore. The PAM operator(s) must assist PSOs in ensuring full coverage of the clearance and shutdown zones. The PAM operator must monitor to and past the clearance zone for large whales;

(2) All on-duty PSOs must remain in real-time contact with the on-duty PAM operator(s), PAM operators must immediately communicate all acoustic detections of marine mammals to PSOs, including any determination regarding species identification, distance, and bearing (where relevant) relative to the pile being driven and the degree of confidence (*e.g.,* detected, possibly detected, not detected) in the determination. All on-duty PSOs and PAM operator(s) must remain in real-time contact with the on-duty construction personnel responsible for implementing mitigations (*e.g.,* delay to pile driving) to ensure communication on marine mammal observations can easily, quickly, and consistently occur between all on-duty PSOs, PAM operator(s), and on-water Project personnel;

(3) The PAM operator must inform the Lead PSO(s) on duty of animal detections approaching or within applicable ranges of interest to the activity occurring via the data collection software system (*i.e.,* Mysticetus or similar system) who must be responsible for requesting that the designated crewmember implement the necessary mitigation procedures (*i.e.,* delay);

(4) PSOs must use high magnification (25x) binoculars, standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals. During foundation installation, at least three PSOs on the pile driving and any dedicated PSO vessel that may be used must be equipped with functional Big Eye binoculars (*e.g.,* 25 x 150; 2.7 view angle; individual ocular focus; height control). These must be pedestal mounted on the deck at the best vantage point that provides for optimal sea surface observation and PSO safety. A minimum of 3 PSOs must be active on a dedicated PSO vessel or an alternate monitoring technology (*e.g.,* UAS) must be used that has been demonstrated as having greater visual monitoring capability compared to 3 PSOs on a dedicated PSO vessel and is approved by NMFS. PAM operators must have the appropriate equipment (*i.e.,* a computer station equipped with a data collection software system available wherever they are stationed) and use a NMFS-approved PAM system to conduct monitoring. PAM systems are approved through the PAM Plan as described in § 217.284(c)(15);

(5) During periods of low visibility (*e.g.,* darkness, rain, fog, poor weather conditions, *etc.*), PSOs must use alternative technology (*i.e.,* infrared or thermal cameras) to monitor the clearance and shutdown zones as approved by NMFS;

(6) PSOs and PAM operators must not exceed 4 consecutive watch hours on duty at any time, must have a 2-hour (minimum) break between watches, and must not exceed a combined watch schedule of more than 12 hours in a 24-hour period;

(7) Any PSO has the authority to call for a delay or shutdown of project activities;

(8) Any visual observations of ESA-listed marine mammals must be communicated immediately to PSOs and vessel captains associated with other vessels to increase situational awareness; and

(9) LOA Holder personnel and PSOs are required to use available sources of information on North Atlantic right whale presence to aid in monitoring efforts. These include daily monitoring of the Right Whale Sightings Advisory System, consulting of the WhaleAlert app, and monitoring of the Coast Guard's VHF Channel 16 throughout the day to receive notifications of any sightings and information associated with any Dynamic Management Areas, to plan construction activities and vessel routes, if practicable, to minimize the potential for co-occurrence with North Atlantic right whales.

(c) *PSO and PAM operator requirements during WTG and OSS foundation installation.* The following measures apply to PSOs and PAM operators during WTG and OSS foundation installation and must be implemented by LOA Holder:

(1) PSOs and PAM operator(s), using a NMFS-approved PAM system, must monitor for marine mammals 60 minutes prior to, during, and 30 minutes following all pile-driving activities. If PSOs cannot visually monitor the minimum visibility zone prior to foundation pile driving at all times using the equipment described in paragraphs (b)(4) and (5) of this section, pile-driving operations must not commence or must shutdown if they are currently active. Foundation pile driving may only commence when the minimum visibility zone is fully visible (*e.g.,* not obscured by darkness, rain, fog, etc.) and the clearance zones are clear of marine mammals for at least 30 minutes, as determined by the Lead PSO, immediately prior to the initiation of impact pile driving;

(2) At least three on-duty PSOs must be stationed on each vessel-based observer platform. If an aerial platform is used (per § 217.284(e)(7)), at least two on-duty PSOs must be actively searching for marine mammals. Concurrently, at least one PAM operator per acoustic data stream (*i.e.,* equivalent to the number of acoustic buoys) must be actively monitoring for marine mammals 60 minutes before and during, and 30 minutes after impact pile driving in accordance with a NMFS-approved PAM Plan; and

(3) LOA Holder must conduct PAM for at least 24 hours immediately prior to pile driving activities. The PAM operator must review all detections from the previous 24-hour period immediately prior to pile driving activities.

(d) *PSO requirements during cable landfall construction activities.* The following measures apply to PSOs during cable landfall construction activities and must be implemented by LOA Holder:

(1) At least two PSOs must be on active duty during all activities related to cable landfall construction. These PSOs must be located at the best vantage points for observing marine mammals;

(2) PSOs must ensure that there is appropriate visual coverage for the entire clearance and shutdown zones and as much of the Level B harassment zone as possible; and

(3) PSOs must monitor the clearance zone for the presence of marine mammals for 30 minutes before and throughout pile driving, and for 30 minutes after all pile driving activities have ceased. Pile driving must only commence when visual clearance zones are fully visible (*e.g.,* not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to initiation of pile driving.

(e) *PSO requirements during HRG surveys.* The following measures apply to PSOs during HRG surveys using acoustic sources that have the potential to result in harassment (*i.e.,* Compressed High Intensity Radiated Pulse (CHIRPs), boomers, and sparkers) and must be implemented by LOA Holder:

(1) At least one PSO must be on active duty monitoring during HRG surveys conducted during daylight (*i.e.,* from 30 minutes prior to civil sunrise through 30 minutes following civil sunset) and at least two PSOs must be on active duty monitoring during HRG surveys conducted at night;

(2) PSOs on HRG vessels must begin monitoring 30 minutes prior to activating acoustic sources, during the use of these acoustic sources, and for 30 minutes after use of these acoustic sources has ceased;

(3) Any observations of marine mammals must be communicated to PSOs on all nearby survey vessels during concurrent HRG surveys; and

(4) During daylight hours when survey equipment is not operating, LOA Holder must ensure that visual PSOs conduct, as rotation schedules allow, observations for comparison of sighting rates and behavior with and without use of the specified acoustic sources. Off-effort PSO monitoring must be reflected in the monthly PSO monitoring reports.

(f) *Reporting.* LOA Holder must comply with the following reporting measures:

(1) Prior to initiation of any on-water project activities, LOA Holder must demonstrate in a report submitted to NMFS Office of Protected Resources that all required training for LOA Holder personnel (including the vessel crews, vessel captains, PSOs, and PAM operators) has been completed;

(2) LOA Holder must use a standardized reporting system during the effective period of the LOA. All data collected related to the Project must be recorded using industry-standard software that is installed on field laptops and/or tablets. Unless stated otherwise, all reports must be submitted to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*), dates must be in MM/DD/YYYY format, and location information must be provided in Decimal Degrees and with the coordinate system information (*e.g.,* NAD83, WGS84, *etc.*);

(3) For all visual monitoring efforts and marine mammal sightings, the following information must be collected and reported to NMFS Office of Protected Resources: the date and time that monitored activity begins or ends; the construction activities occurring during each observation period; the watch status (*i.e.,* sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform); the PSO who sighted the animal; the time of sighting; the weather parameters (*e.g.,* wind speed, percent cloud cover, visibility); the water conditions (*e.g.,* Beaufort sea state, tide state, water depth); all marine mammal sightings, regardless of distance from the construction activity; species (or lowest possible taxonomic level possible); the pace of the animal(s); the estimated number of animals (minimum/maximum/high/low/best); the estimated number of animals by cohort (*e.g.,* adults, yearlings, juveniles, calves, group composition, *etc.*); the description (*i.e.,* as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics); the description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling) and observed changes in behavior, including an assessment of behavioral responses thought to have resulted from the specific activity; the animal's closest distance and bearing from the pile being driven or specified HRG equipment and estimated time entered or spent within the Level A harassment and/or Level B harassment zone(s); the activity at time of sighting (*e.g.,* vibratory installation/removal, impact pile driving, construction survey), use of any noise attenuation device(s), and the specific phase of the activity (*e.g.,* ramp-up of HRG equipment, HRG acoustic source on/off, soft-start for pile driving, active pile driving, *etc.*); the marine mammal occurrence in Level A harassment or Level B harassment zones; the description of any mitigation-related action implemented, or mitigation-related actions called for but not implemented, in response to the sighting (*e.g.,* delay, shutdown, *etc.*) and time and location of the action; other human activity in the area, and; other applicable information, as required in any LOA issued under § 217.286;

(4) If a marine mammal is acoustically detected during PAM monitoring, the following information must be recorded and reported to NMFS: location of hydrophone (*i.e.,* latitude longitude; in Decimal Degrees) and site name; bottom depth and depth of recording unit (in meters); recorder (model manufacturer) and platform type (*i.e.,* bottom-mounted, electric glider, *etc.*), and instrument ID of the hydrophone and recording platform (if applicable); time zone for sound files and recorded date/times in data and metadata (in relation to UTC. *i.e.,* EST time zone is UTC–5); duration of recordings (*i.e.,* start/end dates and times; in ISO 8601 format, yyyy-mm-ddTHH:MM:SS.sssZ); deployment/retrieval dates and times (in ISO 8601 format); recording schedule (must be continuous); hydrophone and recorder sensitivity (in dB re. 1µ Pa); calibration curve for each recorder; bandwidth/sampling rate (in Hz); sample bit-rate of recordings; and detection range of equipment for relevant frequency bands (in meters). The following information must be reported for each detection: species identification (if possible); call type and number of calls (if known); temporal aspects of vocalization (*e.g.,* date, time,

duration, *etc.;* date times in ISO 8601 format); confidence of detection (*i.e.,* detected, or possibly detected); comparison with any concurrent visual sightings, location and/or directionality of call (if determined) relative to acoustic recorder or construction activities; location of recorder and construction activities at time of call; name and version of detection or sound analysis software used, with protocol reference; minimum and maximum frequencies viewed/monitored/used in detection (in Hz); and the name(s) of PAM operator(s) on duty;

(i) For each detection, the following information the following information must be noted: species identification (if possible); call type and number of calls (if known); temporal aspects of vocalization (*e.g.,* date, time, duration, *etc.;* date times in ISO 8601 format); confidence of detection (*i.e.,* detected, or possibly detected); comparison with any concurrent visual sightings; location and/or directionality of call (if determined) relative to acoustic recorder or construction activities; location of recorder and construction activities at time of call; name and version of detection or sound analysis software used, with protocol reference; minimum and maximum frequencies viewed/monitored/used in detection (in Hz); and the name(s) of PAM operator(s) on duty;

(ii) [Reserved]

(5) LOA Holder must compile and submit weekly reports during foundation installation to NMFS Office of Protected Resources that document the daily start and stop of all pile driving associated with the Project; the start and stop of associated observation periods by PSOs; details on the deployment of PSOs; a record of all acoustic and visual detections of marine mammals; any mitigation actions (or if mitigation actions could not be taken, provide reasons why); and details on the noise attenuation system(s) used and its performance. Weekly reports are due on Wednesday for the previous week (Sunday to Saturday) and must include the information required under this section. The weekly report must also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is completed, weekly reports are no longer required by LOA Holder;

(6) LOA Holder must compile and submit monthly reports to NMFS Office of Protected Resources during foundation installation that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, MMIS number, and route), number of piles installed, all detections of marine mammals, and any mitigative action taken. Monthly reports are due on the 15th of the month for the previous month. The monthly report must also identify which turbines become operational and when (a map must be provided). Full PAM detection data and metadata must also be submitted monthly on the 15th of every month for the previous month via the webform on the NMFS North Atlantic Right Whale Passive Acoustic Reporting System website at *https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates;*

(7) LOA Holder must submit a draft annual report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year. LOA Holder must provide a final report within 30 days following resolution of NMFS' comments on the draft report. The draft and final reports must detail the following: the total number of marine mammals of each species/stock detected and how many were within the designated Level A harassment and Level B harassment zone(s) with comparison to authorized take of marine mammals for the associated activity type; marine mammal detections and behavioral observations before, during, and after each activity; what mitigation measures were implemented (*e.g.,* number of shutdowns or clearance zone delays, *etc.*) or, if no mitigative actions was taken, why none were taken; operational details (*e.g.,* days and duration of impact and vibratory pile driving, days and amount of HRG survey effort, *etc.*); any PAM systems used; the results, effectiveness, and which noise attenuation systems were used during relevant activities (*i.e.,* impact pile driving); summarized information related to situational reporting; and any other important information relevant to the Project, including additional information that may be identified through the adaptive management process. The final annual report must be prepared and submitted within 30 calendar days following the receipt of any comments from NMFS on the draft report. If no comments are received from NMFS within 60 calendar days of NMFS' receipt of the draft report, the report must be considered final;

(8) LOA Holder must submit its draft 5-year report to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted within 90 calendar days of the completion of activities occurring under the LOA. A 5-year report must be prepared and submitted within 30 calendar days following receipt of any NMFS Office of Protected Resources comments on the draft report. If no comments are received from NMFS Office of Protected Resources within 30 calendar days of NMFS Office of Protected Resources receipt of the draft report, the report shall be considered final;

(9) For those foundation piles requiring thorough SFV measurements, LOA Holder must provide the initial results of the SFV measurements to NMFS Office of Protected Resources in an interim report after each foundation installation event as soon as they are available and prior to a subsequent foundation installation, but no later than 48 hours after each completed foundation installation event. The report must include, at minimum: hammer energies/schedule used during pile driving, including the total number of strikes and the maximum hammer energy; the model-estimated acoustic ranges ($R_{95percent}$) to compare with the real-world sound field measurements; peak sound pressure level (SPL_{pk}), root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}), and sound exposure level (SEL, in single strike for pile driving, SEL_{ss},), for each hydrophone, including at least the maximum, arithmetic mean, minimum, median (L50), and L5 (95 percent exceedance) statistics for each metric; estimated marine mammal Level A harassment and Level B harassment acoustic isopleths, calculated using the maximum-over-depth L5 (95 percent exceedance level, maximum of both hydrophones) of the associated sound metric; comparison of modeled results assuming 10-dB attenuation against the measured marine mammal Level A harassment and Level B harassment acoustic isopleths; estimated transmission loss coefficients; pile identifier name, location of the pile, and each hydrophone array in latitude/longitude; depths of each hydrophone; one-third-octave band single strike SEL spectra; if filtering is applied, full filter characteristics must be reported; and hydrophone specifications including the type, model, and sensitivity. LOA Holder must also report any immediate observations which are suspected to have a significant impact on the results including but not limited to: observed noise mitigation system issues; obstructions along the measurement transect; and technical issues with hydrophones or recording devices. If any *in-situ* calibration checks for

hydrophones reveal a calibration drift greater than 0.75 dB, pistonphone calibration checks are inconclusive, or calibration checks are otherwise not effectively performed, LOA Holder must indicate full details of the calibration procedure, results, and any associated issues in the 48-hour interim reports;

(10) LOA Holder must conduct abbreviated SFV for all foundation installations for which the complete SFV monitoring is not carried out (refer back to § 217.284(c)(13)), whereas a single acoustic recorder must be placed at an appropriate distance from the pile, in alignment with the completed Biological Opinion. All results must be included in the weekly reports. Any indications that distances to the identified Level A harassment and Level B harassment thresholds for marine mammals were exceeded must be addressed by LOA Holder, including an explanation of factors that contributed to the exceedance and corrective actions that were taken to avoid exceedance on subsequent piles;

(11) The final results of SFV measurements from each foundation installation must be submitted as soon as possible, but no later than 90 days following completion of each event's SFV measurements. The final reports must include all details prescribed above for the interim report as well as, at minimum, the following: the peak sound pressure level (SPL_{pk}); the root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}); the single strike sound exposure level (SEL_{ss}); the integration time for SPL_{rms}; the spectrum; and the 24-hour cumulative SEL extrapolated from measurements at all hydrophones. The final report must also include at least the following: the maximum, mean, minimum, median (L_{50}), and L_5 (95 percent exceedance) statistics for each metric; the SEL and SPL power spectral density and/or one-third octave band levels (usually calculated as decidecade band levels) at the receiver locations; the sound levels reported must be in median, arithmetic mean, and L_5 (95 percent exceedance) (*i.e.,* average in linear space), and in dB; range of TL coefficients; the local environmental conditions, such as wind speed, transmission loss data collected on-site (or the sound velocity profile); baseline pre- and post-activity ambient sound levels (broadband and/or within frequencies of concern); a description of depth and sediment type, as documented in the Construction and Operation Plan (COP), at the recording and foundation installation locations; the extents of the measured Level A harassment and Level B harassment zone(s); hammer energies required for pile installation and the number of strikes per pile; the hydrophone equipment and methods (*i.e.,* recording device, bandwidth/sampling rate; distance from the pile where recordings were made; the depth of recording device(s)); a description of the SFV measurement hardware and software, including software version used, calibration data, bandwidth capability and sensitivity of hydrophone(s), any filters used in hardware or software, any limitations with the equipment, and other relevant information; the spatial configuration of the noise attenuation device(s) relative to the pile; a description of the noise abatement system and operational parameters (*e.g.,* bubble flow rate, distance deployed from the pile, *etc.*), and any action taken to adjust the noise abatement system. A discussion, which includes any observations which are suspected to have a significant impact on the results including but not limited to, observed noise mitigation system issues, obstructions along the measurement transect, and technical issues with hydrophones or recording devices, must also be included in the final SFV report;

(12) If at any time during the Project LOA Holder becomes aware of any issue or issues which may (to any reasonable subject-matter expert, including the persons performing the measurements and analysis) call into question the validity of any measured Level A harassment or Level B harassment isopleths to a significant degree, which were previously transmitted or communicated to NMFS Office of Protected Resources, LOA Holder must inform NMFS Office of Protected Resources within 1 business day of becoming aware of this issue or before the next pile is driven, whichever comes first;

(13) If a North Atlantic right whale is acoustically detected at any time by a project-related PAM system, LOA Holder must ensure the detection is reported as soon as possible to NMFS, but no longer than 24 hours after the detection via the *24-hour North Atlantic right whale Detection Template* (*https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates*). Calling the hotline is not necessary when reporting PAM detections via the template;

(14) Full detection data, metadata, and location of recorders (or GPS tracks, if applicable) from all real-time hydrophones used for monitoring during construction must be submitted within 90 calendar days following completion of activities requiring PAM for mitigation via the ISO standard metadata forms available on the NMFS Passive Acoustic Reporting System website (*https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates*). Submit the completed data templates to *nmfs.nec.pacmdata@noaa.gov.* The full acoustic recordings from real-time systems must also be sent to the National Centers for Environmental Information (NCEI) for archiving within 90 days following completion of activities requiring PAM for mitigation. Submission details can be found at: *https://www.ncei.noaa.gov/products/passive-acoustic-data*;

(15) LOA Holder must submit situational reports if the following circumstances occur (including all instances wherein an exemption is taken must be reported to NMFS Office of Protected Resources within 24 hours):

(i) If a North Atlantic right whale is observed at any time by PSOs or project personnel, LOA Holder must ensure the sighting is immediately (if not feasible, as soon as possible and no longer than 24 hours after the sighting) reported to NMFS and the Right Whale Sightings Advisory System (RWSAS). If in the Northeast Region (Maine to Virginia/North Carolina border) call (866–755–6622). If in the Southeast Region (North Carolina to Florida) call (877–WHALE–HELP or 877–942–5343). If calling NMFS is not possible, reports can also be made to the U.S. Coast Guard via channel 16 or through the WhaleAlert app (*https://www.whalealert.org/*). The sighting report must include the time, date, and location of the sighting, number of whales, animal description/certainty of sighting (provide photos/video if taken), Lease Area/project name, PSO/personnel name, PSO provider company (if applicable), and reporter's contact information;

(ii) If a North Atlantic right whale is observed at any time by PSOs or project personnel, LOA Holder must submit a summary report to NMFS Greater Atlantic Regional Fisheries (GARFO; *nmfs.gar.incidental-take@noaa.gov*), NMFS Office of Protected Resources, and NMFS Northeast Fisheries Science Center (NEFSC; *ne.rw.survey@noaa.gov*) within 24 hours with the above information and the vessel/platform from which the sighting was made, activity the vessel/platform was engaged in at time of sighting, project construction and/or survey activity at the time of the sighting (*e.g.,* pile driving, cable installation, HRG survey), distance from vessel/platform to sighting at time of detection, and any mitigation actions taken in response to the sighting;

(iii) If a large whale (not including a North Atlantic right whale) is observed at any time by PSOs or project personnel during vessel transit, LOA Holder must report the sighting to the WhaleAlert app (*https://www.whalealert.org/*);

(iv) In the event that personnel involved in the Project discover a stranded, entangled, injured, or dead marine mammal, LOA Holder must immediately report the observation to NMFS. If in the Greater Atlantic Region (Maine to Virginia) call the NMFS Greater Atlantic Stranding Hotline (866–755–6622); if in the Southeast Region (North Carolina to Florida), call the NMFS Southeast Stranding Hotline (877–942–5343). Separately, LOA Holder must report the incident to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*) and, if in the Greater Atlantic region (Maine to Virginia), NMFS Greater Atlantic Regional Fisheries Office (GARFO; *nmfs.gar.incidental-take@noaa.gov, nmfs.gar.stranding@noaa.gov*) or, if in the Southeast region (North Carolina to Florida), NMFS Southeast Regional Office (SERO; *secmammalreports@noaa.gov*), as soon as feasible. The report (via phone or email) must include contact information (*e.g.,* name, phone number, *etc.*), the time, date, and location of the first discovery (and updated location information if known and applicable); species identification (if known) or description of the animal(s) involved; condition of the animal(s) (including carcass condition if the animal is dead); observed behaviors of the animal(s), if alive; photographs or video footage of the animal(s) if available; and general circumstances under which the animal was discovered; and

(v) In the event of a vessel strike of a marine mammal by any vessel associated with the Project or if the Project activities cause a non-auditory injury or death of a marine mammal, LOA Holder must immediately report the incident to NMFS. If in the Greater Atlantic Region (Maine to Virginia) call the NMFS Greater Atlantic Stranding Hotline (866–755–6622) and if in the Southeast Region (North Carolina to Florida) call the NMFS Southeast Stranding Hotline (877–942–5343). Separately, LOA Holder must immediately report the incident to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*) and, if in the Greater Atlantic region (Maine to Virginia), NMFS GARFO (*nmfs.gar.incidental-take@noaa.gov, nmfs.gar.stranding@noaa.gov*) or, if in the Southeast region (North Carolina to Florida), NMFS SERO (*secmammalreports@noaa.gov*). The report must include: the time, date, and location of the incident; species identification (if known) or description of the animal(s) involved; vessel size and motor configuration (*e.g.,* inboard, outboard, jet propulsion); vessel's speed leading up to and during the incident; vessel's course/heading and what operations were being conducted (if applicable); status of all sound sources in use; description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike; environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike; estimated size and length of animal that was struck; description of the behavior of the marine mammal immediately preceding and following the strike; if available, description of the presence and behavior of any other marine mammals immediately preceding the strike; estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and, to the extent practicable, photographs or video footage of the animal(s). LOA Holder must immediately cease all on-water activities until the NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. LOA Holder may not resume their activities until notified by NMFS Office of Protected Resources; and

(16) LOA Holder must report any lost gear associated with the fishery surveys to the NMFS GARFO Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*) as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

§ 217.286 Letter of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, LOA Holder must apply for and obtain an LOA;

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed February 21, 2029, the expiration date of this subpart;

(c) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, LOA Holder must apply for and obtain a modification of the LOA as described in § 217.287;

(d) The LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting;

(e) Issuance of the LOA must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under the regulations of this subpart; and

(f) Notice of issuance or denial of an LOA must be published in the **Federal Register** within 30 days of a determination.

§ 217.287 Modifications of Letter of Authorization.

(a) An LOA issued under §§ 217.282 and 217.286 or this section for the activity identified in § 217.280(a) shall be modified upon request by LOA Holder, provided that:

(1) The specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For a LOA modification request by the applicant that includes changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), the LOA shall be modified, provided that:

(1) NMFS Office of Protected Resources determines that the changes to the activity or the mitigation, monitoring, or reporting do not change the findings made for the regulations in this subpart and do not result in more than a minor change in the total estimated number of takes (or distribution by species or years); and

(2) NMFS Office of Protected Resources may, if appropriate, publish a notice of proposed modified LOA in the **Federal Register**, including the associated analysis of the change, and

solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 217.282 and 217.286 or this section for the activities identified in § 217.280(a) may be modified by NMFS Office of Protected Resources under the following circumstances:

(1) Through adaptive management, NMFS Office of Protected Resources may modify (*e.g.,* delete, modify, or add to) the existing mitigation, monitoring, or reporting measures after consulting with LOA Holder regarding the practicability of the modifications, if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA include, but are not limited to:

(A) Results from LOA Holder's monitoring(s);

(B) Results from other marine mammals and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by the regulations in this subpart or subsequent LOA.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS Office of Protected Resources shall publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If NMFS Office of Protected Resources determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in the LOA issued pursuant to §§ 217.282 and 217.286 or this section, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§§ 217.288–217.289 [Reserved]

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Part III

Department of Energy

10 CFR Part 430
Energy Conservation program: Energy Conservation Standards for Consumer Conventional Cooking Products; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2014–BT–STD–0005]

RIN 1904–AF57

Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Direct final rule.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including consumer conventional cooking products. In this direct final rule, the U.S. Department of Energy (''DOE'') is adopting new and amended energy conservation standards for consumer conventional cooking products. DOE has determined that the new and amended energy conservation standards for these products would result in significant conservation of energy, and are technologically feasible and economically justified.

DATES: The effective date of this rule is June 13, 2024. If adverse comments are received by June 3, 2024 and DOE determines that such comments may provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o), a timely withdrawal of this rule will be published in the **Federal Register**. If no such adverse comments are received, compliance with the new and amended standards established for consumer conventional cooking products in this direct final rule is required on and after January 31, 2028. Comments regarding the likely competitive impact of the standards contained in this direct final rule should be sent to the Department of Justice contact listed in the **ADDRESSES** section on or before March 15, 2024.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov*. All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2014-BT-STD-0005*. The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to submit a comment or review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov*.

The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the standards contained in this direct final rule. Interested persons may contact the Antitrust Division at *www.energy.standards@usdoj.gov* on or before the date specified in the **DATES** section. Please indicate in the ''Subject'' line of your email the title and Docket Number of this direct final rule.

FOR FURTHER INFORMATION CONTACT:

Dr. Carl Shapiro, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5649. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

Ms. Melanie Lampton, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 751–5157. Email: *Melanie.Lampton@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

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I. Synopsis of the Direct Final Rule

The Energy Policy and Conservation Act, Public Law 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B of EPCA [2] established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include consumer conventional cooking products, the subject of this direct final rule. (42 U.S.C. 6292(a)(10))

Pursuant to EPCA, any new or amended energy conservation standard must, among other things, be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

In light of the above and under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule establishing and amending energy conservation standards for consumer conventional cooking products.

The adopted standard levels in this direct final rule were proposed in a letter submitted to DOE jointly by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility. This letter, titled ''Energy Efficiency Agreement of 2023'' (hereafter, the ''Joint Agreement'' [3]), recommends specific energy conservation standards for consumer conventional cooking products that, in the commenters' view, would satisfy the EPCA requirements in 42 U.S.C. 6295(o). DOE subsequently received letters of support from States including New York, California, and Massachusetts [4] and utilities including San Diego Gas and Electric (''SDG&E'') and Southern California Edison (''SCE'') [5] advocating for the adoption of the recommended standards.

In accordance with the direct final rule provisions at 42 U.S.C. 6295(p)(4), DOE has determined that the recommendations contained in the Joint Agreement are compliant with 42 U.S.C. 6295(o). As required by 42 U.S.C. 6295(p)(4)(A)(i), DOE is also simultaneously publishing a notice of proposed rulemaking (''NOPR'') that contains identical standards to those adopted in this direct final rule. Consistent with the statute, DOE is providing a 110-day public comment period on the direct final rule. (42 U.S.C. 6295(p)(4)(B)) If DOE determines that any comments received provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o) or any other applicable law, DOE will publish the reasons for withdrawal and continue the rulemaking under the NOPR. (42 U.S.C. 6295(p)(4)(C)) *See* section II.A of this document for more details on DOE's statutory authority.

The new and amended standards that DOE is adopting in this direct final rule are the efficiency levels recommended in the Joint Agreement (shown in Table I.1 and Table I.2). They are performance-based standards for conventional cooking tops and prescriptive standards for conventional ovens. The standards for conventional cooking tops are expressed in terms of integrated annual energy consumption (''IAEC''), measured in thousand British thermal units per year (''kBtu/year'') for gas cooking tops and in kilowatt-hours per year (''kWh/year'') for electric cooking tops, as measured according to DOE's current conventional cooking top test procedure codified at title 10 of the Code of Federal Regulations (''CFR'') part 430, subpart B, appendix I1 (''appendix I1'').

The Joint Agreement replaces the existing prescriptive standard for gas cooking tops—which prohibits a constant burning pilot light—with a performance standard that is expressed as the maximum IAEC as determined in accordance with the appendix I1 test procedure. The Joint Agreement excludes portable indoor conventional cooking tops (discussed in section III.A of this document) from these amended standards, and DOE is clarifying in this direct final rule that the existing prohibition on constant burning pilot lights for gas portable indoor conventional cooking tops will continue to be applicable. For electric cooking tops, the Joint Agreement recommends

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] This document is available in the docket at: *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12811*.

[4] This document is available in the docket at: *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12812*.

[5] This document is available in the docket at: *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12813*.

a performance standard that similarly is expressed as the maximum IAEC, determined in accordance with the appendix I1 test procedure. For both gas and electric cooking tops, the IAEC metric includes active mode, standby mode, and off mode energy use. The Joint Agreement's standards for conventional cooking tops apply to all products listed in Table I.1 and manufactured in, or imported into, the United States starting on January 31, 2028.

Table I.1 Energy Conservation Performance Standards for Conventional Cooking Tops (Compliance Starting January 31, 2028)

Product Class	Maximum integrated annual energy consumption (IAEC)
Electric Open (Coil) Element Cooking Tops	No standard
Electric Smooth Element Standalone Cooking Tops	207 *kWh/year*
Electric Smooth Element Cooking Top Component of Combined Cooking Products	207 *kWh/year*
Gas Standalone Cooking Tops	1,770 *kBtu/year*
Gas Cooking Top Component of Combined Cooking Products	1,770 *kBtu/year*

DOE notes that none of the Department's energy conservation standards limit a consumer's use of a covered product, including consumer conventional cooking products. For example, the Joint Agreement's performance standards for conventional cooking tops, which are expressed as the maximum IAEC in kWh/year for electric cooking tops and kBtu/year for gas cooking tops, do not limit consumers' use of a conventional cooking top within the home. Rather, the IAEC metric is a measure of the estimated energy usage for a given cooking top model for a representative period of use (in this case, 1 year), as determined according to the DOE test procedure. Expressing energy conservation standards for conventional cooking tops in terms of the IAEC metric provides a common point of comparison across all conventional cooking top models, *e.g.,* a conventional cooking top with a lower IAEC is more energy efficient. And establishing a maximum IAEC ensures that all conventional cooking tops meet at least a certain level of energy efficiency, while not limiting a consumer's use of their conventional cooking top.

This direct final rule also establishes a prescriptive design requirement for conventional ovens that prohibits conventional ovens from being equipped with a control system that uses a linear power supply. (*See* Table I.2.) The new and amended standards recommended in the Joint Agreement are represented as trial standard level (''TSL'') 1 in this document and are described in section V.A of this document. These standards apply to all conventional ovens manufactured in, or imported into, the United States starting on January 31, 2028, as recommended by the Joint Agreement. DOE also notes that the current prescriptive standards for gas ovens prohibiting constant burning pilot lights will continue to be applicable. (10 CFR 430.32(j)) Table I.2 provides a summary of the standards for conventional ovens.

Table I.2 Prescriptive Energy Conservation Standards for Conventional Ovens (Compliance Starting January 31, 2028)

Product Class	New and Amended Standards
Electric Ovens	Shall not be equipped with a control system that uses linear power supply.*
Gas Ovens	The control system for gas ovens shall: (1) Not be equipped with a constant burning pilot light; and (2) Not be equipped with a linear power supply.*

* A linear power supply produces unregulated as well as regulated power. The unregulated portion of a linear power supply typically consists of a transformer that steps alternating current ("AC") line voltage down, a voltage rectifier circuit for AC to direct current ("DC") conversion, and a capacitor to produce unregulated, direct current output. Linear power supplies are described in section IV.C.1.b of this document.

A. Benefits and Costs to Consumers

Table I.3 summarizes DOE's evaluation of the economic impacts of the adopted standards on consumers of consumer conventional cooking products, as measured by the average life-cycle cost (''LCC'') savings and the simple payback period (''PBP'').[6] The average LCC savings are positive for all product classes, and the PBP is less than the average lifetime of consumer conventional cooking products, which is estimated to be 14.5 and 16.8 years for gas and electric cooking products, respectively (*see* section IV.F of this document).

[6] The average LCC savings refer to consumers that are affected by a standard and are measured relative to the efficiency distribution in the no-new-standards case, which depicts the market in the compliance year in the absence of new or amended standards (*see* section IV.F.9 of this document). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline product (*see* section IV.C of this document).

Table I.3 Impacts of Adopted Energy Conservation Standards on Consumers of Conventional Cooking Products

Product Class	Average LCC Savings *2022$*	Simple Payback Period *years*
Electric Smooth Element Standalone Cooking Top	$62.80	0.6
Electric Smooth Element Cooking Top Component of a Combined Cooking Product	$62.80	0.6
Gas Standalone Cooking Top	$3.09	6.6
Gas Cooking Top Component of a Combined Cooking Product	$3.09	6.6
Electric Oven	$16.23	2.1
Gas Oven	$15.17	1.9

DOE's analysis of the impacts of the adopted standards on consumers is described in section IV.F of this document.

B. Impact on Manufacturers

The industry net present value (''INPV'') is the sum of the discounted cash flows to the industry from the base year (2024) through the end of the analysis period, which is 30 years from the analyzed compliance date.[7] Using a real discount rate of 9.1 percent, DOE estimates that the INPV for manufacturers of consumer conventional cooking products in the case without new and amended standards is $1,601 million.[8] Under the adopted standards, which align with the Recommended TSL for consumer conventional cooking products, DOE estimates the change in INPV to range from −9.0 percent to −9.0 percent, which is approximately a change in INPV of −$144 million to −$143 million, respectively. In order to bring products into compliance with new and amended standards, it is estimated that industry will incur total conversion costs of $66.7 million.

DOE's analysis of the impacts of the adopted standards on manufacturers is described in section IV.J and section V.B.2 of this document.

C. National Benefits and Costs[9]

DOE's analyses indicate that the adopted energy conservation standards for consumer conventional cooking products would save a significant amount of energy. Relative to the case without new and amended standards, the lifetime energy savings for consumer conventional cooking products purchased in the 30-year period that begins in the anticipated year of compliance with the new and amended standards (2028–2057), amount to 0.22 quadrillion British thermal units (''Btu''), or quads.[10] This represents a savings of approximately 2 percent relative to the energy use of these products in the case without new or amended standards (referred to as the ''no-new-standards case'').

The cumulative net present value (''NPV'') of total consumer benefits of the standards for consumer conventional cooking products ranges from $0.65 billion (at a 7-percent discount rate) to $1.56 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased product and installation costs for consumer conventional cooking products purchased in 2028–2057.

In addition, the adopted standards for consumer conventional cooking products are projected to yield significant environmental benefits. DOE estimates that the standards will result in cumulative emission reductions (over the same period as for energy savings) of 3.99 million metric tons (''Mt'')[11] of carbon dioxide (''CO_2''), 1.15 thousand tons of sulfur dioxide (''SO_2''), 7.61 thousand tons of nitrogen oxides (''NO_X''), 34.70 thousand tons of methane (''CH_4''), 0.04 thousand tons of nitrous oxide (''N_2O''), and 0.01 tons of mercury (''Hg'').[12] The estimated cumulative reduction in CO_2 emissions through 2030 amounts to 0.06 Mt, which is equivalent to the emissions resulting from the annual electricity use of more than 11 thousand homes.

DOE estimates the value of climate benefits from a reduction in greenhouse gases (''GHG'') using four different estimates of the social cost of CO_2 (''SC-CO_2''), the social cost of methane (''SC-CH_4''), and the social cost of nitrous oxide (''SC-N_2O''). Together these represent the social cost of GHG (''SC-GHG''). DOE used interim SC-GHG values (in terms of benefit per ton of GHG avoided) developed by an Interagency Working Group on the Social Cost of Greenhouse Gases (''IWG'').[13] The derivation of these values is discussed in section IV.L of this document. For presentational purposes, the climate benefits associated with the average SC-GHG at a 3-percent discount rate are estimated to be $0.22 billion. DOE does not have a single central SC-GHG point estimate and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates.

DOE estimated the monetary health benefits of SO_2 and NO_X emissions reductions, using benefit per ton estimates from Environmental

[7] DOE's analysis period extends 30 years from the compliance year. The analysis period ranges from 2024–2056 for the no-new-standards case and all TSLs, except for TSL 1 (the Recommended TSL). The analysis period for the Recommended TSL ranges from 2024–2057 due to the 2028 compliance year.

[8] The no-new-standards case INPV of $1,601 million reflects the sum of discounted free cash flows from 2024–2056 (from the reference year to 30 years after the 2027 compliance date) plus a discounted terminal value.

[9] All monetary values in this document are expressed in 2022 dollars. and, where appropriate, are discounted to 2024 unless explicitly stated otherwise.

[10] The quantity refers to full-fuel-cycle (''FFC'') energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H.1 of this document.

[11] A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO_2 are presented in short tons.

[12] DOE calculated emissions reductions relative to the no-new-standards-case, which reflects key assumptions in the *Annual Energy Outlook 2023 (''AEO2023''). AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the Inflation Reduction Act. See section IV.K of this document for further discussion of *AEO2023* assumptions that effect air pollutant emissions.

[13] To monetize the benefits of reducing GHG emissions this analysis uses values that are based on the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG. (''Feb. 2021 SC–GHG TSD''*). www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.*

Protection Agency,[14] as discussed in section IV.L of this document. DOE did not monetize the reduction in mercury emissions because the quantity is very small. DOE estimated the present value of the health benefits would be $0.16 billion using a 7-percent discount rate, and $0.42 billion using a 3-percent discount rate.[15] DOE is currently only monetizing health benefits from changes in ambient fine particulate matter ($PM_{2.5}$) concentrations from two precursors (SO_2 and NO_X), and from changes in ambient ozone from one precursor (for NO_X), but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions.

Table I.4 summarizes the monetized benefits and costs expected to result from the new and amended standards for consumer conventional cooking products. There are other important unquantified effects, including certain unquantified climate benefits, unquantified public health benefits from the reduction of toxic air pollutants and other emissions, unquantified energy security benefits, and distributional effects, among others.

Table I.4 Summary of Monetized Benefits and Costs of Adopted Energy Conservation Standards for Consumer Conventional Cooking Products

	Billion 2022$
3% discount rate	
Consumer Operating Cost Savings	1.63
Climate Benefits*	0.22
Health Benefits**	0.42
Total Benefits†	2.27
Consumer Incremental Product Costs‡	0.07
Net Monetized Benefits	2.20
Change in Producer Cash Flow (INPV‡‡)	(0.14)
7% discount rate	
Consumer Operating Cost Savings	0.69
Climate Benefits* (3% discount rate)	0.22
Health Benefits**	0.16
Total Benefits†	1.07
Consumer Incremental Product Costs‡	0.04
Net Monetized Benefits	1.03
Change in Producer Cash Flow (INPV‡‡)	(0.14)

Note: This table presents the costs and benefits associated with consumer conventional cooking products shipped in 2028−2057. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped in 2028−2057.

* Climate benefits are calculated using four different estimates of the global SC-GHG (*see* section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3-percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions this analysis

[14] U.S. EPA. Estimating the Benefit per Ton of Reducing Directly-Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors and Ozone Precursors from 21 Sectors. Available at *www.epa.gov/benmap/estimating-benefit-ton-reducing-pm25-precursors-21-sectors.*

[15] DOE estimates the economic value of these emissions reductions resulting from the considered TSLs for the purpose of complying with the requirements of Executive Order 12866.

uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total and net benefits include those consumer, climate, and health benefits that can be quantified and monetized. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate, but DOE does not have a single central SC-GHG point estimate. DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates.

‡ Costs include incremental equipment costs as well as installation costs.

‡‡ Operating Cost Savings are calculated based on the life-cycle costs analysis and national impact analysis as discussed in detail below. *See* sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). *See* section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cash flow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. Change in INPV is calculated using the industry weighted average cost of capital value of 9.1 percent that is estimated in the MIA (*see* chapter 12 of the direct final rule technical support document ("TSD") for a complete description of the industry weighted average cost of capital). For consumer conventional cooking products, the change in INPV ranges from -$144 million to -$143 million. DOE accounts for that range of likely impacts in analyzing whether a TSL is economically justified. *See* section V.C of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table, and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated change in INPV in the previously table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this direct final rule to society, including potential changes in production and consumption, which is consistent with Office of Management and Budget ("OMB") Circular A-4 and Executive Order ("E.O.") 12866. If DOE were to include the INPV into the net benefit calculation for this direct final rule, the net benefits would be $2.06 billion at 3-percent discount rate and would be $0.89 billion at 7-percent discount rate. Parentheses () indicate negative values.

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are (1) the reduced consumer operating costs, minus (2) the increase in product purchase prices and installation costs, plus (3) the value of climate and health benefits of emission reductions, all annualized.[16]

The national operating cost savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered products and are measured for the lifetime of consumer conventional cooking products shipped in 2028–2057. The benefits associated with reduced emissions achieved as a result of the adopted standards are also calculated based on the lifetime of consumer conventional cooking products shipped in 2028–2057. Total benefits for both the 3-percent and 7-percent cases are presented using the average GHG social costs with 3-percent discount rate. Estimates of total benefits are presented for all four SC-GHG discount rates in section V.B.6 of this document.

Table I.5 presents the total estimated monetized benefits and costs associated with the adopted standards, expressed in terms of annualized values. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and health benefits from reduced NO_X and SO_2 emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated cost of the standards adopted in this rule is $3.9 million per year in increased equipment costs, while the estimated annual benefits are $68.1 million in reduced equipment operating costs, $12.4 million in climate benefits, and $16.1 million in health benefits. In this case, the net benefit would amount to $92.6 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the standards is $4.0 million per year in increased equipment costs, while the estimated annual benefits are $90.8 million in reduced operating costs, $12.4 million in climate benefits, and $23.5 million in health benefits. In this case, the net benefit would amount to $122.7 million per year.

[16] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2024, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2020 or 2030), and then discounted the present value from each year to 2024. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

Table I.5 Annualized Benefits and Costs of Adopted Standards for Consumer Conventional Cooking Products

	Million 2022$/year		
	Primary Estimate	Low-Net-Benefits Estimate	High-Net-Benefits Estimate
3% discount rate			
Consumer Operating Cost Savings	90.8	84.0	95.6
Climate Benefits*	12.4	11.9	12.5
Health Benefits**	23.5	22.6	23.8
Total Benefits†	126.7	118.4	131.9
Consumer Incremental Product Costs‡	4.0	4.1	3.8
Net Benefits	122.7	114.3	128.1
Change in Producer Cash Flow (INPV‡‡)	(13.8)	(13.8)	(13.8)
7% discount rate			
Consumer Operating Cost Savings	68.1	63.3	71.5
Climate Benefits* (3% discount rate)	12.4	11.9	12.5
Health Benefits**	16.1	15.5	16.3
Total Benefits†	96.6	90.7	100.3
Consumer Incremental Product Costs‡	3.9	4.0	3.8
Net Benefits	92.6	86.7	96.5
Change in Producer Cash Flow (INPV‡‡)	(13.8)	(13.8)	(13.8)

Note: This table presents the costs and benefits associated with consumer conventional cooking products shipped in 2028−2057. These results include consumer, climate, and health benefits that accrue after 2057 from the products shipped in 2028−2057. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low Net Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in sections IV.F.1 and IV.H.2 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC-GHG (see section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3-percent discount rate are shown, but DOE does not have a single central SC-GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. *See* section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate, but DOE does not have a single central SC-GHG point estimate.

‡ Costs include incremental equipment costs as well as installation costs.

‡‡ Operating Cost Savings are calculated based on the life-cycle costs analysis and national impact analysis as discussed in detail below. *See* sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (the MIA). *See* section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cash flow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 9.1 percent that is estimated in the MIA (*see* chapter 12 of the direct final rule TSD for a complete description of the industry weighted average cost of capital). For consumer conventional cooking products, the annualized change in INPV is -$13.8 million. DOE accounts for that range of likely impacts in analyzing whether a TSL is economically justified. *See* section V.C of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table, and the Preservation of Operating

Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annualized change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this direct final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for this direct final rule, the annualized net benefits would be $108.9 million at 3-percent discount rate and would be $78.8 million at 7-percent discount rate. Parentheses () indicate negative values.

DOE's analysis of the national impacts of the adopted standards is described in sections IV.H, IV.K, and IV.L of this document.

D. Conclusion

DOE has determined that the Joint Agreement was submitted jointly by interested persons that are fairly representative of relevant points of view, in accordance with 42 U.S.C. 6295(p)(4)(A). After considering the recommended standards and weighing the benefits and burdens, DOE has determined that the recommended standards are in accordance with 42 U.S.C. 6295(o), which contains the criteria for prescribing new or amended standards. Specifically, the Secretary of Energy (''Secretary'') has determined that the adoption of the recommended standards would result in the significant conservation of energy and is the maximum improvement in energy efficiency that is technologically feasible and economically justified. In determining whether the recommended standards are economically justified, the Secretary has determined that the benefits of the recommended standards exceed the burdens. The Secretary has further concluded that the recommended standards, when considering the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings, would yield benefits that outweigh the negative impacts on some consumers and on manufacturers, including the conversion costs that could result in a reduction in INPV for manufacturers.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the standards for consumer conventional cooking products is $3.9 million per year in increased product costs, while the estimated annual benefits are $68.1 million in reduced product operating costs, $12.4 million in climate benefits, and $16.1 million in health benefits. The net benefit amounts to $92.6 million per year. DOE notes that the net benefits are substantial even in the absence of the climate benefits,[17] and DOE would adopt the same standards in the absence of such benefits.

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[18] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis.

As previously mentioned, the standards are projected to result in estimated national energy savings of 0.22 quads FFC, the equivalent of the primary annual energy use of 1.4 million homes. In addition, they are projected to reduce cumulative CO_2 emissions by 3.99 Mt. Based on these findings, DOE has determined the energy savings from the standard levels adopted in this direct final rule are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B). A more detailed discussion of the basis for these conclusions is contained in the remainder of this document and the accompanying technical support document (''TSD'').[19]

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule establishing and amending the energy conservation standards for consumer conventional cooking products. Consistent with this authority, DOE is also simultaneously publishing elsewhere in this **Federal Register** a NOPR proposing standards that are identical to those contained in this direct final rule. See 42 U.S.C. 6295(p)(4)(A)(i).

[17] The information on climate benefits is provided in compliance with Executive Order 12866.

[18] Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 FR 70892, 70901 (Dec. 13, 2021).

[19] The TSD is available in the docket for this rulemaking at *www.regulations.gov/docket/EERE-2014-BT-STD-0005/document.*

II. Introduction

The following section briefly discusses the statutory authority underlying this direct final rule, as well as some of the relevant historical background related to the establishment of standards for consumer conventional cooking products.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. These products include consumer conventional cooking products, the subject of this document. (42 U.S.C. 6292(a)(10)) EPCA prescribed energy conservation standards for these products (42 U.S.C. 6295(h)(1)), and directed DOE to conduct future rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(h)(2)) EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1))

The energy conservation program under EPCA, consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing,

labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (See 42 U.S.C. 6297(d))

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedures for conventional cooking tops appear at appendix I1. There are currently no DOE test procedures for conventional ovens.

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including consumer conventional cooking products. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

Moreover, DOE may not prescribe a standard if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. A rule prescribing an energy conservation standard for a type (or class) of product must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group: (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE considers such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. (*Id.*) Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Additionally, pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, final rules for new or amended energy conservation standards promulgated after July 1, 2010, are required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedures for conventional cooking tops address standby mode and off mode energy use, as do the new and amended standards adopted in this direct final rule.

Finally, EISA 2007 amended EPCA, in relevant part, to grant DOE authority to issue a final rule (*i.e.,* a ''direct final rule'') establishing an energy conservation standard upon receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, that contains recommendations with respect to an energy or water conservation standard. (42 U.S.C. 6295(p)(4)) Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly-submitted recommendation for an energy or water conservation standard satisfies 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable.

The direct final rule must be published simultaneously with a NOPR that proposes an energy or water conservation standard that is identical to the standard established in the direct final rule, and DOE must provide a public comment period of at least 110 days on this proposal. (42 U.S.C. 6295(p)(4)(A)–(B)) While DOE typically provides a comment period of 60 days on proposed standards, for a NOPR accompanying a direct final rule, DOE provides a comment period of the same length as the comment period on the direct final rule—*i.e.,* 110 days. Based on the comments received during this period, the direct final rule will either become effective, or DOE will withdraw it not later than 120 days after its issuance if: (1) one or more adverse comments is received, and (2) DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, may provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(C)) Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner. (*Id.*)

DOE has previously explained its interpretation of its direct final rule authority. In a final rule amending the Department's ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products'' at 10 CFR part 430, subpart C, appendix A (''Process Rule'' or ''appendix A''), DOE noted that it may issue standards recommended by interested persons that are fairly representative of relative points of view as a direct final rule when the recommended standards are in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. 86 FR 70892, 70912 (Dec. 13, 2021). But the direct final rule provision in EPCA does not impose additional requirements applicable to other standards rulemakings, which is consistent with the unique circumstances of rules issued through consensus agreements under DOE's direct final rule authority. *Id.* DOE's discretion remains bounded by its statutory mandate to adopt a standard that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified—a requirement found in 42 U.S.C. 6295(o). *Id.* As such, DOE's review and analysis of the Joint Agreement is limited to whether the recommended standards satisfy the criteria in 42 U.S.C. 6295(o).

B. Background

1. Current Standards

In a final rule published on April 8, 2009 (''April 2009 Final Rule''), DOE prescribed the current energy conservation standards for consumer conventional cooking products that prohibit constant burning pilot lights for all gas cooking products (*i.e.,* gas cooking products with or without an electrical supply cord) manufactured on and after April 9, 2012. 74 FR 16040. These standards are set forth in DOE's regulations at 10 CFR 430.32(j)(1)–(2).

2. Current Test Procedure

On August 22, 2022, DOE published a test procedure final rule (''August 2022 TP Final Rule'') establishing a test procedure for conventional cooking tops, at 10 CFR part 430, subpart B, appendix I1, ''Uniform Test Method for the Measuring the Energy Consumption of Conventional Cooking Products.'' 87 FR 51492. The test procedure adopted the latest version of the relevant industry standard published by the International Electrotechnical Commission (''IEC''), Standard 60350–2 (Edition 2.0 2017–08), ''Household electric cooking appliances—Part 2: Hobs—Methods for measuring performance'' (''IEC 60350–2:2021''), for electric cooking tops with modifications including adapting the test method to gas cooking tops, normalizing the energy use of each test cycle to a consistent final water temperature, and including a measurement of standby mode and off mode energy use. *Id.*

On February 7, 2023, DOE published correcting amendments to the August 2022 TP Final Rule (''February 2023 Correcting Amendments''). 88 FR 7846. Neither the errors and omissions nor the corrections affected the substance of the rulemaking, or any conclusions reached in support of the August 2022 TP Final Rule. *Id.*

3. History of Standards Rulemaking for Consumer Conventional Cooking Products

The National Appliance Energy Conservation Act of 1987 (''NAECA''), Public Law 100–12, amended EPCA to establish prescriptive standards for gas cooking products, requiring gas ranges and ovens with an electrical supply cord that are manufactured on or after January 1, 1990, not to be equipped with a constant burning pilot light. (42 U.S.C. 6295(h)(1)) NAECA also directed DOE to conduct two cycles of rulemakings to determine if more stringent or additional standards were justified for kitchen ranges and ovens. (42 U.S.C. 6295(h)(2))

DOE undertook the first cycle of these rulemakings and published a final rule on September 8, 1998 (''September 1998 Final Rule''), which found that no standards were justified for conventional electric cooking products at that time. 63 FR 48038. In addition, partially due to the difficulty of conclusively demonstrating at that time that elimination of standing pilot lights for gas cooking products without an electrical supply cord was economically justified, DOE did not include amended standards for gas cooking products in the September 1998 Final Rule. 63 FR 48038, 48039–48040. For the second cycle of rulemakings, DOE published the April 2009 Final Rule amending the energy conservation standards for consumer conventional cooking products to prohibit constant burning pilot lights for all gas cooking products (*i.e.,* gas cooking products with or without an electrical supply cord) manufactured on or after April 9, 2012. DOE decided to not adopt energy conservation standards pertaining to the cooking efficiency of conventional electric cooking products because it determined that such standards would not be technologically feasible and economically justified at that time. 74 FR 16040, 16085.[20]

4. The Joint Agreement

On September 25, 2023, DOE received a joint statement (*i.e.,* the Joint Agreement) recommending standards for consumer conventional cooking products that was submitted by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility.[21] In addition to the

[20] As part of the April 2009 Final Rule, DOE decided not to adopt energy conservation standards pertaining to the cooking efficiency of microwave ovens. DOE has since published a final rule on June 20, 2023, adopting amended energy conservation standards for microwave oven standby mode and off mode. 88 FR 39912. DOE is not considering energy conservation standards for microwave ovens as part of this direct final rule.

[21] The signatories to the Joint Agreement include the Association of Home Appliance Manufacturers (''AHAM''), American Council for an Energy-Efficient Economy, Alliance for Water Efficiency, Appliance Standards Awareness Project, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, and Pacific Gas and Electric Company. Members of AHAM's Major Appliance Division that make the affected products include: Alliance Laundry Systems, LLC; Asko Appliances AB; Beko US Inc.; Brown Stove Works, Inc.; BSH Home Appliances Corporation; Danby Products, Ltd.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber; Fotile America; GE Appliances, a Haier Company; L'Atelier Paris Haute Design LLG; LG Electronics; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Appliances Refrigeration Systems (PAPRSA) Corporation of America; Perlick Corporation;

Continued

recommended standards for consumer conventional cooking products, the Joint Agreement also included separate recommendations for several other covered products.[22] And, while acknowledging that DOE may implement these recommendations in separate rulemakings, the Joint Agreement also stated that the recommendations were recommended as a complete package and each recommendation is contingent upon the other parts being implemented. DOE understands this to mean that the Joint Agreement is contingent upon DOE initiating rulemaking processes to adopt all of the recommended standards in the agreement. That is distinguished from an agreement where issuance of an amended energy conservation standard for a covered product is contingent on issuance of amended energy conservation standards for the other covered products. If the Joint Agreement were so construed, it would conflict with the anti-backsliding provision in 42 U.S.C. 6295(o)(1), because it would imply the possibility that, if DOE were unable to issue an amended standard for a certain product, it would have to withdraw a previously issued standard for one of the other products. The anti-backsliding provision, however, prevents DOE from withdrawing or amending an energy conservation standard to be less stringent. As a result, DOE will be proceeding with individual rulemakings that will evaluate each of the recommended standards separately under the applicable statutory criteria. The Joint Agreement recommends new and amended standard levels for consumer conventional cooking products as presented in Table II.1. (Joint Agreement, No. 12811 at p. 10) Details of the Joint Agreement recommendations for other products are provided in the Joint Agreement posted in the docket.[23]

Table II.1 Recommended New and Amended Energy Conservation Standards for Consumer Conventional Cooking Products

Product Class	Standard Level	Compliance Date
Electric Coil	No standard	January 31, 2028
Propose new class: Electric smooth Cooktop*	207 kWh/year	
Propose new Class: Electric smooth range*	207 kWh/year	
Propose new class: Gas cooktop*	1,770 *kBtu/year*	
Propose new class: Gas range*	1,770 *kBtu/year*	
Ovens (Electric and Gas)*	Electric: Baseline + SMPS Gas: Baseline + SMPS	

* Excludes portable cooking products.

The Joint Agreement also stated that the signatories would propose separately to DOE the inclusion of an alternative simmer calculation in the DOE test procedure for use in certification. (*Id.*) The Joint Agreement specified that, for enforcement purposes, DOE would rely on the full simmer test, rather than the alternative simmer calculation (which would be similar to the triangulation method used for refrigerator/freezers at 10 CFR 429.134(b)(2)). (*Id.*) DOE received a comment on the cooking top test procedure from the Joint Agreement signatories[24] on January 5, 2024, and will address the issues raised in the comment in a separate test procedure rulemaking.

When the Joint Agreement was submitted, DOE was conducting a rulemaking to consider amending the standards for consumer conventional cooking products. As part of that process, DOE published a supplemental notice of proposed rulemaking (''SNOPR'') and announced a public meeting on February 1, 2023, (''February 2023 SNOPR'') seeking comment on its proposed new and amended standards for consumer conventional cooking products to inform its decision consistent with its obligations under EPCA and the Administrative Procedure Act (''APA''). 88 FR 6818. The February 2023 SNOPR proposed new and amended standards for consumer conventional cooking products, consisting of maximum IAEC levels for electric and gas cooking tops and design requirements for conventional ovens. *Id.* Subsequently, on February 28, 2023, DOE published a notification of data availability (''NODA'') providing additional information to clarify the February 2023 SNOPR analysis for gas cooking tops (''February 2023 NODA''). 88 FR 6818. Finally, on August 2, 2023, DOE published a second NODA (''August 2023 NODA'') updating its analysis for gas cooking tops based on the stakeholder data it received in response to the February 2023 SNOPR. 88 FR 50810. The February 2023 SNOPR TSD is available at: *www.regulations.gov/document/EERE-2014-BT-STD-0005-0090*.

Although DOE is adopting the Joint Agreement as a direct final rule and no longer proceeding with its own rulemaking, DOE did consider relevant comments, data, and information obtained during that rulemaking process

Samsung Electronics America, Inc.; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; The Middleby Corporation; U-Line Corporation; Viking Range, LLC; and Whirlpool Corporation.

[22] The Joint Agreement contained recommendations for 6 covered products: refrigerators, refrigerator-freezers, and freezers; clothes washers; clothes dryers; dishwashers; cooking products; and miscellaneous refrigeration products.

[23] The Joint Agreement is available in the docket at *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12811*.

[24] In the test procedure comment letter, only the following Joint Agreement signatories were included: AHAM, Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, the Northwest Energy Efficiency Alliance, and the Pacific Gas and Electric Company. Furthermore, AHAM noted that it represents the following companies who manufacture residential cooking products are members of the AHAM Major Appliance Division: Arcelik A.S.; Beko US, Inc.; Brown Stove Works, Inc.; BSH Home Appliances Corporation; Danby Products, Ltd.; De'Longhi America, Inc.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber S.p.A.; FOTILE America, LLC; GE Appliances, a Haier Company; Gradient, Inc.; Hisense USA Corporation; LG Electronics USA, Inc.; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Corporation of America; Samsung Electronics America Inc.; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; Viking Range, LLC; and Whirlpool Corporation.

in determining whether the recommended standards from the Joint Agreement are in accordance with 42 U.S.C. 6295(o). Any discussion of comments, data, or information in this direct final rule that were obtained during DOE's prior rulemaking will include a parenthetical reference that provides the location of the item in the public record.[25]

III. General Discussion

DOE is issuing this direct final rule after determining that the recommended standards submitted in the Joint Agreement meet the requirements in 42 U.S.C. 6295(p)(4). More specifically, DOE has determined that the recommended standards were submitted by interested persons that are fairly representative of relevant points of view and the recommended standards satisfy the criteria in 42 U.S.C. 6295(o).

A. Scope of Coverage

Before discussing how the Joint Agreement meets the requirements for issuing a direct final rule, it is important to clarify the scope of coverage for the recommended standards. DOE's regulations at 10 CFR 430.2 define ''cooking products'' as consumer products that are used as the major household cooking appliances. They are designed to cook or heat different types of food by one or more of the following sources of heat: gas, electricity, or microwave energy. Each product may consist of a horizontal cooking top containing one or more surface units [26] and/or one or more heating compartments. 10 CFR 430.2. This direct final rule covers consumer conventional cooking products, *i.e.,* those consumer cooking products that meet the definition of ''conventional cooking top'' and ''conventional oven,'' as codified at 10 CFR 430.2. Industrial cooking equipment and microwave ovens are not in the scope of this direct final rule.

In the Joint Agreement, portable cooking products are excluded from the Recommended TSL. (Joint Agreement, No. 12811 at p. 10) However DOE does not currently have a definition for portable cooking products, nor does the Joint Agreement specify one.

In the February 2023 SNOPR, DOE proposed to define a portable conventional cooking top as a conventional cooking top designed to be moved from place to place. 88 FR 6818, 6829. Using this definition, DOE proposed that the proposed standards for conventional cooking tops would apply to portable models according to their means of heating (gas, electric open (coil) element, or electric smooth element). *Id.*

In the February 2023 SNOPR, DOE requested comment on its proposed definition for portable conventional cooking top and DOE's proposal to include portable conventional cooking tops in the existing product classes. *Id.* Stakeholder comments received in response to the February 2023 SNOPR regarding DOE's definition of portable conventional cooking top and proposal to include portable conventional cooking tops in the standards were consistent with the exclusion of portable cooking products specified in the Joint Agreement.

AHAM stated its strong opposition to the inclusion of portable cooking tops in the scope of energy conservation standards for cooking tops because AHAM asserted DOE had done no analysis on this product type and made little mention of them in the February 2023 SNOPR. (AHAM, No. 2285 at pp. 28–29; AHAM, No. 10116 at pp. 31–32) AHAM commented that DOE's proposed definition is so vague that AHAM believes it could include a wide array of products such as cooking tops in recreational vehicles and tea kettles. (*Id.*) AHAM further requested that if portable cooking products are included in the scope of this rule, DOE ensure it provides the public with notice and an opportunity to comment on its analysis and proposal. (*Id.*)

AHAM commented that it opposes including portable cooking tops in the scope of the energy conservation standards for cooking tops. (AHAM, No. 10116 at pp. 31–32) AHAM commented that there is inadequate data to consider standards for portable cooking tops, given that the expanded test sample contains only one portable cooking top with a single cooking zone. (*Id.*) AHAM asserted that given the lack of repeatability and reproducibility data on portable cooking top units, DOE should account for at least a 5.6 percent variation between laboratories, as shown for an electric unit in DOE's test procedure round robin testing, resulting in an IAEC of 216 kWh/year for the tested portable unit that does not meet the proposed standard for electric smooth element cooking tops. (*Id.*) AHAM asserted that portable cooking tops may be eliminated from the market if the proposed standard is finalized. (*Id.*)

Consumers' Research asserted that regulating the energy efficiency of portable gas cooking tops under the same rules as stationary cooking tops is unreasonable and recommended that DOE consider separate rulemakings for each of these product categories. (Consumers' Research, No. 2267 at p. 5) Consumers' Research noted that portable gas cooking tops have a different range of manufacturing costs and constraints than stationary gas cooking tops, they use different types of natural gas, and the cost structure for manufacturing them is different. (*Id.*) Consumers' Research further commented that portable gas cooking tops account for only a tiny percentage of the energy consumed by all gas cooking products and their exclusion would not substantially affect the projected energy efficiency benefits of the proposed rule. (*Id.*)

DOE also received eight comments from individual commenters who expressed concerns about the impact of the standards proposed in the February 2023 SNOPR on barbecues and grills.

As discussed, the Joint Agreement does not specify a definition for portable cooking tops. But, based on the comments received in response to the February 2023 SNOPR, DOE has determined that additional clarity is warranted regarding the definition of a portable conventional cooking top. DOE notes that, as proposed in the February 2023 SNOPR, a portable conventional cooking top is a category of conventional cooking top. DOE defines a ''conventional cooking top'' as a category of cooking products that is a household cooking appliance consisting of a horizontal surface containing one or more surface units that utilize a gas flame, electric resistance heating, or electric inductive heating. This includes any conventional cooking top component of a combined cooking product. 10 CFR 430.2.

Furthermore, as defined, a conventional cooking top is a category of cooking product. DOE defines ''cooking products'' as consumer products that are used as the major household cooking appliances. They are designed to cook or heat different types of food by one or more of the following sources of heat: Gas, electricity, or microwave energy. Each product may consist of a horizontal cooking top containing one or more surface units and/or one or more heating compartments. 10 CFR 430.2.

[25] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop energy conservation standards for consumer conventional cooking products. (Docket No. EERE–2014–BT–STD–0005, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

[26] The term ''surface unit'' refers to burners for gas cooking tops and electric resistance heating elements or inductive heating elements for electric cooking tops.

Therefore, in order for any product to be considered a portable conventional cooking top, it must also satisfy the definition of conventional cooking top and of cooking product, as defined in 10 CFR 430.2.

Specifically, DOE does not consider a tea kettle to be a major household cooking appliance designed to cook or heat different types of food. Therefore, a tea kettle does not meet the definition of a cooking product and cannot be considered a portable conventional cooking top.

Regarding a cooking top in a recreational vehicle (''RV''), DOE notes that EPCA excludes from coverage those consumer products designed solely for use in RVs and other mobile equipment. 42 U.S.C. 6292(a). For example, DOE is aware of gas cooking tops that incorporate an ignition system that must be connected to 12 Volts of direct current power, which is commonly used in RV battery systems and is not present in U.S. households, and has determined that these products are designed solely for use in RVs and therefore excluded from coverage. Regarding the definition of portable cooking tops, DOE further notes that although a cooking top that is not designed solely for use in RVs or other mobile equipment may be installed within a vehicle, the product itself is not necessarily designed to be moved from place to place within the installed location. Therefore, the mere fact of installing a cooking top in an RV does not classify the product as a portable conventional cooking top.

Regarding barbecues and grills, DOE does not consider these products to be used as the main sources of cooking within a household. Therefore, DOE determines that barbecues and grills do not satisfy the definition of cooking product.

To ensure clarity in this regard, in this direct final rule, DOE is further specifying that portable cooking tops are portable indoor conventional cooking tops and is defining ''portable indoor conventional cooking top'' as a conventional cooking top designed (1) for indoor use and (2) to be moved from place to place.

For these reasons, DOE has determined that portable indoor conventional cooking tops are covered products. But as specified in the Joint Agreement, DOE is not adopting standards for these products in this direct final rule. However, gas portable indoor conventional cooking tops, as gas cooking products, remain subject to the existing prohibition on constant burning pilot lights. DOE may consider adopting amended standards for portable indoor conventional cooking tops in a future rulemaking.

See section IV.A.1 of this document for discussion of the product classes analyzed in this direct final rule.

B. Fairly Representative of Relevant Points of View

Under the direct final rule provision in EPCA, recommended energy conservation standards must be submitted by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates) as determined by DOE. (42 U.S.C. 6295(p)(4)(A)) With respect to this requirement, DOE notes that the Joint Agreement included a trade association, AHAM, which represents 19 manufacturers of consumer conventional cooking products. The Joint Agreement also included environmental and energy-efficiency advocacy organizations, consumer advocacy organizations, and a gas and electric utility company. Additionally, DOE received a letter in support of the Joint Agreement from the States of New York, California, and Massachusetts (See comment No. 12812). DOE also received a letter in support of the Joint Agreement from the gas and electric utility, SDG&E, and the electric utility, SCE (*See* comment No. 12813). As a result, DOE has determined that the Joint Agreement was submitted by interested persons who are fairly representative of relevant points of view.

C. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. Sections 6(b)(3)(i) and 7(b)(1) of the Process Rule.

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety and (4) unique-pathway proprietary technologies. Section 7(b)(2)-(5) of the Process Rule. Section IV.B of this document discusses the results of the screening analysis for consumer conventional cooking products, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this rulemaking, *see* chapter 4 of the direct final rule TSD.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt a new or amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(o)(2)(A)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for consumer conventional cooking products, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.C of this document and in chapter 5 of the direct final rule TSD.

D. Energy Savings

1. Determination of Savings

For each trial standard level (''TSL''), DOE projected energy savings from application of the TSL to consumer conventional cooking products purchased in the 30-year period that begins in the year of compliance with the new or amended standards (2027–2056 for all TSLs except the Recommended TSL, *i.e.,* TSL 1, and 2028–2057 for TSL 1).[27] The savings are measured over the entire lifetime of consumer conventional cooking products purchased in the 30-year analysis period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely

[27] DOE also presents a sensitivity analysis that considers impacts for products shipped in a 9-year period.

evolve in the absence of new or amended energy conservation standards.

DOE used its national impact analysis (''NIA'') spreadsheet models to estimate national energy savings (''NES'') from potential new or amended standards for consumer conventional cooking products. The NIA spreadsheet model (described in section IV.H of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE reports national energy savings in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. For natural gas, the primary energy savings are considered to be equal to the site energy savings. DOE also calculates NES in terms of FFC energy savings. The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.[28] DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H.2 of this document.

2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in significant energy savings. (42 U.S.C. 6295(o)(3)(B))

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[29] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis, taking into account the significance of cumulative FFC national energy savings, the cumulative FFC emissions reductions, and the need to confront the global climate crisis, among other factors.

As stated, the standard levels adopted in this direct final rule are projected to result in national energy savings of 0.22 quad, the equivalent of the primary annual energy use of 1.5 million homes. Based on the amount of FFC savings, the corresponding reduction in emissions, and the need to confront the global climate crisis, DOE has determined the energy savings from the standard levels adopted in this direct final rule are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B).

E. Economic Justification

1. Specific Criteria

As noted previously, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)(VII)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of potential new or amended standards on manufacturers, DOE conducts an MIA, as discussed in section IV.J of this document. DOE first uses an annual cash flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include (1) INPV, which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and payback period (''PBP'') associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the consumer costs and benefits expected to result from particular standards. DOE also evaluates the impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a standard.

b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analysis.

The LCC is the sum of the purchase price of a product (including its installation) and the operating cost (including energy, maintenance, and repair expenditures) discounted over the lifetime of the product. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first year of compliance with new or amended standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new or amended standards. DOE's LCC and PBP analysis is discussed in further detail in section IV.F of this document.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy

[28] The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

[29] Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 FR 70892, 70901 (Dec. 13, 2021).

conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section IV.H of this document, DOE uses the NIA spreadsheet models to project national energy savings.

d. Lessening of Utility or Performance of Products

In evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards adopted in this document would not reduce the utility or performance of the products under consideration in this rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii)) DOE will transmit a copy of this direct final rule to the Attorney General with a request that the Department of Justice (''DOJ'') provide its determination on this issue. DOE will consider DOJ's comments on the rule in determining whether to withdraw the direct final rule. DOE will also publish and respond to the DOJ's comments in the **Federal Register** in a separate notice.

f. Need for National Energy Conservation

DOE also considers the need for national energy and water conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the adopted standards are likely to provide improvements to the security and reliability of the Nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity, as discussed in section IV.M of this document.

DOE maintains that environmental and public health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy conservation. The adopted standards are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases (''GHGs'') associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K of this document; the estimated emissions impacts are reported in section V.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L of this document.

g. Other Factors

In determining whether an energy conservation standard is economically justified, DOE may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) To the extent DOE identifies any relevant information regarding economic justification that does not fit into the other categories described previously, DOE could consider such information under ''other factors.''

In response to the February 2023 SNOPR, ONE Gas commented that economic justification should be based primarily upon consumer LCC savings and that economic benefits associated with highly speculative health benefits should play only a minor role. (ONE Gas, No. 2289 at pp. 8–9, 15).

As described in the preceding sections, consumer impacts are one of seven factors listed in EPCA for DOE to consider when determining whether a potential energy conservation standard is economically justified. DOE has and will continue to consider all of these factors in determining whether a potential energy conservation standard is economically justified.

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effect potential new or amended energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F of this document.

IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this rulemaking with regard to consumer conventional cooking products. Separate subsections address each component of DOE's analyses, including relevant comments DOE received during its separate rulemaking to amend the energy conservation standards for consumer conventional cooking products prior to receiving the Joint Agreement.

DOE used several analytical tools to estimate the impact of the standards considered in this document. The first tool is a spreadsheet that calculates the LCC savings and PBP of potential new or amended energy conservation standards. The national impacts analysis uses a second spreadsheet set that provides shipments projections and calculates national energy savings and net present value of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (''GRIM''), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE website for this rulemaking: *www.regulations.gov/docket/EERE-2014-BT-STD-0005/document*. Additionally, DOE used output from the latest version of the U.S. Energy Information Administration (''EIA'') *Annual Energy Outlook* (''*AEO*'') for the emissions and utility impact analyses.

A. Market and Technology Assessment

DOE develops information in the market and technology assessment that provides an overall picture of the

market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly-available information. The subjects addressed in the market and technology assessment for this rulemaking include (1) a determination of the scope of the rulemaking and product classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends, and (6) technologies or design options that could improve the energy efficiency of consumer conventional cooking products. The key findings of DOE's market assessment are summarized in the following sections. *See* chapter 3 of the direct final rule TSD for further discussion of the market and technology assessment.

1. Product Classes

The Joint Agreement specifies seven product classes for consumer conventional cooking products. (Joint Agreement, No. 12811 at p. 10) In particular, the Joint Agreement recommends separate product classes for ranges—a type of combined cooking product that combines a conventional cooking top and a conventional oven—and standalone cooking tops for both electric smooth element cooking tops and gas cooking tops. (*Id.*) In this direct final rule, DOE is adopting the product classes from the Joint Agreement, with updated nomenclature that clarifies that the ''range'' product classes refer to the cooking top component of any combined cooking product, as listed in Table IV.1.

Table IV.1 Product Classes for Consumer Conventional Cooking Products

Joint Agreement Product Class	Analyzed Product Class
Electric coil	Electric open (coil) element cooking top
Electric smooth cooktop	Electric smooth element standalone cooking top
Electric smooth range	Electric smooth element cooking top component of a combined cooking product
Gas cooktop	Gas standalone cooking top
Gas range	Gas cooking top component of a combined cooking product
Electric ovens	Electric oven
Gas ovens	Gas oven

Because combined cooking products include a conventional cooking top and/or a conventional oven, the conventional cooking top and conventional oven standards apply to the individual components of the combined cooking product.

DOE further notes that product classes established through EPCA's direct final rule authority are not subject to the criteria specified at 42 U.S.C. 6295(q)(1) for establishing product classes. Nevertheless, in accordance with 42 U.S.C. 6295(o)(4)—which is applicable to direct final rules—DOE has concluded that the standards adopted in this direct final rule will not result in the unavailability in any covered product type (or class) of performance characteristics, features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States currently.[30] DOE's findings in this regard are discussed in detail in section V.B.4 of this document.

a. Portable Indoor Conventional Cooking Tops

As discussed, while DOE notes that portable indoor conventional cooking tops are covered products, the Joint Agreement recommends excluding portable cooking products from the conventional cooking top and conventional oven product classes. (Joint Agreement, No. 12811 at p. 10)

In the February 2023 SNOPR, DOE proposed standards for conventional cooking tops that would apply to portable models according to their means of heating (gas, electric open (coil) element, or electric smooth element). 88 FR 6818, 6829.

In the February 2023 SNOPR, DOE sought data and information on its initial determination not to differentiate conventional cooking tops on the basis of portability when considering product classes for the February 2023 SNOPR analysis. *Id.*

[30] EPCA specifies that DOE may not prescribe an amended or new standard if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4))

AHAM commented that DOE has done no analysis on portable cooking tops and made little mention of them in the February 2023 SNOPR. (AHAM, No. 2285 at pp. 28–29) AHAM commented that DOE presents no data on several critical aspects related to portable cooking tops: consumer usage and the possibility that the use case for portable products is likely different than for major appliances in terms of the frequency and duration of use; the efficiency of portable products; test data for portable products and their relative efficiency; the similarities and/or differences between portable products and major appliances to show that it has evaluated whether it is justified to apply the same standard to both types of products or to allow commenters to make such an evaluation; or how the test procedure would apply to portable products, given that the pressure of butane and propane canisters do not meet the specifications of appendix I1. (*Id.*) AHAM commented that if portable cooking products are included in the scope of this rule, they should be in a separate product class given their distinct utility and (for electric products) differently rated voltage. (*Id.*)

As discussed in section III.A of this document, DOE is defining ''portable indoor conventional cooking top'' as a conventional cooking top designed (1) for indoor use and (2) to be moved from place to place. DOE considers this definition to apply mainly to ''hot plate'' style cooking products, which are typically electric cooking tops. As such, DOE is aware of no reason that these products cannot be tested to the appendix I1 test procedure. However, as discussed in section III.A of this document, the Joint Agreement specifies that portable indoor conventional cooking tops are not subject to the standards for conventional cooking tops adopted in this direct final rule. DOE notes however, that gas portable indoor conventional cooking tops, as gas cooking products, remain subject to the existing prohibition on constant burning pilot lights.

2. Technology Options

In the preliminary market analysis and technology assessment, DOE identified technology options that would be expected to improve the efficiency of conventional cooking tops and of conventional ovens. These technologies encompass all those that DOE believes are technologically feasible. Section 3.12 of chapter 3 of the TSD for this direct final rule includes the detailed list and descriptions of all technology options identified for consumer conventional cooking products.

As discussed in chapter 3 of the TSD for this direct final rule, DOE has performed market research and evaluated available consumer conventional cooking products to assess existing technology options to improve efficiency. The results of this research are discussed in the following sections and in chapter 3 of the TSD for this direct final rule.

a. Electric Open (Coil) Element Cooking Tops

The Joint Agreement recommends establishing no standards for electric open (coil) element cooking tops. (Joint Agreement, No. 12811 at p. 10)

For electric open (coil) element cooking tops, in the February 2023 SNOPR, DOE did not identify any technology options for improving efficiency. 88 FR 6818, 6840. DOE sought comment on any existing technologies that improve the efficiency of electric open (coil) element cooking tops. *Id.*

AHAM agreed with DOE's determination that there are no available technology options for improving efficiency of electric open (coil) element cooking tops and with DOE's decision not to include improved contact conductance as a technology option based on data and information AHAM provided related to pan warpage. (AHAM, No. 2285 at p. 31) AHAM commented that the unavailability of a viable technology option to improve efficiency is enough on its own to support a determination that a standard for this product class is not technologically feasible. (*Id.*)

ASAP *et al.*[31] recommended that DOE investigate the design considerations that may drive differences in efficiency among open element cooking tops. (ASAP *et al.,* No. 2273 at p. 5) ASAP *et al.* commented that, based on DOE's test data, which included a test unit with an IAEC of 185 kWh/yr., they believe there may be potential efficiency levels beyond the baseline level. (*Id.*) ASAP *et al.* recommended that DOE further investigate what may be driving the efficiency differences among electric open element models or consider an efficiency-level approach for this product class. (*Id.*)

DOE acknowledges the range of IAEC values among the electric open (coil) element cooking tops in the expanded test sample, but DOE notes that it is unaware of any technology options that can be used to improve these products' efficiency. Therefore, DOE did not identify any incremental efficiency levels.

For these reasons, and in accordance with the recommendation in the Joint Agreement, DOE did not evaluate electric open (coil) element cooking tops as part of the efficiency analysis for this direct final rule. For simplicity, many of the tables and headings in the following sections of this document omit the designation that the electric cooking tops for which energy conservation standards are being considered have ''smooth elements.''

b. Electric Smooth Element Cooking Tops

For electric smooth element cooking tops, considered the technologies listed in Table IV.2.

Table IV.2 February 2023 SNOPR Technology Options for Electric Smooth Element Cooking Tops

1. Halogen elements
2. Improved resistance heating elements
3. Induction elements
4. Low-standby-loss electronic controls
5. Reduced air gap

[31] In this context ''ASAP *et al.*'' refers to a joint comment from Appliance Standards Awareness Project, American Council for an Energy Efficient Economy, Consumer Federation of America, National Consumer Law Center, Natural Resources Defense Council, and Northwest Energy Efficiency Alliance.

DOE did not receive any comments regarding technology options for electric smooth element cooking tops in response to the February 2023 SNOPR.

DOE additionally notes that, consistent with the design option evaluated with the proposed EL 2 in the February 2023 SNOPR, DOE has evaluated improved resistance heating elements as a design option for electric smooth element cooking tops. 88 FR 6818, 6846.

Consistent with the February 2023 SNOPR, in this direct final rule, DOE considered the technologies listed in Table IV.3 for both electric smooth element cooking top product classes.

Table IV.3 Technology Options for Electric Smooth Element Cooking Tops

1. Halogen elements
2. Improved resistance heating elements
3. Induction elements
4. Low-standby-loss electronic controls
5. Reduced air gap

c. Gas Cooking Tops

For gas cooking tops, in the February 2023 SNOPR, DOE considered the technologies listed in Table IV.4.

Table IV.4 February 2023 SNOPR Technology Options for Gas Cooking Tops

1. Catalytic burners
2. Optimized burner and grate design
3. Radiant gas burners
4. Reduced excess air at burner
5. Reflective surfaces

In the February 2023 SNOPR, DOE evaluated two versions of the optimized burner and grate design option, representative of a minimum of either four or one high input rate burners (''HIR burners'').[32] 88 FR 6818, 6850–6851.

In the August 2023 NODA, DOE identified an additional type of optimized burner and grate design, in which a burner with optimized turndown capability can be implemented in place of a burner with ''non-optimized'' turndown capability (*i.e.,* the lowest available simmer setting is more energy consumptive than necessary to hold the test load in a constant simmer close to 90 degrees Celsius (''°C''), resulting in significantly higher energy consumption than for a burner with a simmer setting that holds the test load close to that temperature). 88 FR 50810, 50813.

For the reasons stated in the February 2023 SNOPR, in this direct final rule, DOE considered the technologies listed in Table IV.5 for both gas cooking top product classes.

Table IV.5 Technology Options for Gas Cooking Tops

1. Catalytic burners
2. Optimized burner and grate design
3. Radiant gas burners
4. Reduced excess air at burner
5. Reflective surfaces

d. Conventional Ovens

In the February 2023 SNOPR, DOE stated that it considers that intermittent pilot ignition systems would not provide energy savings and did not consider them as a technology option. 88 FR 6818, 6841. DOE requested information on the potential energy savings associated with intermittent pilot ignition systems. *Id.*

Strauch supported DOE's decision to not consider intermittent/interrupted or intermittent pilot ignition systems as a technology option for gas ovens, asserting that for DOE to conduct its own testing on this matter would be a waste of taxpayer money. (Strauch, No. 2263 at p. 2)

For both gas and electric oven product classes, in this direct final rule, DOE considered the technologies listed in Table IV.6, consistent with the February 2023 SNOPR.

[32] In this direct final rule, DOE defines an HIR burner as a burner rated at or above 14,000 Btu per hour (''Btu/h'').

Table IV.6 Technology Options for Electric and Gas Ovens

1. Bi-radiant oven (electric only)
2. Convection mode capability*
3. Halogen lamp oven (electric only)
4. Improved and added insulation (standard ovens only)
5. Improved door seals
6. Low-standby-loss electronic controls
7. No oven-door window
8. Optimized burner and cavity design (gas only)
9. Oven separator (electric only)
10. Reduced vent rate (electric standard ovens only)
11. Reflective surfaces

* This technology option was referred to as "forced convection" in the February 2023 SNOPR. In this direct final rule, DOE is updating the name of this technology option, as discussed in section IV.B.1.c of this document.

B. Screening Analysis

DOE uses the following screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in commercially viable, existing prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production of a technology in commercial products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility.* If a technology is determined to have a significant adverse impact on the utility of the product to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

(4) *Safety of technologies.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-pathway proprietary technologies.* If a technology has proprietary protection and represents a unique pathway to achieving a given efficiency level, it will not be considered further, due to the potential for monopolistic concerns.

10 CFR part 430, subpart C, appendix A, sections 6(b)(3) and 7(b).

In sum, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis. The reasons for eliminating any technology are discussed in the following sections.

The subsequent sections include comments from interested parties pertinent to the screening criteria, DOE's evaluation of each technology option against the screening analysis criteria, and whether DOE determined that a technology option should be excluded (''screened out'') based on the screening criteria.

1. Screened-Out Technologies

In conducting the screening analysis for this direct final rule, DOE considered comments it had received in response to the screening analysis conducted for the February 2023 SNOPR.

a. Electric Smooth Element Cooking Tops

In the February 2023 SNOPR, DOE tentatively determined that it would not be practicable to manufacture, install, and service halogen heating elements for electric smooth element cooking tops on the scale necessary to serve the relevant market at the time of the effective date of a new standard, and screened out this technology from further consideration. 88 FR 6818, 6842.

In the February 2023 SNOPR, DOE also screened out a subset of low-standby-loss electronic controls, namely those that use ''automatic power-down'' because this type of low-standby-loss electronic controls may negatively impact product utility. *Id.* In particular, it may result in a loss in the utility of the continuous clock display for combined cooking products, such as ranges. However, it should be noted that the other low-standby-loss electronic controls such as switch-mode power supplies (''SMPSs'') were still analyzed in the February 2023 SNOPR. *Id.*

In the February 2023 SNOPR, DOE additionally screened out reduced air gap as a technology option because DOE is aware that the air gaps in commercialized radiant heating elements are currently as small as is practicable to manufacture on the scale necessary to serve the cooking products market. *Id.* Furthermore, DOE stated that it is not aware of the magnitude of potential energy savings from this technology. *Id.*

DOE requested comment on the magnitude of potential energy savings that could result from the use of a reduced air gap as a technology option. *Id.* DOE sought comment on its screening analysis for electric smooth element cooking tops and whether any additional technology options should be screened out on the basis of any of the screening criteria in the February 2023 SNOPR.

AHAM stated agreement with DOE's determination to screen out halogen elements in the screening analysis for electric smooth element cooking tops based on its determination that it would not be practicable to manufacture, install, and service halogen heating elements on the scale necessary to serve the relevant market. (AHAM, No. 2285 at p. 31) AHAM also stated agreement with DOE's determination to screen out a subset of low-standby-loss electronic controls that use ''automatic power-down'' because they may result in the loss in the utility of the continuous clock display for combined cooking products, such as ranges. (*Id.*)

AHAM disagreed with DOE's continued inclusion of low-standby loss electronic controls such as SMPS and urged DOE to screen out low-standby-loss electronic controls as a technology option because such controls ''switch the current at high frequencies'' according to DOE, and ranges and cooking tops connected to a ground fault circuit interrupter (''GFCI'') and operating at high frequencies contribute to nuisance tripping, where power is removed from the appliance, even when no electrical hazard exists. (*Id.* at pp. 32–35) AHAM requested that DOE use its expertise and resources to properly investigate this technological incompatibility and advised that if DOE

continues to consider low-standby-loss electronic controls as a feasible technology option, the existing nuisance tripping problems will get worse. (*Id.*)

Strauch commented that SMPSs are not as reliable as linear power supplies, pointing to MIL–HDBK–217 [33] and the Bellcore/Telcordia reliability guide [34] as evidence. (Strauch, No. 2263 at pp. 2–3) Strauch commented that energy efficiency requirements are degrading lifetimes due to more complex electronic controls, SMPSs, and light-weighting. (*Id.*)

DOE emphasizes that it only considered design options that are already demonstrated in cooking products available on the market. DOE is aware of the potential for ''nuisance tripping'' of GFCI circuit protectors by high-frequency components such as induction elements. However, DOE understands that nuisance tripping can generally be mitigated through the use of best practices for reducing leakage current, such as minimizing electrical cable lengths and ensuring that filtered and unfiltered cables are separated to whatever extent possible to reduce leakage current. Additionally, optimizing the variable-frequency controller power filter to reduce total leakage current to levels below the GFCI detection limits can further prevent GFCI tripping. To the extent that the use of additional electronic components is needed in conjunction with the use of design options with high-frequency components (*e.g.,* induction elements), and to the extent that such additional electronic components are provided in electric cooking tops currently on the market that make use of such design options, DOE's teardown analysis captures any additional cost associated with such components.

DOE notes that despite the potential for nuisance tripping, a wide range of appliances on the market today, including cooking products, implement variable-frequency drives in their designs. The inclusion of these variable-frequency drive designs in units on the market leads DOE to conclude that they do not have a significant impact on the consumer utility of these products.

ONE Gas commented that DOE should evaluate the potential health and safety issues associated with consumer conventional cooking product minimum efficiency standards by addressing electromagnetic field emission hazards from induction cooking. (ONE Gas, No. 2289 at pp. 9–10)

It is not within DOE's purview to regulate health and safety. In this direct final rule analysis, DOE has analyzed induction as a technology option insofar as it is already widely available on the market. Although DOE does not regulate electromagnetic field emissions, the Federal Communications Commission requires industrial, scientific, and medical equipment that emits electromagnetic energy on frequencies within the radio frequency spectrum, including induction cooking tops, to comply with its regulations at 47 CFR part 18 to prevent harmful interference to authorized radio communication services. Additionally, the U.S. Food and Drug Administration specifies performance standards for microwave and radio frequency emitting products, but coverage is limited to microwave ovens and thus these standards do not apply to consumer conventional cooking products, including induction cooking tops. 21 CFR 1030.10.

For this direct final rule, DOE used the screening for electric cooking top technology options considered in the February 2023 SNOPR analysis.

b. Gas Cooking Tops

For gas cooking tops, in the February 2023 SNOPR, DOE screened out catalytic burners, radiant gas burners, reduced excess air at burner, and reflective surfaces. 88 FR 6818, 6842.

In the February 2023 SNOPR, DOE stated that it is aware of a wide range of optimized burner and grate designs on the market, some of which may reduce the consumer utility associated with HIR burners and continuous cast-iron grates. *Id.* In the February 2023 SNOPR, DOE screened out any optimized burner and grate designs that would reduce consumer utility by only including in its analysis gas cooking tops that include at least one HIR burner and continuous cast-iron grates. *Id.*

DOE sought comment on its screening analysis for gas cooking tops and whether any additional technology options should be screened out on the basis of any of the screening criteria in the February 2023 SNOPR. *Id.* Section V.B.4 of this document summarizes comments that DOE received regarding the utility provided by certain characteristics of gas cooking tops.

The National Propane Gas Association (''NPGA'') commented that it agrees with the American Public Gas Association (''APGA'') and the American Gas Association's (''AGA'') comments, in which APGA and AGA agreed with DOE's determination that no new standards were justified. (NPGA, No. 2270 at pp. 2–3, 7–8) NPGA commented that it agrees with AHAM's prior comments on this rulemaking, in which AHAM stated that no significant changes have occurred to justify new standards since the April 2009 Final Rule that determined energy conservation standards for consumer conventional cooking products were not justified. (*Id.*) NPGA commented that DOE fails to articulate or demonstrate technological changes for gas cooking tops that would achieve higher efficiencies since the April 2009 Final Rule and that would result in significant conservation of energy as stated by EPCA. (*Id.*) AGA *et al.*[35] echoed these sentiments in response to the August 2023 NODA. (AGA *et al.,* No. 10112 at pp. 3, 11)

AGA commented that DOE's screening analysis is inconsistent and inadequate for use as the primary factor determining the minimum efficiency level for gas cooking tops. (AGA, No. 2279 at pp. 43–45) AGA commented that gas cooking top design requires a complex engineering process to ensure the consumer has a product that meets all safety standards, meets its required purpose (to cook food), is reliable, long lasting, and easy to maintain and clean, but DOE's language about improving product efficiency through ''optimized burner/improved grates'' is inadequate. (*Id.*) AGA commented that DOE suggests that realigning gas burners or moving the gas burners closer to the cooking utensils will optimize burners, but this raises concerns, such as the impact on the combustion process, creating hot spots on cooking utensils and electronic ignition systems, cleaning, and addressing changes in fuel gas supply (for example, switching from natural gas to propane). (*Id.*) AGA commented that more evaluation must be documented before DOE's assumptions can be verified as ''efficiency improvements.'' (*Id.*)

AGA *et al.* commented that gas cooking tops must meet national consensus safety standards for proper operation (*i.e.,* proper combustion under gas pressure variation) and burner characteristics (*i.e.,* burner primary air openings, burner port sizing, variety of input rates, balanced heat distribution on cooking vessels, aesthetics). (AGA *et al.,* No. 10112 at pp. 10–11) AGA *et al.* commented that the features that DOE

[33] DOE interprets MIL–HDBK–217 as referring to Military Handbook: Reliability Prediction of Electronic Equipment, last updated in 1995. Available at *global.ihs.com/doc_detail.cfm?document_name=MIL-HDBK-217&item_s_key=00058764.*

[34] DOE interprets the Bellcore/Telcordia reliability guide as referring to SR–332, Reliability Prediction Procedure for Electronic Equipment, last updated in 2011. Available at *telecom-info.njdepot.ericsson.net/site-cgi/ido/docs.cgi?ID=SEARCH&DOCUMENT=SR-332#ORD.*

[35] ''AGA *et al.*'' refers to a joint comment from AGA, APGA, NOGA, Spire Inc., Spire Missouri Inc., and Spire Alabama Inc.

identified as being responsible for increased efficiency (*i.e.,* grate weight, flame angle, distance from burner ports) should not be mandated which would limit the freedom of the gas cooking top engineers to design products that are safe and fit consumer needs. (*Id.*)

ONE Gas commented that DOE should evaluate the potential health and safety issues associated with consumer conventional cooking product minimum efficiency standards by addressing burn and cooking fire hazards, which are likely to differ across design options and fuels, and the potential magnitudes of such hazards as DOE projections of market share shifts would suggest. (ONE Gas, No. 2289 at pp. 9–10) ONE Gas commented that these potential safety and health hazards fit well within DOE's role in minimum efficiency standards rulemaking. (*Id.*)

Sub-Zero Group, Inc. (''Sub-Zero'') commented that burner spacing between grate and vessel must be greater for HIR burners to meet critical performance and safety requirements; specifically, heat distribution and reduction of carbon monoxide. (Sub-Zero, No. 2140 at p. 11) Sub-Zero commented that reducing burner spacing between burner flame and testing vessel can increase efficiency, but flame impingement/contact with the grate and vessel causes flame quenching (cooling), which directly leads to an increase in carbon monoxide levels and other combustion by-products. (*Id.*)

AHAM commented that moving the burner closer to the cookware—as anticipated by DOE's ''optimize burners and grates'' technology option—should be screened out based on a resulting reduction in consumer utility and safety. (AHAM, No. 2285 at pp. 22–23) AHAM presented a boil-time graph showing that water can be brought to a boil more efficiently, with a lower Btu/h, by moving the burner closer to the cookware, but this design will be essentially useless when cooking foods that require a spectrum of heat inputs as closer burners are unable to adequately reduce heat input. (*Id.*) AHAM commented that testing by one of its members showed that food cooked with only mid-range input rate burners takes longer to cook and that mid-input rate burners, for some foods, provide a lower quality of cooking than HIR burners. (*Id.*) AHAM commented that consumers will lose utility associated with quality of cooking and speed of cooking as manufacturers are forced to homogenize their products and provide mid-range burners to meet the standard. (*Id.*)

AHAM recommended that DOE not rely on European designs as it evaluates whether ''burner and grate optimization'' is possible while also complying with safety standards such as combustion limits as European safety standard EN 30–1–1 ''Domestic cooking appliances burner gas—Part 1–1: Safety—General'' generally has higher CO limits than allowed in North America per American National Standards Institute (''ANSI'') ''Household Cooking Gas Appliances'' (''ANSI Z21.1''), which results in limits on-grate weight, flame angle, and distance from the burner to the cookware. (*Id.* at p. 37)

AHAM commented that DOE did not provide sufficient descriptions of the cooking tops in its test sample to allow AHAM to confirm that the units in the test sample do not include any proprietary designs, components, elements, materials, or other intellectual property. (AHAM, No. 10116 at p. 10) AHAM asserted that DOE has deviated from the data quality standards outlined in the Process Rule. (*Id.* at p. 12) AHAM specifically asserted that DOE failed to eliminate problematic design options, as identified by commenters; did not use transparent and robust analytical methods; and did not evaluate safety pertaining to the updated efficiency levels for gas cooking tops. (*Id.*) AHAM commented that DOE should review these deviations from data quality before issuing any final rule. (*Id.*)

AHAM commented that, per EPCA, DOE should not consider consumer-valued features and/or performance attributes as technology options. (*Id.* at pp. 12–13) AHAM commented that DOE does not have the authority to establish standards that would require removal of such features and attributes. (*Id.*)

AHAM asserted that over the course of this rulemaking, DOE has countered itself several times regarding which EPCA-protected features and performance could be eliminated or altered to achieve energy reductions. (*Id.* at pp. 16–19) AHAM commented that, under EPCA, DOE should not consider the removal or reduction of significant consumer-valued features and performance attributes as technology options for improving efficiency and that any technology options that would have that impact should be screened out. (*Id.*)

As discussed, DOE has performed extensive research to evaluate technology changes that have occurred since the April 2009 Final Rule, and notes that updated analysis depends not only on changes in the available technologies, but also on the relative costs and benefits of implementing them.

DOE acknowledges the safety considerations associated with burner spacing, emissions, and fire hazards, but reiterates that the only optimized burner and grate designs evaluated in this direct final rule analysis were those found through DOE's testing and analysis of a full range of products available on the U.S. market to be implemented in products already. DOE notes that ANSI Z21.1, required by many building codes in the United States, specifies safety requirements for all consumer gas cooking products.

In response to stakeholder comments that optimizing burner and grate designs would reduce consumer utility, DOE has only included in its direct final rule engineering analysis gas cooking tops that include multiple HIR burners and continuous cast-iron grates. DOE further addresses comments related to the impact of the standards on cooking top utility in section V.B.4 of this document.

For this direct final rule, DOE screened out from further consideration catalytic burners, radiant gas burners, reduced excess air at burner, and reflective surfaces for gas cooking tops, consistent with the February 2023 SNOPR analysis.

c. Conventional Ovens

For the same reasons discussed in the SNOPR published on September 2, 2016 (''September 2016 SNOPR''), DOE screened out added insulation, bi-radiant oven, halogen lamp oven, no oven door window, optimized burner and cavity design, and reflective surfaces from further analysis for conventional ovens in the February 2023 SNOPR. 88 FR 6818, 6843.

DOE also stated that it recognizes that the estimates for the energy savings associated with improved insulation, improved door seals and reduced vent rate may vary depending on the test procedure, and thus screened out these technology options from further analysis of conventional ovens in the February 2023 SNOPR. *Id.* DOE stated that it will reevaluate the energy savings associated with these technology options if it considers performance standards in a future rulemaking. *Id.*

For the same reasons as discussed above for electric smooth element cooking tops, in the February 2023 SNOPR, DOE also screened out the use of automatic power-down low-standby-loss electronic controls. *Id.* DOE stated that it is aware that the use of automatic power-down low-standby-loss electronic controls may negatively impact product utility. *Id.* In particular, the use of automatic power-down low-standby-loss electronic controls may result in a loss in the utility of the continuous clock display for ovens.

However, it should be noted that the other low-standby-loss electronic controls such as SMPSs were still analyzed.

DOE continued to seek comment on the technology options for conventional ovens screened out in the February 2023 SNOPR. *Id.* DOE sought comment on its screening analysis for conventional ovens and whether any additional technology options should be screened out on the basis of any of the screening criteria in the February 2023 SNOPR.

AHAM noted that additional high frequency power use beyond SMPSs in an oven, such as low standby loss electronic controls, will exacerbate GFCI nuisance tripping issues. (*Id.* at p. 38)

As discussed previously, DOE is aware of the potential for ''nuisance tripping'' of GFCI circuit protectors by high-frequency components such as low standby loss electronic controls. However, DOE understands that nuisance tripping can generally be mitigated through the use of best practices. To the extent that the use of additional electronic components is needed in conjunction with the use of design options with high-frequency components (*e.g.,* low standby loss electronic controls), and to the extent that such additional electronic components are provided in electric cooking tops currently on the market that make use of such design options, DOE's teardown analysis captures any additional cost associated with such components.

Strauch commented that DOE should not impose forced convection for conventional ovens, because many consumers may never or rarely use this feature. (Strauch, No. 2263 at p. 3)

AHAM reiterated its comments made in response to the September 2016 SNOPR that forced convection should be screened out because the motor wattage could negate any potential energy savings. (*Id.*) AHAM further commented that convection is not appropriate for cooking all food types, noting that any covered food loads will not benefit from this technology. (*Id.*)

DOE notes that the design option referred to in the February 2023 SNOPR as ''forced convection'' corresponds to a design option wherein the conventional oven offers a convection mode to the user. Under this design option, the user is not required to use the convection mode, for instance when cooking covered food loads or cakes which do not benefit from convection mode. However, the user would benefit from using the convection mode when baking food loads that benefit from an even distribution of heat, such as roasting vegetables or baking pies, and because the use of convection mode results in lower energy use, as measured by the conventional oven test procedure finalized in the test procedure final rule published on July 2, 2015 (''July 2015 TP Final Rule'').

However, to ensure full clarity regarding this design option and to reflect the fact that the use of convection mode would not be required by users, in this direct final rule, DOE is changing the name of this design option to ''convection mode capability.'' In the following sections where DOE evaluates convection mode capability as a prescriptive design standard, the prescriptive design standard under evaluation is a requirement for conventional ovens to offer a convection mode.

AHAM also reiterated its comments made in response to the September 2016 SNOPR stating that oven separators should be screened out because they are not a widely available feature. (*Id.*) AHAM commented that this design option essentially relies on consumer use of the feature and without knowing whether consumers do or will use the oven separator, it is impossible to know whether the energy savings would be realized in the field. (*Id.*)

Unless a technology option has proprietary protection or represents a unique pathway to achieving a given efficiency level, the fact that oven separators are not widely available has no bearing on the screening criteria analyzed by DOE and outlined in the Process Rule. DOE has determined that multiple manufacturers offer oven separators and therefore determines that oven separators do not represent a proprietary technology. AHAM did not provide any information that corresponds to DOE's screening criteria for technology options, and as such DOE is retaining the oven separator technology in this direct final rule.

AHAM reiterated other comments it made in response to the September 2016 SNOPR screening analysis for ovens, including: (1) improved door seals should be screened out, as further improving door seals could lead to a loss of performance due to a loss of sufficient airflow; and (2) reduced vent rates should be screened out as energy gains are negligible and DOE is relying on very old product designs and a test procedure DOE has repealed. (*Id.*) AHAM stated agreement with DOE's screening out of the other technology options. (*Id.* at pp. 38–39)

For this direct final rule, DOE screened out from further consideration the same conventional oven technology options as in the February 2023 SNOPR analysis. DOE notes that the concerns expressed by AHAM regarding technology options for conventional ovens are not applicable at the adopted standard levels as specified in the Joint Agreement.

2. Remaining Technologies

Through a review of each technology, DOE tentatively concludes that all of the other identified technologies listed in section IV.A.2 of this document met all screening criteria to be examined further as design options in DOE's direct final rule analysis. In summary, DOE did not screen out the technology options listed in Table IV.7.

Table IV.7 Retained Design Options for Consumer Conventional Cooking Products

Electric Smooth Element Cooking Tops
1. Induction elements
2. Improved resistance elements
3. Switch-mode power supply
Gas Cooking Tops
1. Optimized burner and grate design*
Conventional Ovens
1. Convection mode capability
2. Oven separator (electric only)
3. Switch-mode power supply

* As can be achieved by units with multiple HIR burners and continuous cast-iron grates.

DOE determined that these technology options are technologically feasible because they are being used or have previously been used in commercially-available products or working prototypes. DOE also finds that all of the remaining technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, or safety). For additional details, *see* chapter 4 of the direct final rule TSD.

C. Engineering Analysis

The purpose of the engineering analysis is to establish the relationship between the efficiency and cost of consumer conventional cooking products. There are two elements to consider in the engineering analysis; the selection of efficiency levels to analyze (*i.e.,* the ''efficiency analysis'') and the determination of product cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency products, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each product class, DOE estimates the baseline cost, as well as the incremental cost for the product at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses (*i.e.,* the LCC and PBP analyses and the NIA).

1. Efficiency Analysis

DOE typically uses one of two approaches to develop energy efficiency levels for the engineering analysis: (1) relying on observed efficiency levels in the market (*i.e.,* the efficiency-level approach), or (2) determining the incremental efficiency improvements associated with incorporating specific design options to a baseline model (*i.e.,* the design-option approach). Using the efficiency-level approach, the efficiency levels established for the analysis are determined based on the market distribution of existing products (in other words, based on the range of efficiencies and efficiency level ''clusters'' that already exist on the market). Using the design option approach, the efficiency levels established for the analysis are determined through detailed engineering calculations and/or computer simulations of the efficiency improvements from implementing specific design options that have been identified in the technology assessment. DOE may also rely on a combination of these two approaches. For example, the efficiency-level approach (based on actual products on the market) may be extended using the design option approach to interpolate to define ''gap fill'' levels (to bridge large gaps between other identified efficiency levels) and/or to extrapolate to the ''max-tech'' level (particularly in cases where the ''max-tech'' level exceeds the maximum efficiency level currently available on the market).

In defining the efficiency levels for this direct final rule, DOE considered comments it had received in response to the efficiency levels proposed in the February 2023 SNOPR.

For this direct final rule, DOE is adopting a design-option approach supported by testing and supplemented by reverse engineering (*i.e.,* physical teardowns and testing of existing products in the market) to identify the incremental cost and efficiency improvement associated with each design option or design-option combination. The design-option approach is appropriate for consumer conventional cooking products, given the lack of certification data to determine the market distribution of existing products and to identify efficiency level ''clusters'' that already exist on the market. Following the request for information (''RFI'') published on February 12, 2014 (''February 2014 RFI'') and the August 2022 TP Final Rule, DOE also conducted interviews with manufacturers of consumer conventional cooking products to develop a deeper understanding of the various combinations of design options used to increase product efficiency and their associated manufacturing costs.

DOE conducted testing and reverse engineering teardowns on products available on the market. Because there are no performance-based energy conservation standards or energy reporting requirements for consumer conventional cooking products, DOE selected test units based on performance-related features and technologies advertised in product literature.

For each product class, DOE generally selects a baseline model as a reference point for each class, and measures changes resulting from potential energy conservation standards against the baseline. The baseline model in each product class represents the characteristics of a product typical of that class (*e.g.,* capacity, physical size). Generally, a baseline model is one that just meets current energy conservation standards, or, if no standards are in place, the baseline is typically the most common or least efficient unit on the market.

For each product class for both conventional cooking tops and conventional ovens, DOE analyzed several efficiency levels. As part of DOE's analysis, the maximum available efficiency level is the highest efficiency unit currently available on the market. DOE also defines a ''max-tech'' efficiency level to represent the maximum possible efficiency for a given product.

a. Conventional Cooking Tops

Testing

DOE's test sample for this direct final rule was originally tested in support of the February 2023 SNOPR and February 2023 NODA and included 13 electric smooth element cooking tops, the electric smooth element cooking top portion of 7 conventional ranges, 16 gas cooking tops, and the gas cooking top portion of 8 conventional ranges for a total of 44 conventional cooking tops covering all of the product classes considered in this analysis. The test unit characteristics and appendix I1 test results are available in chapter 5 of the TSD for this direct final rule. DOE's analysis did not include any energy consumption associated with downdraft venting systems.

For the February 2023 SNOPR, DOE developed performance-based baseline efficiency levels for consumer conventional cooking tops using the measured energy consumption of units in the DOE test sample. 88 FR 6818, 6844. DOE determined the cooking top IAEC for each cooking top in the test sample based on the water heating test procedure adopted in the August 2022 TP Final Rule. *Id.*

AGA *et al.* stated that it would be helpful for stakeholders to have information regarding which cooking top units included in DOE's analysis are currently available on the market. (AGA *et al.,* No. 766 at pp. 3–4) AGA *et al.* requested that DOE provide this information through the unit identification (*i.e.,* the ''SNOPR Unit ID'') for each cooking top product included in DOE's analysis, which would allow stakeholders to confirm that DOE's results accurately reflect the product information. (*Id.*)

NPGA asserted that DOE is unable to confirm that the products evaluated remain on the market, as testing occurred prior to April 2022 and products were purchased prior to May 2018. (NPGA, No. 2270 at p. 8) NPGA asserted that it is not clear whether the tested products remain available on the U.S. market. (*Id.*)

Spire Inc. (''Spire'') asserted that the sample of gas cooking products tested by DOE is small and outdated and that there is no basis to conclude that the products tested are representative of the market. (Spire, No. 2710 at pp. 5–7) Spire further commented that the gas cooking tops in DOE's test sample products were likely manufactured between 2014 and 2018, based on their purchase dates. (*Id.*) Spire stated its concern that DOE has not identified the tested products that are still on the market. (*Id.*)

Whirlpool Corporation (''Whirlpool'') commented that DOE cannot rely on data gathered from outdated and unavailable products that do not represent the features, characteristics, and performance standards consumers expect from gas cooking products. (Whirlpool, No. 2284 at pp. 9–10) Whirlpool commented that DOE wrongly assumes that newer models are similar to the tested older models; Whirlpool added that its own catalog experiences substantial turnover in the course of just 5 to 10 years and its older models would likely perform differently than its newer ones under DOE's test procedure. (*Id.*)

AHAM commented that DOE's test sample comprises several old models, some of which are no longer commercially available and therefore would not be considered technologically feasible per sections 6(b)(3)(i) and 7(b)(1) of the Process Rule. (AHAM, No. 2285 at pp. 8–9) AHAM commented that DOE's continued use of this old test sample conflicts with DOE's statement that it considers commercially available products or working prototypes in its evaluation. (*Id.*) AHAM stated disagreement with DOE's statements in the February 2023 NODA that if a product was on the market, it can be included in the analysis—that could be the case if it can be shown that the model was replaced with a similar model that retains similar efficiency performance and similar technology options. (*Id.*) But, AHAM added, if a product is removed from the market and no longer commercially available, it should be eliminated from the sample because it may have been removed for reliability or quality issues or consumer dissatisfaction. (*Id.*) AHAM commented that without data that indicates why a particular model that is no longer commercially available should remain in the test sample, DOE should remove the old models from its test sample and ensure that the test sample informing this analysis consists only of commercially available products (or working prototypes). (*Id.*)

Although other models in DOE's test sample may no longer be on the market, DOE notes that manufacturers of major home appliances update their model numbers regularly, in some cases as frequently as every 1 to 2 years. In DOE's experience of regularly monitoring the market for major home appliances, including consumer conventional cooking products, the model number changes that occur from year to year in most cases do not reflect technological changes that would impact the product's measured energy consumption. Regardless, test results for models that are discontinued over the course of a DOE rulemaking timeline remain applicable in conducting the analysis in accordance with EPCA requirements, because such models incorporate technologically feasible design options that manufacturers may use to achieve the corresponding efficiency levels in commercial products.

DOE cannot comment on whether the units in the AHAM test sample are available on the market because AHAM did not provide DOE with model number information. However, at the time of the direct final rule analysis, 15 of the 30 units in the expanded test sample for which DOE has model information and that meet the standards finalized in this direct final rule, are available for purchase; DOE notes that 7 of these 15 models have multiple HIR burners and continuous cast-iron grates.

AHAM commented it found confusing the addition to DOE's test sample of three new gas cooking top units that did not follow the same criteria as in its February 2023 SNOPR analysis and the conflicting statements and methodology DOE employed in the February 2023 NODA (and in the media). (AHAM, No. 2285 at pp. 53–54)

As stated in the February 2023 NODA, the additional information was intended to clarify the analysis. 88 FR 12603, 12604. Specifically, DOE provided the IAEC values for the three additional units to substantiate its statement that gas cooking tops that do not include HIR burners or continuous cast-iron grates have efficiencies higher than the EL 2 level that DOE defined in the February 2023 SNOPR. *Id.* at 88 FR 12605.

Further, DOE published the August 2023 NODA to provide an updated analysis of the gas cooking top market in light of the new data provided by stakeholders in response to the February 2023 SNOPR and February 2023 NODA.

AHAM requested information on whether DOE has additional data for the units in its test sample that were tested as part of the test procedure rulemaking and, if so, AHAM requested that DOE provide these additional test results. (AHAM, No. 2285 at pp. 9–10) AHAM commented that such data could illuminate the relevance of test variation to DOE's standards selection. (*Id.*)

In the August 2022 TP Final Rule, DOE determined that its test results demonstrate the repeatability and reproducibility of the finalized test procedure. 87 FR 51492, 51497. To the extent that any additional tests beyond those used in this direct final rule analysis were conducted on a given cooking top, the results were used in the analysis for the August 2022 TP Final

Rule. Test reports for these tests are available in the docket for that rulemaking.[36]

NPGA commented that it does not believe DOE's testing conducted in support of the February 2023 SNOPR can be relied upon when it was conducted prior to publishing the August 2022 TP Final Rule and the February 2023 Correcting Amendments. (NPGA, No. 2270 at p. 8) NPGA stated that by relying on testing methods adopted prior to these changes, DOE's foundation for its test method must be called into question. (*Id.*)

As discussed, all conventional cooking top testing conducted by DOE in support of the February 2023 SNOPR, and of this direct final rule was conducted according to the test procedure at appendix I1, as finalized. Despite some of the testing occurring prior to the publication of the August 2022 TP Final Rule, all testing was confirmed to be compliant with appendix I1 as published prior to its incorporation in the analysis. DOE further notes that neither the errors and omissions nor the corrections in the February 2023 Correcting Amendments affected the substance of the rulemaking, or any conclusions reached in support of the August 2022 TP Final Rule. 88 FR 7846.

Furthermore, as discussed in the August 2023 NODA and later in this document, DOE received additional stakeholder test data which DOE incorporated into its analysis as part of the ''expanded data set,'' which was used as the basis for the updated efficiency levels presented in the August 2023 NODA and analyzed in this direct final rule.

AHAM requested that DOE explain why certain gas cooking tops in DOE's test sample have different IAEC values in the August 2023 NODA compared to the February 2023 SNOPR. (AHAM, No. 10116 at pp. 4–5) AHAM commented that DOE should indicate if the updated analysis in the August 2023 NODA was based on the updated IAEC values. (*Id.*) AHAM requested that DOE publish a response on the docket, prior to a final rule, as to whether the updated IAEC values are a result of test variation, error, or additional testing, and provide opportunity for stakeholder comment. (*Id.*)

DOE appreciates AHAM's comment and notes that as part of its review of the engineering analysis for gas cooking tops prior to the publication of the August 2023 NODA, DOE corrected a data processing error that occurred in calculating the annual energy consumption (''AEC'') of seven units in its test sample. At the time of the August 2023 NODA, DOE published the full expanded test sample for gas cooking tops, including this calculation error correction. DOE confirms that the analysis for the August 2023 NODA and for this direct final rule was based upon the IAEC values published in the August 2023 NODA.

AGA *et al.* commented that the standard proposed in February 2023 SNOPR was based on limited product testing unsupported by any other existing body of relevant product efficiency data. (AGA *et al.,* No. 10112 at p. 6) AGA *et al.* commented that, given the impact of the expanded data set on the baseline level analyzed in the August 2023 NODA, as compared to the February 2023 SNOPR, it is unclear how an even further expanded data set would impact the efficiency levels for gas cooking tops. (*Id.*)

DOE has performed extensive testing in support of the energy conservation standards for conventional cooking tops. Furthermore, DOE's analysis for this direct final rule takes into account all additional stakeholder test data received in response to the February 2023 SNOPR. DOE determines that its expanded test data set is a representative sample and sufficient to support its analysis for the standards adopted in this direct final rule.

Electric Cooking Tops

The Joint Agreement recommended a standard level for both electric smooth element cooking top product classes of 207 kWh/year that is equivalent to the IAEC at EL 1 defined in the August 2023 NODA and February 2023 SNOPR.

The baseline IAEC in this direct final rule was initially established in the February 2023 SNOPR. To establish the baseline IAEC values for electric cooking tops, in the February 2023 SNOPR, DOE set the baseline cooking top IAEC equal to the sum of the maximum cooking top AEC observed in the dataset and the maximum annual combined low-power mode energy consumption (''E_{TLP}'') observed in the dataset. 88 FR 6818, 6844.

DOE then reviewed the AEC and E_{TLP} values for the electric smooth element cooking tops in its test sample and identified three higher efficiency levels that can be achieved without sacrificing clock functionality. *Id.* at 88 FR 6845.

In the February 2023 SNOPR, DOE defined EL 1 for electric smooth element cooking tops based on the low-standby-loss electronic controls design option. *Id.* As discussed above, DOE defined the baseline efficiency assuming the highest AEC would be paired with the highest E_{TLP} observed in its test sample. *Id.* In the February 2023 SNOPR, DOE stated that it is aware of many methods employed by manufacturers to achieve lower E_{TLP}, including by changing from a linear power supply to an SMPS, by dimming the control screen's default brightness, by allowing the clock functionality to turn off after a period of inactivity, and by removing the clock from the cooking top altogether. *Id.* DOE defined EL 1 using the lowest measured E_{TLP} among the units in its test sample with clock functionality, paired with the baseline AEC, to avoid any potential loss of utility from setting a standard based on a unit without clock functionality. *Id.*

In the February 2023 SNOPR, DOE defined EL 2 for electric smooth element cooking tops using the lowest measured AEC (highest efficiency) among radiant cooking tops in its sample and the same E_{TLP} as EL 1. *Id.* DOE noted that, this AEC value can also be reached by units using induction technology. *Id.*

To determine the highest measured efficiency for electric smooth element cooking tops, ''max tech'' or EL 3 in the February 2023 SNOPR, DOE calculated the sum of the lowest measured AEC in its test sample of electric smooth element cooking tops, which represented induction technology, and the same E_{TLP} as EL 1. *Id.*

Table IV.8 shows the efficiency levels for electric smooth element cooking tops proposed in the February 2023 SNOPR.

[36] Available at *www.regulations.gov/docket/EERE-2021-BT-TP-0023/document.*

Table IV.8 February 2023 SNOPR Electric Smooth Element Cooking Top Efficiency Levels

Level	IAEC (*kWh/year*)
Baseline	250
1	207
2	189
3	179

DOE sought comment on the methodology and results for the proposed baseline and incremental efficiency levels for electric cooking tops. *Id.* at 88 FR 6844–6845.

Samsung Electronics America, Inc. (''Samsung'') supported DOE's methodology for analyzing AEC and E_{TLP} separately when determining the efficiency levels for baseline electric smooth element cooking tops. (Samsung, No. 2291 at p. 2) Samsung supported DOE's proposed efficiency levels for electric cooking tops. (*Id.*) Samsung commented that standby power is typically consumed by specific features (*e.g.,* clocks, timers, electronic displays), and that because DOE identified low-standby-loss electronic controls for EL 1, it is reasonable to assume that manufacturers will use the lowest level of E_{TLP} to meet EL 1. (*Id.*) Samsung commented that EL 1 also avoids consumer utility loss by maintaining the clock functionality. (*Id.*)

AHAM commented that DOE's method for determining the baseline efficiency levels for conventional cooking tops is flawed because it adds active-mode energy use and standby-mode energy use from different units, which is not a representative approach. (AHAM, No. 2285 at pp. 30–31) AHAM commented that product design is holistic and theoretical energy use should not be assumed based on tests from different units as was DOE's method. (*Id.*) AHAM commented that DOE should follow its usual, more representative methodology of selecting the least efficient single unit, despite the flaws resulting from the methodology's basis on a test sample. (*Id.*) AHAM commented that DOE can minimize this inherent flaw by ensuring its test sample is as broad and representative of the market as possible through the inclusion of AHAM's data. (*Id.*) AHAM added that DOE should rectify the lack of representativeness of its current sample, even with AHAM's test data included, before proceeding to a final rule. (*Id.*)

DOE has determined that adding active-mode energy use and standby-mode energy use from different units to determine baseline efficiency levels for conventional cooking tops is warranted in order to evaluate the most conservative baseline efficiency level so as to allow manufacturers to preserve the utility associated with clock functionality.

AHAM stated its opposition to DOE's proposed standard for smooth electric cooking tops and added that it would oppose any proposed standard more stringent than DOE's proposed level. (*Id.* at pp. 42–43) However, AHAM commented that it does not oppose standards for these products so long as the standard takes into account test procedure variation and the reality that manufacturers will not certify products at the tested values upon which DOE bases its analysis. (*Id.*) AHAM suggested that DOE evaluate a gap-fill level for electric smooth element cooking tops that is between EL 1 and the baseline, and requested that DOE account for test variation and conservative rating by applying an additional 5 percent to the evaluated efficiency level. (*Id.*)

In the August 2022 TP Final Rule, DOE determined that its test results demonstrate the repeatability and reproducibility of the finalized test procedure. 87 FR 51492, 51497. DOE notes that although it is not including a ''buffer'' in its analysis, nothing in DOE's analysis prevents manufacturers from choosing to design a buffer into their own products' rated values.

Regarding AHAM's suggestion that DOE evaluate a gap-fill level, DOE is not aware of any design options that would justify such an efficiency level.

As discussed, DOE received additional electric smooth element cooking top test data from AHAM and the Pacific Gas and Electric Company (''PG&E'') in response to the February 2023 SNOPR. In the August 2023 NODA, DOE stated that these additional data are consistent with DOE's tentative determination in the February 2023 SNOPR regarding efficiency levels for these products. 88 FR 50810, 50811. Therefore, in the August 2023 NODA, DOE maintained the efficiency levels for electric smooth element cooking tops that were proposed in the February 2023 SNOPR. *Id.*

DOE sought comment on the efficiency levels for electric smooth element cooking tops in the August 2023 NODA. *Id.* DOE did not receive any such comments.

For the reasons discussed in the February 2023 SNOPR and August 2023 NODA, and consistent with the recommendations in the Joint Agreement, DOE analyzed for this direct final rule the efficiency levels for both electric smooth element cooking top product classes that were proposed in the February 2023 SNOPR, as shown in Table IV.9.

Table IV.9 Electric Smooth Element Cooking Top Efficiency Levels

Level	IAEC (*kWh/year*)
Baseline	250
1	207
2	189
3	179

Gas Cooking Tops

The Joint Agreement recommended a standard level for both gas cooking top product classes of 1,770 kBtu/year.

As discussed, to establish the baseline IAEC values for cooking tops, in the February 2023 SNOPR, DOE set the baseline cooking top integrated annual energy consumption (*i.e.,* IAEC) equal to the sum of the maximum cooking top active annual energy consumption (*i.e.,* AEC) observed in the dataset for the analyzed product class and the maximum combined low-power mode annual energy consumption (*i.e.,* E_{TLP}) observed in the dataset for the analyzed product class. 88 FR 6818, 6844.

DOE noted that the efficiency levels for gas cooking tops evaluated in the February 2023 SNOPR would replace the current prescriptive standards for gas cooking tops which prohibits the use of a constant burning pilot light. *Id.* As such, DOE's proposed standard for gas cooking tops would be only a performance standard. DOE noted that constant burning pilot lights consume approximately 2,000 kBtu/year and even the proposed baseline considered efficiency level of 1,775 kBtu/year for gas cooking tops would not be achievable by products if they were to incorporate a constant burning pilot light. *Id.* DOE further notes that the updated baseline efficiency level of 1,900 kBtu/year for gas cooking tops considered in the August 2023 NODA, as described later in this section, would also not be achievable by products incorporating a constant burning pilot light. Therefore, a new performance standard for gas cooking tops would preclude the possibility of any product designs with constant burning pilot lights. The existing prescriptive standard would remain in place until the compliance date of the new and amended standards finalized in this direct final rule.

For the February 2023 SNOPR, DOE considered efficiency levels associated with optimized burner and grate design, but only insofar as the efficiency level was achievable with at least one HIR burner [37] and continuous cast-iron grates. 88 FR 6818, 6845. DOE stated that it is aware that some methods used by gas cooking top manufacturers to achieve lower AEC can result in a smaller number of HIR burners. *Id.* HIR burners provide unique consumer utility and allow consumers to perform high heat cooking activities such as searing and stir-frying. DOE stated that it is also aware that some consumers derive utility from continuous cast-iron grates, such as the ability to use heavy pans, or to shift cookware between burners without needing to lift them. *Id.* Because of this, in the February 2023 SNOPR, DOE defined the efficiency levels for gas cooking tops such that all efficiency levels are achievable with at least one HIR burner and continuous cast-iron grates.

DOE's testing showed that energy use was correlated to burner design and cooking top configuration (*e.g.,* grate weight, flame angle, distance from burner ports to the cooking surface) and could be reduced by optimizing the design of the burner and grate system. *Id.* DOE reviewed the test data for the gas cooking tops in its test sample and identified two efficiency levels associated with improving the burner and grate design that corresponded to different design criteria. DOE defined EL 1 and EL 2 for gas cooking tops using the same E_{TLP} as used for the baseline efficiency level.

Table IV.10 shows the efficiency levels for gas cooking tops evaluated in the February 2023 SNOPR. *Id.* at 88 FR 6846.

Table IV.10 February 2023 SNOPR Gas Cooking Top Efficiency Levels

Level	IAEC (*kBtu/year*)
Baseline	1,775
1	1,440
2	1,204

DOE sought comment on the methodology and results for the proposed baseline and incremental efficiency levels for gas cooking tops in the February 2023 SNOPR. *Id.* at 88 FR 6844–6845.

AGA *et al.* requested more information regarding DOE's proposal to limit the EL 2 level to 1,204 kBtu/year, including the specific design changes or enhancements to the gas cooking tops needed to attain EL 2, the data and methodology used to propose EL 2 as the max-tech efficiency level for gas cooking tops, and DOE's justification for the proposed minimum requirement of 1,204 kBtu/year. (AGA *et al.,* No. 766 at p. 3)

As noted in the February 2023 SNOPR, DOE's testing showed that energy use was correlated to burner design and cooking top configuration (*e.g.,* grate weight, flame angle, distance from burner ports to the cooking surface) and could be reduced by optimizing the design of the burner and grate system. DOE reviewed the test data for the gas cooking tops in its test sample and identified two efficiency levels associated with improving the burner and grate design that corresponded to different design criteria. 88 FR 6818, 6845. The full dataset for gas cooking tops may be found in chapter 5 of the direct final rule TSD.[38]

AGA asserted that the February 2023 SNOPR exceeds DOE's authority by effectively imposing design requirements because cooking tops with more than one HIR burner cannot comply with the proposal and there is no real evidence that products with even one HIR burner and cast-iron grates could satisfy the standard proposed in the February 2023 SNOPR based on issues with the test results. (AGA, No. 2279 at pp. 26–28) AGA commented that EPCA allows DOE to issue a performance standard or a design requirement, but not both. (*Id.*) AGA asserted that the February 2023 SNOPR's limitation on the number and types of burners is both a design and a performance standard and is therefore unlawful. (*Id.*) AGA stated that the D.C. Circuit adopted a similar rationale in *Hearth, Patio, & Barbecue Association* v. *DOE,* which vacated and remanded DOE's standards for direct heating equipment when the court rejected

[37] As discussed, DOE defines a high input rate burner as a burner with an input rate greater than or equal to 14,000 Btu/h.

[38] DOE provided this response to AGA *et al.* on April 13, 2023. *See* docket item No. 1069.

DOE's pretextual argument that it had not imposed a design requirement for a class of products that were ineligible for design requirements. (*Id.*) AGA noted that the rule gave manufacturers the option of meeting either DOE's efficiency standard or a third-party standard that would have required elimination of constant burning pilot lights. (*Id.*)

DOE reiterates that the standard level recommended for gas cooking tops in the Joint Agreement and established in this direct final rule is a performance requirement and not a design standard. As stated, this IAEC level can be met by a variety of cooking tops with a variety of burner input rate configurations. Chapter 5 of the TSD for this direct final rule includes examples of cooking tops in the expanded test sample that meet the established performance standard.

AHAM commented that it noticed an error in DOE's standby power analysis for gas cooking tops. (AHAM, No. 2285 at p. 30) AHAM commented that to calculate highest measured efficiency, DOE added the lowest measured active energy consumption to the highest standby energy consumption of all units, but that DOE seemed to be adding values with different units of measure (kBtu + kWh) and that a correct calculation would result in an EL 2 of 1,277 kBtu/year. (*Id.*)

DOE appreciates AHAM's comment and notes that this error was corrected in its analysis for the August 2023 NODA.

AHAM noted that it used DOE's definition of HIR burner—input rate greater than or equal to 14,000 Btu/h—but questioned this as the appropriate threshold for the definition since DOE provided no justification for the selection in the form of consumer data or other evidence. (AHAM, No. 2285 at p. 3) AHAM requested that DOE present the data supporting this threshold to avoid its analysis being seen as arbitrary. (*Id.*) AHAM commented that it presents data on consumer preference that show that higher burner input rates have consumer utility—specifically, HIR burners provide quicker times to boil, an important consumer performance feature. (*Id.* at pp. 17–19)

Whirlpool requested that DOE provide data showing that gas cooking tops and ranges with a single HIR burner of 14,000 Btu/h and above are sufficient to meet consumers' cooking needs across all types of gas cooking products (*e.g.,* entry-level, mass-market, and high-output products). (Whirlpool, No. 2284 at pp. 6–7) If this is not possible, Whirlpool recommended that DOE reconsider the 14,000 Btu threshold proposed, as Whirlpool asserts that DOE's own data reveal that this is not representative of HIR burners on the market, noting that most models in DOE's data set have at least one burner with an input rate between 18,000 Btu/h and 25,000 Btu/h. (*Id.*) Whirlpool commented that DOE's proposed definition of HIR burners would include models that may not adequately perform certain types of cooking such as boiling, stir-frying, and searing, that is more easily done at high temperatures.

Throughout the history of this rulemaking, starting with the February 2014 RFI, DOE has considered HIR burners to be those rated at or above 14,000 Btu/h. 79 FR 8337, 8340. DOE based this determination on the April 2009 Final Rule and a report published as part of the September 1998 Final Rule.[39] 74 FR 16040; 16054 (Apr. 8, 2009). DOE further notes that the cooking product industry has not standardized a threshold for HIR burners within publicly available marketing material. For example, Consumer Reports considers high-power burners to be those rated above 11,000 Btu/h.[40] According to Whirlpool's website, it considers HIR burners to be rated above 12,000 Btu/h.[41] DOE additionally notes that in a comment submitted in response to the February 2023 SNOPR, Whirlpool referred to large burners as those rated above 15,000 Btu/h. (Whirlpool, No. 2284 at p. 7) Considering the apparent lack of consensus regarding a threshold that constitutes an HIR burner, and the range of possible thresholds apparent through publicly available sources, DOE has determined the use of 14,000 Btu/h to be a reasonable threshold for distinguishing HIR burners for the purposes of its analysis.

AHAM recommended that DOE evaluate additional gap-fill levels for gas cooking tops. (AHAM, No. 2285 at p. 44) AHAM commented that for these gap-fill levels, DOE should also add 5 percent to the level to account for test variation and conservative rating. (*Id.*)

Sub-Zero asserted that equity between electric and gas cooking top standards cannot be attained without a gap fill between EL 1 and baseline for gas cooking tops. (Sub-Zero, No. 2140 at p. 11)

As discussed, in response to the February 2023 SNOPR, DOE received additional gas cooking top test data from AHAM and PG&E that prompted DOE to review the engineering analysis—including the defined efficiency levels—for gas cooking tops as presented in the February 2023 SNOPR. In the August 2023 NODA, DOE presented updated efficiency levels for gas cooking tops based on its new expanded data set. 88 FR 50810, 50812. The following paragraphs summarize the key updates to the analysis for gas cooking tops that DOE presented in the August 2023 NODA.

In the August 2023 NODA, the updates to the efficiency levels for gas cooking tops included (1) an updated E_{TLP} estimate at each efficiency level for gas cooking tops, equal to the average of the non-zero E_{TLP} values measured in the expanded test sample; (2) an updated definition of the baseline efficiency level, based on the least efficient AEC value in the expanded test sample, which is less efficient than the least efficient AEC in the February 2023 SNOPR test sample; (3) an updated definition of EL 1, representing the most energy efficient AEC among units with multiple HIR burners and continuous cast-iron grates that would not preclude any combination of other features mentioned by manufacturers (*e.g.,* different nominal unit widths, sealed burners, at least one low input rate burner (''LIR burner''),[42] multiple dual-stacked and/or multi-ring HIR burners, and at least one extra-high input rate burner), as demonstrated by products from multiple manufacturers in the expanded test sample; and (4) an updated definition of the max-tech efficiency level based on the most efficient AEC value in the expanded test sample, achievable with multiple HIR burners (rather than a single HIR burner, used as the basis for the February 2023 SNOPR) and continuous cast-iron grates. *Id.*

As discussed in section IV.B of this document, to develop incremental efficiency levels for gas cooking tops, DOE analyzed the distribution of AEC values among only the cooking tops in the expanded test sample that have multiple HIR burners and continuous cast-iron grates. DOE did not consider any efficiency levels that would result in the lack of multiple HIR burners or continuous cast-iron grates. In the direct final rule TSD, DOE presents the results for all tested gas cooking tops, because these results are also used to develop

[39] Technical Support Document for Residential Cooking Products, Volume 2: Potential Impact of Alternative Efficiency Levels for Residential Cooking Products. Available at *www.regulations.gov/document/EERE-2006-STD-0070-0004.*

[40] See *www.consumerreports.org.*

[41] ''How Many BTUs Are Needed for a Gas Range | Whirlpool''. Available at *www.whirlpool.com/blog/kitchen/how-many-btus-for-gas-range.html* (last accessed August 11, 2023).

[42] In this direct final rule, DOE defines an LIR burner as a burner with an input rate below 6,500 Btu/h.

the market share distributions (see section IV.F.8 of this document).

Table IV.11 shows the efficiency levels for gas cooking tops that DOE evaluated for the August 2023 NODA. *Id.*

Table IV.11 August 2023 NODA Gas Cooking Top Efficiency Levels

Level	IAEC (*kBtu/year*)
Baseline	1,900
1	1,633
2	1,343

DOE sought comment on the methodology and results for the efficiency levels for gas cooking tops presented in the August 2023 NODA. *Id.* at 88 FR 50813.

ASAP *et al.*[43] commented in support of DOE's updated analysis in the August 2023 NODA. (ASAP *et al.,* No. 10113 at p. 1) ASAP *et al.* commented in support of the updated efficiency levels for gas cooking tops to reflect the expanded test sample and to ensure the availability of models with multiple HIR burners. (*Id.*)

WE ACT for Environmental Justice (''WE ACT'') commented that it opposes removing the prescriptive standard that gas cooking products not be equipped with a constant burning pilot light. (WE ACT, No. 10114 at p. 6) WE ACT commented that whether a gas cooking product has a pilot light influences its fuel efficiency. (*Id.*) WE ACT commented that because pilot lights burn constantly without producing usable heat, half of the energy is lost. (*Id.*)

EPCA defines an energy conservation standard as either a performance standard which prescribes a minimum energy efficiency determined in accordance with a test procedure or a design requirement. (42 U.S.C. 6291(6)) Furthermore, EPCA also contains an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) As discussed, DOE notes that constant burning pilot lights consume approximately 2,000 kBtu/year. 88 FR 6818, 6844. Therefore, a gas cooking top with a constant burning pilot light cannot meet the maximum IAEC established as the baseline efficiency level in this direct final rule of 1,900 kBtu/year, or the adopted standard level of 1,770 kBtu/year. The Joint Agreement specifies a performance standard for gas cooking tops, which replaces the existing design requirement prohibiting the use of constant burning pilot lights on gas cooking tops with or without an electrical supply cord.

AHAM requested that DOE clarify how it determined the 101 kBtu/year E_{TLP} value stated to be an outlier, and why it ignored the E_{TLP} value of 118 kBtu/year from PG&E Test Unit #5. (AHAM, No. 10116 at p. 9)

DOE understands AHAM's comment to be referencing a statement in the August 2023 NODA indicating that 101 kBtu/year was the largest E_{TLP} value in DOE's test sample. DOE notes that while PG&E Test Unit #5 has a larger E_{TLP} value, the statement in question was referencing the DOE test sample analyzed in support of the February 2023 SNOPR, which did not include PG&E Unit #5. DOE received data from PG&E after publication of the February 2023 SNOPR. Nonetheless, DOE's assessment that values of E_{TLP} over 100 kBtu/year represent outliers remains valid when the analysis considers the expanded dataset. In response to AHAM's request, DOE is clarifying that in this case, DOE considers the E_{TLP} values of 101 kBtu/year and 118 kBtu/year both to be outliers, as confirmed by the interquartile method of identifying outliers in which any non-zero value in the expanded dataset greater than 68 kBtu/year would be considered an outlier. Furthermore, fewer than 5 percent of the E_{TLP} values in the expanded dataset are greater than 100 kBtu/year.

PG&E, SDG&E, and SCE, jointly the California Investor-Owned Utilities (''CA IOUs''), commented that DOE should revise the E_{TLP} allocated to each efficiency level for gas cooking tops to more closely align with the methodology for electric smooth element cooking tops, stating that this revision allows for the development of more representative efficiency levels where the baseline efficiency levels represent the maximum observed energy consumption while the incremental efficiency levels represent annual standby energy use improvements. (CA IOUs, No. 10106 at pp. 1–3)

As discussed, in response to the February 2023 SNOPR, DOE received additional gas cooking top test data that prompted DOE to review the engineering analysis for gas cooking tops. The updates to the efficiency levels for gas cooking tops presented in the August 2023 NODA reflect this additional stakeholder data. DOE has determined that the updated E_{TLP} estimate at each efficiency level for gas cooking tops, equal to the average of the non-zero E_{TLP} values measured in the expanded test sample, is a representative allocation of the standby mode energy consumption at each efficiency level for gas cooking tops. DOE notes that it analyzed efficiency levels for gas cooking tops and electric cooking tops separately, in accordance with the EPCA requirement that any new or amended energy conservation standards be prescribed for each individual product class in order to achieve the maximum energy efficiency for that product class. (U.S.C. 6295(o)(2)(A))

AHAM commented that it opposes the methodology of combining burners of different types from more than one unit in the test sample to represent a theoretical unit that can meet the updated EL 1 for gas cooking tops. (AHAM, No. 10116 at p. 6) AHAM commented that this methodology is not representative of the units in the test sample. (*Id.*) AHAM further commented that it opposes combining the active mode and standby mode energy consumption of different units to define efficiency levels. (*Id.* at p. 9)

In this direct final rule, DOE determines that the methodology of combining burners of different types from the units in its test sample is an appropriate estimation of the potential breadth of gas cooking top efficiencies available on the market. Although DOE acknowledges that a cooking top redesign is performed at the product

[43] In this context ''ASAP *et al.*'' refers to a joint comment from Appliance Standards Awareness Project, American Council for an Energy Efficient Economy, National Consumer Law Center, and Natural Resources Defense Council.

level and not at the burner level, by combining burners of various input rates and efficiencies in its analysis, DOE can simulate the decisions manufacturers will need to make as they redesign their cooking tops to meet new and amended standards.

The National Association of Home Builders (''NAHB'') commented that DOE should further revise the updated efficiency levels to reflect additional stakeholder feedback and data. (NAHB, No. 10115 at p. 2) NAHB commented that the updated efficiency levels would still increase costs for manufacturers, decrease product performance, and impact the availability of product features that consumers want. (*Id.*)

AHAM commented that it is unclear how DOE defined efficiency levels and how technology options could be employed to reach each efficiency level presented in the August 2023 NODA. (AHAM, No. 10116 at p. 4) AHAM commented that DOE has not provided descriptions of the combination of features present in each unit in its test sample. (*Id.*) AHAM commented that the updated efficiency level for gas cooking tops is sensitive to variation in a limited number of test models. (*Id.* at pp. 6–7) AHAM commented that only one gas cooking top in the test sample, DOE Test Unit #18, meets the updated EL 1 and has multiple HIR burners, continuous cast-iron grates, at least one LIR burner, multiple dual-stacked and/or multi-ring HIR burners, and at least one extra-high input rate burner. (*Id.*) AHAM requested that DOE explain how the updated EL 1 for gas cooking tops does not preclude any combination of certain features and allow opportunity to comment after such explanation. (*Id.*)

The Joint Agreement recommended that DOE establish standards at an efficiency level, corresponding to 1,770 kBtu/year, that was not analyzed in either the February 2023 SNOPR or the August 2023 NODA. In this direct final rule, DOE analyzed this recommended efficiency level in place of the EL 1 defined in the August 2023 NODA and determined that an IAEC of 1,770 Btu/year can be achieved by a gas cooking top with multiple HIR burners, continuous cast-iron grates, at least one LIR burner, and does not preclude any other combination of consumer-desired features.

In this direct final rule, DOE analyzed the gas cooking top efficiency levels for both gas cooking top product classes shown in Table IV.12.

Table IV.12 Gas Cooking Top Efficiency Levels

Level	IAEC (*kBtu/year*)
Baseline	1,900
1	1,770
2	1,343

Although these efficiency levels and the standards adopted in this direct final rule are expressed in terms of IAEC, it is useful to examine how these identified levels relate to performance at a per-burner level to help illustrate the wide range of burner styles that can be implemented in cooking tops that achieve the standards adopted by this direct final rule. By ''backing out'' from each IAEC value the number of annual cooking cycles and representative water load mass as defined by the DOE test procedure, each IAEC value can be associated with a corresponding average normalized gas energy consumption representative of the Energy Test Cycle across all of the burners (*i.e.,* a corresponding ''average per-burner efficiency'' that represents the average of the energy used per gram (g) of water tested, expressed in Btu/g, among all of the burners on the cooking top).[44] Table IV.13 shows the corresponding average per-burner efficiency associated with each defined IAEC level. For both IEAC and the corresponding average per-burner efficiency, lower values are indicative of higher-efficiency performance.

Table IV.13 Corresponding Average Per-Burner Efficiency Associated with Each IAEC Level for Gas Cooking Tops

Level	IAEC (*kBtu/year*)	Corresponding Average Per-Burner Efficiency *(Btu/g)**
Baseline	1,900	1.57
1	1,770	1.46
2	1,343	1.10

* The standards adopted in this direct final rule are expressed in terms of IAEC. The average per-burner efficiency is shown here to help illustrate the wide range of burner styles that can be implemented in cooking tops that achieve the adopted standards.

A wide range of burner styles can achieve these efficiency performance thresholds at each of the defined efficiency levels. Section 5.5.3.1 of chapter 5 of the direct final rule TSD includes a graph in which DOE presents the normalized gas energy consumption of each gas burner in the expanded test sample. This graph demonstrates that a

[44] Chapter 5 of the direct final rule TSD provides further details on the methodology for determining the corresponding average per-burner efficiency associated with each defined IAEC level.

wide diversity of gas burner styles currently on the market meet the EL 1 and EL 2 efficiency thresholds shown in Table IV.13. Specifically, burners meeting the EL 1 efficiency threshold (corresponding to the finalized standard) span the whole range of tested burner input rates (3,900–25,000 Btu/h). In other words, on a per-burner basis, EL 1 performance can be achieved using any combination of low input, medium input, or high input rate burners.

DOE further emphasizes that gas cooking top efficiency is calculated based on the *average* normalized gas energy consumption among each of the burners required to be tested. As such, a gas cooking top that achieves EL 1 performance (corresponding to the finalized standard) may include individual burners whose normalized gas energy consumption is greater than 1.46 Btu/g, provided that the overall average performance across all tested burners is no greater than 1.46 Btu/g.

b. Conventional Ovens

Analyzed Product Types

As discussed, the Joint Agreement defines two product classes for conventional ovens: electric ovens and gas ovens. For this direct final rule, DOE analyzed four product types per conventional oven product class, representing different energy use profiles and baseline cost, as follows.

In the April 2009 Final Rule, DOE found that standard ovens and ovens using a catalytic continuous-cleaning process use roughly the same amount of energy. However, self-clean ovens use a pyrolytic process that provides enhanced consumer utility with lower overall energy consumption as compared to either standard or catalytically lined ovens. Based on DOE's review of gas ovens available on the U.S. market, and on manufacturer interviews and testing conducted as part of the engineering analysis, DOE noted in the June 2015 NOPR that the self-cleaning function of a self-clean oven may employ methods other than a high-temperature pyrolytic cycle to perform the cleaning action.[45] 80 FR 33030, 33043. DOE clarified that a conventional self-clean electric or gas oven is an oven that has a user-selectable mode separate from the normal baking mode, not intended to heat or cook food, which is dedicated to cleaning and removing cooking deposits from the oven cavity walls. *Id.* As part of the September 2016 SNOPR, DOE stated that it is not aware of any differences in consumer behavior in terms of the frequency of use of the self-clean function that would be predicated on the type of self-cleaning technology rather than on cleaning habits or cooking usage patterns that are not dependent on the type of technology. 81 FR 60784, 60804.

In recent conventional oven test procedures, DOE has included methods for measuring fan-only mode energy use.[46] Based on DOE's testing of freestanding, built-in, and slide-in gas and electric ovens, DOE observed that all of the built-in and slide-in ovens tested consumed energy in fan-only mode, whereas freestanding ovens did not. The energy consumption in fan-only mode for built-in and slide-in ovens ranged from approximately 1.3 to 37.6 watt-hours (''Wh'') per cycle, which corresponds to 0.25 to 7.6 kWh/year. Based on DOE's reverse engineering analyses, DOE noted that built-in and slide-in products incorporate an additional exhaust fan and vent assembly that is not present in freestanding products. The additional energy required to exhaust air from the oven cavity is necessary for slide-in and built-in installation configurations to meet safety-related temperature requirements because the oven is enclosed in cabinetry.

For these reasons, in this direct final rule, DOE analyzed four product types for each conventional oven product class: standard freestanding oven, standard built-in/slide-in oven, self-clean freestanding oven, and self-clean built-in/slide-in oven.[47] However, efficiency levels and incremental costs were analyzed at the product class level.

Potential Prescriptive Standards

There are no current test procedures for conventional ovens. Therefore, in the February 2023 SNOPR, DOE considered only efficiency levels corresponding to prescriptive design requirements as defined by the design options developed as part of the screening analysis (*see* section IV.B of this document): convection mode capability,[48] the use of an SMPS, and an oven separator (for electric ovens only). 88 FR 6818, 6846. DOE ordered the design options by ease of implementation. Table IV.14 and Table IV.15 define the efficiency levels analyzed in the February 2023 SNOPR for both electric and gas oven product classes, respectively.

Table IV.14 February 2023 SNOPR Electric Oven Efficiency Levels

Level	Design Option
Baseline	Baseline
1	Baseline + SMPS
2	1 + Convection mode capability
3	2 + Oven separator

[45] DOE noted that it is aware of a type of self-cleaning oven that uses a proprietary oven coating and water to perform a self-clean cycle with a shorter duration and at a significantly lower temperature setting. The self-cleaning cycle for these ovens, unlike catalytically lined standard ovens that provide continuous cleaning during normal baking, still have a separate self-cleaning mode that is user-selectable.

[46] Fan-only mode is an active mode that is not user-selectable in which a fan circulates air internally or externally to the cooking product for a finite period of time after the end of the heating function.

[47] In the February 2023 SNOPR, DOE described standard ovens as including ovens with and without a catalytic line. For simplicity, DOE is using the term ''standard oven'' in this direct final rule.

[48] As discussed in section IV.B.1.c of this document, DOE renamed the design option from ''forced convection'' to ''convection mode capability,'' for clarity.

Table IV.15 February 2023 SNOPR Gas Oven Efficiency Levels

Level	Design Option
Baseline	Baseline
1	Baseline + SMPS
2	1 + Convection mode capability

Note: All efficiency levels for gas ovens include the current prescriptive requirement prohibiting the use of a constant burning pilot light.

In the February 2023 SNOPR, DOE assumed that a baseline conventional oven uses a linear power supply, based on DOE's analysis of these products. *Id.* A linear power supply typically produces unregulated as well as regulated power. The main characteristic of an unregulated power supply is that its output may contain significant voltage ripple and that the output voltage will usually vary with the current drawn. The voltages produced by regulated power supplies are typically more stable, exhibiting less ripple than the output from an unregulated power supply and maintaining a relatively constant voltage within the specified current limits of the device(s) regulating the power. The unregulated portion of a linear power supply typically consists of a transformer that steps AC line voltage down, a voltage rectifier circuit for AC to DC conversion, and a capacitor to produce unregulated, DC output. However, there are other means of producing and implementing an unregulated power supply such as transformer-less capacitive and/or resistive rectification circuits. Within a linear power supply, the unregulated output serves as an input into a single or multiple voltage-regulating device. Such regulating devices include Zener diodes, linear voltage regulators, or similar components which produce a lower-potential, regulated power output from a higher-potential DC input. This approach results in a rugged power supply which is reliable but typically has an efficiency of about 40 percent.

In the February 2023 SNOPR, DOE analyzed the use of an SMPS rather than a linear power supply for EL 1. *Id.* at 88 FR 6847. An SMPS can reduce the standby mode energy consumption for conventional ovens due to their higher conversion efficiencies of up to 75 percent in appliance applications for power supply sizes similar to those of conventional ovens. An SMPS also reduces the no-load standby losses. In the February 2023 SNOPR, DOE stated that it is considering EL 1 to correspond to the prescriptive requirement that the conventional oven not be equipped with a linear power supply. *Id.*

In the February 2023 SNOPR, DOE analyzed the implementation of convection mode capability for EL 2. *Id.* An oven in convection mode uses a fan to distribute warm air evenly throughout the oven cavity. The use of forced circulation can reduce fuel consumption by cooking food more quickly, at lower temperatures, and in larger quantities than a natural convection oven of the same size and rating. Ovens can use convection heating elements in addition to resistance and other types of elements to speed up the cooking process. By using different cooking elements where they are most effective, such combination ovens can reduce the time and energy consumption required to cook food. As described further in chapter 5 of the TSD for this direct final rule, DOE performed testing on consumer conventional ovens in support of this rulemaking to determine the improvement in cooking efficiency associated with convection mode. Included in the DOE test sample were four gas ovens and two electric ovens equipped with a convection mode. DOE compared the measured energy consumption of each oven in bake mode to the average energy consumption of bake mode and convection mode (including energy consumption due to the fan motor) as specified in the test procedure. The relative decrease in active mode energy consumption resulting from the implementation of a convection mode in consumer conventional ovens ranged from 3.5 to 7.5 percent depending on the product class. In the February 2023 SNOPR, DOE stated that it is considering EL 2 to correspond to the prescriptive requirement that the conventional oven be equipped with a convection fan. *Id.* This prescriptive requirement would not preclude a non-convection mode being offered selectable by the consumer. *Id.*

In the February 2023 SNOPR, for EL 3, DOE analyzed the use of an oven separator, for electric ovens only.[49] *Id.* For loads that do not require the entire oven volume, an oven separator can be used to reduce the cavity volume that is used for cooking. With less oven volume to heat, the energy used to cook an item would be reduced. The oven separator considered here is the type that can be easily and quickly installed by the user. The side walls of the oven cavity would be fitted with ''slots'' that guide and hold the separator into position, and a switch to indicate when the separator has been installed. The oven would also require at least two separate heating elements to heat the two cavities. Different pairs of ''slots'' would be spaced throughout the oven cavity so that the user could select different positions to place the separator. In the February 2023 SNOPR, DOE stated that it is considering EL 3 to correspond to the prescriptive requirement that the electric oven be equipped with an oven separator. *Id.*

In the February 2023 SNOPR and the August 2023 NODA, DOE sought comment on the definitions of the proposed efficiency level for conventional ovens. *Id.* at 88 FR 50810, 50813.

The CA IOUs recommended that DOE consider a prescriptive requirement for built-in and slide-in oven fan runtimes. (CA IOUs, No. 2278 at pp. 4–6) The CA IOUs commented that a strong correlation exists between fan-only mode duration and energy use, and noted that DOE found a considerable variation in fan run times and energy use, ranging from 4.5 to 69 minutes and 1 Wh to 32 Wh, respectively. (*Id.*) The CA IOUs recommended that DOE set a prescriptive limit of fan-only mode run time that could potentially save approximately 7 kWh/year per built-in/slide-in oven, comparable to the 12 kWh/year that DOE's proposed prescriptive standard would attain. (*Id.*) The CA IOUs commented that many commercially available ovens have fans that operate for a shorter time while providing the same function as fans with a longer runtime. (*Id.*) The CA IOUs asserted that a prescriptive standard limiting fan runtime is technologically feasible and cost-effective for consumers, because it requires only the implementation of a timer, and could yield savings of up to $13 in lifetime operating costs. (*Id.*) The CA IOUs also asserted that a

[49] Oven separators are not used in gas ovens because they would interfere with the combustion air flow and venting requirements for the separate gas burners on the top and bottom of the oven cavity.

prescriptive runtime requirement is unlikely to increase manufacturer impacts significantly because manufacturers can readily incorporate the timer into any product redesign to comply with the proposed standards. (*Id.*) The CA IOUs additionally recommended DOE consider relevant safety standards and requirements when setting a fan runtime limit. (*Id.*)

DOE notes that limiting fan runtime in conventional ovens could introduce a potential safety hazard for certain designs by limiting the amount of cooling after a cooking cycle. DOE lacks sufficient data at this time to characterize the design tradeoffs and energy consumption impacts of specific fan runtimes to allow it to establish a prescriptive requirement for fan runtimes.

In this direct final rule, DOE is analyzing, consistent with the recommendations in the Joint Agreement, the efficiency levels for conventional ovens that were proposed in the February 2023 SNOPR. Table IV.16 and Table IV.17 define the efficiency levels for the electric and gas oven product classes, respectively.

Table IV.16 Electric Oven Efficiency Levels

Level	Design Option
Baseline	Baseline
1	Baseline + SMPS
2	1 + Convection mode capability
3	2 + Oven separator

Table IV.17 Gas Oven Efficiency Levels

Level	Design Option
Baseline	Baseline
1	Baseline + SMPS
2	1 + Convection mode capability

Energy Consumption of Each Efficiency Level

DOE's test sample for conventional ovens included one gas wall oven, seven gas ranges, five electric wall ovens, and two electric ranges for a total of 15 conventional ovens covering all of the considered product types. DOE conducted testing according to the test procedure adopted in the July 2015 TP Final Rule. 88 FR 6818, 6847. However, as discussed previously, DOE is considering only efficiency levels corresponding to prescriptive design requirements, consistent with the Joint Agreement. In order to develop estimated energy consumption rates for each efficiency level, in support of the Energy Use analysis (*see* section IV.E of this document), DOE based its analyses on the data measured using the now-repealed test procedure.

The integrated annual oven energy consumption (''IE_{AO}'' [50]) for each consumer conventional oven in DOE's test sample was broken down into its component parts: the energy of active cooking mode, E_{AO} (including any self-cleaning operation); fan-only mode, for built-in/slide-in ovens as applicable; and combined low-power mode, E_{TLP} (including standby mode and off mode).

Because oven cooking efficiency and energy consumption depend on cavity volume, DOE normalized IE_{AO} to a representative cavity volume of 4.3 cubic feet (''ft^3'') using the relationship between energy consumption and cavity volume discussed in chapter 5 of the TSD for this direct final rule to allow for more direct comparison between units in the test sample.

As part of the September 2016 SNOPR, DOE developed energy consumption values for the baseline efficiency levels for conventional ovens considering both data from the previous standards rulemaking and the measured energy use for the test units. DOE conducted testing for all units in its test sample to measure integrated annual energy consumption, which included energy use in active mode (including fan-only mode) and standby mode. 81 FR 60784, 60814. As discussed in the September 2016 SNOPR, DOE augmented its analysis of electric standard ovens by considering the energy use of the electric self-clean units in its test sample, adjusted to account for the differences between standard-clean and self-clean ovens. Augmenting the electric standard oven dataset with self-clean models from the DOE test sample allowed DOE to consider a wider range of cavity volumes in its analysis. 81 FR 60784, 60815. To establish the estimated energy consumption values for the baseline efficiency levels for conventional ovens, DOE first derived a relationship between energy consumption and cavity volume. Using the slope from the previous rulemaking, DOE selected new intercepts corresponding to the ovens in its test sample with the lowest efficiency, so that no ovens in the test sample were cut off by the baseline curve. DOE then set baseline standby energy consumption for conventional ovens equal to that of the oven (including the oven component of a combined cooking product) with the highest standby energy consumption in DOE's test sample to maintain the full functionality of controls for consumer utility. In response to the September 2016 SNOPR, DOE did not receive comment on the baseline efficiency

[50] In this direct final rule, DOE refers to the integrated annual oven energy consumption using the abbreviation IE_{AO}, rather than IAEC, to emphasize the difference between the IAEC values used for conventional cooking tops which were measured according to appendix I1 and the energy use values used for conventional ovens which were measured according to the test procedure as finalized in the July 2015 TP Final Rule.

levels considered for conventional ovens. 85 FR 80982, 81011.

For the February 2023 SNOPR, DOE expanded its sample size of conventional ovens and ranges used to determine the baseline E_{TLP} value and calculated the baseline E_{TLP} using the highest combined low-power mode measured power on a conventional range with a linear power supply. 88 FR 6818, 6848.

In the February 2023 SNOPR, DOE developed the incremental efficiency levels for each design option identified as a result of the screening analysis. *Id.* at 88 FR 6849. DOE then developed estimated energy consumption values for each efficiency level based on test data collected according to the earlier version of the oven test procedure established in the July 2015 TP Final Rule. *Id.*

DOE's testing of freestanding, built-in, and slide-in installation configurations for gas and electric ovens revealed that built-in and slide-in ovens have a fan that consumes energy in fan-only mode, whereas freestanding ovens do not have such a fan. For the February 2023 SNOPR, DOE developed separate energy consumption values for each installation configuration. *Id.*

DOE sought comment on the methodology and results for the estimated energy use of each proposed efficiency level for conventional ovens. *Id.* at 88 FR 6850.

AHAM commented that DOE is inappropriately relying on the withdrawn test procedure for conventional ovens to calculate savings attributable to design standards for ovens. (AHAM, No. 2285 at p. 16) AHAM commented that DOE determined that the withdrawn rule may not accurately represent consumer use because it favors conventional ovens with low thermal mass and does not capture cooking performance-related benefits due to increased thermal mass of the oven cavity. (*Id.*) AHAM commented that DOE should not calculate savings based on a test it has determined does not produce representative results and that any analysis produced using an unrepresentative test procedure is likely to be inaccurate. (*Id.*)

DOE notes that because there is currently no established test procedure for conventional ovens, DOE is using the best data it has available at this time, which is based on its previous test procedure, to estimate savings associated with the prescriptive standards. DOE further notes that the prescriptive standards for conventional ovens recommended in the Joint Agreement and adopted in this direct final rule are based on an SMPS design option, and that energy use of this design option does not depend upon the thermal mass of the oven.

For the reasons presented in the February 2023 SNOPR, in this direct final rule, DOE is estimating the energy consumption values for each efficiency level for conventional ovens using the methodology described in the February 2023 SNOPR.

Energy Use Versus Cavity Volume

The energy consumption of the conventional oven efficiency levels detailed above are predicated upon ovens with a cavity volume of 4.3 ft^3. Based on DOE's testing of gas and electric ovens and discussions with manufacturers, energy use scales with oven cavity volume due to larger ovens having higher thermal masses and larger volumes of air (including larger vent rates) than smaller ovens. Because the DOE test procedure adopted in the July 2015 TP Final Rule for measuring IE_{AO} uses a fixed test load size, larger ovens with higher thermal mass will have a higher measured IE_{AO}. As a result, DOE considered available data to characterize the relationship between energy use and oven cavity volume. Additional discussion of DOE's derivation of the oven IE_{AO} versus cavity volume relationship is presented in chapter 5 of the TSD for this direct final rule.

2. Cost Analysis

The cost analysis portion of the engineering analysis is conducted using one or a combination of cost approaches. The selection of cost approach depends on a suite of factors, including the availability and reliability of public information, characteristics of the regulated product, the availability and timeliness of purchasing the product on the market. The cost approaches are summarized as follows:

- *Physical teardowns:* Under this approach, DOE physically dismantles a commercially available product, component-by-component, to develop a detailed bill of materials for the product.
- *Catalog teardowns:* In lieu of physically deconstructing a product, DOE identifies each component using parts diagrams (available from manufacturer websites or appliance repair websites, for example) to develop the bill of materials for the product.
- *Price surveys:* If neither a physical nor catalog teardown is feasible (for example, for tightly integrated products such as fluorescent lamps, which are infeasible to disassemble and for which parts diagrams are unavailable) or cost-prohibitive and otherwise impractical (*e.g.,* large commercial boilers), DOE conducts price surveys using publicly available pricing data published on major online retailer websites and/or by soliciting prices from distributors and other commercial channels.

In the present case, DOE conducted the analysis using physical and catalog teardowns. The resulting bill of materials provides the basis for the manufacturer production cost (''MPC'') estimates.

To account for manufacturers' profit margin, DOE applies a multiplier (the manufacturer markup) to the MPC. The resulting manufacturer selling price (''MSP'') is the price at which the manufacturer distributes a unit into commerce. DOE developed an average manufacturer markup by examining the annual Securities and Exchange Commission (''SEC'') 10–K reports filed by publicly-traded manufacturers primarily engaged in appliance manufacturing and whose combined product range includes consumer conventional cooking products. *See* chapter 12 of the TSD for this direct final rule for additional detail on the manufacturer markup.

3. Cost-Efficiency Results

In defining the baseline and incremental MPCs for each defined product class for this direct final rule, DOE considered comments it had received in response to the cost-efficiency results presented in the February 2023 SNOPR.

a. Electric Cooking Tops

For the February 2023 SNOPR, DOE developed the cost-efficiency results for electric smooth element cooking tops shown in Table IV.18. 88 FR 6818, 6850. DOE developed incremental MPCs based on manufacturing cost modeling of units in its sample featuring the design options.

Table IV.18 February 2023 SNOPR Electric Smooth Element Cooking Tops Incremental Manufacturer Production Costs

Level	IAEC *(kWh/year)*	Incremental MPC (*2021$*)
1	207	$2.17
2	189	$11.05
3	179	$263.19

In the August 2023 NODA, DOE maintained the incremental MPCs for electric smooth element cooking tops that were proposed in the February 2023 SNOPR. 88 FR 50810, 50813.

DOE requested comment, data, and information on the incremental manufacturer production costs for electric smooth element cooking tops in the February 2023 SNOPR and the August 2023 NODA. 88 FR 6818, 6852, 88 FR 50810, 50813.

DOE did not receive any comments regarding electric smooth element cooking top MPCs in response to the February 2023 SNOPR or the August 2023 NODA.

For this direct final rule, DOE updated the underlying raw material prices used in its cost model to reflect current raw material prices, which resulted in slight changes to the MPC values in comparison to the values used in the February 2023 SNOPR. Table IV.19 presents the incremental MPCs for each efficiency level analyzed in this direct final rule for both electric smooth element cooking top product classes. DOE notes that the estimated incremental MPCs are equivalent for standalone cooking tops and the cooking top component of combined cooking products because none of the considered design options would be implemented differently as a function of installation configuration.

Table IV.19 Electric Smooth Element Cooking Tops Incremental Manufacturer Production Costs

Level	IAEC *(kWh/year)*	Incremental MPC (*2022$*)
1	207	$1.99
2	189	$15.82
3	179	$251.34

b. Gas Cooking Tops

For the February 2023 SNOPR, DOE developed the cost-efficiency results for gas cooking tops shown in Table IV.20. 88 FR 6818, 6850. DOE developed incremental MPCs based on manufacturing cost modeling of units in its sample featuring the design options.

Table IV.20 February 2023 SNOPR Gas Cooking Tops Manufacturer Production Costs

Level	IAEC *(kBtu/year)*	Incremental MPC (*2021$*)
1	1,440	$12.41
2	1,204	$12.41

DOE sought comment on the manufacturer production costs for gas cooking tops used in the analysis for the February 2023 SNOPR. 88 FR 6818, 6852.

AGA commented that DOE has considered the design costs of redesigning cooking tops to meet the TSL but does not consider other costs to manufacturers and consumers if the design of the product must completely change to allow for features that keep a product competitive. (AGA, No. 2279 at p. 43)

As discussed, DOE determines the incremental MPCs based on manufacturing cost modeling of the units in its test sample featuring the designated design options. DOE notes that it considers the overall cost to manufacturers and consumers as part of its LCC and PBP analysis and the MIA analysis, as discussed in the following sections of this document.

AHAM commented that DOE should revisit the February 2023 SNOPR MPC for EL 2 gas cooking tops, stating that the incremental cost from EL 1 is not zero. (AHAM, No. 2285 at p. 22) AHAM commented that a cooking top with a full range of burner capacities, including an LIR burner, will cost more than one with a homogenized set of mid-input range burners. (*Id.*)

AHAM commented that in the February 2023 SNOPR, DOE determined that there is not likely to be a cost difference between EL 1 and EL 2, but in order to retain product performance (*e.g.,* the ability to cook at lower temperatures), AHAM commented that a stacked burner would be an option. (*Id.* at p. 37) AHAM noted that DOE has not considered the cost associated with the stacked burner design configuration, but if DOE continues to consider EL 2, it must take into account the cost associated with stacked burners at EL 2. (*Id.*)

DOE defined EL 2 for gas cooking tops based on the AEC of the least energy-consumptive cooking top in its expanded test sample that contained multiple HIR burners and continuous cast-iron grates, regardless of specific burner configuration other than input rate. This efficiency level does not

presume the use of dual-stacked burners, and for that reason DOE did not include the cost of improving the efficiency of dual-stacked burners in an optimized burner and grate design in the incremental MPC for gas cooking tops at EL 2. However, as discussed in section IV.C.1.a of this document, DOE recognizes the value in maintaining the product performance attributes of all the features that manufacturers stated that consumers value, including dual-stacked HIR burners, and notes that the standards adopted in this direct final rule, which represent EL 1 for gas cooking tops, would allow manufacturers to continue to offer this burner design.

In the August 2023 NODA, DOE updated the MPCs for gas cooking tops based on its understanding of the different types of burner and grate redesigns likely to be needed to achieve each of the revised efficiency levels, using the same underlying data as was used in the February 2023 SNOPR. *Id.*

DOE stated that its analysis shows that the incremental MPC developed in the February 2023 SNOPR, $12.41, representing the optimized burner and grate design option (*e.g.,* grate weight, flame angle, distance from burner ports to the cooking surface), accurately represents the cost to redesign a unit at EL 1 to meet EL 2. *Id.*

To develop the incremental MPC between the updated baseline and EL 1 for the August 2023 NODA, DOE analyzed the test data in its expanded test sample which shows that cooking tops at the baseline efficiency level typically include one or two burners with ''non-optimized'' turndown capability (*i.e.,* the lowest available simmer setting is more energy consumptive than necessary to hold the test load in a constant simmer close to 90 °C, resulting in significantly higher energy consumption than for a burner with a simmer setting that holds the test load close to that temperature). *Id.* In the August 2023 NODA, DOE estimated that the cost of implementing a burner with optimized turndown capability in place of a burner with non-optimized turndown capability to meet typical efficiencies available in the market is smaller than the cost of an entirely redesigned burner and grate system (associated with the incremental MPC between EL 1 and EL 2). *Id.* DOE estimated that the percentage of burners with non-optimized turndown capability (defined empirically from the expanded test sample as burners with a specific energy use of more than 1.45 Btu per gram of water in the test load, as measured by appendix I1) in the baseline units in its expanded test sample ranged from 16 percent (one out of six burners) to 40 percent (two out of five burners). *Id.* In order to conservatively assess the incremental MPC between baseline and EL 1, DOE defined it as 40 percent of the $12.41 incremental MPC between EL 1 and EL 2, or $4.96. *Id.*

In the August 2023 NODA, DOE developed the incremental MPCs relative to the baseline associated with the updated efficiency levels shown in Table IV.21. *Id.*

Table IV.21 August 2023 NODA Updated Gas Cooking Tops Incremental Manufacturer Production Costs

Level	IAEC (*kBtu/year*)	Incremental MPC *(2021$)*
1	1,633	$4.96
2	1,343	$17.37

DOE requested comment, data, and information on the incremental manufacturer production costs for gas cooking tops in the August 2023 NODA. *Id.* at 88 FR 50813–50814.

The CA IOUs commented that while simmer setting optimization would improve IAEC, it is unclear why any design changes would result in the $4.96 increase to the MPC modeled in the August 2023 NODA. (CA IOUs, No. 10106 at pp. 3–5) The CA IOUs asserted that four of the nine gas cooking tops tested by PG&E had at least one burner with a non-optimized simmer setting for at least one test run, and that two of these gas cooking tops also had another burner with the same power ratings, where one burner could simmer water at temperatures less than 91 °C and the other burner could not. (*Id.*) The CA IOUs commented that, based on this data, manufacturers could implement an optimized simmer setting for all burners using the hardware already installed on the optimized burner of the same power rating and that new hardware or software that would increase the MPC should not be necessary. (*Id.*) The CA IOUs commented that DOE should consider the incremental MPC at EL 1 to be negligible or substantially lower than $4.96 to reflect the lack of costs associated with optimizing the simmer setting, or clarify its determination of the cost of an optimized simmer setting. (*Id.*)

In the August 2023 NODA, DOE defined the incremental MPC between baseline and EL 1 based on the cost of implementing a burner with optimized turndown capability in place of a burner with non-optimized turndown capability to meet typical efficiencies available in the market. 88 FR 50810, 50813. As discussed in the August 2023 NODA, DOE clarifies that it considers burners with ''non-optimized'' turndown capability to be burners for which the lowest available simmer setting is more energy consumptive than necessary to hold the test load in a constant simmer close to 90 °C, resulting in significantly higher energy consumption than for a burner with a simmer setting that holds the test load close to that temperature. *Id.* DOE empirically defines a non-optimized burner as having a specific energy use of more than 1.45 Btu per gram of water in the test load, as measured by appendix I1. *Id.* In its analysis for the August 2023 NODA, DOE estimated that the percentage of burners with non-optimized turndown capability in the baseline units in its expanded test sample ranged up to 40 percent (two out of five burners). *Id.* DOE therefore estimated the incremental MPC between baseline and EL 1 to be 40 percent of the incremental MPC between EL 1 and EL 2 that corresponds to a whole burner and grate system re-design associated with the optimized burner and grate design option. *Id.* In response to the CA IOUs' comment, DOE has reviewed its test sample and the additional stakeholder data it has received from PG&E, and notes that it has not found information to suggest that burners with optimized turndown capability already exist within a cooking top alongside burners of the same input rate with non-optimized turndown capability for all input rates and unit configurations. Therefore, DOE does not have sufficient information to conclude that there is

zero or negligible incremental cost between a non-optimized burner and a burner with optimized turndown capability, as suggested by the CA IOUs.

AHAM commented that it opposes the incremental MPCs for gas cooking tops between EL 1 and EL 2 presented in the August 2023 NODA. (AHAM, No. 10116 at pp. 21–23) AHAM commented that redesign of one burner requires consideration of the overall system, grate redesign and testing in order to assure performance, safety, and air quality issues. (*Id.*) AHAM commented that DOE should account for total system redesign in determining the costs associated with EL 1 and EL 2. (*Id.*)

ONE Gas commented that DOE should clarify how it calculated increased MPCs for gas cooking tops even though the updated efficiency levels in the August 2023 NODA are less stringent. (ONE Gas, No. 10109 at p. 4)

DOE notes that the MPCs for gas cooking tops evaluated in the February 2023 SNOPR effectively corresponded to a whole burner and grate system re-design based on its evaluation of the optimized burner and grate design option. 88 FR 6818, 6851. By contrast, in the August 2023 NODA, DOE updated the MPCs for gas cooking tops based on its understanding of the different types of burner and grate redesign likely to be needed to achieve each of the revised ELs, using the same underlying data as was used in the February 2023 SNOPR. 88 FR 50810, 50813. Specifically, in the August 2023 NODA, DOE noted that the incremental MPC developed for EL 1 in the February 2023 SNOPR (corresponding to a reduction of approximately 300 kBtu/year) accurately represented the cost to redesign a unit at the August 2023 NODA EL 1 to meet EL 2 (corresponding to an approximately equivalent reduction of around 300 kBtu/year). As discussed, in the August 2023 NODA, DOE defined the incremental MPC between baseline and EL 1 to be 40 percent of the incremental MPC between EL 1 and EL 2, based on its estimation of the percentage of burners with non-optimized turndown capability in the baseline units in its expanded test sample. *Id.* Also, as discussed in the August 2023 NODA, DOE estimated that the cost of implementing a burner with optimized turndown capability in place of a burner with non-optimized turndown capability to meet typical efficiencies available in the market is smaller than the cost of an entirely redesigned burner and grate system. *Id.* As such, DOE determined that a total system redesign would not be necessary to achieve EL 1 as presented in the August 2023 NODA.

For this direct final rule, DOE updated the incremental MPCs methodology for gas cooking tops based on its understanding of the different types of burner and grate redesigns likely to be needed to achieve the updated efficiency levels analyzed in this direct final rule, using the same underlying data as was used in the February 2023 SNOPR and August 2023 NODA. DOE revised the incremental MPC between baseline and EL 1 to reflect the updated efficiency level recommended by the Joint Agreement. In this direct final rule, DOE determines that all baseline gas cooking tops in the expanded test sample can achieve EL 1 by optimizing a single non-optimized burner, representing typically 20 percent of burners (one out of five). Therefore, DOE defined the incremental MPC between baseline and EL 1 as 20 percent of the previously established incremental MPC between EL 1 and EL 2. For this direct final rule, DOE used the analytical approach to determine the MPC increase between baseline and EL 2 that was presented in the August 2023 NODA.

Finally, for this direct final rule, DOE updated the underlying raw material prices used in its cost model to reflect current raw material prices, which resulted in slight changes to the MPC values in comparison to the values used in the August 2023 NODA. Table IV.22 presents the incremental MPCs for each efficiency level analyzed in this direct final rule for both gas cooking top product classes. DOE notes that the estimated incremental MPCs are equivalent for standalone cooking tops and the cooking top component of combined cooking products because none of the considered design options would be implemented differently as a function of installation configuration.

Table IV.22 Gas Cooking Tops Incremental Manufacturer Production Costs

Level	IAEC (*kBtu/year*)	Incremental MPC *(2022$)*
1	1,770	$2.67
2	1,343	$18.72

c. Conventional Ovens

For the February 2023 SNOPR, DOE developed the cost-efficiency results for each conventional oven product class based on manufacturing cost modeling of units in its sample featuring the design options. DOE noted that the estimated incremental MPCs are equivalent for the freestanding and built-in/slide-in oven product classes and for the standard and self-clean oven product classes because none of the considered design options would be implemented differently as a function of installation configuration or self-clean functionality. *Id.*

DOE did not receive any comments regarding conventional oven MPCs in response to the February 2023 SNOPR or the August 2023 NODA.

For this direct final rule, DOE updated the underlying raw material prices used in its cost model to reflect current raw material prices, which resulted in slight changes to the MPC values in comparison to the values used in the February 2023 SNOPR. The incremental MPCs for the electric and gas oven product classes are shown in Table IV.23 and Table IV.24, respectively.

Table IV.23 Electric Oven Incremental Manufacturer Production Costs

Level	Design Option	Incremental MPC (*2022$*)
1	Baseline + SMPS	$1.99
2	1 + Convection mode capability	$36.70
3	2 + Oven separator	$71.89

Table IV.24 Gas Oven Incremental Manufacturer Production Costs

Level	Design Option	Incremental MPC *(2022$)*
1	Baseline + SMPS	$1.99
2	1 + Convection mode capability	$26.23

D. Markups Analysis

The markups analysis develops appropriate markups (*e.g.,* manufacturer markups, retailer markups, distributor markups, contractor markups) in the distribution chain and sales taxes to convert the MSP estimates derived in the engineering analysis to consumer prices, which are then used in the LCC and PBP analysis and in the manufacturer impact analysis. At each step in the distribution channel, companies mark up the price of the product to cover business costs and profit margin.

As part of the analysis, DOE identifies key market participants and distribution channels. For consumer conventional cooking products, the main parties in the distribution chain are (1) the manufacturers of the products; (2) the retailers purchasing the products from manufacturers and selling them to consumers; and (3) the consumers who purchase the products.

For the February 2023 SNOPR, DOE developed baseline and incremental markups for each actor in the distribution chain. Baseline markups are applied to the price of products with baseline efficiency, while incremental markups are applied to the difference in price between baseline and higher-efficiency models (the incremental cost increase). The incremental markup is typically less than the baseline markup and is designed to maintain similar per-unit operating profit before and after new or amended standards.[51] For the February 2023 SNOPR, DOE relied on economic data from the U.S. Census Bureau to estimate average baseline and incremental markups.[52]

For this direct final rule, DOE considered comments it had received regarding the markups analysis conducted for the February 2023 SNOPR. The approach for used for this direct final rule is the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, AHAM commented that DOE uses different markups from manufacturers to end customers for the base case and for any costs added to meet proposed standards, average, and incremental markups respectively. (AHAM, No. 2285 at pp. 50–51) AHAM commented that it, AHRI, and others have disputed this distinction over many years and rulemakings. (*Id.*) In particular, AHAM stated that its comments on DOE's 2015 NOPR for Energy Conservation Standards for Residential Dishwashers contain quotes from actual retailers about their actual practices, quotes that directly contradict a DOE process that is based on no empirical evidence and on discredited theory. (*Id.*) AHAM commented that DOE cannot ignore data that contradicts its analysis and must take these comments into account or its analysis will lack the support of facts and a resulting standard could be arbitrary and capricious. (*Id.*)

DOE's incremental markup approach assumes that an increase in operating profits, which is implied by keeping a fixed markup when the product price goes up, is unlikely to be viable over time in a reasonably competitive market like household appliance retailers. The Herfindahl-Hirschman Index (''HHI'') reported by the 2017 Economic Census indicates that the household appliance stores sector (NAICS 443141) is a competitive marketplace.[53] DOE recognizes that actors in the distribution chains are likely to seek to maintain the same markup on appliances in response to changes in manufacturer selling prices after an amendment to energy conservation standards. However, DOE believes that retail pricing is likely to adjust over time as those actors are forced to readjust their markups to reach a medium-term equilibrium in which per-unit profit is relatively unchanged before and after standards are implemented.

DOE acknowledges that markup practices in response to amended standards are complex and varying with business conditions. However, DOE's analysis necessarily considers a very simplified and hypothetical version of the world of appliance retailing: namely, a situation in which nothing changes except for those changes in appliance offerings that occur in response to amended standards. Obtaining data on markup practices in the situation described above is very challenging. Hence, DOE continues to maintain that its assumption that standards do not facilitate a sustainable increase in profitability is reasonable.

AGA asserted that DOE's data source for developing markups in the February 2023 SNOPR for consumer cooking products differs from the data source used for rulemakings for other products. (AGA, No. 2279 at p. 40)

DOE's methodology for estimating markups is product specific and dependent on the type of distribution channels through which products move from manufacturers to purchasers. DOE uses the best available data to estimate markups for identified distribution channels for a given product. In the case of consumer cooking products, DOE identified the retail channel as the

[51] Because the projected price of standards-compliant products is typically higher than the price of baseline products, using the same markup for the incremental cost and the baseline cost would result in higher per-unit operating profit. While such an outcome is possible, DOE maintains that in markets that are reasonably competitive it is unlikely that standards would lead to a sustainable increase in profitability in the long run.

[52] U.S. Census, *2017 Annual Retail Trade Survey* (*ARTS*), Electronics and Appliance Stores sectors.

[53] 2017 Economic Census, Selected sectors: Concentration of largest firms for the U.S. Data table available at *www.census.gov/data/tables/2017/econ/economic-census/naics-sector-44-45.html.*

dominant distribution channel and estimated markups using data from Census Bureau 2017 Annual Retail Trade Survey (ARTS).

Chapter 6 of the direct final rule TSD provides details on DOE's development of markups for consumer conventional cooking products.

E. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of consumer conventional cooking products at different efficiencies in representative U.S. single-family homes and multi-family residences, and to assess the energy savings potential of increased consumer conventional cooking products efficiency. The energy use analysis estimates the range of energy use of consumer conventional cooking products in the field (*i.e.,* as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of new or amended standards.

In the February 2023 SNOPR, DOE used 2019 California Residential Application Saturation Study (''RASS'') [54] and 2021 field-metered data from the Pecan Street Project.[55] From the Pecan Street data, DOE performed an analysis of 39 households in Texas and 28 households in New York to develop average annual energy consumption values for each State. In the absence of similar field-metered data for other States, DOE weighted the average annual energy use results from California (from CA RASS 2019), Texas, and New York by the number of households in each State to estimate an average National energy use value more representative than any individual State measurement. DOE calculated a household-weighted National value using the average values from Texas, New York, and California and estimates for the number of households in each State from the U.S. Census.

In the February 2023 SNOPR, DOE established a range of energy use from data in the EIA's 2015 Residential Energy Consumption Survey (''RECS 2015'').[56] RECS 2015 does not provide the annual energy consumption of cooking tops, but it does provide the frequency of cooking top use.[57] DOE was unable to use the frequency of use to calculate the annual energy consumption using a bottom-up approach, as data in RECS 2015 did not include information about the duration of a cooking event to allow for an annual energy use calculation. DOE relied on California RASS 2021 and Pecan Street Project data to establish the average annual energy consumption of a conventional cooking top and a conventional oven.

For this direct final rule, DOE considered comments it had received regarding the energy use analysis conducted for the February 2023 SNOPR. The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, AHAM questioned whether DOE uses RECS end-use energy consumption estimates and has reviewed the underlying analyses and equations for allocating energy by end use and the related regression or similar statistics for RECS consumption data. (AHAM, No. 127 at p. 3)

DOE's energy use analysis for consumer conventional cooking products does not make use of end-use energy consumption estimates in RECS. As described in the February 2023 SNOPR, DOE used available field-metered data to estimate the average annual energy use of consumer conventional cooking products. DOE used RECS responses on the frequency of use to establish a range of energy consumption values.

In response to the February 2023 SNOPR, AHAM commented that DOE should retain its current estimate of cooking cycles since DOE has computed an average number of cooking cycles per year at 418 based on the 2015 RECS, which essentially agrees with RECS 2020 data and points to stability in cooking behavior over the past several years. (AHAM, No. 2285 at p. 44)

In response to the August 2023 NODA, AGA *et al.* commented that DOE should update the consumer sample to the more recent and larger RECS 2020 sample rather than rely on RECS 2015 as done in the February 2023 SNOPR and August 2023 NODA. (AGA *et al.,* No. 10112 at pp. 11–12)

DOE agrees with AHAM's assessment that the average number of cooking cycles remains similar between RECS 2015 and RECS 2020 reflecting stability in cooking behavior in recent years. For this direct final rule, DOE has updated the consumer sample to RECS 2020 to estimate the variability in cooking energy use.[58]

AHAM noted that while there may have been some change in cooking at home during the COVID pandemic, it is too soon to determine whether there is a long-term trend for more home-cooked meals and DOE should wait to assess this until the next round of standards when more data will be available. (AHAM, No. 2285 at p. 44)

For this direct final rule, DOE includes more recent 2022 Pecan Street Project data in its estimate of the annual energy use for consumer conventional cooking products. These data are less influenced by the impacts of the COVID pandemic and more representative of current cooking product usage.

Whirlpool commented that by lessening the utility of consumer conventional cooking products such as gas stoves and ranges, the standard proposed in the February 2023 SNOPR may have the unintended effect of influencing consumers to maintain the level of cooking performance they require through less efficient, less cost effective, and more carbon-intensive alternatives (*e.g.,* eat outside of the home more frequently, cater food, or use an outdoor grill). (Whirlpool, No. 2284 at pp. 7–8)

As discussed in section V.B.4 of this document, DOE has determined that the standards adopted in this direct final rule will not lessen the utility or performance of the consumer conventional cooking products under consideration in this rulemaking. Therefore, DOE does not expect and is unaware of any data to indicate that the performance standards adopted in this direct final rule would cause a meaningful change in consumers' cooking behavior.

NPGA recommended that DOE adopt kBtu/year as the unit of measure for reporting the energy use of both electric and gas cooking products, which is consistent with DOE's use of FFC analysis in the rule, to better facilitate the comparison between fuel types. (NPGA, No. 2270 at pp. 3, 6)

For the purposes of calculating consumer costs in the LCC, DOE's presentation of site energy consumption

[54] Available at *www.energy.ca.gov/data-reports/surveys/2019-residential-appliance-saturation-study.*

[55] Available at *www.pecanstreet.org/dataport.*

[56] U.S. Department of Energy: Energy Information Administration, Residential Energy Consumption Survey: 2015 RECS Survey Data (2019). Available at: *www.eia.gov/consumption/residential/data/2015/.* RECS 2015 is based on a sample of 5,686 households statistically selected to represent 118.2 million housing units in the United States. Available at: *www.eia.gov/consumption/residential/.*

[57] DOE was unable to use the frequency of use to calculate the annual energy consumption using a bottom-up approach, as data in RECS did not include information about the duration of a cooking event to allow for an annual energy use calculation.

[58] U.S. Department of Energy: Energy Information Administration, Residential Energy Consumption Survey: 2020 RECS Survey Data (2023). Available at *www.eia.gov/consumption/residential/data/2020/.*

values for electric and gas products is aligned with the measure of energy consumption most familiar to consumers and the unit used for calculating consumer energy bills. For example, electric utilities typically charge by the kWh rather than by kBtu. DOE also notes that the units used in presenting energy consumption align with the energy units used in the DOE test procedure. DOE continues to calculate and present full-fuel cycle national energy savings for gas and electric in quadrillions of Btus (''quads'').

Chapter 7 of the direct final rule TSD provides details on DOE's energy use analysis for consumer conventional cooking products.

F. Life-Cycle Cost and Payback Period Analysis

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for consumer conventional cooking products. The effect of new or amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- The LCC is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost (manufacturer selling price, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.
- The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that new or amended standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-new-standards case, which reflects the estimated efficiency distribution of consumer conventional cooking products in the absence of new or amended energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the baseline product.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of housing units. As stated previously, DOE developed household samples from the 2020 RECS. For each sample household, DOE determined the energy consumption for the consumer conventional cooking products and the appropriate energy price. By developing a representative sample of households, the analysis captured the variability in energy consumption and energy prices associated with the use of consumer conventional cooking products.

For this direct final rule, DOE considered comments it had received regarding the LCC analysis conducted for the February 2023 SNOPR. The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, AHAM commented that RECS is a comprehensive and extremely valuable survey program providing many important insights, but DOE pushes the survey data further than it can support and in doing so, DOE is introducing ''outlier'' values into its LCC analysis and then assuming that those outlier households with very high energy consumption are just as likely as any other household to select an energy efficient appliance absent standards (*i.e.,* in the no-new-standards case). (AHAM, No. 2285 at pp. 51–52) AHAM commented that the effect of this process is that the mean (or average) LCC savings at any standard level are significantly higher than the median (50th percentile) where ordinarily in a statistical distribution, the mean and the median should be relatively close together. (*Id.*) AHAM stated that it and AHRI have commented on this and some of the reasons to treat the RECS data with caution in numerous rulemakings and both commenters and others have proposed that DOE use medians rather than means to avoid many of the random assignment and data issues. (*Id.*)

DOE notes that there is no indication that any of households in the RECS sample represent non-valid data that should be excluded as an outlier. Excluding minimum and maximum values from the field-based usage statistics would result in a less accurate representation of the actual energy consumption patterns exhibited by households participating in the survey. However, as a standardized approach, DOE presents all statistic results of LCC savings in chapter 8 of its TSD (*i.e.,* histograms or box plots). This approach allows stakeholders to observe the full range of LCC savings and understand the distribution of results, enabling a more informed evaluation of the potential impacts of the proposed standards. In addition, DOE's decision on amended standards is not solely determined by (mean) LCC savings. While LCC savings play a role, they may be considered alongside other critical factors, including the percentage of negatively impacted consumers, the simple payback period, and the overall impact on manufacturers.

Strauch recommended that DOE explicitly address dual-fuel ranges. (Strauch, No. 2263 at p. 3)

DOE notes that RECS 2020 identifies households with dual-fuel ranges and those consumers are included in the LCC analysis. Those households are represented in the analysis as having a gas cooking top and an electric oven.

Inputs to the LCC calculation include the installed cost to the consumer, operating expenses, the lifetime of the product, and a discount rate. Inputs to the calculation of total installed cost include the cost of the product—which includes MPCs, manufacturer markups, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, and discount rates. Inputs to the payback period calculation include the installed cost to the consumer and first year operating expenses. DOE created distributions of values for product lifetime, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and consumer conventional cooking products user samples. For this rulemaking, the Monte Carlo approach is implemented in MS Excel together with the Crystal Ball™ add-on.[59] The model calculated the LCC for products at each efficiency level for 10,000 housing units per simulation run. The analytical results include a distribution of 10,000 data points showing the range of LCC savings for a given efficiency level relative to the no-new-standards case efficiency

[59] Crystal Ball™ is commercially available software tool to facilitate the creation of these types of models by generating probability distributions and summarizing results within Excel, available at *www.oracle.com/technetwork/middleware/crystalball/overview/index.html* (last accessed July 28, 2023).

distribution. In performing an iteration of the Monte Carlo simulation for a given consumer, product efficiency is chosen based on its probability. If the chosen product efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient products, DOE avoids overstating the potential benefits from increasing product efficiency. DOE calculated the LCC and PBP for consumers of consumer conventional cooking products as if each were to purchase a new product in the first year of required compliance with new or amended standards. For TSLs other than TSL 1 (the Recommended TSL detailed in the Joint Agreement), new and amended standards apply to consumer conventional cooking products manufactured 3 years after the date on which any new or amended standard is published. (42 U.S.C. 6295(m)(4)(A)(i)) Therefore, DOE used 2027 as the first year of compliance with any new or amended standards for consumer conventional cooking products for TSL 2 and 3. For TSL 1, DOE used 2028 as the first year of compliance for all product classes as specified for the Recommended TSL in the Joint Agreement.

Table IV.25 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 of the direct final rule TSD and its appendices.

Table IV.25 Summary of Inputs and Methods for the LCC and PBP Analysis*

Inputs	Source/Method
Product Cost	Derived by multiplying MPCs by manufacturer and retailer markups and sales tax, as appropriate. Used historical data to derive a price scaling index to project product costs.
Installation Costs	Baseline installation cost determined with data from RS Means 2022. Assumed no change with efficiency level, except for increased costs associated with the installation of an induction unit relative to baseline smooth element cooking tops.
Annual Energy Use	The average energy use is based on estimates from field-metered data. Variability: Based on RECS 2020.
Energy Prices	Electricity: Based on Edison Electric Institute data for 2022. Natural Gas: Based on EIA's Natural Gas Navigator for 2022. Variability: Regional energy prices by Census Division.
Energy Price Trends	Based on *AEO2023* price projections.
Repair and Maintenance Costs	Baseline repairs costs derived from available literature. Assumed no change with efficiency level, except for increased costs associated with the repair of an induction unit relative to baseline smooth element cooking tops. Assumed maintenance costs do not vary with efficiency level.
Product Lifetime	Average: 16.8 years for electric units and 14.5 years for gas units
Discount Rates	Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances, or might be affected indirectly. Primary data source was the Federal Reserve Board's Survey of Consumer Finances.
Compliance Date	2028 for TSL 1 (the Recommended TSL); 2027 for all other TSLs

* Not used for PBP calculation. References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the direct final rule TSD.

1. Product Cost

To calculate consumer product costs, DOE multiplied the MPCs developed in the engineering analysis by the markups described previously (along with sales taxes). DOE used different markups for baseline products and higher-efficiency products, because DOE applies an incremental markup to the increase in MSP associated with higher-efficiency products.

Economic literature and historical data suggest that the real costs of many products may trend downward over time according to ''learning'' or ''experience'' curves. Experience curve analysis implicitly includes factors such as efficiencies in labor, capital investment, automation, materials prices, distribution, and economies of scale at an industry-wide level.[60] In the experience curve method, the real cost of production is related to the cumulative production or ''experience'' with a manufactured product. To project future product prices, DOE examined the electric and gas cooking products Producer Price Index (''PPI''). These indices, adjusted for inflation, show a declining trend. DOE performed a power-law fit of historical PPI data and cumulative shipments. For the electric cooking products price trend, DOE used the ''Electric household ranges, ovens, surface cooking units and equipment'' PPI for 1967–2022.[61] For the gas cooking product price trend, DOE used the ''Gas household ranges, ovens, surface cooking units and equipment'' for 1981–2022.[62]

For this direct final rule, DOE considered comments it had received

[60] Taylor, M. and Fujita, K.S. Accounting for Technological Change in Regulatory Impact Analyses: The Learning Curve Technique. LBNL–6195E. Lawrence Berkeley National Laboratory, Berkeley, CA. April 2013. Available at *escholarship.org/uc/item/3c8709p4#page-1.*

[61] Electric household ranges, ovens, surface cooking units and equipment PPI series ID: PCU33522033522011; *www.bls.gov/ppi/.*

[62] Gas household ranges, ovens, surface cooking units, and equipment PPI series ID; PCU33522033522013; *www.bls.gov/ppi/.*

regarding the methodology for calculating consumer product costs that was presented in the February 2023 SNOPR. The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, AHAM commented that it and several other stakeholders have showed in previous rulemakings there is little to no theoretical underpinning for why an ''experience or learning curve'' should exist that would reduce the expected extra manufacturing costs required to meet proposed standard levels, what functional form it should take and, even, whether it should be a continuous function. (AHAM, No. 2285 at p. 51) AHAM commented that the experience or learning curve is merely an empirical relationship, and as such, there needs to be a clear connection between the actual products in question and the data used to develop the relationship. (*Id.*) AHAM commented that analogs are of highly questionable applicability, that when the data takes a new shape, DOE must adjust its equations to reflect that change, and that continuing to use old data and equations simply to create a longer time series is not acceptable. (*Id.*)

DOE notes that there is considerable empirical evidence of consistent price declines for appliances in the past few decades. Several studies examined refrigerator retail prices during different periods of time and showed that prices had been steadily falling while efficiency had been increasing, for example Dale *et al.* (2009) [63] and Taylor *et al.* (2015).[64] As mentioned in Taylor and Fujita (2013),[65] Federal agencies have adopted different approaches to account for ''the changing future compliance costs that might result from technological innovation or anticipated behavioral changes.'' Given the limited data availability on historical manufacturing costs broken down by different components, DOE utilized the PPI published by the BLS as a proxy for manufacturing costs to represent the analyzed product as a whole. While products may experience varying degrees of price learning during different product stages, DOE modeled the average learning rate based on the full historical PPI series for ''electric household ranges, ovens, surface cooking units and equipment'' and ''gas household ranges, ovens, surface cooking units and equipment'' to capture the overall price evolution in relation to the cumulative shipments for electric and gas products, respectively. DOE also conducted sensitivity analyses that are based on a particular segment of the PPI data for household refrigerator manufacturing to investigate the impact of alternative product price projections (low price learning and high price learning) in the NIA of this direct final rule. For details of the sensitivity results, *see* appendix 10C of the direct final rule TSD.

ASAP *et al.* noted that DOE may be overestimating the price of EL 3 for electric smooth element cooking tops. ASAP *et al.* expect that the price trend for units with induction technology will decline faster than the overall price trend associated with electric cooking products. (ASAP *et al.,* No. 2273 at p. 4)

DOE appreciates the comment on price learning for induction technology. DOE acknowledges that technologies at different maturity levels may experience different rates of price learning. However, the type of data required to develop a component-based price learning for cooking tops using induction technology is currently very limited. Hence, DOE applied the same learning rate to all electric cooking products in this direct final rule analysis.

AGA asserted the equipment costs presented in the February 2023 SNOPR do not reflect the costs of products available on the market as compared to ''Material costs'' listed in RS Means or products available from online retailers. (AGA, No. 2279 at p. 40)

Equipment costs estimated in the February 2023 SNOPR characterize the retail price of products at each efficiency level, holding all other product characteristics and features constant, in the compliance year. The analysis explicitly attempts to estimate costs for each EL at scale, as if each EL were the new baseline product. This may differ from actual market conditions where more efficient options may be bundled with other non-efficiency related features or not currently manufactured at the same scale as the baseline product. Additionally, DOE applies price learning factors to estimate the equipment cost in the year of compliance based on trends observed in historical data, making comparisons with current market prices inappropriate.

AGA asserted that in the February 2023 SNOPR analysis DOE used a simple national average sales tax in the LCC analysis that was inconsistent with other rulemakings. (AGA, No. 2279 at p. 40)

For the February 2023 SNOPR and this direct final rule, DOE used State-level data downloaded from the Sales Tax Clearinghouse to capture the geographic variability in sales tax.[66] The data are aggregated to the Census Division level based on projected State populations in the compliance year and assigned to households in the consumer sample. DOE notes that the calculated average presented in the February 2023 SNOPR TSD is a population-weighted value, rather than a simple average, and is not directly used in the LCC Monte Carlo analysis.

For additional details, *see* chapter 8 of the TSD of this direct final rule.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product that could vary by efficiency.

In the February 2023 SNOPR, DOE used data from the 2021 RS Means Mechanical Cost Data [67] on labor requirements to estimate installation costs for consumer conventional cooking products. In general, DOE estimated that installation costs would be the same for different efficiency levels and for both electric and gas products. In the case of electric smooth element cooking top product classes, the induction heating at EL 3 requires a change of cookware to ones that are ferromagnetic to operate the cooking tops in addition to an upgrade to existing electrical wiring to accommodate for a higher amperage. DOE treated this as additional installation cost for this particular design option. DOE used an average number of pots and pans utilized by a representative household to estimate this portion of the installation cost.

For this direct final rule, DOE considered comments it had received regarding the methodology for calculating installation costs that was presented in the February 2023 SNOPR.

[63] Dale, L., C. Antinori, M. McNeil, James E. McMahon, and K.S. Fujita. Retrospective evaluation of appliance price trends. Energy Policy. 2009. 37 (2) pp. 597–605. *doi.org/10.1016/j.enpol.2008.09.087.*

[64] Taylor, M., C.A. Spurlock, and H.-C. Yang. Confronting Regulatory Cost and Quality Expectations. An Exploration of Technical Change in Minimum Efficiency Performance Standards. 2015. Lawrence Berkeley National Lab. (LBNL), Berkeley, CA (United States). Report No. LBNL–1000576. Available at *www.osti.gov/biblio/1235570/* (last accessed June 30, 2023).

[65] Taylor, M. and K.S. Fujita. Accounting for Technological Change in Regulatory Impact Analyses: The Learning Curve Technique. 2013. Lawrence Berkeley National Lab (LBNL), Berkeley, CA (United States). Report No. LBNL–6195E. Available at *escholarship.org/uc/item/3c8709p4* (last accessed July 20, 2023).

[66] Available at *thestc.com/STRates.stm* (last accessed on August 17, 2023).

[67] RS Means Company Inc., RS Means Mechanical Cost Data (2021). Available at *rsmeans.com* (last accessed on June 23, 2022).

The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, AGA commented that DOE's LCC model makes simplified cost assumptions about cooking tops, beginning with unrealistically low assumptions about installation for both labor and equipment needed. (AGA, No. 2279 at pp. 35–36) AGA commented that equipment and installation costs should vary by region, building type, installation site, and within a specific product class by more than a few dollars as determined by DOE. (*Id.*) AGA commented that DOE's model includes the same installation cost for both gas or electric appliances and ignores the fact that, for example, a gas hookup can involve different steps and safety procedures that can change the average labor cost compared to electric products. (*Id.*)

DOE acknowledges that cost of installation may vary by installation location and fuel type. In this direct final rule, DOE derived fuel-specific installation costs for electric and gas products as well as geographic-dependent labor factors to account for the variability in installation costs in its LCC analysis. DOE assumed that average values derived from RS Means 2022 [68] would be representative of the national value for installation of electric products. For gas products, DOE included an additional labor cost including a gas plumber to perform any additional set-up specific to gas appliances. DOE developed geographic labor factors from RS Means 2022. DOE notes that that there were no data indicating that the installation cost varies with efficiency for electric ovens and gas cooking products and assigned the same installation cost to all efficiency levels.

AGA questioned why additional material costs were included in the installation cost for induction units but not for other efficiency levels. (AGA, No. 2279 at p. 37)

The installation of an induction electric smooth element cooking top requires additional costs for wiring upgrades and purchasing ferromagnetic pots that are not needed for non-induction electric smooth element cooking tops. A standard at EL 3 would require all electric smooth element cooking top consumers to purchase an induction unit, including the majority of consumers that would have purchased a non-induction unit in the no-new-standards case. For this reason, DOE includes the extra cost for materials in order to more accurately reflect the increase in installation costs that consumers will incur as a result of a standard. For all other product classes, DOE did not find evidence that material costs would differ between efficiency levels and therefore assumed that material costs would not increase as a result of a standard.

ASAP *et al.* noted that, due to a lack of information about the existing amperage of electric circuits in homes, DOE assumed that 50 percent of the user population would need wiring upgrades to meet EL 3; however, ASAP *et al.* stated that wiring upgrades may be necessary even in the base case for homes with older electric cooking tops and smaller breaker capacities (*i.e.,* 30 amps). (ASAP *et al.,* No. 2273 at p. 4)

DOE acknowledges it is possible that wiring updates may be necessary in older homes in the no-new-standards case. However, households requiring wiring upgrades in both the no-new-standards case (*i.e.,* the base case) and a standards case will not incur an additional cost attributable to a standard and, thus, will not impact the LCC savings calculation.

3. Annual Energy Consumption

For each sampled household, DOE determined the energy consumption for a consumer conventional cooking product at different efficiency levels using the approach described previously in section IV.E of this document.

4. Energy Prices

Because marginal electricity price more accurately captures the incremental savings associated with a change in energy use from higher efficiency, it provides a better representation of incremental change in consumer costs than average electricity prices. Therefore, DOE applied average electricity prices for the energy use of the product purchased in the no-new-standards case, and marginal electricity prices for the incremental change in energy use associated with the other efficiency levels considered.

DOE derived electricity prices in 2022 using data from EEI Typical Bills and Average Rates reports. Based upon comprehensive, industry-wide surveys, this semi-annual report presents typical monthly electric bills and average kilowatt-hour costs to the customer as charged by investor-owned utilities. For the residential sector, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2018).[69] For the commercial sector, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2019).[70]

DOE obtained data for calculating regional prices of natural gas in 2022 from the EIA publication, *Natural Gas Navigator.*[71] This publication presents monthly volumes of natural gas deliveries and average prices by State for residential, commercial, and industrial customers.

DOE's methodology allows electricity and natural gas prices to vary by sector, region, and season. In the analysis, variability in electricity prices is chosen to be consistent with the way the consumer economic and energy use characteristics are defined in the LCC analysis. For consumer conventional cooking products, DOE calculated weighted-average values for average and marginal electricity and gas prices for the nine census divisions. *See* chapter 8 of the direct final rule TSD for details.

To estimate energy prices in future years, DOE multiplied the 2022 energy prices by the projection of annual average price changes for each of the nine census divisions from the Reference case in *AEO2023,* which has an end year of 2050.[72] To estimate price trends after 2050, the 2046–2050 average was used for all years.

ONE Gas commented that DOE's forecasting errors were compounded by price trends used in the calculations that do not reflect the return of natural gas prices to historically low levels following the COVID–19 pandemic run up or the sharp increases in consumer electricity prices in States where electrification policies are driving all-electric new construction. (ONE Gas, No. 2289 at pp. 6–7; ONE Gas, No. 10109 at p. 4) ONE Gas commented that these are real relative consumer energy prices that tilt the consumer economics in favor of natural gas in the near term but that will have persistent impacts on future prices over the timeline of the rulemaking analysis. (*Id.*) ONE Gas

[68] RS Means Company Inc., RS Means Mechanical Cost Data (2022). Available at *rsmeans.com* (last accessed on Aug. 3, 2023).

[69] Coughlin, K. and B. Beraki. 2018. Residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001169. Available at *ees.lbl.gov/publications/residential-electricity-prices-review.*

[70] Coughlin, K. and B. Beraki. 2019. Non-residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001203. *ees.lbl.gov/publications/non-residential-electricity-prices.*

[71] U.S. Department of Energy–Energy Information Administration. Natural Gas Navigator 2022. Available at *www.eia.gov/naturalgas/data.php* (last accessed July 28, 2023).

[72] EIA. *Annual Energy Outlook 2023.* Available at *www.eia.gov/outlooks/aeo/* (last accessed Aug. 3, 2023).

noted that DOE did not include supply chain price inflation that is already affecting first costs of consumer conventional cooking products. (*Id.*) ONE Gas commented that wholesale commodity prices appear to be leveling off, but consumer prices for durable goods have increased via a step function due to the war in Ukraine, the COVID–19 pandemic, and other disruptions, and these costs will not be coming down via either economic recovery or recession. (*Id.*) ONE Gas commented that it anticipates that DOE's use of RECS 2015 data (instead of RECS 2020) will exacerbate these deviations from real world prices and consumer LCC. (*Id.*)

AGA commented that the February 2023 SNOPR uses an energy price forecast based on the *AEO,* which has consistently overestimated future natural gas energy costs. (AGA, No. 2279 at pp. 33–34; AGA *et al.,* No. 10112 at p. 7) ONE Gas provided similar comments, and noted that the forecast overstates LCC savings and paybacks for natural gas alternatives. (ONE Gas, No. 2289 at pp. 5–6) AGA commented that the statistically biased outcome toward higher prices in the *AEO* reveals a need for DOE's analysis to use a distribution of prices in its model simulations and not a forecasted mean. (AGA, No. 2279 at pp. 33–34; AGA *et al.,* No. 10112 at p. 7) ONE Gas commented that DOE uses single time series consumer energy price forecasts for electricity and gaseous fuels in contrast to the probability-weighted analysis input variables DOE has used in Monte Carlo simulations in the consumer LCC savings analysis. (ONE Gas, No. 2289 at pp. 5–6)

DOE maintains that the patterns of difference between *AEO* projections and actual energy prices do not reflect a systematic bias in the model used to prepare the *AEO* or the assumptions. The *AEO2023* projection for residential natural gas prices shows constant-dollar prices declining from the 2022–2023 spike and then increasing at a slow rate starting around 2030. Rather than use a distribution of prices, DOE conducted a sensitivity analysis using *AEO2023* cases that exhibit higher and lower energy prices than the Reference projection. The analysis and results are described in appendix 8E of the direct final rule TSD.

In response to the February 2023 SNOPR, the CO_2 Coalition requested that DOE explain the data supporting its proposed energy conservation standards for consumer cooking tops, including the data showing natural gas is cheaper than electricity. The CO_2 Coalition commented that DOE cannot ignore a category of costs (*e.g.,* upstream renewable energy generation costs) and stated that the CO_2 Coalition was unable to understand how electricity, which costs 3.5 times more than natural gas, is more energy efficient. The CO_2 Coalition requested additional information regarding how DOE computed the anticipated savings attributed to the proposed standards. (The CO_2 Coalition, No. 2275 at pp. 6–7)

In response to the August 2023 NODA, ONE Gas and AGA *et al.* commented that the DOE's recently published representative average unit costs of energy indicates that natural gas is more affordable that other fuels including electricity on a unit cost basis. (ONE Gas, No. 10109 at pp. 1–2; AGA *et al.,* No. 101112 at p. 7)

DOE provides the methodology and data sources for calculating energy cost savings by geographic location in Chapter 8 of the TSD and energy cost accounting in Chapter 15 of the TSD. The representative average unit referenced by ONE Gas and AGA *et al.* are used by manufacturers to comply with the U.S. Federal Trade Commission (''FTC'') labeling requirements and do not capture the diversity in energy costs utilized in the LCC analysis.

5. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing product components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the product. Typically, small incremental increases in product efficiency entail no, or only minor, changes in repair and maintenance costs compared to baseline efficiency products.

For this direct final rule, DOE updated repair costs for all product classes based on available online data. For cooking tops, DOE used data from a 2022 Consumer Reports survey.[73] DOE assumed a repair cost of $153 for a gas cooking top, $192 for a non-induction electric smooth element cooking top, and $536 for an induction electric smooth element cooking top. For ovens, DOE used data from an online appliance repair website that presented average values of $150 for electric ovens and $350 for gas ovens.[74] With the exception of induction electric smooth element cooking tops, DOE notes repair costs do not vary by efficiency level, and remain the same in the no-new-standards and standards cases leading to no additional repair cost as a result of a standard.

6. Product Lifetime

For consumer conventional cooking products, DOE used a variety of sources to establish low, average, and high estimates for product lifetime. Additionally, DOE used AHAM's input on the average useful life by product category, such as electric range, gas range, wall oven, and electric cooking top. Utilizing this detail and the market shares of these product categories, DOE estimated the average lifetime estimates to be 16.8 years for all electric cooking products and 14.5 years for all gas cooking products. DOE characterized the product lifetimes with Weibull probability distributions.

7. Discount Rates

In the calculation of LCC, DOE applies discount rates appropriate to households to estimate the present value of future expenditures and savings. DOE estimated a distribution of discount rates for consumer conventional cooking products based on the opportunity cost of consumer funds.

DOE applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.[75] The LCC analysis estimates net present value over the lifetime of the product, so the appropriate discount rate will reflect the general opportunity cost of household funds, taking this time scale into account. Given the long time horizon modeled in the LCC, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate impact of this rebalancing using the historical distribution of debts and assets.

[73] Available at *www.consumerreports.org/appliances/cooktops/should-you-repair-or-replace-your-broken-cooktop-a6490859316* (last accessed on Aug. 7, 2023).

[74] Available at *www.fixr.com/costs/oven-repair* (last accessed on Aug. 7, 2023).

[75] The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: transaction costs; risk premiums and response to uncertainty; time preferences; interest rates at which a consumer is able to borrow or lend. The implicit discount rate is not appropriate for the LCC analysis because it reflects a range of factors that influence consumer purchase decisions, rather than the opportunity cost of the funds that are used in purchases.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's triennial Survey of Consumer Finances [76] (''SCF'') starting in 1995 and ending in 2019. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which new and amended standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity and income groups, weighted by the shares of each type, is 4.1 percent. See chapter 8 of the direct final rule TSD for further details on the development of consumer discount rates.

For this direct final rule, DOE considered comments it had received regarding the discount rates used in the February 2023 SNOPR. The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, AHAM commented that DOE uses an inappropriate discount rate in its analysis of the effects of standards on low-income households, claiming that this analysis does not take into account issues of capital availability or the non-financial costs from a purchase. (AHAM, No. 2285 at pp. 49–50) AHAM also presented data from its survey work with Bellomy Research showing that the lowest 30-percent income groups have no discretionary income to save, making it impossible for these groups to rebalance their balance sheets after making a purchase. (*Id.*)

With respect to the issue of DOE's methodology for estimating consumer discount rates, DOE maintains that the LCC is not predicting a purchase decision, as AHAM seems to interpret given a focus on the availability of cash for appliance purchases. Rather, the LCC estimates the net present value of the financial impact of a given standard level over the lifetime of the product (*i.e.,* 14.5 years for gas cooking products and 16.8 years for electric cooking products) assuming the standard-compliant product has already been installed, and allows for comparison of this value across different hypothetical minimum efficiency levels. The LCC is applied to future-year energy costs and non-energy operations and maintenance costs in order to calculate the net present value of the appliance to a household at the time of installation. The consumer discount rate reflects the opportunity cost of receiving energy cost savings in the future, rather than at the time of purchase and installation. The opportunity cost of receiving operating cost savings in future years, rather than in the first year of the modeled period, is dependent on the rate of return that could be earned if invested into an interest-bearing asset or the interest cost accrual avoided by paying down debt. Consumers in all income groups generally hold a variety of assets (*e.g.,* certificates of deposit, stocks, bonds) and debts (*e.g.,* mortgage, credit cards, vehicle loan), which vary in amount over time as consumers allocate their earnings, make new investments, *etc.* Thus, the consumer discount rate is estimated as a weighted average of the rates and proportions of the various types of assets and debts held by households in each income group, as reported by the Survey of Consumer Finances. In the low-income subgroup analysis, DOE separately evaluated the impact of increased efficiency standards on low-income households using discount rates estimated specifically for the low-income group.

Whirlpool commented that DOE's analysis fails to account for the fact that many consumers, especially low-income consumers, finance their appliance purchases through loans or other methods, and any increase in the upfront cost of an appliance will have a direct impact on the cost of financing the appliance. (Whirlpool, No. 2284 at p. 5) Whirlpool stated that financing comes at a cost that exceeds the face value of a product, specifically in cases in which consumers owe interest, and recommended that DOE account for these costs in the proposal. (*Id.*)

In the case of gas cooking tops (standalone and as a component of a combined cooking product), the price differential between EL 1 (the adopted standard level) and baseline is $4.04 in 2028, the first year of compliance at the Recommended TSL. If a consumer purchases the more efficient unit on a credit card with a 25-percent APR, it would amount to an additional financing cost of only about $0.09 per month in the first year of leaving the balance on the card. While the compound interest could start to accumulate if the balance was left unpaid for an extended period of time (*e.g.,* for the life of the appliance or longer), DOE contends that it would be an unusual case as the Survey of Consumer Finances shows that consumers across all income groups generally rebalance their assets and debts before a significant amount of interest is incurred.

8. Energy Efficiency Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution (market shares) of product efficiencies under the no-new-standards case (*i.e.,* the case without new or amended energy conservation standards) in the compliance year. This approach reflects the fact that some consumers may purchase products with efficiencies greater than the baseline levels in the absence of new or amended standards.

In the February 2023 SNOPR, DOE estimated the efficiency distribution for each product class of cooking tops from the tested efficiencies of cooking tops used to develop the SNOPR engineering analysis. For ovens, DOE relied on model counts of the current market distribution. Given the lack of data on historic efficiency trends, DOE assumed that the estimated current distributions would apply in the compliance year in the no-new-standards case.

In the February 2023 NODA, DOE clarified that the efficiency distribution for gas cooking tops presented in the February 2023 SNOPR did not include higher-efficiency ''entry-level'' products [77] that were not included in the development of efficiency levels. Based on its testing results and model counts of the burner/grate configurations of gas cooking top models currently available on the websites of major U.S. retailers, DOE estimated in the February 2023 NODA that the products that were screened out of the engineering analysis represent over 40 percent of the market and exceed the max tech efficiency levels. DOE further estimated that nearly half of the total gas cooking top market currently meets or exceeds the max tech level. 88 FR 12605.

Multiple stakeholders questioned DOE's methodology for estimating the percentage of gas cooking tops that

[76] U.S. Board of Governors of the Federal Reserve System. Survey of Consumer Finances. 1995, 1998, 2001, 2004, 2007, 2010, 2013, 2016, and 2019. Available at *www.federalreserve.gov/econresdata/scf/scfindex.htm* (last accessed Aug. 3, 2023).

[77] As discussed in chapter 5 of the direct final rule TSD, DOE defined products that do not have at least one HIR burner and continuous cast-iron grates as ''entry-level.''

would meet the standard proposed in the February 2023 SNOPR and August 2023 NODA. AHAM stated that DOE did not provide data in the February 2023 SNOPR or TSD to support the assertion that nearly half of the gas cooking tops meet the proposed standard. (AHAM, No. 127 at p. 2) NPGA commented that the method by which DOE arrived at the market share of gas cooking tops screened out of the February 2023 SNOPR is suspect. (NPGA, No. 2270 at p. 10) The Institute for Energy Research (''IER'') stated that DOE provides no support to the assertion made in the February 2023 NODA that nearly half of the total gas cooking tops market currently achieve EL 2. (IER, No. 2274 at pp. 5–6) Western Alliance Energy commented that DOE issued conflicting information between the February 2023 SNOPR and the August 2023 NODA regarding the market share of gas cooking tops that would be able to meet the proposed standard. (Western Alliance Energy, No. 2272 at p. 3) AHAM commented that DOE has presented contradictory information and data regarding the percentage of compliant gas cooking tops, using its test sample in the February 2023 SNOPR and including model counts based on product features in the August 2023 NODA. (AHAM, No. 2285 at pp. 13–15) Spire stated its concern regarding DOE's assumption that all gas cooking top products lacking both HIR burners and cast-iron grates meet the standard proposed in the February 2023 SNOPR because DOE tested only two such products. (Spire, No. 2710 at pp. 5–7)

NAHB commented that gas ranges are crucial for affordable housing as they represent the more affordable end of the product spectrum and are often used in starter homes and dwellings with limited kitchen sizes. (NAHB, No. 2288 at p. 2) NAHB commented that DOE's methodology investigated product samples that are not representative of the overall product market, by oversampling gas cooking tops versus gas ranges, with outcomes that penalize cooking tops that are part of a range. (*Id.*) NAHB commented that many consumer-preferred ranges will likely be unable to comply with the standards proposed in the February 2023 SNOPR despite being a popular consumer choice. (*Id.*)

AHAM commented that DOE must demonstrate that its proposed rule is based on adequate data and is not arbitrary and capricious and added that DOE should not proceed to a final rule without ensuring that its test sample is representative of the market. (AHAM, No. 2285 at pp. 6–8) AHAM commented that although it conducted testing in support of its comments, the AHAM test sample does not solve the representativeness issue. (*Id.*)

AHAM commented that its data show that in its test sample, DOE significantly under-sampled gas ranges, which represent a majority of gas cooking top shipments in 2022 and over-sampled gas standalone cooking tops, then relied on these test samples as representative of the market, representing a significant error. (*Id.* at p. 6) AHAM presented shipment data stating that 86.7 percent of gas cooking tops were shipped as part of gas ranges in 2022, whereas DOE's test sample only includes 38.1 percent of gas ranges. (*Id.*) AHAM presented a table showing that gas and electric ranges represented 91 percent of the total cooking products shipped in 2022. (*Id.* at p. 27)

AHAM commented that its data show that in its test sample, DOE significantly over-sampled induction cooking tops among electric products. (*Id.* at p. 6) AHAM presented 2022 shipment data stating that 4.6 percent of electric cooking tops were induction, whereas they represent 40.9 percent of DOE's test sample. (*Id.*) AHAM also presented 2022 shipment data stating that 25.6 percent of electric cooking tops use open (coil) elements, whereas they only represent 9.1 percent of DOE's test sample. (*Id.*)

ASAP *et al.* supported DOE's estimate of the percentage of gas cooking tops on the market that meet the standard proposed in the February 2023 SNOPR. (ASAP *et al.,* No. 2273 at p. 3)

In the August 2023 NODA, DOE updated its analysis in response to stakeholder data and information received in response to the February 2023 SNOPR. 88 FR 50810, 50811. For electric cooking tops, DOE used AHAM shipment data to calculate an updated efficiency distribution incorporating weightings for electric smooth element cooking tops are that are sold as components of conventional ranges (93.4 percent) and as a standalone unit (6.6 percent), as well as weightings for radiant technology (93.8 percent) and induction technology (6.2 percent). *Id.* at 88 FR 50814. For gas cooking tops, DOE presented updated efficiency levels based on substantive feedback provided by stakeholders (*see* section IV.C.1.a of this document) and presented updated efficiency distributions incorporating weightings for gas cooking tops are that are sold as components of conventional ranges (86.7 percent) and as a standalone unit (13.3 percent), as well as weightings for entry-level cooking tops (40 percent) and non-entry-level [78] cooking tops (60 percent). *Id.* at 88 FR 50815. DOE notes that the expanded data set shows that not all entry-level gas cooking tops achieve the updated EL 2 efficiency, and that the updated efficiency distributions reflect this fact. *Id.* In the August 2023 NODA, DOE maintained the same efficiency distributions for electric and gas ovens as was used in the February 2023 SNOPR. *Id.*

ONE Gas asserted that DOE characterizing gas cooking tops as entry-level or non-entry-level is antithetical to DOE's rulemaking responsibilities for setting energy efficiency standards for covered products generally and *ad hoc* and undefined with respect to DOE's responsibility for defining consumer benefits. (ONE Gas, No. 10109 at p. 3) ONE Gas commented that it understood the characterization of entry-level products as an attempt to capture low-income consumer products. (*Id.*) ONE Gas asserted that this interpretation is unwarranted without additional description of how DOE uses such characterizations, an analysis of the economic burden that these types of minimum efficiency standards could impose, and an analysis on the income effect of standards. (*Id.*) ONE Gas commented that entry-level gas products represent the most viable and cost-effective energy solution and asserted that by characterizing these products as such, DOE presumes that consumers will upgrade to more expensive products.

In response to ONE Gas's assertion that DOE characterizing gas cooking tops as entry-level or non-entry-level is *ad hoc* and antithetical to DOE's rulemaking responsibilities, DOE notes that the categorization was used for the purposes of defining the no-new-standards case efficiency distributions. DOE notes that entry-level gas cooking tops, while being typically the cheapest products, are also often the most efficient and that all of the entry-level gas cooking tops in DOE's expanded test sample meet the adopted standard level.

ASAP *et al.* commented in support of the updated no-new-standards case market share estimates for electric smooth element cooking tops and gas cooking tops based on shipment estimates recently provided by manufacturers. (ASAP *et al.,* No. 10113 at p. 1)

For this direct final rule, DOE used the methodology from the August 2023

[78] As discussed in chapter 5 of the direct final rule TSD, DOE defined products that feature at least one HIR burner and continuous cast-iron grates as ''non-entry-level''.

NODA to estimate efficiency distributions for electric smooth element cooking top product classes, gas cooking top product classes, electric oven product classes, and gas oven product classes. As in the February 2023 SNOPR, DOE assumed no efficiency trend.

The estimated market shares for the no-new-standards case for consumer conventional cooking products are shown in Table IV.26 through Table IV.29. See chapter 8 of the direct final rule TSD for further information on the derivation of the efficiency distributions.

Table IV.26 Electric Smooth Element Cooking Top Market Shares for the No-New-Standards Case

Standalone Cooking Top			Cooking Top Component of a Combined Cooking Product		
Efficiency Level	**IAEC** *(kWh/year)*	**Market Share** *(%)*	**Efficiency Level**	**IAEC** *(kWh/year)*	**Market Share** *(%)*
Baseline	250	23%	Baseline	250	23%
1	207	62%	1	207	62%
2	189	15%	2	189	15%
3	179	0.02%	3	179	0.02%

Table IV.27 Gas Cooking Top Market Shares for the No-New-Standards Case

Standalone Cooking Top			Cooking Top Component of a Combined Cooking Product		
Efficiency Level	**IAEC** *(kBtu/year)*	**Market Share** *(%)*	**Efficiency Level**	**IAEC** *(kBtu/year)*	**Market Share** *(%)*
Baseline	1,900	3%	Baseline	1,900	3%
1	1,770	56%	1	1,770	56%
2	1,343	41%	2	1,343	41%

Table IV.28 Electric Oven Market Shares for the No-New-Standards Case

Efficiency Level	Electric Standard Ovens, Freestanding	Electric Standard Ovens, Built-In/Slide-In	Electric Self-Clean Ovens, Freestanding	Electric Self-Clean Ovens, Built-In/Slide-In
0	5%	5%	5%	5%
1	57%	65%	18%	7%
2	38%	30%	77%	86%
3	0%	0%	0%	2%

Table IV.29 Gas Oven Market Shares for the No-New-Standards Case

EL	Gas Standard Ovens, Freestanding	Gas Standard Ovens, Built-In/Slide-In	Gas Self-Clean Ovens, Freestanding	Gas Self-Clean Ovens, Built-In/Slide-In
0	4%	4%	4%	4%
1	34%	58%	3%	19%
2	62%	38%	93%	77%

The LCC Monte Carlo simulations draw from the efficiency distributions and randomly assign an efficiency to the consumer conventional cooking products purchased by each sample household in the no-new-standards case. The resulting percent shares within the sample match the market shares in the efficiency distributions.

In the February 2023 SNOPR, DOE performed a random assignment of efficiency levels to consumers in its Monte Carlo sample. While DOE acknowledges that economic factors may play a role when consumers decide on what type of conventional cooking product to install, assignment of conventional cooking product efficiency for a given installation, based solely on economic measures such as life-cycle cost or simple payback period, most likely would not fully and accurately reflect actual real-world installations. There are a number of market failures discussed in the economics literature that illustrate how purchasing decisions with respect to energy efficiency are unlikely to be perfectly correlated with energy use, as described below. DOE maintains that the method of assignment, which is in part random, is a reasonable approach, because it simulates behavior in the conventional cooking product market, where market failures result in purchasing decisions not being perfectly aligned with economic interests, more realistically than relying only on apparent cost-effectiveness criteria derived from the limited information in RECS. DOE further emphasizes that its approach does not assume that all purchasers of consumer conventional cooking product make economically irrational decisions (*i.e.,* the lack of a correlation is not the same as a negative correlation). As part of the random assignment, some homes or buildings with more frequent cooking events will be assigned higher efficiency conventional cooking products, and some homes or buildings with particularly lower cooking events will be assigned baseline units. By using this approach, DOE acknowledges the uncertainty inherent in the data and minimizes any bias in the analysis by using random assignment, as opposed to assuming certain market conditions that are unsupported given the available evidence.

The following discussion provides more detail about the various market failures that affect consumer conventional cooking product purchases. First, consumers are motivated by more than simple financial trade-offs. There are several behavioral factors that can influence the purchasing decisions of complicated multi-attribute products, such as consumer conventional cooking products. For example, consumers (or decision makers in an organization) are highly influenced by choice architecture, defined as the framing of the decision, the surrounding circumstances of the purchase, the alternatives available, and how they are presented for any given choice scenario.[79] The same consumer or decision maker may make different choices depending on the characteristics of the decision context (*e.g.,* the timing of the purchase, competing demands for funds), which have nothing to do with the characteristics of the alternatives themselves or their prices. Consumers or decision makers also face a variety of other behavioral phenomena including loss aversion, sensitivity to information salience, and other forms of bounded rationality.[80] Thaler, who won the Nobel Prize in Economics in 2017 for his contributions to behavioral economics, and Sunstein point out that these behavioral factors are strongest when the decisions are complex and infrequent, when feedback on the decision is muted and slow, and when there is a high degree of information asymmetry.[81] These characteristics describe almost all purchasing situations of appliances and equipment, including consumer conventional cooking products. The installation of a new or replacement consumer conventional cooking products is done very infrequently, as evidenced by the mean lifetime of 14.5 years for gas cooking products and 16.8 years for electric cooking products. Further, if the purchaser of the consumer conventional cooking product is not the entity paying the energy costs (*e.g.,* a building owner and tenant), there may be little to no feedback on the purchase. Additionally, there are systematic market failures that are likely to contribute further complexity to how products are chosen by consumers, as explained in the following paragraphs. The first of these market failures—the split-incentive or principal-agent problem—is likely to significantly affect consumer conventional cooking products. The principal-agent problem is a market failure that results when the consumer that purchases the equipment does not internalize all of the costs associated with operating the equipment. Instead, the user of the product, who has no control over the purchase decision, pays the operating costs. There is a high likelihood of split-incentive problems in the case of rental properties where the landlord makes the choice of what consumer conventional cooking product to install, whereas the renter is responsible for paying energy bills.

In addition to the split-incentive problem, there are other market failures that are likely to affect the choice of consumer conventional cooking product efficiency made by consumers. For example, unplanned replacements due to unexpected failure of equipment such as a consumer conventional cooking products are strongly biased toward like-for-like replacement (*i.e.,* replacing the non-functioning equipment with a similar or identical product). Time is a constraining factor during unplanned replacements, and consumers may not consider the full range of available options on the market, despite their availability. The consideration of alternative product options is far more likely for planned replacements and installations in new construction.

Additionally, Davis and Metcalf[82] conducted an experiment demonstrating that, even when consumers are presented with energy consumption information, the nature of the information available to consumers (*e.g.,* from EnergyGuide labels) results in an inefficient allocation of energy efficiency across households with different usage levels. Their findings indicate that households are likely to make decisions regarding the efficiency of the air conditioning equipment of their homes that do not result in the highest net present value for their specific usage pattern (*i.e.,* their decision is based on imperfect information and, therefore, is not necessarily optimal). Also, most consumers did not properly understand the labels (specifically whether energy consumption and cost estimates were national averages or specific to their State). As such, consumers did not make the most informed decisions. Consumer conventional cooking products do not

[79] Thaler, R.H., Sunstein, C.R., and Balz, J.P. (2014). ''Choice Architecture'' in *The Behavioral Foundations of Public Policy,* Eldar Shafir (ed).

[80] Thaler, R.H., and Bernartzi, S. (2004). ''Save More Tomorrow: Using Behavioral Economics in Increase Employee Savings,'' *Journal of Political Economy* 112(1), S164–S187. *See also* Klemick, H., *et al.* (2015) ''Heavy-Duty Trucking and the Energy Efficiency Paradox: Evidence from Focus Groups and Interviews,'' *Transportation Research Part A: Policy & Practice,* 77, 154–166 (providing evidence that loss aversion and other market failures can affect otherwise profit-maximizing firms).

[81] Thaler, R.H., and Sunstein, C.R. (2008). Nudge: Improving Decisions on Health, Wealth, and Happiness. New Haven, CT: Yale University Press.

[82] Davis, L.W., and G.E. Metcalf (2016): ''Does better information lead to better choices? Evidence from energy-efficiency labels,'' *Journal of the Association of Environmental and Resource Economists,* 3(3), 589–625 (Available at: *www.journals.uchicago.edu/doi/full/10.1086/686252*) (Last accessed August 1, 2023).

require EnergyGuide labels, therefore energy consumption information is more difficult to determine for a consumer, resulting in an even more inefficient allocation of energy efficiency across households with different usage levels.

In part because of the way information is presented, and in part because of the way consumers process information, there is also a market failure consisting of a systematic bias in the perception of equipment energy usage, which can affect consumer choices. Attari *et al.*[83] show that consumers tend to underestimate the energy use of large energy-intensive appliances (such as air conditioners, dishwashers, and clothes dryers), but overestimate the energy use of small appliances (such as light bulbs). Therefore, it is possible that consumers systematically underestimate the energy use associated with consumer conventional cooking products, resulting in less cost-effective purchases.

These market failures affect a sizeable share of the consumer population. A study by Houde[84] indicates that there is a significant subset of consumers that appear to purchase appliances without taking into account their energy efficiency and operating costs at all.

The existence of market failures in the residential sector is well supported by the economics literature and by a number of case studies. If DOE developed an efficiency distribution that assigned consumer conventional cooking product efficiency in the no-new-standards case solely according to energy use or economic considerations such as life-cycle cost or payback period, the resulting distribution of efficiencies within the consumer sample would not reflect any of the market failures or behavioral factors above. Thus, DOE concludes such a distribution would not be representative of the consumer conventional cooking product market. Further, even if a specific household is not subject to the market failures above, the purchasing decision of conventional cooking product efficiency can be highly complex and influenced by a number of factors (*e.g.,* aesthetics) not captured by the building characteristics available in the RECS sample. These factors can lead to households or building owners choosing a conventional cooking product efficiency that deviates from the efficiency predicted using only energy use or economic considerations such as life-cycle cost or payback period (as calculated using the information from RECS 2020).

There is a complex set of behavioral factors, with sometimes opposing effects, affecting the consumer conventional cooking product market. It is impractical to model every consumer decision incorporating all of these effects at this extreme level of granularity given the limited available data. Given these myriad factors, DOE estimates the resulting distribution of such a model, if it were possible, would be very scattered with high variability. It is for this reason DOE utilizes a random distribution (after accounting for efficiency market share constraints) to approximate these effects. The methodology is not an assertion of economic irrationality, but instead, it is a methodological approximation of complex consumer behavior. The analysis is neither biased toward high or low energy savings. The methodology does not preferentially assign lower-efficiency conventional cooking products to households in the no-new-standards case where savings from the rule would be greatest, nor does it preferentially assign lower-efficiency conventional cooking products to households in the no-new-standards case where savings from the rule would be smallest. Some consumers were assigned the conventional cooking products that they would have chosen if they had engaged in perfect economic considerations when purchasing the products. Others were assigned less-efficient conventional cooking products even where a more-efficient product would eventually result in life-cycle savings, simulating scenarios where, for example, various market failures prevent consumers from realizing those savings. Still others were assigned conventional cooking products that were *more* efficient than one would expect simply from life-cycle costs analysis, reflecting, say, ''green'' behavior, whereby consumers ascribe independent value to minimizing harm to the environment.

ASAP *et al.* commented that they believe DOE's assignment of efficiency levels in the no-new-standards case reasonably reflects actual consumer behavior. (ASAP *et al.,* No. 2273 at pp. 1–2) ASAP *et al.* supported DOE's determination that its method of assigning cooking product efficiencies is more representative of actual consumer behavior than assigning efficiencies based solely on cost-effectiveness. (*Id.*)

For this direct final rule, DOE performed a random assignment of efficiencies in the LCC analysis.

9. Payback Period Analysis

The payback period is the amount of time (expressed in years) it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the product and the change in the first-year annual operating expenditures relative to the baseline. DOE refers to this as a ''simple PBP'' because it does not consider changes over time in operating cost savings. The PBP calculation uses the same inputs as the LCC analysis when deriving first-year operating costs.

NPGA commented that DOE does not disclose how it calculated the estimated installation cost of a gas cooking top at the proposed standard level in the February 2023 SNOPR and asserted that the payback period for a compliant unit would be approximately 261 years. (NPGA, No. 2270 at p. 9)

DOE's methodology for calculating installed cost and payback period is documented in chapter 8 of the TSD and in the LCC analytical spreadsheet.

As noted previously, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure, and multiplying those savings by the average energy price projection for the year in which compliance with the new and amended standards would be required.

G. Shipments Analysis

DOE uses projections of annual product shipments to calculate the national impacts of potential new or amended energy conservation standards on energy use, NPV, and future

[83] Attari, S.Z., M.L. DeKay, C.I. Davidson, and W. Bruine de Bruin (2010): ''Public perceptions of energy consumption and savings.'' *Proceedings of the National Academy of Sciences* 107(37), 16054–16059 (Available at: *www.pnas.org/content/107/37/16054*) (Last accessed August 1, 2023).

[84] Houde, S. (2018): ''How Consumers Respond to Environmental Certification and the Value of Energy Information,'' *The RAND Journal of Economics,* 49 (2), 453–477 (Available at: *onlinelibrary.wiley.com/doi/full/10.1111/1756-2171.12231*) (Last accessed August 1, 2023).

manufacturer cash flows.[85] The shipments model takes an accounting approach, tracking market shares of each product class and the vintage of units in the stock. Stock accounting uses product shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock. The shipments projections are based on historical data and an analysis of key market drivers for each product. For consumer conventional cooking products, DOE accounted for three market segments: (1) new construction, (2) existing homes (*i.e.,* replacing failed products), and (3) retired but not replaced products.

For this direct final rule, DOE considered comments it had received regarding its shipments analysis for the February 2023 SNOPR. The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, Benjamin Zycher[86] commented that despite DOE's assertion, estimated aggregate data on sales are available from market reports. (Zycher, No. 2266 at p. 3)

DOE maintains that AHAM shipments data collected from consumer cooking product manufacturers present a more accurate estimate for annual national sales compared to estimates provided by third-party market reports.

To determine new construction shipments, DOE used a forecast of new housing coupled with product market saturation data for new housing. For new housing completions and mobile home placements, DOE adopted the projections from EIA's *AEO2023* through 2050. For subsequent years, DOE set the annual new housing completions fixed to the 2050 value.

In response to February 2023 SNOPR, the National Multifamily Housing Council (''NMHC'') and National Apartment Association (''NAA'') recommended that DOE consider the impacts of this rulemaking on housing production and affordability to ensure that new cooking product efficiency requirements do not undermine efforts to address acute housing challenges in the United States. (NMHC and NAA, No. 2265 at pp. 1–3)

DOE notes that the estimated installed cost increase associated with the Recommended TSL under the Joint Agreement is less than one percent relative to the cost of a baseline unit for all product classes and is unlikely to impact housing production or affordability.

DOE estimated replacements using product retirement functions developed from product lifetimes. DOE used retirement functions based on Weibull distributions. To reconcile the historical shipments with modeled shipments, DOE assumed that every retired unit is not necessarily replaced. DOE attributed the reason for this non-replacement to building demolition occurring over the shipments analysis period. The not-replaced rate is distributed across electric and gas cooking products.

DOE allocated shipments to each product class based on the current market share of the class. DOE developed the market shares based on data collected from the Appliance Magazine Market Research report[87] and U.S. Appliance Industry Statistical Review.[88]

In response to the February 2023 SNOPR, ONE Gas commented that DOE's shipments analysis projects that electric cooking tops will account for 75 percent of the market share starting in 2027 to 2055, which fails to account for the introduction of technologically advanced and more energy-efficient gas appliances into the market, and subsequent increased market demand for such products. (ONE Gas, No. 2289 at p. 11)

DOE projects the market share of electric and gas cooking tops based on historical data. In both the February 2023 SNOPR and this direct final rule, DOE estimates that electric cooking tops (including electric open (coil) element cooking tops) account for approximately 60 percent of the cooking top market, similar to the 2022 estimates from AHAM shipments data. DOE is unaware of data identifying future product launches of technologically advanced, energy-efficient gas appliances and their impact on the cooking top market and did not include such a trend in the shipments analysis.

In response to the August 2023 NODA, AHAM commented that DOE projections overestimate savings because DOE has not incorporated a slower rate of adoption of new or replacement cooking tops as a result of a standard that reduces product features or performance. (AHAM, No. 10116 at p. 25) AHAM asserted that a standard that diminishes product performance will extend the operating lifetime of existing, non-compliant cooking tops, slowing the rate of adoption of new or replacement cooking tops that would result from reducing features or product performance. (*Id.*)

As discussed, DOE has concluded that the standards adopted in this direct final rule will not lessen the utility or performance of consumer conventional cooking products. Therefore, DOE finds no basis to conclude that shipments of new cooking tops would be affected by product performance in the standards case. For this direct final rule, DOE used the approach used in the August 2023 NODA for estimating shipments in standards cases.

In the February 2023 SNOPR, DOE did not include the impact of the Inflation Reduction Act (''IRA'') or local electrification policies. Whirlpool commented that IRA rebates would incentivize consumers to purchase electric cooking products and should be included in the shipments model. (Whirlpool, No. 400 at p. 45) Whirlpool commented that it was not sure what level of impact that might have but that it could be included in the analysis. (*Id.*)

For this direct final rule, DOE estimated the impact that the IRA and local electrification policies would have on product shipments in the no-new-standards and standards cases. The IRA apportions $4.3 billion to homeowners to transition from gas products to electric products with a maximum rebate of $14,000 per household and up to $840 specifically for cooking products. DOE estimated that the portion of IRA funding used for cooking products was proportional to the ratio of the maximum cooking product rebate with the total maximum household rebate. The rebate amount for which households are eligible is dependent on household income, ranging from 50 to 100 percent of the cooking product cost, with a maximum of $840. DOE conservatively assumed not all households would be eligible for the full rebate and that potential rebates would range from half the full rebate amount ($420) to the full rebate amount ($840). DOE assumed a typical cooking product rebate of $630, the midpoint between these two values. From this analysis, DOE estimates that approximately 410,000 households over the period of 2023–2031 will voluntarily switch from gas cooking products to electric cooking

[85] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

[86] Although this individual commenter is associated with the American Enterprise Institute, the comment states that the views expressed in it should not be construed as representing any official position of the American Enterprise Institute. (Zycher, No. 2266 at p. 1)

[87] Appliance Magazine Market Research. The U.S. Appliance Industry: Market Value, Life Expectancy & Replacement Picture 2012.

[88] U.S. Appliance Industry Statistical Review: 2000 to YTD 2011.

products, resulting in a 1.6-percent drop in gas cooking product shipments over this period. DOE also included the impact of local and State electrification policies that prohibit gas connections to new housing construction and would slightly increase shipments of electric cooking products. DOE notes that the impact of the IRA and local electrification policies is exogenous to the impact of an efficiency standard and is the same in the no-new-standards and standards cases.

DOE received multiple comments from stakeholders regarding the impact standards may have in prompting consumers to switch fuel types for their cooking product.

The AGs of LA *et al.*[89] recommended that DOE consider whether regulation of gas cooking products will result in substitution to electric cooking products, with a corresponding increase in demand for electricity and attendant effects on a stretched power grid and pollution. (AGs of LA *et al.,* No. 2264 at p. 12)

Representatives McMorris-Rodgers *et al.*[90] stated that the consumer savings estimated in the February 2023 SNOPR for gas cooking tops do not justify the decreased features and functionality, and noted that these potential cost savings do not account for the cost of converting homes from gas to electric cooking, which Representatives McMorris-Rodgers *et al.* stated can total thousands of dollars per home. (Representatives McMorris-Rodgers *et al.,* No. 765 at p. 2)

NMHC and NAA recommended that DOE consider whether the electric grid is prepared for any anticipated increase in electrification needs as a result of a marketplace shift from gas cooking products to electric cooking products in response to the possible diminished availability of gas cooking products. (NMHC and NAA, No. 2265 at pp. 3–4)

NPGA asserted that DOE's analysis of payback and net cost percentage failed to account for the costs to consumers that will need to switch from gas to electric products as a result of a standard that eliminates products from the gas cooking market. (NPGA, No. 2270 at p. 7)

Senators Marshall *et al.*[91] commented that the February 2023 SNOPR fails to account for fuel switching as a result of the proposed standards, which will likely compel consumers to switch fuels in order to purchase products that comply with the proposed standards. (Senators Marshall *et al.,* No. 2277 at p. 2)

AGA commented that the standard proposed in the February 2023 SNOPR would remove many popular features in gas cooking tops, such as HIR burners and cast-iron grates. (AGA, No. 2279 at pp. 41–43) AGA commented that such changes in features would impact consumer demand and customers may switch away from gas cooking tops at potentially great economic expense because of insufficient gas options available to fit their current needs. (*Id.*) AGA added that additional expenses to electrify a natural gas kitchen, potentially thousands of dollars, were not included in DOE's analysis; DOE only accounted for the cost to replace or hook up a new cooking top.

APGA commented that the lack of utility arising from the standard proposed in the February 2023 SNOPR, coupled with IRA rebates to incentivize individuals to purchase electric cooking products, could result in less gas cooking products being shipped in the future, which would further decrease the benefits of the proposed rule. (APGA, No. 2283 at p. 6)

Whirlpool commented that the market elimination of gas cooking products threatens to cause a substantial problem for consumers who are encouraged to switch from gas to electric cooking products without financial relief from the potentially higher operating costs from using electricity as the fuel source. (Whirlpool, No. 2284 at p. 5) Consumers' Research also commented that a standard that prompts consumers to switch from gas cooking tops to electric cooking products would lead to higher consumer operating costs due to a higher cost for electricity relative to gas. (Consumers' Research, No. 2267 at p. 3)

ONE Gas commented that DOE does not adequately account for the cost impact to consumers of fuel switching and inadequately addresses statutory prohibitions for setting minimum efficiency standards that would lead to fuel switching. (ONE Gas, No. 2289 at pp. 11–15; ONE Gas, No. 10109 at p. 4) ONE Gas commented that most gas cooking top products will need redesign to meet standards set at EL 2, and the added cost passed on to consumers for gas cooking top products will compel further fuel switching by consumers. (*Id.*) ONE Gas stated this would be particularly impactful to low-income consumers that cannot afford the cost to transition to an electric cooking product. (*Id.*) ONE Gas commented that fuel switching and elimination of consumer choice is anticompetitive and contrary to EPCA. (*Id.*) ONE Gas further commented that DOE's logic in not conducting a fuel switching analysis is flawed and represents a departure from previous analyses of gas cooking products. (*Id.*) ONE Gas commented that DOE should conduct a fuel switching analysis for all standards levels to meet EPCA's need to minimize fuel switching. (*Id.*)

In response to the August 2023 NODA, ONE Gas commented that the elimination of gas cooking top models as a result of the IAEC levels analyzed in the August 2023 NODA would likely lead to fuel switching as the only means of product availability to price-sensitive consumers. (ONE Gas, No. 10109 at p. 4) ONE Gas noted that fuel switching programs are prohibited and restricted in several territories. (*Id.*) ONE Gas commented that DOE should issue an SNOPR that incorporates the updated efficiency levels from the NODA and that it requests the ability to provide analysis of fuel switching and other impacts to consumers. (*Id.*)

In this direct final rule, DOE is adopting TSL 1, the Recommended TSL

[89] ''The AGs of LA *et al.*'' refers to a joint comment from the attorneys general of the States of Louisiana, Tennessee, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Texas, Utah, and Virginia.

[90] ''Representatives McMorris-Rodgers *et al.*'' refers to a joint comment from the following members of the U.S. House of Representatives: Cathy McMorris-Rodgers (WA), Jeff Duncan (SC), Debbie Lesko (AZ), Bruce Westerman (AR), Jason Smith (MO), Rick Allen (GA), Earl L. ''Buddy'' Carter (GA), John Joyce (PA), Dan Newhouse (WA), Troy Balderson (OH), Greg Pence (IN), Gregory F. Murphy (NC), Robert E. Latta (OH), Jefferson Van Drew (NJ), Randy Weber (TX), Larry Bucshon (IN), Elise M. Stefanik (NY), John Curtis (UT), Russ Fulcher (ID), Claudia Tenney (NY), Lauren Boebert (CO), Diana Harshbarger (TN), Andy Biggs (AZ), Troy Nehls (TX), Ronny L. Jackson (TX), Bill Johnson (OH), Austin Scott (GA), Alex X. Mooney (WV), Mike Ezell (MS), Adrian Smith (NE), Randy Feenstra (IA), Andy Ogles (TN), Mike Kelly (PA), Dan Crenshaw (TX), Robert J. Wittman (VA), Glenn Grothman (WI), Mariannette Miller-Meeks (IA), Harriet M. Hageman (NY), Kat Cammack (FL), Ann Wagner (MO), William R. Timmons (SC), Tracey Mann (KS), Michael Burgess (TX), Mary E. Miller (IL), Tim Walberg (MI), Jay Obernolte (CA), Michael V. Lawler (NY), Gus M. Bilirakis (FL), Glenn ''GT'' Thompson (PA), Richard Hudson (NC), Nick Langworthy (NY), Eric A. ''Rick'' Crawford (AR), Daniel Webster (FL), Rich McCormick (GA), Bill Posey (FL), Michael Guest (MS), Darrell Issa (CA), Tom Tiffany (WI), Roger Williams (TX), Russell Fry (SC), Warren Davidson (OH), Brad Finstad (MN), Ryan Zinke (MT), Chip Roy (TX), Eric Burlison (MO), Gary Palmer (AL), Blaine Luetkemeyer (MO), Michael Bost (IL), Pete Stauber (MN), David G. Valadao (CA), Scott Perry (PA), Lori Chavez-Deremer (OR), and Ralph Norman (SC). Duplicate names have been removed from the list of signatories.

[91] ''Senators Marshall *et al.*'' refers to a joint comment from the following U.S. Senators: Roger Marshall (KS), Steve Daines (MT), John Barrasso (WY), Roger F. Wicker (MS), Todd Young (IN), Joni K. Ernst (IA), James E. Risch (ID), Cindy Hyde-Smith (MS), Markwayne Mullin (OK), John Hoeven (ND), James Lankford (OK), Ted Cruz (TX), and Bill Cassidy (LA).

described in the Joint Agreement. For gas cooking products, TSL 1 corresponds to EL 1. DOE estimates that 97 percent of the gas cooking top market currently meets or exceeds the efficiency of EL 1, ensuring that consumers will have access to gas cooking tops with the full range of product features in the first year of compliance. Furthermore, DOE notes that the incremental cost increase for EL 1 relative to the baseline is $4.04 (calculated in 2028, the first year of compliance), which is less than 1 percent of the installed cost of a baseline gas cooking top and far too small to incentivize switching to an electric cooking top. For these reasons, DOE is assuming in this direct final rule analysis that consumers will not switch fuel types as a result of the standard and, as such, has not included fuel switching in this direct final rule analysis.

Whirlpool stated that, according to a survey it conducted in 2013, most consumers prefer to replace their current cooking top with one that uses the same fuel source, and they may not be willing to trade their gas cooking appliance for one that does not meet their needs or preferences. (Whirlpool, No. 2284 at pp. 6, 9) Whirlpool commented that this could disrupt the normal appliance replacement cycle and cause consumers to delay purchases as long as possible, which will result in the reduction of the standard's potential efficiency savings. (*Id.*)

DOE agrees that consumers are most likely to replace their current cooking top with one that uses the same fuel. The adopted standard for gas cooking tops, the Recommended TSL described in the Joint Agreement, is expected to preserve the features identified by manufacturers and individual commenters as important to consumers, as demonstrated by products from multiple manufacturers in the expanded test sample, and will not disrupt the consumer appliance replacement cycle.

CEI *et al.*[92] commented that many consumer and environmental organizations are enthusiastic about the promise of induction cooking tops, a potentially more energy-efficient type of electric cooking top they claim offers numerous advantages for consumers, but such products would gain market share with or without the proposed rule, casting further doubt as to the significance of any marginal energy savings from agency action. (CEI *et al.,* No. 2287 at pp. 5–6) CEI *et al.* commented that the emergence of induction cooking tops further militates against a finding of significant energy savings as required under EPCA. (*Id.*)

DOE agrees that the market share for induction products is likely to grow over the shipments analysis period. However, DOE's expanded test sample indicates that radiant electric smooth element cooking tops span much of the same range of efficiencies as induction electric smooth element cooking tops (*see* testing results in chapter 5 of this direct final rule TSD). As such, an energy-efficiency standard will reduce energy consumption across both product technologies.

DOE considered the impact of standards on product shipments. DOE concluded that it is unlikely that the price increase due to the proposed standards would impact the decision to install a cooking product in the new construction market. In the replacement market, DOE assumed that, in response to an increased product price, some consumers will choose to repair their old cooking product and extend its lifetime instead of replacing it immediately. DOE estimated the magnitude of such impact through a purchase price elasticity of demand. The estimated price elasticity of –0.367 is based on data for cooking products as described in appendix 9A of the TSD for this direct final rule. This elasticity relates the repair or replace decision to the incremental installed cost of higher efficiency cooking products. DOE estimated that the average extension of life of the repaired unit would be 5 years, and then that unit will be replaced with a new cooking product.

In response to the August 2023 NODA, AHAM commented that DOE's price elasticity estimate used in consumers' repair-replace decisions is an aggregate value that averages over the impact to consumer subgroups. (AHAM, No. 10116 at p. 29) AHAM requested DOE identify the consumer subgroups impacted by a higher price associated with a standard. (*Id.*)

DOE is unaware of a source that provides the necessary data disaggregated by household income needed to reliably estimate price elasticity by household income level and commenters did not provide such data. Available data is only available at the national level allowing DOE to estimate the aggregate impact to product shipments (see appendix 9A of the direct final rule TSD for details). DOE notes that the adopted standard at the Recommended TSL is expected to increase the average price of a cooking top in the first year of compliance (2028) by $4 and of an oven by $3, resulting in minimal impacts across all consumer subgroups.

H. National Impact Analysis

The NIA assesses the national energy savings (''NES'') and the NPV from a national perspective of total consumer[93] costs and savings that would be expected to result from new or amended standards at specific efficiency levels.[94] DOE calculates the NES and NPV for the potential standard levels considered based on projections of annual product shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses. For the present analysis, DOE projected the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of consumer conventional cooking products sold from 2027 through 2056 for TSLs other than TSL 1 and 2028 through 2057 for TSL 1 (the Recommended TSL detailed in the Joint Agreement).

DOE evaluates the impacts of new or amended standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy use and consumer costs for each product class in the absence of new or amended energy conservation standards. For this projection, DOE considers historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each product class if DOE adopted new or amended standards at specific energy efficiency levels (*i.e.,* the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of products with efficiencies greater than the standard.

[92] ''CEI *et al.*'' refers to a joint comment from Competitive Enterprise Institute, Project 21, Caesar Rodney Institute, Center of the American Experiment, Mackinac Center for Public Policy, Thomas Jefferson Institute for Public Policy, Committee For A Constructive Tomorrow, Roughrider Policy Center, Heartland Institute, Eagle Forum, Rio Grande Foundation, Cornwall Alliance, Conservative Caucus, Science and Environmental Policy Project, 60 Plus Association, Energy & Environment Legal Institute, Consumers' Research, Institute for Energy Research, FreedomWorks, Independent Women's Forum, John Locke Foundation, America First Policy Institute, Leadership Institute, Center for Urban Renewal and Education, Association of Mature American Citizens Action, Free Enterprise Project, Americans for Prosperity, Conservative Partnership Institute, American Constitutional Rights Union Action, Becky Norton Dunlop, Faith Wins, and The Heritage Foundation.

[93] ''Consumer'' in this context refers to consumers of the product being regulated.

[94] The NIA accounts for impacts in the 50 States and U.S. territories.

DOE uses a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet. The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV.30 summarizes the inputs and methods DOE used for the NIA analysis for the direct final rule. Discussion of these inputs and methods follows the table. *See* chapter 10 of the direct final rule TSD for further details.

Table IV.30 Summary of Inputs and Methods for the National Impact Analysis

Inputs	Method
Shipments	Annual shipments from shipments model.
Compliance Date of Standard	2028 for TSL 1 (the Recommended TSL); 2027 for all other TSLs
Efficiency Trends	No-new-standards case: No efficiency trend Standard cases: No efficiency trend
Annual Energy Consumption per Unit	Annual weighted-average values are a function of energy use at each TSL.
Total Installed Cost per Unit	Annual weighted-average values are a function of cost at each TSL. Incorporates projection of future product prices based on historical data.
Annual Energy Cost per Unit	Annual weighted-average values as a function of the annual energy consumption per unit and energy prices.
Repair and Maintenance Cost per Unit	Annual values do not change with efficiency level.
Energy Price Trends	*AEO 2023* projections (to 2050) and value fixed to average between 2046–2050 prices thereafter.
Energy Site-to-Primary and FFC Conversion	A time-series conversion factor based on *AEO 2023*.
Discount Rate	Three and seven percent.
Present Year	2024

1. Product Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases. Section IV.F.8 of this document describes how DOE developed an energy efficiency distribution for the no-new-standards case (which yields a shipment-weighted average efficiency) for each of the considered product classes for the year of anticipated compliance with a new or amended standard. DOE assumed a static efficiency distribution over the shipments analysis period.

For the standards cases, DOE used a ''roll-up'' scenario to establish the shipment-weighted efficiency for the year that standards are assumed to become effective. In this scenario, the market shares of products in the no-new-standards case that do not meet the standard under consideration would ''roll up'' to meet the new standard level, and the market share of products above the standard would remain unchanged.

2. National Energy Savings

The national energy savings analysis involves a comparison of national energy consumption of the considered products between each potential standards case (''TSL'') and the case with no new or amended energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each product (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the electricity consumption and savings to primary energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO2023.* For natural gas, primary energy is the same as site energy. Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

Use of higher-efficiency products is sometimes associated with a direct rebound effect, which refers to an increase in utilization of the product due to the increase in efficiency. DOE did not find any data on the rebound effect specific to consumer conventional cooking products and assumed there would be no rebound due to a standard.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011, notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (''NEMS'') is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [95] that EIA uses to prepare its

[95] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2023,* DOE/EIA–0581(2023), May 2023. Available at *www.eia.gov/outlooks/aeo/nems/overview/pdf/0581(2023).pdf* (last accessed Aug. 3, 2023).

Annual Energy Outlook. The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the direct final rule TSD.

The CO_2 Coalition requested additional detailed information regarding DOE's FFC measures. (CO_2 Coalition, No. 2275 at pp. 6–7) The CO_2 Coalition additionally asserted that it could not find an explanation as to why DOE used FFC measurement when EPCA states that appliance energy conservation standards should be measured using ''the quantity of energy directly consumed by a consumer product at point of use.'' (*Id.*)

The definition cited by the CO_2 Coalition refers to the energy use of a covered product, determined in accordance with test procedures. In a statement of policy published on August 18, 2011, DOE announced its intention to use FFC measures in its analysis, and DOE noted that it will continue to set energy conservation standards for covered products based on energy consumption at the point-of-use, as required by EPCA, as amended. 76 FR 51284. EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) EPCA states that the term ''energy'' means electricity, or fossil fuels. DOE maintains that proper consideration of total energy savings should include the full fuel cycle.

Fall commented that the evolving share of renewables in electricity generation should be accounted for in the analysis, based on the EIA's *AEO2022.* (Fall, No. 376 at pp. 1–3)

For this direct final rule, DOE utilized EIA's *AEO2023,* which incorporates an increasing share of renewables in electricity generation, to derive FFC factors. *See* appendix 10B of the direct final rule TSD for details.

NPGA supported DOE's decision to use FFC to provide a comprehensive analysis of national energy savings. (NPGA, No. 2270 at p. 6)

Multiple commenters stated that the standards proposed in the February 2023 SNOPR would lead to increased overall full-fuel-cycle energy consumption due to consumers that will have to switch from gas to electric products. Spire commented that the proposed standards will promote fuel switching to electric appliances due the elimination of features and performance characteristics that cause many consumers to prefer gas, and added that any such proposed standards are in contradiction to EPCA. (Spire, No. 2710 at pp. 26–30) Spire commented that fuel switching would result in greater overall energy consumption and carbon emissions when accounting for the FFC energy associated with electric appliances relative to gas appliances. (*Id.*) NPGA commented that the standard proposed in the February 2023 SNOPR will result in the replacement of gas cooking products with electric cooking products that consume more energy when including the energy required to generate and transmit the site electricity. (NPGA, No. 2270 at pp. 4–5) AGA commented that the result of DOE's proposed standards will be an increase in source energy usage due to AGA's assessment that the elimination of certain cooking tops from the market will likely result in the gas appliances being replaced with electric resistance appliances. (AGA, No. 2279 at pp. 45–46)

As described in section IV.G of this document, DOE maintains that consumers will not switch fuels as a result of the adopted standard.

ONE Gas commented that DOE has placed improper emphasis upon site energy consumption calculations as the basis for consumer and national energy savings. (ONE Gas, No. 2289 at pp. 7–8) ONE Gas commented that, as the National Academies of Sciences, Engineering, and Medicine (''NAS'') concluded in 2009, using the FFC metric would provide the public with more comprehensive information about the impacts of energy consumption on the environment, the economy, and other national concerns while noting that DOE used site energy consumption analysis that reflects the energy used in generating and distributing electricity, natural gas, or oil in addition to the energy used by the appliance at the site. (*Id.*) ONE Gas commented that 14 years after NAS recommended that DOE move to the FFC measure of energy consumption for assessment of national and environmental impacts, especially levels of GHGs, DOE still has not fully implemented FFC. (*Id.*) ONE Gas acknowledged that DOE accounts for FFC energy savings for entire TSLs and energy and emissions associated with the TSL level of aggregation, but it does not do so for design options independently or across consumer fuel types. (*Id.*) ONE Gas commented that the incomplete use of FFC savings as a metric leads to biased analysis and interpretation of proposed minimum efficiency standards for conventional consumer cooking appliances. (*Id.*)

DOE's use of the FFC metric is consistent with the NAS recommendations and EPCA requirements. Using site energy rather than FFC measures for design options and consumer energy use is appropriate because it serves the purpose of allowing estimation of the economic impacts of potential standards on consumers in the LCC and PBP analysis. The FFC metric is appropriate at the level of the national impact analysis where the purpose is to estimate the total energy savings and environmental impacts from potential standards.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are (1) total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each product shipped during the projection period.

As discussed in section IV.F.1 of this document, DOE developed price trends for consumer conventional cooking products based on a power-law fit of historical PPI data and cumulative shipments. For the electric cooking products price trend, DOE used the ''Electric household ranges, ovens, surface cooking units and equipment'' PPI for 1967–2022.[96] For the gas cooking product price trend, DOE used the ''Gas household ranges, ovens, surface cooking units and equipment'' for 1981–2022.[97] DOE applied the same trends to project prices for each product class at each considered efficiency level. By 2057, which is the end date of the projection period for the Recommended TSL detailed in the Joint Agreement, the average product price is projected to drop 16 percent relative to 2028 for electric cooking products, and 20 percent for gas cooking products. DOE's projection of product prices is described in chapter 8 of the TSD for this direct final rule.

To evaluate the effect of uncertainty regarding the price trend estimates, DOE

[96] Electric household ranges, ovens, surface cooking units and equipment PPI series ID: PCU33522033522011; *www.bls.gov/ppi/.*

[97] Gas household ranges, ovens, surface cooking units, and equipment PPI series ID; PCU33522033522013; *www.bls.gov/ppi/.*

investigated the impact of different product price projections on the consumer NPV for the considered TSLs for consumer conventional cooking products. In addition to the default price trend, DOE considered two product price sensitivity cases: (1) a high price decline case based on a learning rate derived from subset of PPI data for the period 1993–2022 for electric cooking products and the period 1981–2004 for gas cooking products and (2) a low price decline case based on a learning rate derived from a subset of PPI data from the period of 1967–1992 for electric cooking products and the period 2005–2022 for gas cooking products. The derivation of these price trends and the results of these sensitivity cases are described in appendix 10C of the TSD for this direct final rule.

The operating cost savings are energy cost savings, which are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the projection of annual national-average residential energy price changes in the Reference case from *AEO2023,* which has an end year of 2050. To estimate price trends after 2050, the 2046–2050 average was used for all years. As part of the NIA, DOE also analyzed scenarios that used inputs from variants of the *AEO2023* Reference case that have lower and higher economic growth. Those cases have lower and higher energy price trends compared to the Reference case. NIA results based on these cases are presented in appendix 10C of the direct final rule TSD.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this direct final rule, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (''OMB'') to Federal agencies on the development of regulatory analysis.[98] The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value.

I. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended energy conservation standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new or amended national standard. The purpose of a subgroup analysis is to determine the extent of any such disproportional impacts. DOE evaluates impacts on particular subgroups of consumers by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. For this direct final rule, DOE analyzed the impacts of the considered standard levels on two subgroups: (1) low-income households and (2) senior-only households.

For low-income households, the analysis used a subset of the RECS 2020 sample composed of low-income households. DOE separately analyzed different groups in the low-income household sample using data from RECS on home ownership status and on who pays the energy bill. Low-income homeowners are analyzed equivalently to how they are analyzed in the standard LCC analysis. Low-income renters who do not pay their energy bill are assumed to not be impacted by any new or amended standards. In this case, the landlord purchases the appliance and pays its operating costs, so is effectively the consumer and the renter is not impacted. Low-income renters who do pay their energy bill are assumed to incur no first cost. DOE made this assumption to acknowledge that the vast majority of low-income renters will not pay to have their conventional cooking product replaced—such replacement would be up to the landlord.

Whirlpool commented that the standards proposed in the February 2023 SNOPR will disproportionately affect low-income consumers and elderly individuals living on a fixed income. (Whirlpool, No. 2284 at p. 5)

In response to the August 2023 NODA, AHAM commented that DOE has not performed a distributional analysis that accounts for the burdens to low-income households for whom increased prices may result in cumulative financial burden. (AHAM, No. 10116 at pp. 25–26) AHAM stated that DOE's analyses fail to account for the economic impacts to subgroups that may be disproportionately impacted by regulations due to increased first costs. (*Id.*) AHAM further commented that DOE has not modeled consumer choice to discern how proposed standards would influence consumer decisions to retain older, less energy efficient appliances. (*Id.*) In particular, AHAM stated that low-income consumers are not in a financial condition that might prepare them to invest in higher price durable goods, particularly if energy savings are slight and may not be achieved for many years. (*Id.*)

As noted above, many low-income consumers are renters who are not expected to pay the incremental cost due to an amended standard. For low-income homeowners who are expected to bear that incremental cost, the analysis incorporates the higher incremental costs at each considered TSL. In the aggregate, DOE finds that low-income consumers have higher average LCC savings and lower payback periods relative to the general population. At the adopted TSL in this direct final rule, the average increase in incremental first cost relative to the baseline level the low-income consumers (including both renters and home-owners) is $2 for cooking tops and $1 for ovens, which is unlikely to influence consumers' decisions to repair or retain older, less efficient units. Additionally, DOE finds that the consumer impacts to senior-only households are similar to the national population with positive LCC savings and a less than 1 percent of senior-only households experience a net cost at the adopted TSL. DOE presents the results of low-income and senior-only subgroup analyses in section V.B.1.b of this document.

AHAM commented that DOE has done nothing to determine to what degree split-incentive situations (landlord purchases efficient appliance while tenant pays the utility bill) occur or analyzed fully the effects of tighter standards on other potential landlord behavior, such as continuing to repair old appliances or resorting to used appliances. (AHAM, No. 2285 at pp. 48–49)

The existence of a split incentive across a substantial number of U.S. households, in which a tenant pays for the cost of electricity while the building owner furnishes appliances, has been identified through a number of studies of residential appliance and equipment use broadly. Building from early work

[98] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* Available at *www.whitehouse.gov/omb/information-for-agencies/circulars* (last accessed January 4, 2024). DOE used the prior version of Circular A–4 (September 17, 2003) in accordance with the effective date of the November 9, 2023, version.

including Jaffe and Stavins [99] and Murtishaw and Sathaye [100] discussed the presence of landlord–tenant split incentives (*i.e.,* the ''principal-agent problem''). Spurlock and Fujita [101] showed that 87 percent of low-income individuals who rented their homes were found to pay the electricity bill resulting from their energy use, such that they were likely subject to a scenario in which their landlord purchased the appliance, but they paid the operating costs. DOE notes that there continues to be a lack of data to corroborate the notion that landlords pass on some, or all, of increased appliance costs to tenants. Additionally, DOE notes that the shipment-weighted average incremental first cost increase to landlords at the adopted standard relative to the baseline level is $3 and unlikely to impact landlord behavior. DOE has continued to analyze low-income renters under the assumption that they pay no upfront costs under an amended standard in this direct final rule.

AHAM commented that DOE should assess distributional consumer impacts thoroughly prior to promulgation of energy standards to minimize harm to subpopulations. (AHAM, No. 10116 at pp. 26–29) AHAM asserted that previous research shows disparate impacts based on household income and ability to pay for appliance upgrades required by regulatory requirements. (*Id.*) AHAM commented that DOE standards should be assessed for regressive impacts on low- and middle-income households. (*Id.*)

DOE's low-income LCC subgroup analysis uses inputs specific to low-income consumers to estimate the impact of adopted standards. Additionally, DOE notes that there is evidence that prior efficiency standards, by acting on a market substantially more complex than the simplified model of perfect competition, have aligned with improvements in efficiency (and in some cases additional product attributes) while maintaining a constant price for baseline products. For example, Spurlock and Fujita (2022) examined appliance point of sales data and noted that the 2004 and 2007 clothes washer efficiency standards were associated with 30-percent increase in product efficiency contemporaneous with no change in average price within the baseline market segment.[102]

Chapter 11 in the direct final rule TSD describes the consumer subgroup analysis.

J. Manufacturer Impact Analysis

1. Overview

DOE performed an MIA to estimate the financial impacts of new and amended energy conservation standards on manufacturers of consumer conventional cooking products and to estimate the potential impacts of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects and includes analyses of projected industry cash flows, the INPV, investments in research and development (''R&D'') and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how new and amended energy conservation standards might affect manufacturing employment, capacity, and competition, as well as how standards contribute to overall regulatory burden. Finally, the MIA serves to identify any disproportionate impacts on manufacturer subgroups, including small business manufacturers.

The quantitative part of the MIA primarily relies on the GRIM, an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, product shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant products. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact to domestic manufacturing employment. The model uses standard accounting principles to estimate the impacts of more-stringent energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a no-new-standards case and the various standards cases (*i.e.,* TSLs). To capture the uncertainty relating to manufacturer pricing strategies following new and amended standards, the GRIM estimates a range of possible impacts under different manufacturer markup scenarios.

The qualitative part of the MIA addresses manufacturer characteristics and market trends. Specifically, the MIA considers such factors as a potential standard's impact on manufacturing capacity, competition within the industry, the cumulative impact of other DOE and non-DOE regulations, and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 12 of the direct final rule TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1 of the MIA, DOE prepared a profile of the consumer conventional cooking products manufacturing industry based on the market and technology assessment, preliminary manufacturer interviews, and publicly available information. This included a top-down analysis of consumer conventional cooking products manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.,* revenues; materials, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (''SG&A''); and R&D expenses). DOE also used public sources of information to further calibrate its initial characterization of the consumer conventional cooking products manufacturing industry, including company filings of form 10–K from the SEC,[103] corporate annual reports, the U.S. Census Bureau's ''Economic Census,'' [104] and reports from D&B Hoovers.[105]

In Phase 2 of the MIA, DOE prepared a framework industry cash flow analysis to quantify the potential impacts of new and amended energy conservation standards. The GRIM uses several factors to determine a series of annual cash flows starting with the announcement of standards and extending over a 30-year period following the compliance date of standards. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) creating a need for increased investment, (2) raising production costs per unit, and (3) altering revenue due to higher per-unit prices and changes in sales volumes.

In addition, during Phase 2, DOE developed interview guides to distribute to manufacturers of consumer conventional cooking products in order to develop other key GRIM inputs,

[99] B. Jaffe and R.N. Stavins (1994) The energy-efficiency gap What does it mean? Energy Policy, 22 (10) 804–810, 10.1016/0301–4215(94)90138–4.

[100] Murtishaw, S., & Sathaye, J. (2006). Quantifying the Effect of the Principal-Agent Problem on US Residential Energy Use. Lawrence Berkeley National Laboratory. Retrieved from *https://escholarship.org/uc/item/6f14t11t.*

[101] C.A. Spurlock and K.S. Fujita (2022) Equity implications of market structure and appliance energy efficiency regulation, Energy Policy, 165(112943), *doi.org/10.1016/j.enpol.2022.112943.*

[102] *Id.*

[103] Available at *www.sec.gov/edgar.shtml.*

[104] Available at *www.census.gov/programs-surveys/asm/data/tables.html.*

[105] Available at *app.avention.com.*

including product and capital conversion costs, and to gather additional information on the anticipated effects of energy conservation standards on revenues, direct employment, capital assets, industry competitiveness, and subgroup impacts.

In Phase 3 of the MIA, DOE conducted structured, detailed interviews with representative manufacturers. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics to validate assumptions used in the GRIM and to identify key issues or concerns. As part of Phase 3, DOE also evaluated subgroups of manufacturers that may be disproportionately impacted by new and amended standards or that may not be accurately represented by the average cost assumptions used to develop the industry cash flow analysis. Such manufacturer subgroups may include small business manufacturers, low-volume manufacturers, niche players, and/or manufacturers exhibiting a cost structure that largely differs from the industry average. DOE identified two manufacturer subgroups for a separate impact analysis: premium product manufacturers and small businesses. The premium product manufacturer subgroup is discussed in section V.B.2.d of this document. The small business subgroup is discussed in section chapter 12 of the direct final rule TSD.

2. Government Regulatory Impact Model and Key Inputs

DOE uses the GRIM to quantify the changes in cash flow due to new or amended standards that result in a higher or lower industry value. The GRIM uses a standard, annual discounted cash flow analysis that incorporates manufacturer costs, markups, shipments, and industry financial information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from a new and amended energy conservation standard. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2024 (the base year of the analysis) and continuing 30 years after the analyzed compliance year.[106] DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For manufacturers of consumer conventional cooking products, DOE used a real discount rate of 9.1 percent, which was derived from industry financials and then modified according to feedback received during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of the new and amended energy conservation standard on manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis, and information gathered from industry stakeholders during the course of manufacturer interviews. The GRIM results are presented in section V.B.2 of this document. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the direct final rule TSD.

a. Manufacturer Production Costs

Manufacturing more efficient products is typically more expensive than manufacturing baseline products due to the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered products can affect the revenues, gross margins, and cash flow of the industry.

In the MIA, DOE used the MPCs calculated in the engineering analysis as described in section IV.C of this document and further detailed in chapter 5 of the direct final rule TSD. For this direct final rule analysis, DOE used a design-option approach supported by testing and supplemented by reverse engineering (physical teardowns and testing of existing products in the market) to identify the incremental cost and efficiency improvement associated with each design option or design option combination. DOE used these updated MPCs from the engineering analysis in this MIA.

For a complete description of the MPCs, *see* chapter 5 of the direct final rule TSD.

b. Shipments Projections

The GRIM estimates manufacturer revenues based on total unit shipment projections and the distribution of those shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment projections derived from the updated shipments analysis from the base year (2024) to the end of the analysis period (30 years after the analyzed compliance date).[107] *See* chapter 9 of the direct final rule TSD for additional details.

c. Product and Capital Conversion Costs

New and amended energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and product designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with new or amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

To evaluate the level of product conversion costs manufacturers would likely incur to comply with new and amended energy conservation standards, DOE estimated the number of consumer conventional cooking product models currently on the market, the efficiency distribution of those models on the market, the estimated testing cost to test to the DOE test procedure (for cooking tops only), and the estimated per model R&D costs to redesign a non-compliant model into a compliant model for each analyzed efficiency level.

DOE used the same number of consumer conventional cooking models that were identified in the February 2023 SNOPR for this direct final rule MIA. DOE used the efficiency distribution from the updated shipments analysis for this direct final rule MIA. DOE updated the per model testing cost and per model R&D cost based on updated wage data from the BLS.[108] DOE revised the per model R&D costs for gas cooking tops to reflect the updated direct final rule engineering analysis. DOE then combined the per model testing and R&D costs with the number of models that would need to be tested and redesigned to estimate the

[106] For the no-new-standards case and all TSLs except the Recommended TSL, the analysis period ranges from 2024–2056. For the Recommended TSL, the analysis period ranges from 2024–2057.

[107] *Id.*

[108] DOE updated the hourly wage from 2021 data used in the February 2023 SNOPR to 2022 data used in this direct final rule.

industry product conversion costs. Lastly, DOE updated all conversion cost estimates from 2021 dollars that were used in the February 2023 SNOPR to 2022 dollars for this direct final rule analysis.

Whirlpool commented that the standards proposed in the February 2023 SNOPR are not economically justified and that DOE must account for the costs that manufacturers will bear in developing and marketing products to meet these energy conservation standards. (Whirlpool, No. 2284 at pp. 4–5) Whirlpool stated that it could not identify a single gas cooking top or range model in its product line that meets the gas cooking top standard proposed in the February 2023 SNOPR. (*Id.*) Whirlpool stated that a significant time investment and an expensive product redesign would be required to bring gas cooking tops into compliance with the gas cooking top standard proposed in the February 2023 SNOPR. (*Id.*) Whirlpool commented that DOE's projected conversion cost of $183.4 million in the February 2023 SNOPR reflects flaws in analysis. (*Id.*) Specifically, Whirlpool commented that DOE's approximation that half of all gas cooking top models currently on the market are compliant with the gas cooking top standard proposed in the February 2023 SNOPR contradict DOE's conclusion in the February 2023 SNOPR TSD that only about 4 percent of gas cooking tops on the market meet or exceed the proposed standard of EL 2. (*Id.*) Thus, Whirlpool stated that DOE's February 2023 SNOPR analysis does not reflect the true cost to manufacturers of complying with the standards proposed in the February 2023 SNOPR. (*Id.*)

Conversely, the CA IOUs stated that the MIA from the February 2023 SNOPR accurately accounts for the significant investments manufacturers must make to comply with the standards proposed in the February 2023 SNOPR. (CA IOUs, No. 2278 at p. 2) The CA IOUs commented that DOE appropriately balances the significant costs to manufacturers to retool and redesign products to meet the standard against the significant consumer benefits from the standard. (*Id.*) The CA IOUs stated that DOE's analysis shows manufacturers can make more efficient gas cooking tops at an incremental cost to consumers while saving consumers significant money over the lifetime of the cooking top. (*Id.*)

As discussed in section IV.C.1.a of this document, DOE updated the efficiency levels for gas cooking tops for this direct final rule analysis. The conversion costs calculated for this direct final rule reflect these updated efficiency levels for the gas cooking top product class.

In general, DOE assumes all conversion-related investments occur between the year of publication of the direct final rule and the year by which manufacturers must comply with the new and amended standards. The conversion cost figures used in the GRIM can be found in section V.B.2 of this document. For additional information on the estimated capital and product conversion costs, see chapter 12 of the direct final rule TSD.

d. Manufacturer Markup Scenarios

MSPs include direct manufacturing production costs (*i.e.,* labor, materials, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied non-production cost markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of new and amended energy conservation standards: (1) a preservation of gross margin scenario; and (2) a preservation of operating profit scenario. These scenarios lead to different markup values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin scenario, DOE applied the same ''gross margin percentage'' across all efficiency levels in the standards cases that is used in the no-new-standards case, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. DOE continued to use a manufacturer markup of 1.20 for all consumer conventional cooking products, which corresponds to a 17 percent gross margin percentage and the same manufacturer markup that was used in the February 2023 SNOPR.[109] This manufacturer markup scenario represents the upper bound to industry profitability under new and amended energy conservation standards.

Under the preservation of operating profit scenario, DOE modeled a situation in which manufacturers are not able to increase per-unit operating profit in proportion to increases in manufacturer production costs. Under this scenario, as the MPCs increase, manufacturers reduce their margins (on a percentage basis) to a level that maintains the no-new-standards case operating profit (in absolute dollars). The implicit assumption behind this scenario is that the industry can only maintain its operating profit in absolute dollars after compliance with new and amended standards. Therefore, operating profit in percentage terms is reduced between the no-new-standards case and the analyzed standards cases. DOE adjusted the margins in the GRIM at each TSL to yield approximately the same earnings before interest and taxes in the standards cases in the year after the compliance date of the new and amended standards as in the no-new-standards case.[110] This scenario represents the lower bound to industry profitability under new and amended energy conservation standards.

A comparison of industry financial impacts under the two markup scenarios is presented in section V.B.2.a of this document.

3. Comments From Interested Parties

For this direct final rule, DOE considered comments it had received regarding its manufacturer impact analysis presented in the February 2023 SNOPR. The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

Several interested parties commented on DOE's February 2023 SNOPR MIA. These comments were made either in writing during the comment period following the publication of the February 2023 SNOPR or during the consumer conventional cooking products public meeting for the February 2023 SNOPR.

NPGA stated that in the February 2023 SNOPR, DOE identified only one model of gas cooking top that meets the proposed standard for gas cooking tops. (NPGA, No. 2270 at p. 10) NPGA stated that this eliminates competition and creates an unfair, government-assisted advantage to the manufacturer of this particular model and risks that the market will be monopolized by a few select manufacturers. (*Id.*) AGA also stated that lessening of competition will have monopolistic consequences for those manufacturers who remain in business and drive-up prices for consumers who will have only 4 percent of gas cooking tops remaining. (AGA,

[109] 88 FR 6818, 6863.

[110] For TSL 1 (the Recommended TSL), the modeled compliance date is 2028. For the remaining TSLs, the modeled compliance date is 2027.

No. 2279 at pp. 24–26) Additionally, Senators Marshall *et al.* stated that the February 2023 SNOPR proposed standards are anticompetitive and will likely lead to manufacturers leaving the market. (Marshall *et al.,* No. 2277 at pp. 1–2)

Consumers' Research noted that DOE's February 2023 SNOPR analysis does not include data to justify the claim that most of the gas cooking top models currently on the market are capable of being redesigned to meet the standard for gas cooking tops that was proposed in the February 2023 SNOPR. (Consumers' Research, No. 2267 at pp. 1–2) Consumers' Research commented that the largest share of DOE's estimated INPV costs from the February 2023 SNOPR would fall on gas cooking product manufacturers, as they produce the overwhelming majority of the models that will require redesign to meet the standards proposed in the February 2023 SNOPR. (*Id.*) Consumers' Research commented that due to increased costs concentrated on gas cooking product manufacturers, some manufacturers will likely have a negative cash flow if the standards proposed in the February 2023 SNOPR are adopted. (*Id.*) Consumers' Research stated that they believe the standard for gas cooking tops that was proposed in the February 2023 SNOPR will prompt companies to decrease product lines or leave the market altogether, thereby limiting consumer choice by decreasing market competition. (*Id.*)

Conversely, the CA IOUs stated that cooking tops do not currently have minimum performance standards or efficiency labels and are not currently subject to a voluntary ENERGY STAR specification, nor are manufacturers incentivized to produce more efficient cooking tops or provide consumers with energy-efficiency information. (CA IOUs, No. 2278 at p. 2) The CA IOUs commented that these market failures mean consumers have no ability to choose a more efficient cooking top because they lack both the available options and the information to do so. (*Id.*)

Based on comments received in response to the February 2023 SNOPR, DOE further examined the potential impacts of the gas cooking top market in this direct final rule analysis and agrees that there would likely be a significant impact to the gas cooking top market if DOE adopted the standards for the gas cooking tops that were proposed in the February 2023 SNOPR. As discussed in section IV.C.1.a of this document, DOE updated the efficiency levels for gas cooking tops for this direct final rule analysis. Additionally, in section V.B.2.c of this document, DOE further discusses the manufacturing capacity concerns and potential market disruption, including the potential for manufacturers to leave the gas cooking top market, if DOE were to adopt energy conservation standards at max-tech for gas cooking tops.

NMHC and NAA stated that overly prescriptive directives for marginal efficiency gains will outpace the ability of the manufacturing sector and installation providers to alleviate existing product shortages and delays while creating new barriers to cost-effective and timely appliance procurement. (NMHC and NAA, No. 2265 at p. 3) NMHC and NAA stated their interest in preserving product choice and ensuring the flexibility to select those appliances that reflect the unique characteristics and wide array of multifamily building types and their residents. (*Id.*)

As previously stated in this section, DOE updated the efficiency levels for gas cooking tops for this direct final rule from the efficiency levels used in the February 2023 SNOPR. As discussed in section IV.C.1.a of this document, the updated efficiency levels for gas cooking tops allow gas cooking tops to retain the presence of multiple HIR burners; continuous cast-iron grates; the ability to choose between nominal unit widths; the ability to have sealed burners; at least one LIR burner (*i.e.,* with an input rate below 6,500 Btu/h); the ability to have multiple dual-stacked and/or multi-ring HIR burners; and at least one extra-high input rate burner (*i.e.,* with an input rate above 18,000 Btu/h) at EL 1, the adopted EL, thereby preserving consumer product choice for gas cooking tops. DOE discusses the potential impacts for manufacturing production capacity for gas cooking tops in section V.B.2.c of this document.

K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO_2, NO_X, SO_2, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH_4 and N_2O, as well as the reductions in emissions of other gases due to ''upstream'' activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion.

The analysis of electric power sector emissions of CO_2, NO_X, SO_2, and Hg uses emissions intended to represent the marginal impacts of the change in electricity consumption associated with new or amended standards. The methodology is based on results published for the *AEO,* including a set of side cases that implement a variety of efficiency-related policies. The methodology is described in appendix 13A in the direct final rule TSD. The analysis presented in this notice uses projections from *AEO2023.* Power sector emissions of CH_4 and N_2O from fuel combustion are estimated using Emission Factors for Greenhouse Gas Inventories published by the Environmental Protection Agency (''EPA'').[111]

The on-site operation of consumer conventional cooking products involves combustion of fossil fuels and results in emissions of CO_2, NO_X, SO_2, CH_4, and N_2O where these products are used. Site emissions of these gases were estimated using Emission Factors for Greenhouse Gas Inventories and, for NO_X and SO_2, emissions intensity factors from an EPA publication.[112]

DOE received several comments on the connection between gas stove efficiency and indoor air quality, and related health impacts.

ANHE *et al.*[113] commented that burned methane gas byproducts contribute to premature mortality and increase risk for a number of illnesses. (ANHE *et al.,* No. 2276 at pp. 4–5) ANHE *et al.* further stated that a growing body of evidence shows an association between long-term exposure to air pollution and adverse birth outcomes, while short-term exposure to high levels of air pollution can exacerbate asthma and cardiopulmonary symptoms. (*Id.*) ANHE *et al.* commented that methane gas leaks pose risks to human health, stating that a recent study found consumer-grade natural gas contains at least 21 different hazardous air pollutants and that leaks can be

[111] Available at *www.epa.gov/sites/production/files/2021-04/documents/emission-factors_apr2021.pdf* (last accessed July 12, 2021).

[112] U.S. Environmental Protection Agency. External Combustion Sources. In *Compilation of Air Pollutant Emission Factors.* AP–42. Fifth Edition. Volume I: Stationary Point and Area Sources. Chapter 1. Available at *www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors#Proposed/* (last accessed July 12, 2021).

[113] ''ANHE *et al.*'' refers to a joint comment from Alliance of Nurses for Healthy Environments, American Lung Association, Association of Public Health Laboratories, Asthma and Allergy Foundation of America, Climate Psychiatry Alliance, Foundation for Sarcoidosis Research, Greater Boston Physicians for Social Responsibility, Medical Society Consortium on Climate and Health, National Association of Pediatric Nurse Practitioners, National League for Nursing, National Medical Association, and Physicians for Social Responsibility.

undetectable by smell. ANHE *et al.* stated that higher efficiency burner systems correlate with more complete combustion and more efficient energy conversion. ANHE *et al.* noted that gas cooking products are not required to be vented outside and that most cooking top hood ventilation systems recirculate the air with only a moderate impact on immediate air quality. (*Id.*)

ASAP *et al.* commented that the standards proposed in the February 2023 SNOPR would improve indoor air quality because higher efficiency burner systems correlate with more complete combustion, which reduces in-home gas combustion and therefore reduces exposure to pollutants that harm human health. (ASAP *et al.,* No. 2273 at pp. 3–4)

Sierra Club and Earthjustice commented that DOE's analysis undervalues the health benefits of the standards proposed in the February 2023 SNOPR, citing studies that connect children with asthma to homes with gas cooking products as well as homes with high concentrations of nitrogen dioxide (''NO_2''). (Sierra Club and Earthjustice, No. 2282 at pp. 3–4) Sierra Club and Earthjustice commented that improving the energy efficiency of gas cooking tops would ensure that compliant models combust less gas to do the same amount of cooking. (*Id.*) Sierra Club and Earthjustice recommended that DOE pursue an accurate quantitative assessment of the economic value of the harms resulting from gas cooking top emissions, or, at minimum, acknowledge that its current dollar-per-ton estimates may significantly undervalue the health and welfare benefits associated with reducing these emissions. (*Id.*)

The AGs of NY *et al.*[114] commented that the standards proposed in the February 2023 SNOPR would provide potentially significant—but as-yet unquantified—public health benefits such as those associated with improved indoor air quality, as the operation of gas cooking products results in emissions of methane, carbon monoxide, particulate matter, nitrogen dioxide, and other air pollutants in the home that may be associated with a variety of serious respiratory and cardiovascular conditions and other health risks, according to studies cited by DOE. (AGs of NY *et al.,* No. 2286 at p. 3) The AGs of NY *et al.* commented that they share DOE's concerns regarding gas cooking products' potential negative health impacts and pointed to recent studies showing that children growing up in households with gas cooking products have a 42-percent increased risk of experiencing asthma symptoms, and nearly 13 percent of current childhood asthma cases nationwide can be attributed to gas cooking product usage. (*Id.*)

The AGs of NY *et al.* support DOE's efforts to quantify whether the proposed efficiency standards will reduce emissions indoors caused by leakage from gas cooking products, citing a 2022 study by Stanford University researchers that found a significant quantity of emissions from gas ranges occurs due to leakage when they are not actively being used. (*Id.* at pp. 3–4) The AGs of NY *et al.* commented that improved air quality is especially important to low-income and minority communities, which often experience energy insecurity and disproportionately suffer from asthma and other negative health outcomes associated with indoor air pollution from gas cooking products. (*Id.*) The AGs of NY *et al.* stated that making cooking appliances more efficient and reducing cooking-related emissions that exacerbate or contribute to asthma will help reduce the economic and health burdens of historically underserved communities. (*Id.*)

The AGs of NY *et al.* encouraged DOE to incorporate performance standards into a final rule that mandate design approaches, control strategies, or other measures to mitigate methane or other emissions from gas ranges due to incomplete combustion and leakage design improvements, should such approaches and strategies exist and if they are economically feasible. (*Id.* at p. 4) The AGs of NY *et al.* further commented that two benefits of more efficient cooking appliances—lower utility bills and improved air quality—are especially important to low-income and minority communities, which often experience energy insecurity and disproportionately suffer from asthma and other negative health outcomes associated with indoor air pollution from gas cooking products. (*Id.* at pp. 4–5) The AGs of NY *et al.* commented that, for example, children living in Wards 7 and 8 of the District of Columbia (neighborhoods afflicted with poor housing conditions, including inadequate ventilation) have higher asthma rates and higher asthma hospitalization rates than children living in the wealthier parts of DC. (*Id.*) The AGs of NY *et al.* also cited a recent New York Public Housing Authority study, which found that cooking with gas cooking products resulted in NO_2 concentrations nearly double the levels in outdoor air that EPA considers unhealthy for sensitive groups. (*Id.*) The AGs of NY *et al.* commented that making cooking appliances more efficient and reducing cooking-related emissions that exacerbate or contribute to asthma will help reduce the economic and health burdens of historically underserved communities. (*Id.*)

In response to the August 2023 NODA, WE ACT provided a study detailing the impact on indoor air quality from transitioning from gas to induction stoves in affordable housing in New York City. (WE ACT, No. 10114 at p. 1) WE ACT commented that DOE should consider health impacts that the energy conservation standards can address. (*Id.*) WE ACT further commented that gas cooking products carry a significant health risk due to the combustion-related pollutants, like nitrogen dioxide (NO_2), benzene, methane, and carbon monoxide. (*Id.* at pp. 2–3) WE ACT further commented that combustion-related pollutants pose a disproportionate health risk to vulnerable populations. (*Id.*)

WE ACT commented that methane used in gas cooking products is an even more potent greenhouse gas than carbon dioxide and notes that gas cooking products have been reported to leak methane even when not in use. (*Id.* at pp. 2–3) WE ACT note that methane leakage from gas cooking products when not in use poses a safety concern, as well as being disruptive to the climate. (*Id.*)

AGA commented that DOE relied on a limited and biased selection of literature to make a presumption that gas cooking applications contribute to negative health impacts. AGA commented that DOE's assertions that reducing in-home use of gas combustion may deliver health benefits are not quantified in the February 2023 SNOPR analysis and such assertions are outside the scope of this proceeding and not supported by the record. (AGA, No. 2279 at pp. 47–50) AGA cited studies that DOE ignored showing no evidence of an association between the use of gas as a cooking fuel and either asthma symptoms or asthma diagnoses. (*Id.*) AGA commented that the Federal Interagency Committee on Indoor Air Quality, which includes two dozen Federal agencies led by EPA, has not identified natural gas cooking emissions as an important issue concerning asthma or respiratory illness. (*Id.*) AGA added that the U.S. Consumer Product Safety Commission and EPA do not

[114] ''The AGs of NY *et al.*'' refers to a joint comment from the attorneys general of the States of New York, California, Colorado, Connecticut, Maine, Maryland, Minnesota, Oregon, Vermont, and Washington, the Commonwealths of Massachusetts and Pennsylvania, and the District of Columbia; and the Corporation Counsel for the City of New York.

present gas ranges as a significant contributor to adverse air quality or health hazard in their technical or public information literature, guidance, or requirements. (*Id.*) AGA commented that indoor air quality is far less dependent on the heat source for the cooking, either natural gas or electricity, than on the types of food being cooked and the cooking conditions such as time, temperature, space configuration, and ventilation. AGA commented that if health impacts were in scope, DOE would need to conduct a full analysis of the cooking process with natural gas and evaluate the cooking process and emissions unrelated to the fuel used. (*Id.*)

AHAM commented that DOE's question in the February 2023 SNOPR regarding indoor air pollutants released by gas cooking products is biased and focused only on the potential indoor air pollutants released by gas products. (AHAM, No. 2285 at pp. 37–38) AHAM commented that pollutants are released by indoor cooking no matter the fuel, with the main concern related to $PM_{2.5}$. (*Id.*) AHAM commented that $PM_{2.5}$ results from cooking and is at the same or similar levels whether the cooking product is gas or electric. (*Id.*) AHAM commented that the standard from the American Society of Heating, Refrigerating and Air-Conditioning Engineers (''ASHRAE''), 62.2, *Ventilation and Acceptable Indoor Air Quality in Low-Rise Residential Buildings,* has for decades been used to establish the proper requirements for dealing with contaminants of concern and requires a minimum air flow and external venting (or equivalent continuous venting) regardless of the fuel. (*Id.*)

NPGA commented that gas cooking products have not been proven to contribute substantially to indoor air quality or health hazards, and reputable sources such as the Center for Disease Control and the medical journal Lancet do not identify a correlation between the use of gas cooking products and asthma. (NPGA, No. 2270 at pp. 10–11) NPGA commented that any health benefits to consumers would not be affected by enhanced efficiency standards but could be affected by improved ventilation through high-efficiency range hoods, exhaust fans, or opened windows. NPGA commented that these solutions are outside the scope of this rulemaking and that DOE lacks scientific, peer-reviewed studies showing a link between the use of gas cooking products and hazardous indoor air pollutants. (*Id.*)

Western Energy Alliance commented that DOE's review of scientific literature regarding indoor air emissions is too narrow, and the few studies referenced are biased. (Western Energy Alliance, No. 2272 at pp. 9–11) Western Energy Alliance recommended DOE include a more complete analysis. (*Id.*) Western Energy Alliance commented that DOE has overlooked a well-established air study from the International Study of Asthma and Allergies in Childhood that negates the claims from Seals *et al.* 2020. (*Id.* at p. 11)

ONE Gas commented that DOE's interest in the IAQ issues of consumer gas cooking is misplaced and should be omitted from rulemaking considerations as DOE is straying into health and safety issues beyond its rulemaking role as authorized in EPCA. (ONE Gas, No. 2289 at pp. 9–10; ONE Gas, No. 10109 at p. 4) ONE Gas commented that health or safety claims of covered products is the role of the U.S. Consumer Product Safety Commission (''CPSC''), and DOE should focus on ''technologically feasible and economically justified'' minimum efficiency standards. (*Id.*)

Michael D. submitted a California Restaurant Association/California Building Industry Association/Catalyst Environmental Solutions research study entitled ''The Effects of Cooking on Indoor Air Quality: A Critical Review of the Literature with an Emphasis on the Use of Natural Gas Appliances'' by Tormey and Huntley, which included five key findings: (1) the type of appliance—natural gas or electric—used to cook food indoors is not a significant determinant of residential indoor air; (2) IAQ is impacted far more by the act of cooking than the fuel used, and the most effective method to protect health is to provide proper ventilation; (3) many additional factors influence emissions during cooking, including the type of food, the oils used, cooking temperatures and time, and proper ventilation; (4) reports linking gas cooking to negative health outcomes often rely on analyses that do not make that connection; and (5) the International Study of Asthma and Allergies in Childhood, the largest worldwide epidemiologic project focused on links between gas stove use and asthma, found that for 512,707 primary and secondary school children from 47 countries, there was ''no evidence of an association between the use of gas as a cooking fuel and either asthma symptoms or asthma diagnosis.'' (Michael D., No. 2490 at p. 1)

DOE acknowledges the significant uncertainty in quantifying the impact of higher gas stove efficiency on indoor air quality and associated health outcomes. In particular, multiple commenters provided additional studies pointing to the role of ventilation in affecting indoor air quality. Given the high degree of uncertainty, DOE has not tried to quantify how higher gas stove efficiency standards might affect occupant health, apart from continuing to monetize the health impact of decreased NO_X and SO_2 emissions, which is applicable to both gas and electric products (due to emissions from power plants). *See* chapter 14 of this direct final rule TSD for details.

FFC upstream emissions, which include emissions from fuel combustion during extraction, processing, and transportation of fuels, and ''fugitive'' emissions (direct leakage to the atmosphere) of CH_4 and CO_2, are estimated based on the methodology described in chapter 15 of the direct final rule TSD.

The emissions intensity factors are expressed in terms of physical units per MWh or MMBtu of site energy savings. For power sector emissions, specific emissions intensity factors are calculated by sector and end use. Total emissions reductions are estimated using the energy savings calculated in the national impact analysis.

1. Air Quality Regulations Incorporated in DOE's Analysis

DOE's no-new-standards case for the electric power sector reflects the *AEO,* which incorporates the projected impacts of existing air quality regulations on emissions. *AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the emissions control programs discussed in the following paragraphs the emissions control programs discussed in the following paragraphs, and the Inflation Reduction Act.[115]

SO_2 emissions from affected electric generating units (''EGUs'') are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (''DC''). (42 U.S.C. 7651 *et seq.*) SO_2 emissions from numerous States in the eastern half of the United States are also limited under the Cross-State Air Pollution Rule (''CSAPR''). 76 FR 48208 (Aug. 8, 2011). CSAPR requires these States to reduce certain emissions, including annual SO_2 emissions, and went into effect as of

[115] For further information, *see* the Assumptions to *AEO2023* report that sets forth the major assumptions used to generate the projections in the Annual Energy Outlook. Available at *www.eia.gov/outlooks/aeo/assumptions/* (last accessed Aug. 3, 2023).

January 1, 2015.[116] *AEO* incorporates implementation of CSAPR, including the update to the CSAPR ozone season program emission budgets and target dates issued in 2016. 81 FR 74504 (Oct. 26, 2016). Compliance with CSAPR is flexible among EGUs and is enforced through the use of tradable emissions allowances. Under existing EPA regulations, for States subject to SO_2 emissions limits under CSAPR, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by another regulated EGU.

However, in 2016, SO_2 emissions began to fall as a result of the Mercury and Air Toxics Standards (''MATS'') for power plants.[117] 77 FR 9304 (Feb. 16, 2012). The direct final rule establishes power plant emission standards for mercury, acid gases, and non-mercury metallic toxic pollutants. Because of the emissions reductions under the MATS, it is unlikely that excess SO_2 emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO_2 emissions by another regulated EGU. Therefore, energy conservation standards that decrease electricity generation will generally reduce SO_2 emissions. DOE estimated SO_2 emissions reduction using emissions factors based on *AEO2023.*

IER commented that DOE's statement that SO_2 emissions began to fall in 2016 as a result of the Mercury and Air Toxics Standards for power plants is not supported by the data. IER commented that SO_2 emissions were falling for decades prior to 2016 and have flattened since 2016. (IER, No. 2274 at p. 7)

It is correct that SO_2 emissions from the electric power sector were declining prior to 2016, but EIA statistics show that the decline accelerated beginning in 2015.[118]

CSAPR also established limits on NO_X emissions for numerous States in the eastern half of the United States. Energy conservation standards would have little effect on NO_X emissions in those States covered by CSAPR emissions limits if excess NO_X emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_X emissions from other EGUs. In such case, NO_X emissions would remain near the limit even if electricity generation goes down. Depending on the configuration of the power sector in the different regions and the need for allowances, however, NO_X emissions might not remain at the limit in the case of lower electricity demand. That would mean that standards might reduce NO_X emissions in covered States. Despite this possibility, DOE has chosen to be conservative in its analysis and has maintained the assumption that standards will not reduce NO_X emissions in States covered by CSAPR. Standards would be expected to reduce NO_X emissions in the States not covered by CSAPR. DOE used *AEO2023* data to derive NO_X emissions factors for the group of States not covered by CSAPR.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would be expected to slightly reduce Hg emissions. DOE estimated mercury emissions reduction using emissions factors based on *AEO2023,* which incorporates the MATS.

L. Monetizing Emissions Impacts

As part of the development of this direct final rule, for the purpose of complying with the requirements of Executive Order 12866, DOE considered the estimated monetary benefits from the reduced emissions of CO_2, CH_4, N_2O, NO_X, and SO_2 that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the projection period for each TSL. This section summarizes the basis for the values used for monetizing the emissions benefits and presents the values considered in this direct final rule.

To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

1. Monetization of Greenhouse Gas Emissions

DOE estimates the monetized benefits of the reductions in emissions of CO_2, CH_4, and N_2O by using a measure of the SC of each pollutant (*e.g.,* SC–CO_2). These estimates represent the monetary value of the net harm to society associated with a marginal increase in emissions of these pollutants in a given year, or the benefit of avoiding that increase. These estimates are intended to include (but are not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.

DOE exercises its own judgment in presenting monetized climate benefits as recommended by applicable Executive orders, and DOE would reach the same conclusion presented in this rulemaking in the absence of the social cost of greenhouse gases. That is, the social costs of greenhouse gases, whether measured using the February 2021 interim estimates presented by the Interagency Working Group on the Social Cost of Greenhouse Gases or by another means, did not affect the rule ultimately adopted by DOE.

DOE estimated the global social benefits of CO_2, CH_4, and N_2O reductions using SC–GHG values that were based on the interim values presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990,* published in February 2021 by the IWG (''February 2021 SC–GHG TSD''). The SC–GHGs is the monetary value of the net harm to society associated with a marginal increase in emissions in a given year, or the benefit of avoiding that increase. In principle, SC–GHGs includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–GHGs therefore reflects the societal value of reducing emissions of the gas in question by one metric ton. The SC–GHGs is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect CO_2, N_2O and CH_4

[116] CSAPR requires States to address annual emissions of SO_2 and NO_X, precursors to the formation of fine particulate matter (''$PM_{2.5}$'') pollution, in order to address the interstate transport of pollution with respect to the 1997 and 2006 $PM_{2.5}$ National Ambient Air Quality Standards (''NAAQS''). CSAPR also requires certain States to address the ozone season (May-September) emissions of NO_X, a precursor to the formation of ozone pollution, in order to address the interstate transport of ozone pollution with respect to the 1997 ozone NAAQS. 76 FR 48208 (Aug. 8, 2011). EPA subsequently issued a supplemental rule that included an additional five States in the CSAPR ozone season program; 76 FR 80760 (Dec. 27, 2011) (Supplemental Rule), and EPA issued the CSAPR Update for the 2008 ozone NAAQS. 81 FR 74504 (Oct. 26, 2016).

[117] In order to continue operating, coal power plants must have either flue gas desulfurization or dry sorbent injection systems installed. Both technologies, which are used to reduce acid gas emissions, also reduce SO_2 emissions.

[118] *www.eia.gov/electricity/annual/html/epa_09_01.html* (last accessed Aug. 3, 2023).

emissions. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees that the interim SC–GHG estimates represent the most appropriate estimate of the SC–GHG for this rule, which was developed using the interim estimates. DOE continues to evaluate recent developments in the scientific literature, including EPA's December 2023 SC–GHG estimates.

The SC–GHGs estimates presented here were developed over many years, using transparent process, peer-reviewed methodologies, the best science available at the time of that process, and with input from the public. Specifically, in 2009, the IWG, which included DOE and other executive branch agencies and offices, was established to ensure that agencies were using the best available science and to promote consistency in the social cost of carbon (''SC–CO_2'') values used across agencies. The IWG published SC–CO_2 estimates in 2010 that were developed from an ensemble of three widely cited integrated assessment models (''IAMs'') that estimate global climate damages using highly aggregated representations of climate processes and the global economy combined into a single modeling framework. The three IAMs were run using a common set of input assumptions in each model for future population, economic, and CO_2 emissions growth, as well as equilibrium climate sensitivity—a measure of the globally averaged temperature response to increased atmospheric CO_2 concentrations. These estimates were updated in 2013 based on new versions of each IAM. In August 2016 the IWG published estimates of the social cost of methane (''SC–CH_4'') and nitrous oxide (''SC–N_2O'') using methodologies that are consistent with the methodology underlying the SC–CO_2 estimates. The modeling approach that extends the IWG SC–CO_2 methodology to non-CO_2 GHGs has undergone multiple stages of peer review. The SC–CH_4 and SC–N_2O estimates were developed by Marten *et al.*[119] and underwent a standard double-blind peer review process prior to journal publication. In 2015, as part of the response to public comments received to a 2013 solicitation for comments on the SC–CO_2 estimates, the IWG announced a National Academies of Sciences, Engineering, and Medicine review of the SC–CO_2 estimates to offer advice on how to approach future updates to ensure that the estimates continue to reflect the best available science and methodologies. In January 2017, the National Academies released their final report, Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide, and recommended specific criteria for future updates to the SC–CO_2 estimates, a modeling framework to satisfy the specified criteria, and both near-term updates and longer-term research needs pertaining to various components of the estimation process.[120] Shortly thereafter, in March 2017, President Trump issued Executive Order 13783, which disbanded the IWG, withdrew the previous TSDs, and directed agencies to ensure SC–CO_2 estimates used in regulatory analyses are consistent with the guidance contained in OMB's Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (E.O. 13783, Section 5(c)). Benefit-cost analyses following Executive Order (''E.O.'') 13783 used SC–GHG estimates that attempted to focus on the U.S.-specific share of climate change damages as estimated by the models and were calculated using two discount rates recommended by Circular A–4, 3 percent and 7 percent. All other methodological decisions and model versions used in SC–GHG calculations remained the same as those used by the IWG in 2010 and 2013, respectively.

On January 20, 2021, President Biden issued Executive Order 13990, which re-established the IWG and directed it to ensure that the U.S. Government's estimates of the social cost of carbon and other greenhouse gases reflect the best available science and the recommendations in the National Academies 2017 report. The IWG was tasked with first reviewing the SC–GHG estimates currently used in Federal analyses and publishing interim estimates within 30 days of the E.O. that reflect the full impact of GHG emissions, including by taking global damages into account. The interim SC–GHG estimates published in February 2021 are used here to estimate the climate benefits for this rulemaking. The E.O. instructs the IWG to undertake a fuller update of the SC–GHG estimates that takes into consideration the advice in the National Academies 2017 report and other recent scientific literature. The February 2021 SC–GHG TSD provides a complete discussion of the IWG's initial review conducted under E.O.13990. In particular, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to reflect the full impact of GHG emissions in multiple ways.

First, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to fully capture many climate impacts that affect the welfare of U.S. citizens and residents, and those impacts are better reflected by global measures of the SC–GHG. Examples of omitted effects from the E.O. 13783 estimates include direct effects on U.S. citizens, assets, and investments located abroad, supply chains, U.S. military assets and interests abroad, and tourism, and spillover pathways such as economic and political destabilization and global migration that can lead to adverse impacts on U.S. national security, public health, and humanitarian concerns. In addition, assessing the benefits of U.S. GHG mitigation activities requires consideration of how those actions may affect mitigation activities by other countries, as those international mitigation actions will provide a benefit to U.S. citizens and residents by mitigating climate impacts that affect U.S. citizens and residents. A wide range of scientific and economic experts have emphasized the issue of reciprocity as support for considering global damages of GHG emissions. If the United States does not consider impacts on other countries, it is difficult to convince other countries to consider the impacts of their emissions on the United States. The only way to achieve an efficient allocation of resources for emissions reduction on a global basis—and so benefit the U.S. and its citizens—is for all countries to base their policies on global estimates of damages. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with this assessment and, therefore, in this direct final rule DOE centers attention on a global measure of SC–GHG. This approach is the same as that taken in DOE regulatory analyses from 2012 through 2016. A robust estimate of climate damages that accrue only to U.S. citizens and residents does not currently exist in the literature. As explained in the February 2021 SC–GHG TSD, existing estimates are both incomplete and an underestimate of total damages that accrue to the citizens and residents of the U.S. because they do not fully capture the regional interactions and spillovers discussed above, nor do they

[119] Marten, A.L., E.A. Kopits, C.W. Griffiths, S.C. Newbold, and A. Wolverton. Incremental CH_4 and N_2O mitigation benefits consistent with the U.S. Government's SC–CO2 estimates. *Climate Policy.* 2015. 15(2): pp. 272–298.

[120] National Academies of Sciences, Engineering, and Medicine. Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide. 2017. The National Academies Press: Washington, DC. *nap.nationalacademies.org/catalog/24651/valuing-climate-damages-updating-estimation-of-the-social-cost-of.*

include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature. As noted in the February 2021 SC–GHG TSD, the IWG will continue to review developments in the literature, including more robust methodologies for estimating a U.S.-specific SC–GHG value, and explore ways to better inform the public of the full range of carbon impacts. As a member of the IWG, DOE will continue to follow developments in the literature pertaining to this issue.

Second, the IWG found that the use of the social rate of return on capital (7 percent under current Office of Management and Budget (''OMB'') Circular A–4 guidance) to discount the future benefits of reducing GHG emissions inappropriately underestimates the impacts of climate change for the purposes of estimating the SC–GHG. Consistent with the findings of the National Academies and the economic literature, the IWG continued to conclude that the consumption rate of interest is the theoretically appropriate discount rate in an intergenerational context,[121] and recommended that discount rate uncertainty and relevant aspects of intergenerational ethical considerations be accounted for in selecting future discount rates.

Furthermore, the damage estimates developed for use in the SC–GHG are estimated in consumption-equivalent terms, and so an application of OMB Circular A–4's guidance for regulatory analysis would then use the consumption discount rate to calculate the SC–GHG. DOE agrees with this assessment and will continue to follow developments in the literature pertaining to this issue. DOE also notes that while OMB Circular A–4, as published in 2003, recommends using 3-percent and 7-percent discount rates as ''default'' values, Circular A–4 also reminds agencies that ''different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.'' On discounting, Circular A–4 recognizes that ''special ethical considerations arise when comparing benefits and costs across generations,'' and Circular A–4 acknowledges that analyses may appropriately ''discount future costs and consumption benefits . . . at a lower rate than for intragenerational analysis.'' In the 2015 Response to Comments on the Social Cost of Carbon for Regulatory Impact Analysis, OMB, DOE, and the other IWG members recognized that ''Circular A–4 is a living document'' and ''the use of 7 percent is not considered appropriate for intergenerational discounting. There is wide support for this view in the academic literature, and it is recognized in Circular A–4 itself.'' Thus, DOE concludes that a 7-percent discount rate is not appropriate to apply to value the social cost of greenhouse gases in the analysis presented in this analysis.

To calculate the present and annualized values of climate benefits, DOE uses the same discount rate as the rate used to discount the value of damages from future GHG emissions, for internal consistency. That approach to discounting follows the same approach that the February 2021 SC–GHG TSD recommends ''to ensure internal consistency—*i.e.,* future damages from climate change using the SC–GHG at 2.5 percent should be discounted to the base year of the analysis using the same 2.5 percent rate.'' DOE has also consulted the National Academies' 2017 recommendations on how SC–GHG estimates can ''be combined in RIAs with other cost and benefits estimates that may use different discount rates.'' The National Academies reviewed several options, including ''presenting all discount rate combinations of other costs and benefits with [SC–GHG] estimates.''

As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with the above assessment and will continue to follow developments in the literature pertaining to this issue. While the IWG works to assess how best to incorporate the latest, peer reviewed science to develop an updated set of SC–GHG estimates, it set the interim estimates to be the most recent estimates developed by the IWG prior to the group being disbanded in 2017. The estimates rely on the same models and harmonized inputs and are calculated using a range of discount rates. As explained in the February 2021 SC–GHG TSD, the IWG has recommended that agencies revert to the same set of four values drawn from the SC–GHG distributions based on three discount rates as were used in regulatory analyses between 2010 and 2016 and were subject to public comment. For each discount rate, the IWG combined the distributions across models and socioeconomic emissions scenarios (applying equal weight to each) and then selected a set of four values recommended for use in benefit-cost analyses: an average value resulting from the model runs for each of three discount rates (2.5 percent, 3 percent, and 5 percent), plus a fourth value, selected as the 95th percentile of estimates based on a 3-percent discount rate. The fourth value was included to provide information on potentially higher-than-expected economic impacts from climate change. As explained in the February 2021 SC–GHG TSD, and DOE agrees, this update reflects the immediate need to have an operational SC–GHG for use in regulatory benefit-cost analyses and other applications that was developed using a transparent process, peer-reviewed methodologies, and the science available at the time of that process. Those estimates were subject to public comment in the context of dozens of proposed rulemakings as well as in a dedicated public comment period in 2013.

There are a number of limitations and uncertainties associated with the SC–GHG estimates. First, the current scientific and economic understanding of discounting approaches suggests discount rates appropriate for intergenerational analysis in the context of climate change are likely to be less than 3 percent, near 2 percent or lower.[122] Second, the IAMs used to produce these interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature and the science underlying their ''damage functions''—*i.e.,* the core parts of the IAMs that map global mean temperature

[121] Interagency Working Group on Social Cost of Carbon. Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866. 2010. United States Government *www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf* (last accessed April 15, 2022); Interagency Working Group on Social Cost of Carbon. Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866. 2013 *www.federalregister.gov/documents/2013/11/26/2013-28242/technical-support-document-technical-update-of-the-social-cost-of-carbon-for-regulatory-impact* (last accessed April 15, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis-Under Executive Order 12866. August 2016 *www.epa.gov/sites/default/files/2016-12/documents/sc_co2_tsd_august_2016.pdf* (last accessed Jan. 18, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide. August 2016 *www.epa.gov/sites/default/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf* (last accessed Jan. 18, 2022).

[122] Interagency Working Group on Social Cost of Greenhouse Gases. 2021. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990. February. United States Government. Available at *www.whitehouse.gov/briefing-room/blog/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution/.*

changes and other physical impacts of climate change into economic (both market and nonmarket) damages—lags behind the most recent research. For example, limitations include the incomplete treatment of catastrophic and non-catastrophic impacts in the integrated assessment models, their incomplete treatment of adaptation and technological change, the incomplete way in which inter-regional and intersectoral linkages are modeled, uncertainty in the extrapolation of damages to high temperatures, and inadequate representation of the relationship between the discount rate and uncertainty in economic growth over long time horizons. Likewise, the socioeconomic and emissions scenarios used as inputs to the models do not reflect new information from the last decade of scenario generation or the full range of projections. The modeling limitations do not all work in the same direction in terms of their influence on the SC–CO_2 estimates. However, as discussed in the February 2021 SC–GHG TSD, the IWG has recommended that, taken together, the limitations suggest that the interim SC–GHG estimates used in this direct final rule likely underestimate the damages from GHG emissions. DOE concurs with this assessment.

For this direct final rule, DOE considered comments it had received regarding its approach for monetizing greenhouse gas emissions in the February 2023 SNOPR. The approach used for this direct final rule is largely the same approach DOE had used for the February 2023 SNOPR analysis.

In response to the February 2023 SNOPR, the AGs of LA *et al.* recommended that DOE avoid using or referencing the IWG estimates in its analysis and that DOE clarify the role of the SC–GHG in its analysis. (AGs of LA *et al.,* No. 2264 at pp. 2–7) The AGs of LA *et al.* commented that DOE's use of the IWG numbers is in direct conflict with EPCA's directions and that there is no way to determine if the effect of the standards proposed in the February 2023 SNOPR on GHG emissions has an economic impact. (*Id.* at pp. 8–9)

AHAM stated its objection to DOE's use of SC–GHG and other monetization of emissions reductions benefits in its analysis of the factors EPCA requires DOE to balance to determine the appropriate standard. (AHAM, No. 2885 at pp. 52–53) AHAM commented it is inappropriate for DOE to rely on the highly subjective and ever-changing monetization estimates in justifying an energy conservation standard. (*Id.*) AHAM commented that DOE has responded to these objections by indicating that environmental and public health benefits associated with the more efficient use of energy, including those connected to global climate change, are important to take into account when considering the need for national energy conservation, which is one of the factors EPCA requires DOE to evaluate in determining whether a potential energy conservation standard is economically justified, and AHAM does not object to DOE considering the benefits. AHAM commented that DOE can consider ''other factors'' under EPCA, but that does not override the key criteria EPCA requires DOE to balance and DOE must consider EPCA's factors together and achieve a balance of impacts and benefits—a balance DOE has failed to strike in this rule. (*Id.*)

APGA stated concern with DOE's use of the SC–GHG in its cost-benefit analysis because such a large percentage of the total benefits of the proposed rulemaking result from these values. (APGA, No. 2283 at pp. 6–7) APGA commented that DOE's reliance on these SC–GHG values is flawed and brings into question whether the proposed ECS is actually economically justified. (*Id.*)

ONE Gas commented that DOE should table inclusion of SC–GHG benefits until the legal validity of these benefits used in minimum efficiency standards is resolved, and that any analysis of SC–GHG benefits should reflect the full range of uncertainty associated with IWG cost estimates. (ONE Gas, No. 2289 at p. 15)

Strauch asserted that the social cost of carbon is difficult to quantify, an issue that is exacerbated by deviating climate models. (Strauch, No. 2263 at p. 3) Strauch recommended that DOE avoid weak and controversial cost constructs. (*Id.*)

In response to the foregoing comments, DOE reiterates its view that the environmental and public health benefits associated with more efficient use of energy, including those connected to global climate change, are important to take into account when considering the need for national energy conservation. (*See* 42 U.S.C. 6295(o)(2)(B)(i)(IV)) In addition, Executive Order 13563, which was re-affirmed on January 21, 2021, stated that each agency must, among other things: ''select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).'' For these reasons, DOE considers the monetized value of emissions reductions in its evaluation of potential standard levels. While the benefits associated with reduction of GHG emissions inform DOE's evaluation of potential standards, DOE would reach the same conclusion regarding the economic justification of standards presented in this direct final rule without considering the social cost of greenhouse gases. As described in detail in section V.C.1 of this document, at the adopted TSL for consumer conventional cooking products, the average LCC savings for all product classes is positive, a shipment-weighted 0 percent of consumers would experience a net cost, and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate.

The AGs of LA *et al.* disagreed with DOE's policy choice to adopt the IWG's discount rate of 3 percent and added that calculations based on a 7-percent discount rate are consistent with guidance provided by OMB Circular A–4. (AGs of LA *et al.,* No. 2264 at pp. 4–5) The AGs of LA *et al.* commented that the choice of a 3-percent discount rate is arbitrary and recommended that DOE align its chosen discount rates with those used for calculating the impact of the proposed standards on consumers and manufacturers. (*Id.*) Western Energy Alliance commented that the mixing and matching of discount rates with respect to climate change is inappropriate. (Western Energy Alliance, No. 2272 at pp. 7–8) Western Energy Alliance and Zycher recommended DOE use the 7-percent discount rate consistently for the 7-percent discount rate scenario. (Western Energy Alliance, No. 2272 at pp. 7–8; Zycher, No. 2266 at p. 9)

The reasons for using a consumption discount rate rather than a rate based on the social rate of return on capital (7 percent under OMB Circular A–4 guidance) were presented previously in this section.[123] DOE reiterates that while OMB Circular A–4, as published in 2003, recommends using 3-percent and 7-percent discount rates as ''default'' values, Circular A–4 also reminds agencies that ''different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.'' On discounting, Circular A–4 recognizes that ''special ethical considerations arise when comparing benefits and costs across generations,'' and Circular A–4 acknowledges that analyses may appropriately ''discount future costs and

[123] DOE used the prior version of Circular A–4 (September 17, 2003) in accordance with the effective date of the November 9, 2023, version.

consumption benefits . . . at a lower rate than for intragenerational analysis.''

The AGs of LA *et al.* disagreed with DOE's policy choice to accept IWG's measurement of global damages in lieu of domestic damages, and with DOE's choice to adopt the IWG's decision to run the IAMs through a 300-year time span. (AGs of LA *et al.,* No. 2264 at pp. 3–4, 5–6) The AGs of LA *et al.* noted that outside of the GHG emissions context, DOE uses a 30-year horizon to analyze the costs and benefits of the proposed rule on consumers, which makes the analysis of costs and benefits incomparable to the analysis of SC–GHGs. (*Id.* at pp. 5–6)

Regarding the use of global SC–GHG values, as previously discussed, many climate impacts that affect the welfare of U.S. citizens and residents are better reflected by global measures of the SC–GHG. In addition, assessing the benefits of U.S. GHG mitigation activities requires consideration of how those actions may affect mitigation activities by other countries, as those international mitigation actions will provide a benefit to U.S. citizens and residents by mitigating climate impacts that affect U.S. citizens and residents.

Regarding the use of different time horizons for the SC–GHG values and the other costs and benefits of potential standards, DOE's analysis considers the costs and benefits associated with 30 years of shipments of a covered product. Because such products continue to operate beyond 30 years, DOE accounts for energy cost savings and reductions in emissions until all products shipped within the 30-year period are retired. In the case of CO_2 emissions, which remain in the atmosphere and contribute to climate change for many decades, the benefits of reductions in emissions likewise occur over a lengthy period; to not include such benefits would be inappropriate.

The Institute for Policy Integrity at New York University School of Law (''Policy Integrity'') commented that DOE should consider applying sensitivity analysis using EPA's draft climate-damage estimates released in November 2022, as EPA's work faithfully implements the roadmap laid out in 2017 by the National Academies of Sciences and applies recent advances in the science and economics on the costs of climate change. (Policy Integrity, No. 2280 at pp. 1, 3)

DOE is aware that in December 2023, EPA issued a new set of SC–GHG estimates in connection with a final rulemaking under the Clean Air Act.[124] DOE continues to evaluate recent developments in the scientific literature, including EPA's December 2023 SC–GHG estimates. DOE notes that because EPA's estimates are considerably higher than the IWG's interim SC–GHG values applied for this direct final rule, DOE anticipates that an analysis that used the EPA's estimates would result in significantly greater climate-related benefits. Even if that were the case, however, such results would not affect DOE's decision in this direct final rule. As stated elsewhere in this document, DOE would reach the same conclusion regarding the economic justification of the standards presented in this direct final rule because the standards are economically justified even without considering the IWG's interim SC–GHG values, which DOE agrees are conservative estimates. For the same reason, if DOE were to use EPA's higher SC–GHG estimates, they would likewise not change DOE's conclusion that the standards are economically justified because the standards are economically justified even without considering EPA's SC–GHG estimates.

The AGs of LA *et al.* asserted that the IWG's analysis of the three IAMs used to determine SC–GHG damages is flawed because a number of factually based assumptions cause the SC–GHG to swing from positive to negative, making them too sensitive to be reliable. (AGs of LA *et al.,* No. 2264 at pp. 2–7) The AGs of LA *et al.* commented that several policy choices made by the IWG contribute to an overestimated SC–GHG calculation. (*Id.*) The AGs of LA *et al.* also commented that the IWG's projections do not account for the emissions-reducing policies being instituted globally. (*Id.*) The AGs of LA *et al.* commented that the IWG estimates are both flawed and unlawful, considering the result of the district court's decision in *Louisiana* v. *Biden,* 585 F. Supp. 3d 840 (W.D. La. 2022), *vacated, Louisiana ex rel Landry* v. *Biden,* 64 F.4th 674 (5th Cir. 2023), in which a preliminary injunction barred DOE from adopting the IWG estimates based on EPCA's direction to preclude the consideration of global effects. (*Id.* at pp. 7–8) The AGs of LA *et al.* commented that DOE cannot overlook this injunction by relying on the Fifth Circuit's interlocutory order, and instead must justify why the Louisiana court was incorrect in its conclusion or why DOE may use the IWG estimates regardless. (*Id.*)

APGA restated comments it submitted to OMB jointly with over 20 other trade associations [125] that the interim SC–GHG values developed by IWG in response to E.O. 13990 require additional modifications before use in Federal rulemakings or policy decisions. (APGA, No. 2283 at pp. 6–7)

The CO_2 Coalition asserted that the IWG SC–GHG estimates relied on peer review and consensus, not the scientific method, and the estimates relied on scientifically invalid models, extreme weather conclusions, and catastrophic global warming theory. (CO_2 Coalition, No. 2275 at pp. 8–15) The CO_2 Coalition incorporated by reference all arguments made against use of the social cost of carbon by the State of Louisiana in *Louisiana* v. *Biden.* (CO_2 Coalition, No. 2275 at pp. 15–19, 21)

Rachael Wilfong and Kevin Dayaratna (''Wilfong and Dayaratna'') [126] commented that the climate benefits of the proposed rule are arbitrary and overstated. Wilfong and Dayaratna stated that testing with several models, subjecting their sensitivity to a variety of important and reasonable assumptions, found the models can offer a plethora of different estimates of the SC–GHG, ranging from extreme damages to overall benefits. Wilfong and Dayaratna commented that they used EPA's climate change model and found that assuming the upper bound of the IPCC's climate sensitivity estimates, DOE's estimated reduction in CO_2 would result in a global temperature mitigation of only 0.0004 °C by 2050 and 0.0009 °C by 2100. (Wilfong and Dayaratna, No. 2281 at pp. 7–10)

CEI *et al.* commented that IWG 2021 uses improperly low discount rates, relies on climate models that have consistently overstated actual warming, and on baseline emission scenarios that implausibly assume an increasingly coal-centric global energy system through 2100 and beyond, while downplaying the capacity for adaptation to mitigate climate impacts. CEI *et al.* added that IWG 2021's inclusion of claimed climate benefits nearly 300 years into the future and the use of global rather than national benefits are also skewed toward inflating the end result. (CEI *et al.,* No. 2287 at pp. 6–7)

Zycher commented that the IWG estimates are flawed for a number of reasons, including the use of inconsistent and inappropriate discount rates. Zycher commented that DOE's

[124] See *www.epa.gov/environmental-economics/scghg.*

[125] Available at *www.regulations.gov/comment/CEQ-2021-0002-33767.*

[126] Although these individual commenters are associated with the Heritage Foundation, the comment states that the views expressed in it should not be construed as representing any official position of the Heritage Foundation. (Wilfong and Dayaratna, No. 2281 at p. 1)

adoption of the IWG estimates is misguided because the IWG considers global emissions. (Zycher, No. 2266 at pp. 4–7)

Policy Integrity commented that DOE appropriately applies the social cost estimates developed by the IWG to its analysis of climate benefits. Policy Integrity commented that these values are widely agreed to underestimate the full social costs of greenhouse gas emissions, but for now they remain appropriate to use as conservative estimates. Policy Integrity incorporated by reference comments on DOE's recent proposed standards for room air conditioners, which present numerous legal, economic, and policy justifications that further bolster DOE's adoption of the Working Group's climate-damage valuations. (Policy Integrity, No. 2280 at pp. 1–3)

Western Energy Alliance commented that the SC–GHG estimates are inappropriate to include within this or any rule until the estimates have been subjected to the Administrative Procedure Act process complete with public notice and comment. (Western Energy Alliance, No. 2272 at pp. 5–9)

In response to the foregoing comments, DOE notes that the IWG's SC–GHG estimates were developed over many years, using a transparent process, peer-reviewed methodologies, the best science available at the time of that process, and with input from the public. A number of criticisms raised in the comments were addressed by the IWG in its February 2021 SC–GHG TSD, and previous parts of this section summarized the IWG's conclusions on several key issues. DOE agrees that the interim SC–GHG values applied for this direct final rule are conservative estimates. In the February 2021 SC–GHG TSD, the IWG stated that the models used to produce the interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature. For these same impacts, the science underlying their ''damage functions'' lags behind the most recent research. In the judgment of the IWG, these and other limitations suggest that the range of four interim SC–GHG estimates presented in the TSD likely underestimate societal damages from GHG emissions. The IWG is in the process of assessing how best to incorporate the latest peer-reviewed science and the recommendations of the National Academies to develop an updated set of SC–GHG estimates. DOE also notes that the Fifth Circuit vacated the district court's decision on which the AGs of LA *et al.* rely.

DOE's derivations of the SC–CO_2, SC–N_2O, and SC–CH_4 values used for this direct final rule are discussed in the following sections, and the results of DOE's analyses estimating the benefits of the reductions in emissions of these GHGs are presented in section V.B.6 of this document. DOE considers the monetized value of emissions reductions in its evaluation of potential standard levels. While the benefits associated with reduction of GHG emissions inform DOE's evaluation of potential standards, DOE would reach the same conclusion regarding the economic justification of standards presented in this direct final rule without considering the social cost of greenhouse gases.

a. Social Cost of Carbon

The SC–CO_2 values used for this direct final rule were based on the values developed for the February 2021 SC–GHG TSD, which are shown in Table IV.31 in 5-year increments from 2020 to 2050. The set of annual values that DOE used, which was adapted from estimates published by EPA,[127] is presented in appendix 14A of the direct final rule TSD. These estimates are based on methods, assumptions, and parameters identical to the estimates published by the IWG (which were based on EPA modeling), and include values for 2051 to 2070. DOE expects additional climate benefits to accrue for products still operating after 2070, but a lack of available SC–CO_2 estimates for emissions years beyond 2070 prevents DOE from monetizing these potential benefits in this analysis.

Table IV.31 Annual SC-CO_2 Values from 2021 Interagency Update, 2020–2050 (2020$ per Metric Ton CO_2)

Year	Discount Rate and Statistic			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
2020	14	51	76	152
2025	17	56	83	169
2030	19	62	89	187
2035	22	67	96	206
2040	25	73	103	225
2045	28	79	110	242
2050	32	85	116	260

DOE multiplied the CO_2 emissions reduction estimated for each year by the SC–CO_2 value for that year in each of the four cases. DOE adjusted the values to 2022$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC–CO_2 values in each case.

b. Social Cost of Methane and Nitrous Oxide

The SC–CH_4 and SC–N_2O values used for this direct final rule were based on the values developed for the February 2021 SC–GHG TSD. Table IV.32 shows the updated sets of SC–CH_4 and SC–N_2O estimates from the latest interagency update in 5-year increments from 2020 to 2050. The full set of annual values used is presented in Appendix 14A of the direct final rule TSD. To capture the uncertainties involved in regulatory

[127] *See* EPA, Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis, Washington, DC, December 2021. Available at *nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1013ORN.pdf* (last accessed Feb. 21, 2023).

impact analysis, DOE has determined it is appropriate to include all four sets of SC–CH_4 and SC–N_2O values, as recommended by the IWG. DOE derived values (based on EPA values) after 2050 using the approach described above for the SC–CO_2.

Table IV.32 Annual SC-CH_4 and SC-N_2O Values from 2021 Interagency Update, 2020–2050 (2020$ per Metric Ton)

Year	SC-CH_4				SC-N_2O			
	Discount Rate and Statistic				Discount Rate and Statistic			
	5%	3%	2.5%	3%	5%	3%	2.5 %	3%
	Average	Average	Average	95th percentile	Average	Average	Average	95th percentile
2020	670	1500	2000	3900	5800	18000	27000	48000
2025	800	1700	2200	4500	6800	21000	30000	54000
2030	940	2000	2500	5200	7800	23000	33000	60000
2035	1100	2200	2800	6000	9000	25000	36000	67000
2040	1300	2500	3100	6700	10000	28000	39000	74000
2045	1500	2800	3500	7500	12000	30000	42000	81000
2050	1700	3100	3800	8200	13000	33000	45000	88000

DOE multiplied the CH_4 and N_2O emissions reduction estimated for each year by the SC–CH_4 and SC–N_2O estimates for that year in each of the cases. DOE adjusted the values to 2022$ using the implicit price deflator for GDP from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the cases using the specific discount rate that had been used to obtain the SC–CH_4 and SC–N_2O estimates in each case.

2. Monetization of Other Emissions Impacts

For the direct final rule, DOE estimated the monetized value of NO_X and SO_2 emissions reductions from electricity generation using benefit per ton estimates for that sector from the EPA's Benefits Mapping and Analysis Program.[128] DOE used EPA's values for $PM_{2.5}$-related benefits associated with NO_X and SO_2 and for ozone-related benefits associated with NO_X for 2025, 2030, 2035, and 2040, calculated with discount rates of 3 percent and 7 percent. DOE used linear interpolation to define values for the years not given in the 2025 to 2040 range; for years beyond 2040 the values are held constant (rather than extrapolated) to be conservative. DOE combined the EPA regional benefit-per-ton estimates with regional information on electricity consumption and emissions from *AEO2023* to define weighted-average national values for NO_X and SO_2 (see appendix 14B of the direct final rule TSD).

DOE also estimated the monetized value of NO_X and SO_2 emissions reductions from site use of natural gas in consumer conventional cooking products using benefit per ton estimates from the EPA's Benefits Mapping and Analysis Program. Although none of the sectors covered by EPA refers specifically to residential and commercial buildings, the sector called ''area sources'' would be a reasonable proxy for residential and commercial buildings.[129] The EPA document provides high and low estimates for 2025 and 2030 at 3- and 7-percent discount rates.[130] DOE used the same linear interpolation and extrapolation as it did with the values for electricity generation.

DOE multiplied the site emissions reduction (in tons) in each year by the associated $/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

M. Utility Impact Analysis

The utility impact analysis estimates the changes in installed electrical capacity and generation projected to result for each considered TSL. The analysis is based on published output from the NEMS associated with *AEO2023.* NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. For the current analysis, impacts are quantified by comparing the levels of electricity sector generation, installed capacity, fuel consumption and emissions in the *AEO2023* Reference case and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the direct final rule TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of potential new or amended energy conservation standards.

The utility analysis also estimates the impact on gas utilities in terms of projected changes in natural gas deliveries to consumers for each TSL.

AGA commented that the Process Rule requires DOE to conduct a utility impact analysis to ''include estimated marginal impacts on electric and gas utility costs and revenues'' in its standards rulemakings. (AGA, No. 2279 at pp. 51–52) AGA commented that the February 2023 SNOPR states that DOE conducted some analysis related to electric utilities, and even less for natural gas utilities, concluding that ''the impact to natural gas utility sales is equivalent to the natural gas saved by the proposed standard.'' (*Id.*) AGA

[128] U.S. Environmental Protection Agency. Estimating the Benefit per Ton of Reducing Directly-Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors, and Ozone Precursors from 21 Sectors. Available at *www.epa.gov/benmap/estimating-benefit-ton-reducing-directly-emitted-pm25-pm25-precursors-and-ozone-precursors.*

[129] ''Area sources'' represents all emission sources for which States do not have exact (point) locations in their emissions inventories. Because exact locations would tend to be associated with larger sources, ''area sources'' would be fairly representative of small dispersed sources like homes and businesses.

[130] ''Area sources'' are a category in the 2018 document from EPA, but are not used in the 2021 document cited above. *See www.epa.gov/sites/default/files/2018-02/documents/sourceapportionmentbpttsd_2018.pdf.*

commented that the analysis and findings were insufficient and DOE should adhere to the Process Rule and conduct a complete impact analysis that quantifies and evaluates the marginal impacts to gas utility costs and revenues of a reduction in gas deliveries due to the proposed rule. (*Id.*) AGA commented that DOE should also analyze the impact to retail natural gas ratepayers due to DOE's acknowledgement that the proposed standards could drive many consumers from natural gas to electric for cooking, with a loss of demand for natural gas local distribution companies that could lead to higher rates on remaining consumers to cover fixed distribution costs. (*Id.*) AGA commented that if DOE chooses to deviate from the Process Rule, it must explain why deviation is necessary or appropriate and allow stakeholder comments on that explanation. (*Id.*)

In the context of this direct final rule, DOE maintains that the marginal impacts on gas utility costs and revenues would be minimal, given that the estimated reduction in annual gas demand at the Recommended TSL is a very small fraction of total U.S. residential gas demand (see chapter 15 of the direct final rule TSD). DOE maintains that utilities will not be impacted from fuel switching because consumers are unlikely to switch from gas to electric products as a result of the adopted standard (*see* section IV.G of this document for details). Lastly, analysis of the impact of standards on rates is very difficult, given the diversity of regulatory structures in the U.S. and the many factors that go into setting utility rates.

N. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a standard. Employment impacts from new or amended energy conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards, their suppliers, and related service firms. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by (1) reduced spending by consumers on energy, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the products to which the new standards apply and other goods and services, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's BLS. BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[131] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, the BLS data suggest that net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this direct final rule using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 4 (''ImSET'').[132] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (''I–O'') model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and that the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may overestimate actual job impacts over the long run for this rule. Therefore, DOE used ImSET only to generate results for near-term timeframes (2027/2028), where these uncertainties are reduced. For more details on the employment impact analysis, see chapter 16 of the direct final rule TSD.

O. Regulatory Impact Analysis

For any regulatory action that the Administrator of the Office of Information and Regulatory Affairs (''OIRA'') within OMB determines is a significant regulatory action under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094, section 6(a)(3)(C) of E.O. 12866 requires Federal agencies to provide an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable non-regulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives. 58 FR 51735, 51741. OIRA has determined that this final regulatory action constitutes a ''significant regulatory action'' within the scope of section 3(f) of E.O. 12866, as discussed further in section VI.A of this document. DOE conducted a regulatory impact analysis (''RIA'') for this direct final rule.

As part of the RIA, DOE identifies major alternatives to standards that represent feasible policy options to reduce the energy and water consumption of the covered product. DOE evaluates each alternative in terms of its ability to achieve significant energy and water savings at a reasonable cost, and compares the effectiveness of each alternative to the effectiveness of the finalized standard. DOE recognizes that voluntary or other non-regulatory efforts by manufacturers, utilities, and other interested parties can substantially affect energy and water efficiency or reduce energy and water consumption. DOE bases its assessment on the recorded impacts of any such initiatives to date, but also considers information presented by interested parties

[131] See U.S. Department of Commerce–Bureau of Economic Analysis. *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (''RIMS II'').* 1997. U.S. Government Printing Office: Washington, DC. Available at *www.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf* (last accessed July 1, 2021).

[132] Livingston, O.V., S.R. Bender, M.J. Scott, and R.W. Schultz. *ImSET 4.0: Impact of Sector Energy Technologies Model Description and User's Guide.* 2015. Pacific Northwest National Laboratory: Richland, WA. PNNL–24563.

regarding the impacts current initiatives may have in the future. Further details regarding the RIA are provided in chapter 17 of the direct final rule TSD.

AN commented that DOE should postpone the compliance deadline for the proposed rule to account for the length and complexity of the policymaking process and ongoing global events (such as COVID 19). (AN, No. 374 at p. 1) AN commented that DOE should use a combination of economic incentives and direct regulations to promote energy conservation without manufacturers incurring losses. (*Id.* at p. 2)

Fall suggested that a labelling program would be an alternative to the proposed rule that could allow consumers the ability to make informed decisions. (Fall, No. 376 at pp. 2–3)

Gardener commented that the public would overall be better served by incentivizing manufacturers and consumers via tax credits to purchase products that meet the various levels of energy efficiency. (Gardener, No. 118 at p. 1) Gardener commented that the amount of the tax credits could also be tiered based on what level of efficiency is achieved. (*Id.*) Gardener commented that these types of incentives have worked very well in the home heating and home solar power markets and that this approach allows more consumer options and encourages the free market to respond more efficiently. (*Id.*)

Strauch recommended that DOE address the cumulative regulatory burden on consumers in addition to manufacturers. (Strauch, No. 2263 at p. 3)

Consumers' Research recommended that DOE should postpone establishing mandatory energy efficiency standards for gas cooking tops for at least another year following a successful one-year trial period of providing consumers with efficiencies measured using the test procedure in order to enhance consumer information and enable voluntary consumer selection of more efficient gas cooking products. (Consumers' Research, No. 2267 at p. 4)

NMHC and NAA commented that the proposed rulemaking accompanies a series of similar rulemakings DOE is proposing, all seeking to change the performance standards for essential residential appliances. (NMHC and NAA, No. 2265 at p. 3) NMHC and NAA recommended that DOE consider the collective impacts of these requirements and recognize that, in practice, the effect of individual pricing increases is magnified when housing providers must manage cost escalations across multiple products at once. (*Id.*)

Whirlpool recommended that DOE consider non-regulatory approaches to increasing energy efficiency, including educating consumers on efficient cooking behaviors and practices. (Whirlpool, No. 2284 at p. 12) Whirlpool commented that cooking products differ from other major appliances in that the user has substantial influence on the product's energy usage, and that the choices consumers make regarding their cooking techniques, food preferences, and choice in cookware can result in diverse energy usage results across consumers using the same model and food loads. (*Id.*) Whirlpool stated that according to its testing, the amount of energy savings DOE estimates would result from moving a gas cooking top from the baseline to EL 2 is roughly equivalent to the savings of a consumer switching from a stainless steel pot to an aluminum pot to boil the same amount of water, and that a consumer could therefore achieve roughly the same annual operating cost savings by switching their cookware to a more efficient material. (*Id.*) Whirlpool commented that it welcomes collaboration with DOE to achieve a larger savings opportunity through consumer education. (*Id.*)

As discussed, E.O. 12866 directs DOE to assess potentially effective and reasonably feasible alternatives to the planned regulation, and to provide an explanation why the planned regulatory action is preferable to the identified potential alternatives. As part of the RIA, DOE analyzed five non-regulatory policy alternatives to the finalized standards for consumer conventional cooking products, including consumer rebates, consumer tax credits, manufacturer tax credits, voluntary energy efficiency targets, and bulk government purchases. Chapter 17 of the direct final rule TSD provides DOE's analysis of the impacts of these alternatives to the planned regulation.

Notwithstanding the requirements of E.O. 12866, as discussed, DOE is required by EPCA to establish or amend standards for a covered product that are designed to achieve the maximum improvement in energy efficiency, which the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) DOE has determined that setting energy conservation standards for consumer conventional cooking products at the Recommended TSL achieves the maximum improvement in energy efficiency which is technologically feasible and economically justified.

P. Other Comments

As discussed previously, DOE considered relevant comments, data, and information obtained during its own rulemaking process in determining whether the recommended standards from the Joint Agreement are in accordance with 42 U.S.C. 6295(o). And while some of those comments were directed at specific aspects of DOE's analysis of the Joint Agreement under 42 U.S.C. 6295(o), others were more generally applicable to DOE's energy conservation standards rulemaking program as a whole. The ensuing discussion focuses on these general comments concerning energy conservation standards issued under EPCA.

1. Commerce Clause

The AGs of LA *et al.* asserted that the proposed standards, by not differentiating between interstate and intrastate markets, fail to reflect the proper scope of Federal regulation under the Commerce Clause of the U.S. Constitution. (AGs of LA *et al.,* No. 2264 at pp. 10–11) The AGs of LA *et al.* noted that EPCA prohibits any manufacturer or private labeler from distributing in commerce any new covered product which is not in conformity with an applicable energy conservation standard established pursuant to the statute [emphasis added]. 42 U.S.C. 6302(a)(5) The AGs of LA *et al.* further noted that the term ''commerce'' is defined by EPCA to mean trade, traffic commerce, or transportation (A) between a place in a State and any place outside thereof, or (B) which affects trade, traffic, commerce, or transportation described in subparagraph (A). (42 U.S.C. 6291(17)). The AGs of LA *et al.* asserted that by not differentiating between interstate and intrastate commerce—like the statutory language of 42 U.S.C. 6291(17)—the standards cover all commercial activity, whether inter- or intrastate, which is improper. In summarizing previous Supreme Court decisions, the AGs of LA *et al.* further asserted that precedent dictates that Congress can regulate intrastate activity under the Commerce Clause only when that activity substantially affects interstate commerce. Thus, according to the AGs of LA *et al.,* for the proposed standards to apply to the intrastate market for the products subject to this rulemaking, DOE must show that the intrastate activity covered by 42 U.S.C. 6291(17) and 6302(a)(5) substantially affects the interstate market for the products covered by this rulemaking. The AGs of LA *et al.* stated that there is no such analysis in the proposed

standards, and therefore no constitutional basis for application of the standards to intrastate markets for the products subject to this rulemaking. (AGs of LA *et al.,* No. 2264 at pp. 10–11) The AGs of LA *et al.* further asserted that if such an analysis were to show that the intrastate market did not substantially affect the interstate market (and therefore was not properly the subject of Federal regulation), DOE must redo its cost-benefit analysis since the standards would apply to a more limited set of products—those traveling interstate. (*Id.*) The AGs of LA *et al.* further commented that even if DOE were to find that intrastate commerce in gas cooking products substantially affects interstate commerce, DOE should still exclude purely intrastate activities from any promulgated standard because the original understanding of the Commerce Clause does not give Congress the power to regulate activities that ''substantially affect'' interstate commerce. (*Id.*) In summary, the AGs of LA *et al.* asserted that DOE must exclude all intrastate activity from the proposed standards even if such activity has a substantial effect on interstate commerce in covered cooking products. (*Id.*)

In response, DOE notes that it has clear authority under EPCA to regulate the energy use of a variety of consumer products and certain commercial and industrial equipment, including the subject consumer conventional cooking products. See 42 U.S.C. 6295. The scope of the new and amended standards adopted in this direct final rule properly includes all consumer conventional cooking products distributed in commerce for personal use or consumption because intrastate State activity involving a fungible commodity for which there is an established market, such as consumer conventional cooking products substantially affects interstate commerce. Furthermore, binding Supreme Court precedent contravenes the AGs of LA *et al.'*s arguments relating to the original understanding of the Commerce Clause. *See e.g., Gonzales* v. *Raich,* 545 U.S. 1 (2005). As the Court noted in *Raich,* the Commerce Clause case law ''firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.'' *Id.* at 17. The Court concluded that to leave intrastate goods unregulated where there is an established interstate market for the commodity would have a substantial impact on the market and could undermine the very purpose of the regulatory scheme. *See Id.* at 18–19. Such would be the case here. DOE therefore affirms its view that Congress' intent in EPCA was to provide it with authority to regulate all consumer conventional cooking products distributed in commerce. Indeed, based on its statutory authority in EPCA, DOE has a long-standing practice of issuing energy conservation standards with the same scope as the standard in this direct final rule. For example, DOE has maintained a similar scope of products in the April 2009 Final Rule that established the current standards for consumer conventional cooking products (74 FR 16040), and in the September 1998 Final Rule establishing the preceding set of standards for these products (63 FR 48038). As such, DOE disagrees with the AGs of LA *et al.'*s contention that the Commerce Clause limits DOE's clear and long-standing authority under EPCA to adopt the standard, including its scope, presented in this direct final rule. A further discussion regarding federalism concerns can be found at section VI.E of this document.

2. Fuel Neutrality Under EPCA

Gas Analytics & Advocacy Services, LLC (''GAAS'') commented that Congress has made it clear that fuel neutrality be strictly adhered to with respect to energy conservation standards for consumer conventional cooking products, despite electrification being a cornerstone of the Biden Administration's energy and environmental policies. (GAAS, No. 2271 at p. 3)

AHAM commented that disparate treatment of gas and electric cooking tops based on fuel source is not appropriate and that energy conservation standards should be fuel neutral. (AHAM, No. 2285 at p. 4)

In response, DOE first notes that the only requirement related to fuel neutrality in EPCA is that DOE establish separate product classes and standards based on the kind of energy, *i.e.,* fuel, consumed. (42 U.S.C. 6295(q)(1)(A)) And while this requirement is not applicable to direct final rules issued under 42 U.S.C. 6295(p)(4), DOE notes that the recommended standards in the Joint Agreement are divided into product classes based on fuel type.

3. National Academy of Sciences Report

The National Academies of Sciences, Engineering, and Medicine (''NAS'') periodically appoint a committee to peer review the assumptions, models, and methodologies that DOE uses in setting energy conservation standards for covered products and equipment. The most recent such peer review was conducted in a series of meetings in 2020, and NAS issued the report [133] in 2021 detailing its findings and recommendations on how DOE can improve its analyses and align them with best practices for cost-benefit analysis.

AGA commented that DOE should follow, or at least respond, to recommendations in the NAS report, specifically: appliance standards should be economically justified or based on significant failures of private markets or irrational consumer behavior (Recommendation 2–2); the Cost Analysis segment of the Engineering Analysis should be expanded to include ranges of costs, patterns of consumption, diversity factors, energy peak demand, and variance regarding environmental factors (Recommendation 3–5); DOE should put greater weight on ex post and market-based evidence of markups to project a more realistic range of effects of a standard on prices (Recommendation 4–1); DOE should place greater emphasis on providing an argument for the plausibility and magnitude of any market failure related to the energy efficiency gap in its analyses (Recommendation 4–13); and DOE should give greater attention to a broader set of potential market failures on the supply side, including how standards might reduce the number of competing firms, and also how standards might impact price discrimination, technological diffusion, and collusion (Recommendation 4–14). (AGA, No. 2279 at pp. 18–20) AGA commented that DOE has not addressed the NAS recommendations in the February 2023 SNOPR and should revise the proposed rule and allow stakeholders an opportunity to comment. (*Id.*)

AHAM stated that it has continually commented that DOE should review the NAS report and provide notice and an opportunity to comment on whether and how DOE will incorporate the recommendations in that report in its analysis repeated its request of several years that DOE review the NAS report and provide notice and opportunity to comment on whether and how DOE will incorporate into its analysis the recommendations in that report. (AHAM, No. 2285 at pp. 47–49) AHAM asserted commented that DOE cannot continue to perpetuate what AHAM asserted to be the errors in its analytical

[133] National Academies of Sciences, Engineering, and Medicine. 2021. *Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards.* Washington, DC: The National Academies Press. Available at *doi.org/10.17226/25992* (last accessed August 2, 2023).

approach that have been pointed out by stakeholders and the NAS report. (*Id.*)

AHAM commented that DOE has not assessed the utility of consumer-valued features that would be redesigned and eliminated under the standards. (AHAM, No. 10116 at p. 24) AHAM commented that, per OMB Circular A–4, DOE should perform an analysis of the consumer utility of specific features and performance that recognizes the opportunity cost to choose a feature or performance attribute. (*Id.*) AHAM commented that NAS recommends that DOE should collect data on consumer choices in appliance markets and estimate a discrete choice model of consumer behavior to quantify the trade-offs that consumers face from changes in appliance performance. (*Id.*) AHAM further commented that per NAS, DOE should assess consumer utility of features prior to establishing any standard where such features are required by law to be preserved. (*Id.*) AHAM commented that DOE's only technology option for improving efficiency of gas cooking tops eliminates consumer-valued features and performance. (*Id.*)

GAAS commented that DOE has not considered the NAS report's recommendation regarding methodologies to simultaneously improve and simplify economics analyses via the use of consumer marginal energy rates. (GAAS, No. 10107 at p. 4)

As discussed, the rulemaking process for establishing new or amended standards for covered products and equipment are specified at appendix A to subpart C of 10 CFR part 430, and DOE periodically examines and revises these provisions in separate rulemaking proceedings. The recommendations in the NAS report, which pertain to the processes by which DOE analyzes energy conservation standards, will be considered by DOE in a separate rulemaking process.

V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for consumer conventional cooking products. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for consumer conventional cooking products, and the standards levels that DOE is adopting in this direct final rule. Additional details regarding DOE's analyses are contained in the direct final rule TSD supporting this document.

A. Trial Standard Levels

In general, DOE typically evaluates potential new or amended standards for products and equipment by grouping individual efficiency levels for each class into TSLs. Use of TSLs allows DOE to identify and consider manufacturer cost interactions between the product classes, to the extent that there are such interactions, and price elasticity of consumer purchasing decisions that may change when different standard levels are set.

In the February 2023 SNOPR, DOE defined the TSLs presented in Table V.1 and Table V.2. 88 FR 6818, 6870.

Table V.1 February 2023 SNOPR Trial Standard Levels for Cooking Tops

Trial Standard Level	Electric Open (Coil) Element Cooking Tops		Electric Smooth Element Cooking Tops		Gas Cooking Tops	
	EL	IAEC *(kWh/year)*	EL	IAEC *(kWh/year)*	EL	IAEC *(kBtu/year)*
1	Baseline	199	1	207	1	1,440
2	Baseline	199	1	207	2	1,204
3	Baseline	199	3	179	2	1,204

Table V.2 February 2023 SNOPR Trial Standard Levels for Conventional Ovens

Trial Standard Level	Electric Ovens		Gas Ovens	
	EL	Design Option	EL	Design Option
1	1	SMPS	1	SMPS
2	1	SMPS	1	SMPS
3	3	SMPS, Convection mode capability, and Oven separator	2	SMPS and Convection mode capability

Note: All efficiency levels for gas ovens include the current prescriptive requirement prohibiting the use of a constant-burning pilot light.

The CA IOUs commented that they recommend DOE create a TSL 2.5 that is identical to February 2023 SNOPR TSL 2 except that it incorporates EL 2 (instead of EL 1) for electric smooth element cooking tops because EL 2 is highly cost-effective and would improve the efficiency of a larger portion of cooking tops. (CA IOUs, No. 2278 at p. 4) The CA IOUs noted that 80 percent of these cooking tops already meet EL 1, while 30 percent meet EL 2 and above. (*Id.*) The CA IOUs commented that EL 2 is based on the lowest measured AEC for radiant cooking tops in the test sample, with the same E_{TLP} as EL 1, yet five of the 11 tested smooth electric resistant cooking tops have an AEC of 189 kWh/year or below and could meet an IAEC of 189 kWh/year by making improvements in standby mode power use (which the CA IOUs noted was cited by DOE as the technology option for EL 1). (*Id.*) Additionally, the CA IOUs commented that eight of the nine smooth-induction cooking tops have an AEC of 189 kWh/year or less and stated that most induction cooking tops should meet this efficiency level through energy use improvements in standby power mode. (*Id.*) The CA IOUs commented that adopting EL 2 for electric smooth element cooking tops

will not require higher conversion costs for many electric smooth element cooking tops. (*Id.*)

NPGA commented that the proposed TSL mapping that does not include significant efficiency improvements for electric smooth element cooking tops until TSL 3 is arbitrary and inconsistent across fuel types. (NPGA, No. 2270 at p. 5)

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including consumer conventional cooking products. When considering energy conservation standards for consumer conventional cooking products, the standards must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In this assessment, DOE considers seven statutory factors, which include consideration of the economic impacts on manufacturers and consumers, as well as energy savings and the need for national energy conservation. In this direct final rule, DOE has modified TSL 2 to analyze the impacts of a standard set at EL 2 for all product classes, including electric smooth element cooking tops, as suggested by the CA IOUs and NGPA. Section V.C of this document includes a summary of the benefits and burdens of TSLs considered for consumer conventional cooking products.

ONE Gas commented that TSLs should be analyzed independently across design options and not among groupings of technology options. (ONE Gas, No. 2289 at p. 15; ONE Gas, No. 10109 at p. 4)

Although DOE considered new and amended standard levels for consumer conventional cooking products by grouping the efficiency levels for each product class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis and provides a comparative analysis of each design option in section V.C.1 of this document.

NPGA commented that the statement in the February 2023 SNOPR that ''DOE may adopt energy efficiency levels that are higher or lower than the proposed standards'' is misleading. (NPGA, No. 2270 at p. 2) NPGA commented that DOE's decision to incorporate max-tech standards for gas cooking tops means that the adopted energy efficiency levels cannot be higher than the proposed standards, pursuant to EPCA. (*Id.*)

DOE's statement in the February 2023 SNOPR is intended to apply across all product classes and not necessarily to each individual product class.

In the analysis conducted for this direct final rule, DOE analyzed the benefits and burdens of three TSLs for consumer conventional cooking products. DOE developed TSLs that combine efficiency levels for each analyzed product class. TSL 3 represents the maximum technologically feasible (max-tech) energy efficiency for all product classes. TSL 2 represents an intermediate TSL. TSL 1—which corresponds to the Recommended TSL in the Joint Agreement—corresponds to the minimum efficiency improvement in each product class corresponding to electronic controls for electric smooth element cooking tops, optimized burners for gas cooking tops, and SMPSs for ovens. DOE presents the results for the TSLs in this document, while the results for all efficiency levels that DOE analyzed are in the direct final rule TSD. While not all ELs were included among the defined TSLs, DOE considered all efficiency levels as part of its analysis.[134]

Table V.3 and Table V.4 present the TSLs and the corresponding efficiency levels and potential prescriptive standards that DOE has identified for potential new and amended energy conservation standards for consumer conventional cooking products, consistent with those analyzed in the February 2023 SNOPR. As discussed in section IV.A.2.a of this document, DOE did not evaluate electric open (coil) element cooking tops as part of the efficiency analysis for this direct final rule.

Table V.3 Trial Standard Levels for Cooking Tops

Trial Standard Level	Electric Smooth Element Cooking Tops (All Classes)		Gas Cooking Tops (All Classes)	
	EL	IAEC *(kWh/year)*	EL	IAEC *(kBtu/year)*
1	1	207	1	1,770
2	2	189	2	1,343
3	3	179	2	1,343

Table V.4 Trial Standard Levels for Conventional Ovens

Trial Standard Level	Electric Ovens		Gas Ovens	
	EL	Design Option	EL	Design Option
1	1	SMPS	1	SMPS
2	2	SMPS and Convection mode capability	2	SMPS and Convection mode capability
3	3	SMPS, Convection mode capability, and Oven separator	2	SMPS and Convection mode capability

Note: All efficiency levels for gas ovens include the current prescriptive requirement prohibiting the use of a constant burning pilot light.

[134] Efficiency levels that were analyzed for this direct final rule are discussed in section IV.C.1 of this document. Results by efficiency level are presented in chapter 8 of the direct final rule TSD.

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on consumer conventional cooking products consumers by looking at the effects that potential new and amended standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected consumer subgroups. These analyses are discussed in the following sections.

a. Life-Cycle Cost and Payback Period

In general, higher-efficiency products affect consumers in two ways: (1) purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* product price plus installation costs), and operating costs (*i.e.,* annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses product lifetime and a discount rate. Chapter 8 of the direct final rule TSD provides detailed information on the LCC and PBP analyses.

Table V.5 through Table V.16 show the LCC and PBP results for the TSLs considered for each product class in the compliance year for that TSL. All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028. In the first of each pair of tables, the simple payback is measured relative to the baseline product. In the second table, the impacts are measured relative to the efficiency distribution in the no-new-standards case in the compliance year (*see* section IV.F.8 of this document). Because some consumers purchase products with higher efficiency in the no-new-standards case, the average savings are less than the difference between the average LCC of the baseline product and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase a product with efficiency at or above a given TSL are not affected. Consumers for whom the LCC increases at a given TSL experience a net cost.

Table V.5 Average LCC and PBP Results for Electric Smooth Element Standalone Cooking Tops

TSL*	Efficiency Level	Average Costs *2022$*				Simple Payback *years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	$571	$20	$259	$830	--	16.8
1	1	$571	$15	$194	$765	0.6	16.8
2	2	$595	$14	$180	$775	4.0	16.8
3	3	$1,212	$16	$209	$1,422	170.5	16.8

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.6 Average LCC Savings Relative to the No-New-Standards Case for Electric Smooth Element Standalone Cooking Tops

TSL*,**	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	$62.80	0%
2	2	$8.54	52%
3	3	($638.87)	100%

* The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.

** All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.7 Average LCC and PBP Results for Electric Smooth Element Cooking Top Component of a Combined Cooking Product

TSL*	Efficiency Level	Average Costs *2022$*				Simple Payback *years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	$571	$20	$259	$830	--	16.8
1	1	$571	$15	$194	$765	0.6	16.8
2	2	$595	$14	$180	$775	4.0	16.8
3	3	$1,212	$16	$209	$1,422	170.5	16.8

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.
* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.8 Average LCC Savings Relative to the No-New-Standards Case for Electric Smooth Element Cooking Top Component of a Combined Cooking Product

TSL*,**	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	$62.80	0%
2	2	$8.54	52%
3	3	($638.87)	100%

* The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.
** All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.9 Average LCC and PBP Results for Gas Standalone Cooking Tops

TSL*	Efficiency Level	Average Costs *2022$*				Simple Payback *years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	$464	$16	$175	$639	--	14.5
1	1	$465	$15	$169	$634	6.6	14.5
2, 3	2	$492	$13	$145	$637	10.5	14.5

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.
* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.10 Average LCC Savings Relative to the No-New-Standards Case for Gas Standalone Cooking Tops

TSL*,**	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	$3.09	1%
2, 3	2	($1.03)	38%

* The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.
** All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.11 Average LCC and PBP Results for Gas Cooking Top Component of a Combined Cooking Product

TSL*	Efficiency Level	Average Costs *2022$*				Simple Payback *years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	$464	$16	$175	$639	--	14.5
1	1	$465	$15	$169	$634	6.6	14.5
2, 3	2	$492	$13	$145	$637	10.5	14.5

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.
* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.12 Average LCC Savings Relative to the No-New-Standards Case for Gas Cooking Top Component of a Combined Cooking Product

TSL*,**	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	$3.09	1%
2, 3	2	($1.03)	38%

* The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.
** All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.13 Average LCC and PBP Results for Electric Ovens

TSL*	Efficiency Level	Average Costs *2022$*				Simple Payback *years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	$750	$27	$344	$1,094	--	16.8
1	1	$749	$25	$327	$1,075	2.1	16.8
2	2	$806	$24	$316	$1,122	25.4	16.8
3	3	$860	$21	$275	$1,135	20.8	16.8

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.
* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.14 Average LCC Savings Relative to the No-New-Standards Case for Electric Ovens

TSL*,**	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	$16.23	0%
2	2	($39.55)	27%
3	3	($24.87)	81%

* The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.
** All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.15 Average LCC and PBP Results for Gas Ovens

TSL*	Efficiency Level	Average Costs *2022$*				Simple Payback *years*	Average Lifetime *years*
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost	LCC		
--	Baseline	$892	$22	$244	$1,135	--	14.5
1	1	$889	$20	$226	$1,115	1.9	14.5
2, 3	2	$932	$19	$218	$1,150	18.0	14.5

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.
* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

Table V.16 Average LCC Savings Relative to the No-New-Standards Case for Gas Ovens

TSL*,**	Efficiency Level	Life-Cycle Cost Savings	
		Average LCC Savings* *2022$*	Percent of Consumers that Experience Net Cost
1	1	$15.17	0%
2, 3	2	($24.16)	21%

* The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.
** All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on low-income households and senior-only households. Table V.17 through Table V.22 compare the average LCC savings and PBP at each efficiency level for the consumer subgroups with similar metrics for the entire consumer sample for each product class of consumer cooking products. In most cases, the average LCC savings and PBP for senior-only households at the considered efficiency levels are not substantially different from the average for all households. Low-income households have higher LCC savings and lower payback periods relative to the results for all households. Consumers not impacted by the TSL are composed of the remaining consumers that neither experience a net benefit or a net cost. Chapter 11 of the direct final rule TSD presents the complete LCC and PBP results for the subgroups.

Table V.17 Comparison of LCC Savings and PBP for Consumer Subgroups and All Households; Electric Smooth Standalone Cooking Tops

TSL*	Low-Income Households	Senior-Only Households	All Households
Average LCC Savings (2022$)**			
1	$62.53	$62.32	$62.80
2	$21.37	$9.03	$8.54
3	($245.84)	($637.64)	($638.87)
Payback Period (years)			
1	0.2	0.6	0.6
2	1.3	3.9	4.0
3	58.0	165.0	170.5
Consumers with Net Benefit (%)			
1	20%	22%	22%
2	57%	34%	33%
3	47%	0%	0%
Consumers with Net Cost (%)			
1	0%	0%	0%
2	17%	51%	52%
3	41%	100%	100%

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

** The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.

Table V.18 Comparison of LCC Savings and PBP for Consumer Subgroups and All Households; Electric Smooth Element Cooking Top Component of a Combined Cooking Product

TSL*	Low-Income Households	Senior-Only Households	All Households
Average LCC Savings (2022$)**			
1	$62.53	$62.32	$62.80
2	$21.37	$9.03	$8.54
3	($245.84)	($637.64)	($638.87)
Payback Period (years)			
1	0.2	0.6	0.6
2	1.3	3.9	4.0
3	58.0	165.0	170.5
Consumers with Net Benefit (%)			
1	20%	22%	22%
2	57%	34%	33%
3	47%	0%	0%
Consumers with Net Cost (%)			
1	0%	0%	0%
2	17%	51%	52%
3	41%	100%	100%

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

** The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.

Table V.19 Comparison of LCC Savings and PBP for Consumer Subgroups and All Households; Gas Standalone Cooking Tops

TSL*	Low-Income Households	Senior-Only Households	All Households
Average LCC Savings (2022$)**			
1	$4.31	$3.12	$3.09
2	$8.57	($0.36)	($1.03)
3	$8.57	($0.36)	($1.03)
Payback Period (years)			
1	3.9	6.4	6.6
2	6.1	10.2	10.5
3	6.1	10.2	10.5
Consumers with Net Benefit (%)			
1	2%	2%	2%
2	35%	22%	21%
3	35%	22%	21%
Consumers with Net Cost (%)			
1	1%	1%	1%
2	22%	37%	38%
3	22%	37%	38%

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

** The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.

Table V.20 Comparison of LCC Savings and PBP for Consumer Subgroups and All Households; Gas Standalone Cooking Top Component of a Combined Cooking Product

TSL*	Low-Income Households	Senior-Only Households	All Households
Average LCC Savings (2022$)**			
1	$4.31	$3.12	$3.09
2	$8.57	($0.36)	($1.03)
3	$8.57	($0.36)	($1.03)
Payback Period (years)			
1	3.9	6.4	6.6
2	6.1	10.2	10.5
3	6.1	10.2	10.5
Consumers with Net Benefit (%)			
1	2%	2%	2%
2	35%	22%	21%
3	35%	22%	21%
Consumers with Net Cost (%)			
1	1%	1%	1%
2	22%	37%	38%
3	22%	37%	38%

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

** The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.

Table V.21 Comparison of LCC Savings and PBP for Consumer Subgroups and All Households; Electric Ovens

TSL	Low-Income Households	Senior-Only Households	All Households
Average LCC Savings (2022$)**			
1	$17.72	$16.38	$16.23
2	($3.65)	($39.54)	($39.55)
3	$25.85	($26.16)	($24.87)
Payback Period (years)			
1	0.7	2.1	2.1
2	7.6	25.6	25.4
3	5.8	21.2	20.8
Consumers with Net Benefit (%)			
1	4%	5%	5%
2	15%	1%	1%
3	62%	18%	19%
Consumers with Net Cost (%)			
1	0%	0%	0%
2	8%	27%	27%
3	24%	82%	81%

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.
** The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.

Table V.22 Comparison of LCC Savings and PBP for Consumer Subgroups and All Households; Gas Ovens

TSL*	Low-Income Households	Senior-Only Households	All Households
Average LCC Savings (2022$)**			
1	$15.45	$15.06	$15.17
2	($8.61)	($24.58)	($24.16)
3	($8.61)	($24.58)	($24.16)
Payback Period (years)			
1	1.2	1.9	1.9
2	10.5	18.0	18.0
3	10.5	18.0	18.0
Consumers with Net Benefit (%)			
1	4%	4%	4%
2	9%	0%	1%
3	9%	0%	1%
Consumers with Net Cost (%)			
1	0%	0%	0%
2	12%	21%	21%
3	12%	21%	21%

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.
** The savings represent the average LCC for affected consumers. Negative values are denoted in parentheses.

c. Rebuttable Presumption Payback

As discussed in section III.E.2 of this document, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete

values and, as required by EPCA, based the energy use calculation on the DOE test procedures for consumer conventional cooking products. In contrast, the PBPs presented in section V.B.1.a of this document were calculated using distributions that reflect the range of energy use in the field.

Table V.23 presents the rebuttable-presumption payback periods for the considered TSLs for consumer conventional cooking products. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for this rule are economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6295(o)(2)(B)(i), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

Table V.23 Rebuttable-Presumption Payback Periods

Product Class	Trial Standard Level*		
	1	2	3
years			
Electric Smooth Element Standalone Cooking Top	0.5	2.6	59.3
Electric Smooth Element Cooking Top Component of a Combined Cooking Product	0.5	2.6	59.3
Gas Standalone Cooking Top	3.7	6.0	6.0
Gas Cooking Top Component of a Combined Cooking Product	3.7	6.0	6.0
Electric Ovens	1.6	14.4	9.1
Gas Ovens	8.4	26.7	26.7

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of new and amended energy conservation standards on manufacturers of consumer conventional cooking products. The next section describes the expected impacts on manufacturers at each considered TSL. Chapter 12 of the direct final rule TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

In this section, DOE provides GRIM results from the analysis, which examines changes in the industry that would result from the analyzed energy conservation standards. The following tables summarize the estimated financial impacts (represented by changes in INPV) of potential new and amended energy conservation standards on manufacturers of consumer conventional cooking products, as well as the conversion costs that DOE estimates manufacturers of consumer conventional cooking products would incur at each TSL. To evaluate the range of cash flow impacts on the consumer conventional cooking product industry, DOE modeled two scenarios using different assumptions that correspond to the range of anticipated market responses to new and amended energy conservation standards: (1) the preservation of gross margin scenario and (2) the preservation of operating profit scenario, as previously described in section IV.J.2.d of this document.

Each of the modeled scenarios results in a unique set of cash flows and corresponding INPV for each TSL. INPV is the sum of the discounted cash flows to the industry from the base year (2024) through the end of the analysis period (30 years from the analyzed compliance year). The ''change in INPV'' results refer to the difference in industry value between the no-new-standards case and standards case at each TSL. To provide perspective on the short-run cash flow impact, DOE includes a comparison of free cash flow between the no-new-standards case and the standards case at each TSL in the year before new and amended standards would take effect. This figure provides an understanding of the magnitude of the required conversion costs relative to the cash flow generated by the industry in the no-new-standards case.

DOE presents the range in INPV for consumer conventional cooking product manufacturers in Table V.24 and Table V.25. DOE presents the impacts to industry cash flows and the conversion costs in Table V.26.

Table V.24 Industry Net Present Value for Consumer Conventional Cooking Products - Preservation of Gross Margin Scenario

	Units	No-New-Standards Case	Trial Standard Level*		
			1	2	3
INPV	*2022$ millions*	1,601	1,458	1,078	(25)
Change in INPV	*2022$ millions*	-	(143)	(522)	(1,626)
	%	-	(9.0)	(32.6)	(101.6)

*Numbers in parentheses indicate a negative number. Some numbers may not sum exactly due to rounding.

Table V.25 Industry Net Present Value for Consumer Conventional Cooking Products - Preservation of Operating Profit Scenario

	Units	No-New-Standards Case	Trial Standard Level*		
			1	2	3
INPV	*2022$ millions*	1,601	1,457	1,042	(302)
Change in INPV	*2022$ millions*	-	(144)	(559)	(1,903)
	%	-	(9.0)	(34.9)	(118.9)

*Numbers in parentheses indicate a negative number. Some numbers may not sum exactly due to rounding.

Table V.26 Cash Flow Analysis for Consumer Conventional Cooking Product Manufacturers

	Units	No-New-Standards Case	Trial Standard Level*		
			1***	2	3
Free Cash Flow (2026)	*2022$ millions*	133.8**	100.6	(94.0)	(763.7)
Change in Free Cash Flow (2026)	*2022$ millions*	-	(28.1)	(227.9)	(897.5)
	%	-	(21.8)	(170.2)	(670.6)
Product Conversion Costs	*2022$ millions*	-	19.9	334.0	1,593.5
Capital Conversion Costs	*2022$ millions*	-	46.8	242.5	475.7
Total Conversion Costs	*2022$ millions*	-	66.7	576.5	2,069.2

* Numbers in parentheses indicate a negative number. Some numbers may not sum exactly due to rounding.
** The no-new-standards case free cash flow in 2027 is $128.7 million.
*** Change in free cash flow for TSL 1 (the Recommended TSL) is compared to the no-new-standards case free cash flow in 2027.

At TSL 3, DOE estimates the change in INPV will range from −$1,903 million to −$1,626 million, which represents a change in INPV of –118.9 percent to –101.6 percent, respectively. At TSL 3, industry free cash flow decreases to −$763.7 million, which represents a decrease of approximately 670.6 percent, compared to the no-new-standards case value of $133.8 million in 2026, the year before the compliance date.

TSL 3 would set the energy conservation standard at EL 2 for the gas cooking top product classes (standalone and component of a combined cooking product) and for the gas oven product class and at EL 3 for the electric smooth element cooking top product classes (standalone and component of a combined cooking product) and for the electric oven product class. This represents max-tech for all product classes. DOE estimates that less than 1 percent of electric smooth element cooking top shipments (standalone and component of a combined cooking product), 41 percent of gas cooking top shipments (standalone and component of a combined cooking product), there are no electric standard oven (freestanding and built-in) shipments, there are no electric self-clean oven (freestanding) shipments, 2 percent of electric self-clean (built-in) shipments, 62 percent of gas standard oven (freestanding) shipments, 38 percent of gas standard oven (built-in) shipments, 93 percent of gas self-clean oven (freestanding) shipments, and 77 percent of gas self-clean (built-in) shipments would already meet the efficiency levels required at TSL 3 in 2027.

At TSL 3, DOE expects consumer conventional cooking product manufacturers to incur approximately $1,593.5 million in product conversion costs. This includes testing costs and product redesign costs. At TSL 3, electric smooth element cooking top manufacturers would have to completely redesign most of their electric smooth element cooking top models to use induction technology. Electric oven manufacturers would have to completely redesign almost all their electric oven models to use oven separators. Additionally, consumer conventional cooking product manufacturers would incur approximately $475.7 million in capital conversion costs to purchase new tooling and equipment necessary to produce the numerous redesigned cooking top and oven models at TSL 3.

At TSL 3, the shipment weighted average MPC for consumer conventional cooking products significantly increases by 22.3 percent relative to the no-new-standards case shipment weighted average MPC in 2027. In the preservation of gross margin scenario, manufacturers can fully pass along this cost increase, which causes an increase in manufacturers' free cash flow. However, the $2,069.2 million in conversion costs estimated at TSL 3, ultimately results in a significantly negative change in INPV at TSL 3 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, manufacturers earn the same per-unit operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments or higher MPCs. In this scenario, the 22.3 percent increase in the shipment weighted average MPC results in a reduction in the margin after the compliance year. This reduction in the margin and the $2,069.2 million in conversion costs incurred by manufacturers causes a significantly negative change in INPV at TSL 3 under the preservation of operating profit scenario.

At TSL 2, DOE estimates the change in INPV will range from −$559 million to −$522 million, which represents a change in INPV of –34.9 percent to –32.6 percent, respectively. At TSL 2, industry free cash flow decreases to −$94.0 million, which represents a decrease of approximately 170.2 percent, compared to the no-new-standards case value of $133.8 million in 2026, the year before the compliance date.

TSL 2 would set the energy conservation standard at EL 2 for all product classes. DOE estimates that 15 percent of electric smooth element cooking top shipments (standalone and component of a combined cooking product), 41 percent of gas cooking top shipments (standalone and component of a combined cooking product), 38 percent of electric standard oven (freestanding) shipments, 30 percent of electric standard oven (built-in) shipments, 77 percent of electric self-clean oven (freestanding) shipments, 88 percent of electric self-clean (built-in) shipments, 62 percent of gas standard oven (freestanding) shipments, 38 percent of gas standard oven (built-in) shipments, 93 percent of gas self-clean oven (freestanding) shipments, and 77 percent of gas self-clean (built-in) shipments would already meet the efficiency levels required at TSL 2 in 2027.

At TSL 2, DOE expects consumer conventional cooking product manufacturers to incur approximately $334.0 million in product conversion costs. This includes testing costs and product redesign costs. Additionally, consumer conventional cooking product manufacturers would incur approximately $242.5 million in capital conversion costs to purchase new tooling and equipment necessary to produce all electric smooth element cooking top models and all oven models to use SMPSs and to purchase new molds for grates and burners for gas cooking top models that would not meet this energy conservation standard.

At TSL 2, the shipment weighted average MPC for consumer conventional cooking products slightly increases by 3.1 percent relative to the no-new-standards case shipment weighted average MPC in 2027. In the preservation of gross margin scenario, manufacturers can fully pass on this cost increase, which causes an increase in manufacturers' free cash flow. However, the $576.5 million in conversion costs estimated at TSL 2, ultimately results in a significantly negative change in INPV at TSL 2 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the 3.1 percent increase in the shipment weighted average MPC results in a reduction in the margin after the compliance year. This reduction in the margin and the $576.5 million in conversion costs incurred by manufacturers causes a significantly negative change in INPV at TSL 2 under the preservation of operating profit scenario.

At TSL 1 (*i.e.,* the Recommended TSL), DOE estimates the change in INPV will range from −$144 million to −$143 million, which represents a change of –9.0 percent. At TSL 1, industry free cash flow decreases to $100.6 million, which represents a decrease of approximately 21.8 percent, compared to the no-new-standards case value of $128.7 million in 2027, the year before the compliance date.

TSL 1 would set the energy conservation standard at EL 1 for all product classes. DOE estimates that 77 percent of all electric smooth element cooking top shipments, 97 percent of all gas cooking top shipments, 95 percent of all electric oven shipments, and 96 percent of all gas oven shipments would already meet or exceed the efficiency levels required at TSL 1 in 2028.

At TSL 1, DOE expects consumer conventional cooking product manufacturers to incur approximately $19.9 million in product conversion costs to redesign all non-compliant cooking top models and oven models, as well as to test all (both compliant and newly redesigned) cooking top models to DOE's cooking top test procedure. Additionally, consumer conventional cooking product manufacturers would incur approximately $46.8 million in capital conversion costs to purchase new tooling and equipment necessary to produce all electric smooth element cooking top models and all oven models to use SMPSs and to purchase new molds for grates and burners for gas cooking top models that would not meet this energy conservation standard.

At TSL 1, the shipment weighted average MPC for consumer conventional cooking products slightly increases by 0.1 percent relative to the no-new-standards case shipment weighted average MPC in 2028. In the preservation of gross margin scenario, manufacturers can fully pass on this slight cost increase, which causes an increase in manufacturers' free cash flow. However, the $66.7 million in conversion costs estimated at TSL 1, ultimately results in a slightly negative change in INPV at TSL 1 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the 0.1 percent increase in the shipment weighted average MPC results in a reduction in the margin after the compliance year. This reduction in the margin and the $66.7 million in conversion costs incurred by manufacturers causes a slightly negative change in INPV at TSL 1 under the preservation of operating profit scenario.

b. Direct Impacts on Employment

To quantitatively assess the potential impacts of new and amended energy conservation standards on direct employment in the consumer conventional cooking products industry, DOE used the GRIM to estimate the domestic labor expenditures and number of direct employees in the no-new-standards case and in each of the standards cases (*i.e.,* TSLs) during the analysis period.

Production employees are those who are directly involved in fabricating and assembling products within a manufacturer's facility. Workers performing services that are closely associated with production operations, such as materials handling tasks using forklifts, are included as production labor, as well as line supervisors.

DOE used the GRIM to calculate the number of production employees from labor expenditures. DOE used statistical data from the U.S. Census Bureau's 2021 Annual Survey of Manufacturers (''ASM'') and the results of the engineering analysis to calculate industry-wide labor expenditures. Labor expenditures related to product manufacturing depend on the labor intensity of the product, the sales volume, and an assumption that wages remain fixed in real terms over time. The total labor expenditures in the GRIM were then converted to domestic production employment levels by dividing production labor expenditures by the annual payment per production worker.

Non-production employees account for those workers that are not directly engaged in the manufacturing of the covered products. This could include sales, human resources, engineering, and management. DOE estimated non-production employment levels by multiplying the number of consumer conventional cooking product workers by a scaling factor. The scaling factor is calculated by taking the ratio of the total number of employees, and the total production workers associated with the industry NAICS code 335220, which covers consumer conventional cooking product manufacturing.

The employment impacts shown in Table V.27 represent the potential domestic production employment that

could result following the analyzed new and amended energy conservation standards. The upper bound of the results estimates the maximum change in the number of production workers that could occur after compliance with new and amended energy conservation standards when assuming that manufacturers continue to produce the same scope of covered products in the same production facilities. It also assumes that domestic production does not shift to lower labor-cost countries. Because there is a risk of manufacturers evaluating sourcing decisions in response to new and amended energy conservation standards, the lower bound of the employment results includes DOE's estimate of the total number of U.S. production workers in the industry who could lose their jobs if some existing domestic production was moved outside of the United States. While the results present a range of domestic employment impacts following 2027 or 2028 (depending on the TSL being analyzed), the following sections also include qualitative discussions of the likelihood of negative employment impacts at the various TSLs.

Using 2021 ASM data and interviews with manufacturers, DOE estimates that approximately 60 percent of the consumer conventional cooking products sold in the United States are manufactured domestically. With this assumption, DOE estimates that in the absence of new and amended energy conservation standards, there would be approximately 4,208 domestic production workers involved in manufacturing consumer conventional cooking products in 2027. Table V.27 shows the range of the impacts of the analyzed new and amended energy conservation standards on U.S. production workers in the consumer conventional cooking product industry.

Table V.27 Domestic Employment for Consumer Conventional Cooking Products in the Analyzed Compliance Year

	No-New-Standards Case	Trial Standard Level*		
		1***	2	3
Domestic Production Workers in 2027	4,208**	4,195	4,333	4,808
Domestic Non-Production Workers in 2027	506**	504	521	578
Total Direct Employment in 2027	4,714**	4,699	4,854	5,386
Potential Changes in Total Direct Employment in 2027*	-	(13) - 0	(939) – 125	(1,123) – 600

*DOE presents a range of potential impacts. Numbers in parentheses indicate a negative number.
**In the no-new-standards case in 2028 there are 4,193 domestic production workers; there are 504 domestic non-production workers; and the total direct employment is 4,697 in 2028.
***Change in employment for TSL 1 (the Recommended TSL) is compared to the no-new-standards case employment in 2028.

At the upper end of the range, all examined TSLs show an increase in the number of domestic production workers for consumer conventional cooking products. The upper end of the range represents a scenario where manufacturers increase production hiring due to the increase in the labor associated with adding the required components to make consumer conventional cooking products more efficient. However, as previously stated, this assumes that in addition to hiring more production employees, all existing domestic production would remain in the United States and not shift to lower labor-cost countries.

At the lower end of the range, all examined TSLs show either no change in domestic production employment or a decrease in domestic production employment. The lower end of the domestic employment range assumes that gas cooking top domestic production employment does not change at any TSL. Manufacturing more efficient gas cooking tops by optimizing the burner and improving grates would not impact the location where production occurs for these product classes. Additionally, this lower range assumes that at TSL 1, the Recommended TSL, which sets all oven product classes and all electric smooth element cooking top product classes at EL 1, domestic production employment would not change. EL 1 would require SMPSs for all oven product classes and can be achieved using low-standby-loss electronic controls for the electric smooth element cooking top product classes. The majority of manufacturers already use SMPSs in their ovens and are able to meet the efficiency requirements at EL 1 for the electric smooth element cooking top product classes using purchased components. Adding these standby features to models currently not using these features would not change the location where production occurs for these product classes.

At the lower end of the range for TSL 2, DOE estimated that up to 25 percent of the domestic employment for the electric smooth element cooking top product classes could be relocated abroad at EL 2. Additionally, DOE estimated that up to 25 percent of domestic production employment for the oven product classes could be relocated abroad at TSL 2. DOE estimates that there would be approximately 736 domestic production employees involved in the production of electric smooth element cooking tops and 3,020 domestic production employees involved in the production covering all oven product classes in 2027 in the no-new-standards case. Using these values to estimate the lower end of the range, DOE estimated that up to 939 domestic production employees could be eliminated at TSL 2 (due to standards being set at EL 2 for all electric smooth element cooking top product classes and for all oven product classes).[135]

At the lower end of the range for TSL 3, DOE estimated that up to 50 percent of domestic production employment for the electric smooth element cooking top product classes could be relocated abroad at max-tech. Additionally, DOE estimated that up to 25 percent of domestic production employment for

[135] $736 \times 25\% + 3{,}020 \times 25\% = 939$

the oven product classes could be relocated abroad at TSL 3. DOE estimates that there would be approximately 736 domestic production employees involved in the production of electric smooth element cooking tops and 3,020 domestic production employees involved in the production covering all oven product classes in 2027 in the no-new-standards case. Using these values to estimate the lower end of the range, DOE estimated that up to 1,123 domestic production employees could be eliminated at TSL 3 (due to standards being set at max-tech for all electric smooth element cooking top product classes and for all oven product classes).[136]

DOE provides a range of potential impacts to domestic production employment as each manufacturer would make a business decision that best suits their individual product needs. However, manufacturers stated during interviews that due to the larger size of most consumer conventional cooking products, there are few units that are manufactured and shipped from far distances such as Asia or Europe. The vast majority of consumer conventional cooking products are currently made in North America. Some manufacturers stated that even significant changes to production lines would not cause them to shift their production abroad, as several manufacturers either only produce consumer conventional cooking products domestically or have made significant investments to continue to produce consumer conventional cooking products domestically.

In response to the energy conservation standard proposed in the February 2023 SNOPR for gas cooking tops, Sub-Zero Group commented that any standard that would force its Wolf brand to remove consumer-desired features from their gas cooking tops would jeopardize its ability to maintain market share and negatively impact its employees represented by SMART Union International. (Sub-Zero Group, No. 767 at p. 3; Sub-Zero Group, No. 2140 at p. 6)

As discussed in section IV.C.1.a of this document, DOE updated the efficiency levels for gas cooking tops for this direct final rule analysis. With the updates to the efficiency levels for gas cooking tops that were made for this direct final rule analysis, DOE estimates that domestic production employment would not change significantly at TSL 1, but could be reduced by up to 939 domestic employees at TSL 2 and by up to 1,123 domestic employees at TSL 3 as displayed in the lower bound for Table V.27.

c. Impacts on Manufacturing Capacity

Manufacturers stated that any standard requiring induction heating technology for electric smooth element cooking tops would be very difficult to meet since there are less than 1 percent of shipments currently using this technology. Additionally, any standards requiring oven separators for the electric oven product class would be very difficult to meet since that would require completely redesigning the oven cavity of almost every electric oven model currently on the market.

AGA commented that designers and manufacturers of gas cooking tops are likely to leave the market rather than spend the millions of dollars required to redesign their products to comply with the February 2023 SNOPR. (AGA, No. 2279 at p. 22)

NPGA stated that DOE's proposed standard in the February 2023 SNOPR for gas cooking tops will pose a substantial difficulty for manufacturers and upheaval in the market. (NPGA, No. 2270 at p. 9) NPGA stated that even if DOE is correct in asserting the proposed standard's technical feasibility and economic justification, 96 percent of the gas cooking tops tested by DOE were not in compliance with the proposal intended to be in effect by 2027. (*Id.*) Additionally, NPGA stated that it is more likely that manufacturers will choose to leave the market rather than spend the millions of dollars it will take to redesign their products to be in compliance with the proposed standards. (*Id.*)

Whirlpool commented that it and other multi-brand companies differentiate their products on the basis of price, new features, improved customer experience, and improved energy efficiency. (Whirlpool, No. 2284 at pp. 4–8) Whirlpool commented that standards proposed in the February 2023 SNOPR for gas cooking tops will limit the variety of cooking tops available on the market and functionally phase out product features that manufacturers use to differentiate between models and brands (*e.g.,* grates and burners), and that without these features, Whirlpool and other manufacturers will lack the ability to meaningfully differentiate between products in their own product lines and those of their competitors. (*Id.*) Whirlpool commented that the standard proposed in the February 2023 SNOPR for gas cooking tops also threaten the ability of smaller companies to compete in the market, resulting in reduced consumer choice, less innovation, and industry consolidation as manufacturers lose the ability to add new features or improve consumer experience as readily within the confines of the standards. (*Id.*) Whirlpool added that DOE fails to account for the decreased competition that will likely result from this rulemaking. (*Id.*) Additionally, Whirlpool commented that DOE's February 2023 SNOPR analysis fails to consider the likely diminution in market competition, product utility, and product performance of gas cooking products, as well as the likely wholesale removal of certain products and features from the market, resulting from the standard proposed in the February 2023 SNOPR for gas cooking tops. (*Id.*) Whirlpool recommended that DOE account for whether the standard proposed in the February 2023 SNOPR for gas cooking tops will reduce competition and increase consolidation. (*Id.*) ONE Gas stated that manufacturers would likely choose to leave the market rather than expend the millions of dollars to redesign their products in order to comply, unreasonably eliminating competition and resulting in enormous market upheaval. (ONE Gas, No. 2289 at pp. 3–4)

Based on comments received in response to the February 2023 SNOPR, DOE further examined the potential impacts of the gas cooking top market in this direct final rule analysis and agrees that some gas cooking top manufacturers might not be willing to make the investments required to comply with the max-tech gas cooking top efficiency level that was proposed in the February 2023 SNOPR and the max-tech gas cooking top efficiency level analyzed in this direct final rule analysis. If energy conservation standards are set at max-tech for gas cooking tops, it could result in some gas cooking top manufacturers leaving the gas cooking top market (either by exclusively manufacturing electric cooking tops or exiting the cooking top market all together). However, DOE notes that 97 percent of gas cooking top shipments on the market today would meet EL 1 for the gas cooking tops product classes, which DOE is finalizing in this rulemaking. Therefore, DOE does not anticipate that adopting energy conservation standards at EL 1 for the gas cooking tops product classes would cause any manufacturer to exit the gas cooking top market and all manufacturers would be able to continue to differentiate their products based on features other than energy efficiency.

As discussed in section IV.C.1 of this document, DOE updated the efficiency levels for gas cooking tops for this direct

[136] $736 \times 50\% + 3{,}020 \times 25\% = 1{,}123$

final rule. Based on the updated efficiency levels for gas cooking tops, DOE estimates that approximately 41 percent of gas cooking shipments would meet the efficiency requirements at max-tech. Based on DOE's further analysis, including the updated efficiency levels for gas cooking tops for this direct final rule, DOE understands that there is a risk that some manufacturers might not be willing or able to make the investments required to comply with standards for gas cooking tops if standards are set at max-tech for gas cooking tops. DOE notes that 97 percent of gas cooking top shipments on the market today would meet EL 1 for the gas cooking tops product classes, which DOE is finalizing in this rulemaking.

Other than the max-tech ELs for the electric cooking top product classes and the gas cooking top product classes, all other ELs require making incremental improvements to existing designs and should not present any manufacturing capacity constraints given a compliance period of 3 or more years (depending on the TSL analyzed).

d. Impacts on Subgroups of Manufacturers

Using average cost assumptions to develop an industry cash flow estimate may not be adequate for assessing differential impacts among manufacturer subgroups. Small manufacturers, niche product manufacturers, and manufacturers exhibiting cost structures substantially different from the industry average could be affected disproportionately. DOE analyzed the impacts on small businesses in a separate analysis for the standards proposed in the NOPR published elsewhere in today's **Federal Register** and in chapter 12 of the direct final rule TSD. DOE also identified the premium product manufacturer subgroup as a potential manufacturer subgroup that could be adversely impacted by energy conservation standards based on the results of the industry characterization.

The premium product manufacturer subgroup consists of consumer conventional cooking product manufacturers that primarily sell gas cooking tops, gas ovens, and electric self-clean ovens marketed as premium or professional style, either as a standalone product or as a component of a combined cooking product. These products are typically significantly more expensive than the market average costs. For the cooking top product classes, some premium product manufacturers do manufacture electric smooth element cooking tops. Of the premium product manufacturers that manufacture electric smooth element cooking tops, all have products that use induction technology and would be able to meet the max-tech efficiency level for these product classes.

Premium product manufacturers would likely face more difficulty meeting potential standards set for the gas cooking top product classes than other consumer conventional cooking product manufacturers. However, as previously stated in section IV.C.1.a of this document, all analyzed efficiency levels for the gas cooking top product classes are achievable with multiple HIR burners and continuous cast-iron grates. Therefore, while premium product manufacturers would likely have to redesign a higher portion of their gas cooking top models compared to other consumer conventional cooking product manufacturers, all efficiency levels for the gas cooking top product classes are achievable for premium product manufacturers.

For the oven product classes, the vast majority of premium product electric and gas ovens already use SMPSs in their ovens and would not have difficulty meeting potential standard levels requiring SMPSs for any oven product classes. Additionally, premium product manufacturers typically have a higher percentage of gas oven models with convection mode capability compared to other consumer conventional cooking product manufacturers. However, like the rest of the market, there are very few, if any, premium product electric ovens equipped with an oven separator, and it would be difficult for premium product manufacturers to convert all their oven cavities into ovens equipped with oven separators.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and States that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

DOE evaluates product-specific regulations that will take effect approximately 3 years before or after the 2028 compliance date of the new and amended energy conservation standards for consumer conventional cooking products. This information is presented in Table V.28.

Table V.28 Compliance Dates and Expected Conversion Expenses of Federal Energy Conservation Standards Affecting Consumer Conventional Cooking Product Manufacturers

Federal Energy Conservation Standard	Number of Mfrs.*	Number of Manufacturers Affected from this Rule**	Approx. Standards Year	Industry Conversion Costs (millions)	Industry Conversion Costs / Product Revenue***
Portable Air Conditioners 85 FR 1378 (Jan. 10, 2020)	11	4	2025	$320.9 (2015$)	6.7%
Room Air Conditioners 88 FR 34298 (May 26, 2023)	8	4	2026	$24.8 (2021$)	0.4%
Microwave Ovens 88 FR 39912 (Jun. 20, 2023)	18	10	2026	$46.1 (2021$)	0.7%
Clothes Dryers† 87 FR 51734 (Aug. 23, 2022)	15	10	2027	$149.7 (2020$)	1.8%
Automatic Commercial Ice Makers† 88 FR 30508 (May 11, 2023)	23	4	2027	$15.9 (2022$)	0.6%
Dishwashers† 88 FR 32514 (May 19, 2023)	21	14	2027	$125.6 (2021$)	2.1%
Electric Motors 88 FR 36066 (Jun. 1, 2023)	74	1	2027	$468.5 (2021$)	2.6%
Residential Clothes Washers† 88 FR 13520 (Mar. 3, 2023)	19	11	2027	$690.8 (2021$)	5.2%
Ceiling Fans† 88 FR 40932 (Jun. 22, 2023)	91	1	2028	$107.2 (2022$)	1.9%
Commercial Refrigeration Equipment† 88 FR 70196 (Oct. 10, 2023)	89	7	2028	$226.4 (2022$)	1.6%
Dehumidifiers† 88 FR 76510 (Nov. 6, 2023)	20	4	2028	$7.0 (2022$)	0.4%
General Service Lamps† 88 FR 1638 (Jan. 11, 2023)	100+	1	2028	$407 (2021$)	4.5%
Consumer Furnaces 88 FR 87502 (Dec. 18, 2023)	15	1	2029	$162.0 (2022$)	1.8%

Miscellaneous Refrigeration Products† 88 FR 19382 (Mar. 31, 2023)	38	9	2029	$126.9 (2021$)	3.1%
Refrigerators, Refrigerator-Freezers, and Freezers 88 FR 3026 (Jan. 17, 2024)	49	14	2029 & 2030‡	$830.3 (2022$)	1.3%

* This column presents the total number of manufacturers identified in the energy conservation standard rule contributing to cumulative regulatory burden.
** This column presents the number of manufacturers producing consumer conventional cooking products that are also listed as manufacturers in the listed energy conservation standard contributing to cumulative regulatory burden.
*** This column presents industry conversion costs as a percentage of product revenue during the conversion period. Industry conversion costs are the upfront investments manufacturers must make to sell compliant products/equipment. The revenue used for this calculation is the revenue from just the covered product/equipment associated with each row. The conversion period is the time frame over which conversion costs are made and lasts from the publication year of the direct final rule to the compliance year of the energy conservation standard. The conversion period typically ranges from 3 to 5 years, depending on the rulemaking.
† Indicates a NOPR publication. Values may change on publication of a final rule.
‡ For the refrigerators, refrigerator-freezers, and freezers energy conservation standards direct final rule, the compliance year (2029 and 2030) varies by product class.

AHAM commented that DOE should abide by Process Rule requirements and take action to fully review the cumulative impacts its rules will have on manufacturers and consumers, with this review including examination of the potential impact on the economy and inflation as a result of the unprecedented stringency and close compliance dates of DOE's recently proposed standards. (AHAM, No. 2285 at pp. 44–47) AHAM commented that DOE's proposed levels for consumer clothes dryers, residential clothes washers, conventional cooking products, consumer refrigerator/freezers, and its final rule for room air conditioners will require significant redesign of products—and in the case of gas cooking tops and top-loading clothes washers, the complete redesign of entire product lines. (*Id.*) AHAM repeated its request that DOE acknowledge this cumulative regulatory burden and take action, such as spacing out its final rules, allowing more lead-time by issuing final rules well before publishing them in the **Federal Register**, and reducing the stringency of standards such that fewer percentages of products would require complete re-design. (*Id.*) AHAM cited the example of CPSC's investigation of IAQ and cooking, which will require potential redesign to meet any new NO_2 requirements. (*Id.*) AHAM commented DOE's proposed rule for cooking tops should be combined with CPSC's IAQ effort into a single compliance date. (*Id.*) AHAM commented that Section 13(g) of the Process Rule provides specific actions DOE should take should there be cumulative impacts from other Federal regulatory action that DOE will recognize cumulative burden and ''seek to mitigate the overlapping effects on manufacturers of new or revised DOE standards and other regulatory actions affecting the same products or equipment.'' (*Id.*) AHAM noted that during the comment period for the February 2023 SNOPR, there were also rulemakings open for battery chargers, clothes washers, dishwashers, external power supplies, miscellaneous refrigeration products, refrigerator/freezers, and small electric motors, all of which impact AHAM's members. (*Id.*) AHAM commented that the Process Rule indicates if ''a proposed standard would impose a significant impact on product or equipment manufacturers within approximately 3 years of the compliance date of another DOE standard that imposes significant impacts on the same manufacturers (or divisions thereof, as appropriate), the Department will, in addition to evaluating the impact on manufacturers of the proposed standard, assess the joint impacts of both standards on manufacturers.'' (*Id.*) AHAM commented that the manufacturer impact analysis, as currently structured, does not adequately analyze the effects on an industry of multiple regulations within a short period and suggested adding the combined costs of complying with multiple regulations into the product conversion costs in GRIM as one potential solution DOE could take. (*Id.*)

Regarding AHAM's suggestion about spacing out the timing of final rules for home appliance rulemakings to reduce regulatory burden, DOE has statutory requirements under EPCA on the timing of rulemakings. For consumer conventional cooking products; consumer clothes dryers; dishwashers; refrigerators, refrigerator-freezers and freezers; residential clothes washers; and room air conditioners, new and amended standards apply to covered products manufactured 3 years after the date on which any new or amended standard is published. (42 U.S.C. 6295(m)(4)(A)(i)) For miscellaneous refrigeration products, amended standards apply 5 years after the date on which any new or amended standard is published. (42 U.S.C. 6295(l)(2)) However, the multi-product Joint Agreement recommends alternative compliance dates. As discussed in section II.B.4 of this document the Joint Agreement recommendations are in accordance with the statutory requirements of 42 U.S.C. 6295(p)(4) for the issuance of a direct final rule. Therefore, as compared to the EPCA-required lead time of 3-years, consumer conventional cooking product manufacturers have more lead time to meet new and amended standards at the Recommend TSL.

As shown in Table V.28, the ongoing rulemakings with the largest overlap of consumer conventional cooking product manufacturers include dishwashers; refrigerators, refrigerator-freezers, and freezers; residential clothes washers; clothes dryers; and miscellaneous

refrigeration products, which are all part of the multi-product Joint Agreement submitted by interested parties. As detailed in the Joint Agreement, the signatories indicated that their recommendations should be considered a ''complete package.'' The signatories further stated that ''each part of this agreement is contingent upon the other parts being implemented.'' (Joint Agreement, No. 505 at p. 3)

The multi-product Joint Agreement states the ''jointly recommended compliance dates will achieve the overall energy and economic benefits of this agreement while allowing necessary lead-times for manufacturers to redesign products and retool manufacturing plants to meet the recommended standards across product categories.'' (Joint Agreement, No. 505 at p. 2) The staggered compliance dates help mitigate manufacturers' concerns about their ability to allocate sufficient resources to comply with multiple concurrent new and amended standards. See Table V.29 for a comparison of the estimated compliance dates based on EPCA-specified timelines and the compliance dates detailed in the Joint Agreement.

Table V.29 Expected Compliance Dates for Multi-Product Joint Agreement

Rulemaking	Estimated Compliance Year based on EPCA Requirements	Compliance Year in the Joint Agreement
Dishwashers	2027	2027*
Consumer Conventional Cooking Products	2027	2028
Residential Clothes Washers	2027	2028
Consumer Clothes Dryers	2027	2028
Miscellaneous Refrigeration Products	2029	2029
Refrigerators, Refrigerator-Freezers, and Freezers	2027	2029 or 2030 depending on the product class

* Estimated compliance year. The Joint Agreement states, "3 years after the publication of a final rule in the *Federal Register*." (Joint Agreement, No. 505 at p. 2)

3. National Impact Analysis

This section presents DOE's estimates of the national energy savings and the NPV of consumer benefits that would result from each of the TSLs considered as potential new or amended standards.

a. National Energy Savings

To estimate the energy savings attributable to potential new or amended standards for consumer conventional cooking products, DOE compared their energy consumption under the no-new-standards case to their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the year of anticipated compliance with new and amended standards (2027–2056 for all TSLs other than TSL 1, the Recommended TSL; 2028–2057 for TSL 1). Table V.30 presents DOE's projections of the national energy savings for each TSL considered for consumer conventional cooking products. The savings were calculated using the approach described in section IV.H of this document.

Table V.30 Cumulative National Energy Savings for Consumer Conventional Cooking Products; 30 Years of Shipments*

	Trial Standard Level		
	1	2	3
	quads		
Primary energy	0.21	0.62	1.46
FFC energy	0.22	0.66	1.52

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

OMB Circular A–4 [137] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using 9 years, rather than 30 years, of product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[138] The review

[137] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* Available at *www.whitehouse.gov/omb/information-for-agencies/circulars* (last accessed January 3, 2024). DOE used the prior version of Circular A–4 (September 17, 2003) in accordance with the effective date of the November 9, 2023, version.

[138] EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. (42 U.S.C. 6295(m)) While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6-year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability

timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to consumer conventional cooking products. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in Table V.31. The impacts are counted over the lifetime of consumer conventional cooking products purchased during the period 2027–2035 for all TSLs except TSL 1 (the Recommended TSL); 2028–2035 for TSL 1.

Table V.31 Cumulative National Energy Savings for Consumer Conventional Cooking Products; 9 Years of Shipments

	Trial Standard Level		
	1	2	3
	quads		
Primary energy	0.06	0.17	0.37
FFC energy	0.06	0.18	0.39

*2027–2035 for all TSLs except TSL 1 (the Recommended TSL); 2028–2036 for TSL 1

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for consumers that would result from the TSLs considered for consumer conventional cooking products. In accordance with OMB's guidelines on regulatory analysis,[139] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. Table V.32 shows the consumer NPV results with impacts counted over the lifetime of products purchased during the period 2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1.

Table V.32 Cumulative Net Present Value of Consumer Benefits for Consumer Conventional Cooking Products; 30 Years of Shipments*

Discount Rate	Trial Standard Level		
	1	2	3
	billion 2022$		
3 percent	1.56	0.34	(43.89)
7 percent	0.65	(0.40)	(26.34)

Note: Negative values denoted in parentheses.
*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

The NPV results based on the aforementioned 9-year analytical period are presented in Table V.33. The impacts are counted over the lifetime of products purchased during the period 2027–2035 for all TSLs other than TSL 1 (the Recommended TSL); 2028–2036 for TSL 1. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

Table V.33 Cumulative Net Present Value of Consumer Benefits for Consumer Conventional Cooking Products; 9 Years of Shipments*

Discount Rate	Trial Standard Level		
	1	2	3
	billion 2022$		
3 percent	0.55	(0.04)	(19.11)
7 percent	0.31	(0.29)	(14.25)

Note: Negative values denoted in parentheses.
*2027–2035 for all TSLs except TSL 1 (the Recommended TSL); 2028–2036 for TSL 1

The previous results reflect the use of a default trend to estimate the change in price for consumer conventional cooking products over the analysis period (*see* section IV.H.3 of this document). DOE also conducted a

that occurs in the timing of standards reviews and the fact that for some products, the compliance period is 5 years rather than 3 years.

[139] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* Available at *www.whitehouse.gov/omb/information-for-agencies/circulars* (last accessed January 3, 2024). DOE used the prior version of Circular A–4 (September 17, 2003) in accordance with the effective date of the November 9, 2023, version.

sensitivity analysis that considered one scenario with a lower rate of price decline than the reference case and one scenario with a higher rate of price decline than the reference case. The results of these alternative cases are presented in appendix 10C of the direct final rule TSD. In the high-price-decline case, the NPV of consumer benefits is higher than in the default case. In the low-price-decline case, the NPV of consumer benefits is lower than in the default case.

c. Indirect Impacts on Employment

DOE estimates that new and amended energy conservation standards for consumer conventional cooking products will reduce energy expenditures for consumers of those products, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.N of this document, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered. There are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for near-term timeframes ((2027–2032) for all TSLs other than TSL 1 (the Recommended TSL) and 2028 for TSL 1), where these uncertainties are reduced.

The results suggest that the adopted standards are likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the direct final rule TSD presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Products

As stated, EPCA, as codified, contains the provision that the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4)) This provision is referred to by commenters as the ''unavailability provision'' or the ''features provision.''

The Joint Agreement signatories [140] stated that standards recommended in the Joint Agreement and adopted in this direct final rule are unlikely to result in the unavailability of covered products in the United States, in accordance with 42 U.S.C. 6295(o)(4). (Joint Agreement signatories, No. 12814 at p. 8)

This section summarizes the comments received in response to the gas cooking top standard proposed in the February 2023 SNOPR and the updated efficiency levels for gas cooking tops in the August 2023 NODA, regarding their impact on the utility of gas cooking tops.

a. General Comments

ASAP *et al.* commented that the standards DOE proposed in the February 2023 SNOPR for gas cooking tops ensure that consumers will have access to the features generally available on the market today. (ASAP *et al.,* No. 2273 at pp. 2–3) ASAP *et al.* commented that HIR burners allow consumers to perform high-heat cooking and that continuous cast-iron grates are useful for heavy pans or to easily shift cookware between burners. (*Id.*) ASAP *et al.* commented that DOE's decision to evaluate only models with at least one HIR burner and continuous cast-iron grates ensures that gas cooking top models with both features could comply with the proposed standard. (*Id.*) ASAP *et al.* commented that well-designed cooking tops can be both energy efficient and have multiple HIR burners. (*Id.*)

The CA IOUs commented that DOE has provided sufficient evidence of the standard's technological feasibility across a range of gas cooking top types and has ensured that gas cooking tops with varying utilities, including those with at least one HIR burner and continuous cast-iron grates, can be more efficient and will have continued market availability. (CA IOUs, No. 2278 at pp. 2–3) The CA IOUs commented that the rulemaking record shows that the proposed standard will not reduce gas cooking top utility, will not negatively affect consumer choice, and will provide consumers with more efficient gas cooking tops. (*Id.*)

b. Market Availability

Spire and AGA requested that, in any final rule, DOE include a provision stating that interested persons have established by a preponderance of evidence that the proposed standard is likely to result in the unavailability of products that are substantially the same as those currently generally available in the United States. (Spire, No. 2710 at p. 23; AGA, No. 2279 at p. 24)

EPCA specifies that the Secretary may not prescribe an amended or new standard under this section if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4)) DOE is publishing its analyses and findings in this direct final rule, including comments from interested parties, that demonstrate that the standards DOE is adopting fulfill this requirement.

DOE notes that it estimates that the adopted standards will affect only 3 percent of gas cooking top shipments, which can be redesigned through technology options that maintain the performance characteristics of currently available models, thus not resulting in the unavailability of products that are substantially the same as those currently available in the United States.

Spire commented that there is no basis to believe any of the gas cooking tops that DOE tested could be modified to meet the standard proposed in the February 2023 SNOPR without sacrificing their HIR burners and the more heavy-duty continuous cast-iron grates that provide the greatest utility for consumers, unless the product has only one HIR burner and relatively light cast-iron grates. (Spire, No. 2710 at pp. 11–14) Spire commented that based on its analysis of DOE's test sample, the presence or absence of HIR burners is the only material determinant of whether products do or do not meet the standard proposed in the February 2023 SNOPR for gas cooking tops. (*Id.*)

Whirlpool added that only a single model tested by DOE that meets the standard proposed in the February 2023 SNOPR offers the key features that consumers expect from their gas cooking tops and ranges (*i.e.,* HIR

[140] In Docket Item 12814, AHAM noted that it represents the following companies who manufacture residential cooking products are members of the AHAM Major Appliance Division: Arcelik A.S.; Beko US, Inc.; Brown Stove Works, Inc.; BSH Home Appliances Corporation; Danby Products, Ltd.; De'Longhi America, Inc.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber S.p.A.; FOTILE America, LLC; GE Appliances, a Haier Company; Gradient, Inc.; Hisense USA Corporation; LG Electronics USA, Inc.; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Corporation of America; Samsung Electronics America Inc.; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; Viking Range, LLC; and Whirlpool Corporation.

burners and continuous cast-iron grates), and that three additional models were screened out of DOE's dataset because they did not offer these key features. (Whirlpool, No. 2284 at pp. 9–10) Whirlpool commented that DOE has not identified a single model of gas cooking product with these common features that is currently on the market and can meet the standard proposed in the February 2023 SNOPR. (*Id.*)

Sub-Zero commented that the Wolf SRT366 model, which is a very typical gas cooking top for the Wolf company, cannot meet the standard proposed in the February 2023 SNOPR. (Sub-Zero, No. 2140 at pp. 8–9) Sub-Zero noted that this product has one burner with a 20,000 Btu/h input rate, two with 18,000 Btu/h, two with 15,000 Btu/h, and one with 9,200 Btu/h. (*Id.*)

IER asserted that DOE has not tested, nor has it disclosed to the public, a single gas cooking top that has HIR burners and continuous cast-iron grates, is available for purchase, and meets the standard proposed in the February 2023 SNOPR. (IER, No. 2274 at pp. 4–5)

IER commented that it disagrees with DOE's assertion that nearly half of the total gas cooking top market currently achieves the proposed EL 2 in the February 2023 SNOPR and August 2023 NODA, based on IER's analysis of the expanded test sample. (IER, No. 10111 at p. 5) IER asserted that only four out of 21 gas cooking tops in DOE's test sample meet updated EL 2, that three out of 30 gas cooking tops in AHAM's test sample meet updated EL 2, and that one out of 6 gas cooking tops in the PG&E test sample meet updated EL 2. (*Id.*) IER commented that DOE's review of websites of major U.S. retailers without test data does not provide sufficient information for DOE's determination of the percentage of cooking tops that would not be impacted by the proposed standard. (*Id.*) IER repeated its comments on the February 2023 SNOPR that there are no gas cooking tops in DOE's test sample currently available on the market that meet the proposed standards. (*Id.*)

ONE Gas commented that DOE's test data are insufficient to justify the standards proposed in the February 2023 SNOPR and updated efficiency levels analyzed in the August 2023 NODA. (ONE Gas, No. 10109 at pp. 2–3) ONE Gas commented that only one of the gas cooking top models tested meets the proposed standard and only two of the gas cooking top models tested meet the updated EL 2. (*Id.*) ONE Gas commented that DOE should use expanded testing prior to issuing an updated proposed standard for gas cooking tops. (*Id.*)

DOE notes that 53 out of 55 non-entry-level gas cooking top units (*i.e.,* with at least one HIR burner and continuous cast-iron grates) in its expanded test sample, including units with all HIR burners, as well as all eight entry-level gas cooking tops (*i.e.,* cooking tops that do not have at least one HIR burner and continuous cast-iron grates) in its expanded test sample meet the adopted standard for gas cooking tops. Additionally, there are gas cooking tops in DOE's expanded test sample that meet the adopted standard level with all features identified by manufacturers and individual commenters as important to consumers.

AGA asserted that the standards proposed in the February 2023 SNOPR would violate the unavailability provision of EPCA through its drastic market elimination of 50 percent of the total gas cooking top market and 96 percent of the market for ''commercial'' or ''professional'' gas cooking tops—particularly those with features most desirable to consumers, such as HIR burners and continuous cast-iron grates. (AGA, No. 2279 at pp. 21–24, 29–30) AGA commented that Congress ensured that: (1) energy conservation standards would not eliminate traits, qualities, or characteristics of products that make them work for consumers or are otherwise attractive to them; (2) energy conservation standards would be neutral as to which fuels that covered products use, protecting the standards from being used to favor one fuel source over another; (3) energy conservation standards would not eliminate a class of covered products or render them unworkable through infeasible or overly costly standards; and (4) DOE may not promulgate standards that are ''likely to result in the unavailability in the United States of any covered product type (or class) of performance characteristics (including reliability) features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States.'' (*Id.*) AGA asserted that the courts will pay particular scrutiny to DOE's interpretation in this case because DOE asserts the authority to eliminate the availability of a class of natural gas appliances with features desired by millions of Americans, which is a major policy decision that the courts will presume rests with Congress. (*Id.*) AGA asserted that performance-related features warrant separate standards, and DOE must not set standards that would be ''likely to result in the unavailability'' of currently available ''performance characteristics,'' which represents a desired policy outcome that fails to adhere to the structure Congress enacted into law. (*Id.*)

AGA also asserted that the February 2023 SNOPR assumptions that the standard presents no problem because it would allow cooking tops to offer at least one HIR burner and continuous cast-iron grates are false. (AGA, No. 2279 at pp. 25–26)

Spire commented that DOE's data do not support the proposition that the standard proposed in the February 2023 SNOPR is achievable for gas cooking tops with the features and performance characteristics that many consumers demand, and that as such, there is no basis for the economic and energy conservation benefits that DOE claims justify the proposed standard. (Spire, No. 2710 at pp. 4–5) Spire asserted that the standard proposed in the February 2023 SNOPR violates DOE's requirement under EPCA to ensure that any proposed standards will not preclude consumers from purchasing the equivalent of products currently available to them on the market. (*Id.* at pp. 19–23)

GAAS asserted that the standard proposed in the February 2023 SNOPR comes with restrictions to consumer choice and that restricted features include, but are not limited to, HIR burners and heavy-duty grates. (GAAS, No. 2271 at p. 2)

NAHB asserted that the standard proposed in the February 2023 SNOPR could eliminate or severely limit several product features in gas cooking tops that are widely available currently and highly valued by consumers, including HIR burners (particularly cooking tops with multiple HIR burners), simmer burners for low-temperature cooking, and heavy cast-iron grates that add safety and durability over the lifespan of the appliance. (NAHB, No. 2288 at p. 2)

Representatives McMorris-Rodgers *et al.* asserted that the design changes DOE expects manufacturers to make—such as smaller burners, longer cooking times, and smaller grates that could be less stable—are not likely to be accepted by consumers. (Representatives McMorris-Rodgers *et al.,* No. 765 at p. 2)

CEI *et al.* asserted that the proposed rule violates the ''features provision'' of EPCA by jeopardizing several features of gas cooking tops that lead many cooks to prefer gas over electric cooking tops. (CEI *et al.,* No. 2287 at pp. 3–4) CEI *et al.* commented that the features provision requires that characteristics presently available in gas cooking tops be preserved in substantially the same form and DOE lacks the discretion to decide whether a particular feature is important enough to warrant protection. (*Id.*) CEI *et al.* commented that HIR

burners (especially those with input rates greater than 20,000 Btu/h) are of particular concern, as this feature is critical for stir-frying, searing, or heating up a large pot of water in a short time, but CEI *et al.* asserted that the proposed rule would limit gas cooking tops to only one such burner (some currently available models have more than one) and require that the maximum heat for the one HIR burner be reduced to considerably less than those now available. (*Id.*) CEI *et al.* commented that the rule would also threaten smaller, low-heat burners ideal for cooking tasks like simmering. (*Id.*) CEI *et al.* commented that heavy and/or continuous (often cast-iron) grates needed to safely handle large pots and to shift them from one gas burner to another—a feature on several currently offered gas cooking top models—may also be in jeopardy. (*Id.*)

Wilfong and Dayaratna commented that the standard proposed in the February 2023 SNOPR could eliminate many gas cooking tops from the market or at least significantly affect competition and degrade consumer choice, which is not permitted under EPCA. (Wilfong and Dayaratna, No. 2281 at pp. 5–6) Wilfong and Dayaratna asserted that consumers value energy safety, convenience, and durability along with energy efficiency when choosing appliances, and if DOE regulates based on one or two characteristics and prioritizes energy efficiency over other factors, the government stifles the free market, hinders innovation, and discourages products that consumers want to buy. (*Id.*)

Strauch commented that manufacturers offer a range of grate and burner design choices to consumers for aesthetic purposes, in addition to utility purposes. (Strauch, No. 2263 at p. 2)

Zycher commented that DOE accounts for neither the reasons why consumers prefer a mix of cooking products nor the benefits that consumers see in various cooking products' cooking quality or convenience. (Zycher, No. 2266 at pp. 3–4) Zycher commented that the proposed rule would reduce or eliminate many products preferred by consumers, and that this is an essential consideration when developing a cost/benefit analysis. (*Id.*) Zycher asserted that consumers would be forced to choose the product characteristics favored by DOE, which suggests that the benefits of consumer choices exceed the costs estimated by DOE. (*Id.*)

AHAM asserted that finalizing standards at the proposed levels for gas products will force a ''race to the middle'' where all products are essentially the same and, contrary to EPCA's requirements and the Process Rule, lack features and functionality currently available in the U.S. market (HIR burners and continuous cast-iron grates). (AHAM, No. 2285 at pp. 15–16) AHAM also asserted that DOE's proposed levels will likely result in homogenized cooking top designs that eliminate more than one HIR burner and the consumer utility associated with multiple HIR burners, eliminate burners with input rates at or above 14,000 Btu/h without adding costs that DOE has not accounted for in its analysis (lengthening boil times), eliminate LIR burners, and offer burner input rates ranging from 9,500–10,000 Btu/h in order to meet the stringent standard. (*Id.* at p. 43) AHAM commented that the products potentially capable of meeting the standard proposed in the February 2023 SNOPR are those that do not include the very features and utility that DOE deemed must be maintained. (*Id.* at pp. 15–16) Thus, asserted AHAM, the February 2023 NODA shows that DOE's proposed standard for gas cooking tops do not meet EPCA's requirements. (*Id.*)

AHAM commented that, contrary to EPCA's requirements, DOE's proposed standard for gas cooking tops will eliminate gas products with performance characteristics, features, and sizes that are substantially the same as those generally available in the United States today. (*Id.* at pp. 16–17) AHAM commented that its consumer research shows that consumers of cooking products rated safety (88 percent), performance (87 percent), and cost (85 percent) as extremely or very important purchase drivers more than energy efficiency (79 percent) and cost to use over time (76 percent). (*Id.*) AHAM commented this analysis demonstrates that, consistent with EPCA's requirements, DOE must ensure that safety, performance, and product price are not negatively impacted by its proposed energy conservation standards. (*Id.*)

AHAM commented that while DOE has acknowledged consumer-valued features for gas cooking tops, it has not produced an exhaustive list of those features. (AHAM, No. 10116 at pp. 15–16) AHAM commented that ranking these features by monetary value could help DOE preserve these features under EPCA. (*Id.*)

AHAM asserted that commenters have provided evidence that the proposed standard is likely to result in the unavailability of features generally available at the time of this rulemaking, including but not limited to safety, performance, and product price; cooking tops with more than one HIR burner; LIR burners; a spectrum of heat input rates; conventional ranges; continuous cast-iron grates; and specialty cooking zones. (*Id.* at pp. 19–21) AHAM commented that much of this information is publicly available from online product reviews. (*Id.*) AHAM commented that HIR burners, LIR burners, and continuous cast-iron grates are likely to be removed under the proposed standards. (*Id.*)

Whirlpool asserted that the proposed rulemaking threatens to diminish the availability, utility, and performance of consumer conventional cooking products, particularly gas cooking tops and gas ranges, which will negatively affect how consumers cook. (Whirlpool, No. 2284 at p. 6) Whirlpool asserted that the proposed and updated EL 2 for gas cooking tops do not preserve key features of products available on the market today, and that DOE is not permitted under EPCA to prescribe energy conservation standards for gas cooking tops as proposed. (Whirlpool, No. 10117 at p. 2)

Whirlpool commented that the standard proposed in the February 2023 SNOPR would effectively require manufacturers of gas cooking tops and gas ranges to replace large (input rates greater than 15,000 Btu/h) and small (input rates of 5,000–6,000 Btu/h) burners with mid-sized (input rates of 9,500–10,000 Btu/h) burners that offer higher optimized tested efficiency under appendix I1. (Whirlpool, No. 2284 at p. 7) Whirlpool asserted that cooking with mid-sized burners will disrupt the cooking process for many types of meals and consumers will likely lose the ability to use their cooking tops for low-temperature cooking. (*Id.*)

ONE Gas commented that with the updated efficiency levels in the August 2023 NODA, at least 59 percent of current gas cooking top models would be eliminated from the market. (ONE Gas, No. 10109 at p. 4) ONE Gas asserted that elimination of gas cooking top models will disproportionately impact certain manufacturers and will reduce product availability and consumer choice. (*Id.*)

DOE notes that its definition of EL 1 for gas cooking tops, as updated in this direct final rule, and consistent with the Recommended TSL, represents the most energy efficient AEC among units with multiple HIR burners and continuous cast-iron grates that would not preclude any combination of other features mentioned by manufacturers (*e.g.,* different nominal unit widths, sealed burners, at least one LIR burner, multiple dual-stacked and/or multi-ring HIR burners, and at least one extra-high input rate burner), as demonstrated by

products from multiple manufacturers in the expanded test sample. As such, DOE notes that any utility associated with these features is preserved under the adopted standards. DOE also determines that the adopted standards would not result in homogenized cooking top designs, because the adopted standards do not preclude any combination of the features mentioned by manufacturers, and a wide range of both entry-level and non-entry-level gas cooking tops meeting the adopted standards from multiple manufacturers already exist on the market.

AGA asserted that the proposed rule would eliminate features from gas cooking tops that permit home cooks and home-based businesses to make certain foods, with impacts on the ability to cook a family meal, a holiday dinner, or food that is part of a home-based business, such as catering. (AGA, No. 2279 at pp. 50–51) AGA also asserted that DOE's proposal would limit cooks to one stir-fry dish or one large pot of boiling water, but not both, and that cooks would no longer be able to shift a heavy pot of hot water or a large pan without lifting it because a continuous cast-iron grate would no longer be an option. (*Id.*) AGA commented that DOE should conduct a full analysis of the impact of the proposed rule on the various communities in the United States whose cooking methods and food preferences would be negatively impacted, and also analyze the impact on home-based businesses. (*Id.*)

APGA commented that despite DOE acknowledging the consumer utility of HIR burners and continuous cast-iron grates, DOE did nothing to protect these features, as required by EPCA. (APGA, No. 2283 at pp. 4–5) APGA commented that DOE proposed to set the standards for gas cooking products at max-tech, which does not allow for more than one HIR burner, if any at all, or the use of heavy cast-iron grates, and no ''professional-style cooking products'' passed DOE's testing. (*Id.*) APGA asserted that because DOE is in violation of EPCA's unavailability provisions, DOE must reissue proposed standards that adequately protect these features in all situations, not just some, whether that be done with the creation of separate product classes or in some other manner. (*Id.*)

Western Energy Alliance commented that home cooks benefit from access to the same features of gas cooking tops enjoyed by professional chefs, which include (1) the ability to control temperature precisely; (2) better distribution of heat for even cooking, which is especially important for complex recipes; (3) efficiency, as it takes about three times as much energy to produce and deliver the electricity to the cooking top compared to gas at the burner tip; (4) instant heat and higher temperatures, resulting in shorter cook times; and (5) the ability to cook during an electricity outage. (Western Energy Alliance, No. 2272 at pp. 2–3) Western Energy Alliance asserted that DOE's proposed rule would risk the future availability of HIR burners on gas cooking tops (and therefore common cooking styles like stir-frying and searing). (*Id.*)

Wilfong and Dayaratna commented that DOE proposed to alter features that the TSD for the February 2023 SNOPR acknowledges that manufacturers and consumers have indicated as enhancing performance and utility, such as HIR burners with large diameters; HIR burners with high levels of flame controllability; spacing between the gas flame, grate, and cookware; and heavy, cast-iron grates. (Wilfong and Dayaratna, No. 2281 at pp. 3–4) Wilfong and Dayaratna that EPCA statutorily requires DOE to consider any lessening of utility or performance, and they asserted that by requiring design alterations such as flame angle, distance from burner to cookware, and grate weight, DOE proposes a standard that runs in direct opposition to this requirement. (*Id.*)

Whirlpool commented that the standard proposed in the February 2023 SNOPR would effectively ban an entire class of high output gas cooking products that have many features and utilities that consumers consider to be important, including the ability to perform low-temperature cooking, as well as having the necessary burner input rates across a number of burners to perform large cooking events. (Whirlpool, No. 2284 at pp. 6–7) Whirlpool asserted that the proposed standard may harm consumers who rely on gas stoves to cook certain cuisines, and that the proposed standard would effectively eliminate aspects of cooking tops that consumers prefer, such as 18,000 Btu/h rapid burners and thick continuous cast-iron grates, both because of flame size efficiency and aesthetic appeal. (*Id.*) Whirlpool commented that this would be inconsistent with EPCA's unavailability provision. (*Id.*)

Sub-Zero asserted that to meet the standard proposed in the February 2023 SNOPR for gas cooking tops, manufacturers would be forced to reduce the burner input rate and the mass of the grates, both of which would diametrically oppose the needs of Sub-Zero's niche market. (Sub-Zero, No. 2140 at p. 4) Sub-Zero requested that DOE reanalyze the market for the entirety of gas cooking tops and most specifically, the ''commercial''- or ''professional''-style market. (*Id.*) Sub-Zero commented that while all of its Wolf-brand electric products (using both radiant and induction technology) meet the proposed standard for electric smooth element cooking tops, no Wolf-brand gas model is close to meeting the proposed standard for gas cooking tops, which Sub-Zero commented is inappropriate from a rulemaking process perspective and a threat to its niche market. (*Id.*)

Sub-Zero shared several confidential data sets with DOE representing what it characterized as its niche consumer needs in high-performance surface cooking, including specifics on HIR burners, which have been reflected in its Wolf-brand products. (Sub-Zero, No. 2140 at p. 6)

Sub-Zero commented it could find no evidence that DOE took into consideration important attributes of high-performance gas cooking tops in its February 2023 SNOPR analysis, such as: mass of grates, diameter of gas burner, distance from burner to utensil surface, and open area for primary and secondary air for combustion and exhaust of combustion by-products. (Sub-Zero, No. 2140 at p. 9)

Sub-Zero asserted that cooking top performance includes much more than speed-to-boil time, and that the high-performance cooking equipment user expects controllability of the flame, specifically in the area of simmer/low heat for foods such as melting of chocolate and simmering of sauces. (Sub-Zero, No. 2140 at pp. 10–11) Sub-Zero commented that dual-stacked burner systems can provide excellent simmer performance while also achieving fast speed-to-boil times, by adding two distinct burner port rings and combustion systems within one unique burner position for high burner input rate along with precise simmer performance from a single burner position. (*Id.*) Sub-Zero commented that this design affects spacing from the flame to the cooking vessel to enhance performance at low input rates and allow precise burner control, both of which are impacted greatly when balancing safety and efficiency standards. (*Id.*)

Sub-Zero asserted that consumers who purchase high-performance cooking tops require special performance enhancements for which they are willing to spend up to ten times more than for a non-high performance cooking top. (Sub-Zero, No. 2140 at p. 11) Sub-Zero acknowledged that a precise definition of ''high-

performance'' may be hard to develop, but stated DOE's obligation under law to acknowledge performance-related features that provide utility to the consumer. (*Id.*)

As discussed, the adopted standards will not preclude designs with multiple HIR burners, continuous cast-iron grates, and any combination of other features mentioned by manufacturers. As such, DOE preserved the utility, including the cooking processes and styles, of existing gas cooking tops. The results for units in DOE's expanded test sample satisfying AHAM's suggested definition of a high-performance gas cooking top demonstrate that such units can meet the adopted standard.

c. High Input Rate Burners

AGA commented that HIR burners are sought by consumers because of their versatility to boil very large amounts of water without long wait times or to allow cookware to reach ideal surface temperatures for cooking normal portions of food while maintaining that temperature despite the initial shock from adding room temperature ingredients into a pan. (AGA, No. 2279 at p. 30)

APGA commented that DOE should screen out products without both multiple HIR burners and cast-iron grates because such products would have adverse impacts on product utility or availability to consumers. (APGA, No. 2283 at p. 5)

ONE Gas asserted that the proposed rule for gas cooking tops would have unrealistic and discriminatory effects on consumer utility. (ONE Gas, No. 2289 at pp. 4–5; ONE Gas, No. 10109 at p. 4) ONE Gas asserted that the proposed total cooking top IAEC maximum would limit cooking performance for searing and stir-frying to just one HIR burner, and asserted that the burner would be limited in providing heat rates that might not meet consumer needs for these cooking functions. (*Id.*) ONE Gas also asserted that DOE's presumption of consumer ''needs'' limited to one such burner is unjustified. (*Id.*)

Spire asserted that multiple HIR burners are a typical feature of the highest-performing and most highly rated gas cooking tops and that no such products in DOE's test sample can meet the standard proposed in the February 2023 SNOPR. (Spire, No. 2710 at pp. 19–23) Spire commented that multiple HIR burners are desired by many consumers for the ability to quickly reach a boil in multiple pots at the same time. (*Id.*)

AHAM stated agreement with DOE that HIR burners must be retained as a key consumer feature. (AHAM, No. 2285 at pp. 3–4) AHAM asserted, however, that DOE's proposed stringent energy conversation standards would allow only a single HIR burner, even though DOE recognizes in the February 2023 SNOPR the ''unique consumer utility'' of this feature that allows high-heat cooking activities such as searing and stir-frying. (*Id.* at pp. 17–19) AHAM commented that research supplied by members show consumers desire the ability to boil water faster using an HIR burner and to have another HIR burner available because they have more than one large pan in use, particularly for serving larger groups of people and special occasion meals. (*Id.*) However, commented AHAM, no cooking top in DOE's or AHAM's sample with more than one HIR burner meets the standard proposed in the February 2023 SNOPR. (*Id.*) DOE's own anticipated design pathways to reach EL 2 for gas cooking tops involves reducing the number of HIR burners. (*Id.*) AHAM commented that, with the possible exception of DOE Test Unit #2 with its single HIR burner, no product in AHAM's or DOE's test sample with even a single HIR burner meets the standard proposed in the February 2023 SNOPR—and asserted that DOE Test Unit #2 likely would not be certified to meet the proposed standard in the future. AHAM commented that DOE must ensure that a final standard does not remove this important performance feature. (*Id.*)

AHAM commented that DOE should consider the utility associated with more than one HIR burner because consumers find utility in being able to mix and match various pan sizes and cooking methods all at the same time. (*Id.* at pp. 19–20) AHAM commented that in order to avoid negatively impacting consumer utility and removing products on the market like those that are available today—which is contrary to EPCA—DOE must ensure that its standards do not require limitations on the number of HIR burners. (*Id.*) AHAM asserted that boiling two pots of water on a unit with only one HIR burner would take 37 percent longer than on a unit with two burners having input rates of 19,000 Btu/h. (*Id.*)

AHAM commented that research shows consumers typically use two or more burners to make dinner and four or more for special occasions and want the ability to cook with a spectrum of heat inputs. (*Id.* at pp. 22–23)

In response to the August 2023 NODA, AHAM asserted that the updated EL 2 for gas cooking tops cannot be achieved by models with all HIR burners, noting that none of the seven units with all HIR burners in the expanded data set meet the proposed or updated EL 2. (AHAM, No. 10116 at pp. 8–9) AHAM commented that it is unclear how DOE identified the updated EL 2 and what gas cooking top with all HIR burners can meet updated EL 2. (*Id.*) AHAM commented that if DOE is basing this claim on a theoretical unit that has the most efficient HIR burners from different units, the methodology fails to take into account system dynamics and interactions between various components. (*Id.*) AHAM commented that DOE should explain and provide data to show that the proposed standard or updated EL 2 can be met by a unit with all HIR burners. (*Id.*) AHAM asserted that applicable units in the expanded test sample that meet EL 2 only have one HIR burner. (*Id.*)

AGA *et al.* commented that they disagree that the updated EL 2 is achievable with multiple HIR burners and continuous cast-iron grates. (AGA *et al.,* No. 10112 at pp. 8–9) AGA *et al.* commented that DOE's data shows that of the 55 tested gas cooking tops with HIR burners and continuous cast-iron grates, only one gas cooking top with multiple HIR burners was able to achieve EL 2 (DOE Test Unit #10). (*Id.*) AGA *et al.* commented that this unit met EL 2 by a margin of 1.25 percent, which they asserted is within the test procedure's margin for error and would preclude any reasonable certification of compliance with a standard based on EL 2. (*Id.*) AGA *et al.* commented that among the other 54 gas cooking tops tested, only eight gas cooking tops can achieve EL 2, and that none of those products have more than one HIR burner. (*Id.*)

AGA *et al.* commented that DOE has not provided evidence that manufacturers will be able to redesign their products to achieve significant improvements in measured efficiency without compromising the features or performance of their products. (*Id.* at pp. 9–10) AGA *et al.* commented that the presence of HIR burners and continuous cast-iron grates appears to be the only material determinant of whether products could satisfy the standard proposed in the February 2023 SNOPR, and that they find the same to be true of the updated EL 2. (*Id.*) AGA *et al.* commented that changes to flame angle and distance from burner ports to cooking surfaces are design options that have the potential to degrade product features or performance without providing real energy savings. (*Id.*) AGA *et al.* commented that DOE has not explained how anticipated efficiency improvements can be achieved through redesigned products. (*Id.*) AGA *et al.*

commented that DOE does not include a description of what constitutes EL 2 as presented in the August 2023 NODA. (*Id.*)

After evaluation of comments and data received in response to the February 2023 SNOPR, DOE evaluated the utility associated with multiple HIR burners and updated its screening analysis and efficiency levels in order to define efficiency levels achievable by gas cooking tops with multiple HIR burners. The adopted standard for gas cooking tops preserves the utility associated with multiple HIR burners.

d. Low Input Rate Burners

AHAM commented that DOE should consider LIR burners in its screening criteria and ensure that its final standards do not eliminate LIR burners, which are ranked amongst the most important cooking top features for consumers. (AHAM, No. 2285 at pp. 20–22) In this context, AHAM defined LIR burners as having an input rate of 6,500 Btu/h or less, based on Consumer Reports, and noted that they are typically designed to gently heat small quantities of liquid and are used by consumers for melting chocolate, cooking sauces, gravies, simmering soups/stews, cooking scrambled eggs, *etc.* and also used to keep food warm. (*Id.*) AHAM commented that LIR burners are smaller in diameter, with 30–40 percent lower minimum input rates than traditional (non-multi-ring) burners, and because the test procedure measures the efficiency of boiling a pot of water, these burners appear less efficient when tested using the appendix I1 test procedure and, therefore, do not meet DOE's proposed level. (*Id.*) AHAM asserted that to comply with the standard proposed in the February 2023 SNOPR, manufacturers may not be able to offer LIR burners, and their removal will have negative performance impacts on consumers and consumer utility. (*Id.*)

AHAM commented that DOE's definition of a LIR burner is inconsistent in the August 2023 NODA. (AHAM, No. 10116 at pp. 7–8) AHAM commented that DOE should clarify the definition of a LIR burner used in its analysis and provide opportunity for comment. (*Id.*) AHAM further commented that DOE has not preserved LIR burners as a product feature. (*Id.*) AHAM asserted that what DOE calls non-optimized burners are actually LIR burners. (*Id.*) AHAM commented that according to its dataset, 73 percent of all burners that meet the definition of non-optimized have input rates less than 6,500 Btu/hr. (*Id.*) AHAM commented that the proposed standard for gas cooking tops would require the removal of LIR burners in order to increase efficiency. (*Id.*) AHAM commented that DOE should not eliminate product features but instead exclude non-optimized burners from the test procedure. (*Id.*) AHAM asserted that optimizing a LIR burner could result in a loss of utility because, while an LIR burner can be optimized to boil water more efficiently by reducing grate weight, bringing the flame closer to the cookware, and pointing the flame more directly at the cookware, these design changes reduce utility of the LIR burner. (*Id.*) AHAM commented that multi-ring burners can preserve the utility of a LIR burner, but that multi-ring technology is significantly more expensive, and that DOE should consider the cost of replacing LIR burners with multi-ring burners for manufacturers. (*Id.*)

DOE considers a LIR burner to have a burner input rate less than 6,500 Btu/h. DOE notes that its adopted standard for gas cooking tops does not preclude the use of LIR burners, as demonstrated by units in its expanded test sample. As discussed in section IV.C.3.b of this document, DOE notes that it considers burners with ''non-optimized'' turndown capability to be burners for which the lowest available simmer setting is more energy consumptive than necessary to hold the test load in a constant simmer close to 90 °C, resulting in significantly higher energy consumption than for a burner with a simmer setting that holds the test load close to that temperature. 88 FR 50810, 50813. DOE empirically defines a non-optimized burner as having a specific energy use of more than 1.45 Btu per gram of water in the test load, as measured by appendix I1. *Id.* As such, DOE clarifies that its definition of a non-optimized burner is separate from the definition of a LIR burner and that its test sample includes LIR burners that are ''optimized,'' as well as ''non-optimized'' burners with input rates above 6,500 Btu/h. DOE additionally notes that the IAEC of a gas cooking top is calculated as the average of the performance of each of the individual burners on the cooking top. DOE notes that the adopted standard for gas cooking tops would not preclude a non-optimized burner if the average performance of all burners on the cooking top achieves the standard, but also notes that optimized turndown capability is a design option available to manufacturers in order to improve the efficiency of a cooking top. DOE further determines that excluding non-optimized burners from the test procedure is not warranted. However, as discussed in section IV.C.3.b of this document, DOE has previously stated that a burner that is not able to heat water to 90 °C would likely be excluded from testing because it would be a specialty cooking zone (*e.g.,* a warming plate or zone). 87 FR 51492, 51505.

e. Cooking Time

Consumers' Research asserted that the standard proposed in the February 2023 SNOPR may require manufacturers to redesign gas cooking tops with reduced burner sizes or heat outputs leading to longer cooking times, which would pose time constraints on consumers' cooking abilities and perhaps incentivize consumers to choose unhealthy pre-packaged food options over home-cooked meals. (Consumers' Research, No. 2267 at pp. 2–3)

AHAM asserted that part of the consumer utility of HIR burners is quicker times to boil and that the standard proposed in the February 2023 SNOPR would eliminate that performance feature and lengthen times to boil. (AHAM, No. 2285 at p. 18) AHAM further noted that its data show that time to boil is directly related to burner input rate, with higher burner input rates generally resulting in shorter times to boil. (*Id.*)

DOE notes that its adopted standard for gas cooking tops does not preclude the use of extra-high input rate burners or multiple HIR burners on a cooking top. DOE therefore determines that cooking time is not impacted by its adopted standards.

f. Continuous Cast-Iron Grates

AHAM asserted that in order to achieve the ''burner and grate optimization'' required by the standard proposed in the February 2023 SNOPR, manufacturers are likely to turn to thinner, wire grates, meaning that consumers will lose the option of sturdier grates that allow pots and pans to be safely moved from one place to another without lifting the pot/pan—a commonly reported activity. (AHAM, No. 2285 at p. 24) AHAM commented that consumer research provided by its members indicates that large, heavy, or specialty pots must be able to be slid from burner to burner without getting caught or causing a spill that must be cleaned up or cause a burn, which is a purchase driver for consumers and translates to consumer satisfaction. (*Id.*)

As discussed, DOE evaluated only efficiency levels in this direct final rule analysis that can be achieved by gas cooking tops with multiple HIR burners and continuous cast-iron grates. Therefore, the adopted standards do not require the use of wire grates.

g. Conventional Ranges

NAHB commented that gas ranges are crucial for affordable housing as they represent the more affordable end of the product spectrum and are often used in starter homes and dwellings with limited kitchen sizes. (NAHB, No. 2288 at p. 2) NAHB asserted that many consumer-preferred ranges will likely be unable to comply with the standard proposed in the February 2023 SNOPR despite being a popular consumer choice and recommended that DOE define separate product classes for gas cooking tops and gas ranges. (*Id.*)

Senators Marshall *et al.* commented that only one cooking top in DOE's test sample, and no freestanding ranges meet the standard for gas cooking tops proposed in the February 2023 SNOPR. (Senators Marshall *et al.,* No. 2277 at p. 1) Senators Marshall *et al.* stated that none of the products that manufacturers tested were able to meet the proposed standard and that the rule poses serious consumer concerns with no consumer benefits. (*Id.*)

AHAM commented that ranges offer the consumer a cooking top and an oven in a single product, taking up less space than a separate cooking top and oven, and ranges are less expensive to install because they do not require customization in the kitchen. (AHAM, No. 2285 at p. 23) However, AHAM noted, no ranges in DOE's or AHAM's sample meet DOE's proposed energy conservation standard for gas cooking tops. (*Id.*) AHAM commented that millions of ranges are sold each year and yet the standard proposed in the February 2023 SNOPR threatens to eliminate them from the market for gas products, as no gas ranges meet the proposed standard. (*Id.*)

AHAM commented that no gas ranges in DOE's or AHAM's test sample meet the standard proposed in the February 2023 SNOPR, asserting that products representing 91 percent of U.S. shipments in 2022 would not meet the proposed standard. (AHAM, No. 2285 at p. 27)

DOE notes that electric and gas ranges can meet the adopted standards, as demonstrated by the units in its expanded test sample.

AHAM commented DOE should understand the safety requirements for gas ranges that impact the ability of ranges to achieve higher levels of efficiency, which include: combustion requirements (also applicable to cooking tops) that require higher grates and make burners less efficient; component temperature thermal and emissions testing for gas and electric ranges that are run with both the cooking top and oven components on; surface temperatures for both electric and gas ranges that affect the proximity of elements/burners to touchpad and knobs, which must be designed to ensure touchable surfaces remain cool for the user; enclosure temperatures that impact grate design, input rates, and burner spacing to ensure fire hazards are avoided; and venting location and impact on secondary air for cooking top burners, because the oven is on during safety testing of freestanding ranges. (AHAM, No. 2285 at pp. 26–27)

The cooking top efficiency levels that DOE analyzed for this direct final rule were based on the measured performance of gas and electric cooking tops available on the market in the United States, and therefore which meet all applicable safety standards. The adopted standards can be achieved by both standalone cooking tops and the cooking top portion of combined cooking products, such as ranges, as demonstrated by units in DOE's expanded test sample.

h. Unit Width

AHAM commented that the size of the unit plays an important role in the design of the cooking top due to its impact on the availability of secondary air. (AHAM, No. 2285 at p. 26) AHAM commented that it believes the only gas cooking top to meet the standard proposed in the February 2023 SNOPR is 36 inches wide, making it easier to pass this test, and that DOE must consider all widths in order to ensure it does not eliminate consumer utility. (*Id.*)

Representatives McMorris-Rodgers *et al.* stated that DOE has not demonstrated that its proposed design changes are possible for products outside the niche market of 36-inch-wide countertop-mounted cooking tops and noted that EPCA prohibits DOE from using standards to eliminate products with features that are substantially the same as those available on the market today. (Representatives McMorris-Rodgers *et al.,* No. 765 at p. 2, citing 42 U.S.C. 6295(o)(4))

BSH Home Appliances Corporation (''BSH'') commented that it supports the inclusion of additional consumer-valued features in the August 2023 NODA efficiency levels. (BSH, No. 10110 at p. 2) BSH commented that while DOE finds that units with two to six HIR burners can achieve the updated EL 1 and that a gas cooking top with all HIR burners can achieve the updated EL 2, the data set does not account for any range greater than 36 inches in width. (*Id.*)

DOE notes that the adopted standards for gas and electric cooking tops do not preclude units of varying width and installation configuration from meeting the standard, as demonstrated by units in its expanded test sample. Specifically, since the IAEC metric is an average measurement across all cooking zones on a cooking top, the number of cooking zones (and by proxy, the unit width) has no bearing on a unit's ability to meet the adopted standard levels.

i. Conclusion

DOE has concluded that the standards adopted in this direct final rule will not lessen the utility or performance of the consumer conventional cooking products under consideration in this rulemaking. Manufacturers of these products currently offer units that meet or exceed the adopted standards.

5. Impact of Any Lessening of Competition

DOE considered any lessening of competition that would be likely to result from new or amended standards. As discussed in section III.E.1.e of this document, EPCA directs the Attorney General of the United States (''Attorney General'') to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination in writing to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. To assist the Attorney General in making this determination, DOE is providing the Department of Justice (''DOJ'') with copies of this direct final rule and the TSD for review.

Overall, DOE does not anticipate that energy conservation standards set at the Recommended TSL, *i.e.,* TSL 1, would significantly alter the current market structure that consumer conventional cooking products are currently sold.

DOE does not expect this direct final rule to increase the concentration in an already concentrated market. 88 FR 6818, 6887. DOE understands that barriers to entry or expansion associated with manufacturing and selling cooking products is high particularly in the mass-market segment. The cost of developing brand recognition; achieving manufacturing scale to lower production costs; and developing a distribution network, are all significant challenges. The industry has responded by segmenting the market into more focused markets that allow differentiation and competition on factors other than price. For the reasons described in this section, the proposed

rule likely would not alter the competitive balance or market structure of the consumer conventional cooking product industry.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. Chapter 15 in the direct final rule TSD presents the estimated impacts on electricity generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this rulemaking.

In response to the February 2023 SNOPR, Fall commented that the impact of performance standards on energy security should be considered, particularly with respect to the need for diversification of energy sources to provide increased energy security. (Fall, No. 376 at pp. 1–2) Fall commented that performance standards should be technologically feasible while allowing a range of products utilizing an array of possible energy source. (*Id.* at p. 2)

As discussed in section V.C of this document, the Secretary has concluded that the standards adopted in this direct final rule represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in significant conservation of energy. As discussed in section V.B.4 of this document, consumers will continue to have access to cooking products with the same performance features across both electric and gas fuel types at the adopted TSL (the Recommended TSL detailed in the Joint Agreement).

Energy conservation resulting from potential energy conservation standards for consumer conventional cooking products is expected to yield environmental benefits in the form of reduced emissions of certain air pollutants and greenhouse gases. Table V.34 provides DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this rulemaking. The emissions were calculated using the multipliers discussed in section IV.K of this document. DOE reports annual emissions reductions for each TSL in chapter 13 of the direct final rule TSD.

Table V.34 Cumulative Emissions Reduction for Consumer Conventional Cooking Products; 30 Years of Shipments*

	Trial Standard Level		
	1	2	3
Electric Power Sector and Site Emissions			
CO_2 (*million metric tons*)	3.61	18.80	32.90
CH_4 (*thousand tons*)	0.25	0.73	1.77
N_2O (*thousand tons*)	0.04	0.09	0.24
SO_2 (*thousand tons*)	1.13	2.21	6.83
NO_X (*thousand tons*)	1.75	13.82	20.46
Hg (*tons*)	0.01	0.01	0.05
Upstream Emissions			
CO_2 (*million metric tons*)	0.38	2.37	3.79
CH_4 (*thousand tons*)	34.45	234.68	364.45
N_2O (*thousand tons*)	0.00	0.01	0.01
SO_2 (*thousand tons*)	0.02	0.05	0.13
NO_X (*thousand tons*)	5.87	37.32	59.57
Hg (*tons*)	0.00	0.00	0.00
Total FFC Emissions			
CO_2 (*million metric tons*)	3.99	21.16	36.69
CH_4 (*thousand tons*)	34.70	235.42	366.22
N_2O (*thousand tons*)	0.04	0.10	0.25
SO_2 (*thousand tons*)	1.15	2.26	6.96
NO_X (*thousand tons*)	7.61	51.14	80.03
Hg (*tons*)	0.01	0.01	0.05

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

As part of the analysis for this rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 that DOE estimated for each of the considered TSLs for consumer conventional cooking products. Section IV.L of this document discusses the estimated SC–CO_2 values that DOE used. Table V.35 presents the value of CO_2 emissions reduction at each TSL for each of the SC–CO_2 cases. The time-series of annual values is presented for

the selected TSL in chapter 14 of the direct final rule TSD.

Table V.35 Present Value of CO_2 Emissions Reduction for Consumer Conventional Cooking Products; 30 Years of Shipments*

TSL	SC-CO_2 Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	billion 2022$			
1	0.04	0.17	0.27	0.52
2	0.22	0.94	1.47	2.85
3	0.39	1.64	2.55	4.96

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

As discussed in section IV.L.2 of this document, DOE estimated the climate benefits likely to result from the reduced emissions of methane and N_2O that DOE estimated for each of the considered TSLs for consumer conventional cooking products. Table V.36 presents the value of the CH_4 emissions reduction at each TSL, and Table V.37 presents the value of the N_2O emissions reduction at each TSL. The time-series of annual values is presented for the selected TSL in chapter 14 of the direct final rule TSD.

Table V.36 Present Value of Methane Emissions Reduction for Consumer Conventional Cooking Products; 30 Years of Shipments*

TSL	SC-CH_4 Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	billion 2022$			
1	0.02	0.05	0.07	0.13
2	0.11	0.34	0.47	0.89
3	0.18	0.52	0.73	1.39

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

Table V.37 Present Value of Nitrous Oxide Emissions Reduction for Consumer Conventional Cooking Products; 30 Years of Shipments*

TSL	SC-N_2O Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	billion 2022$			
1	0.000	0.001	0.001	0.002
2	0.000	0.002	0.002	0.004
3	0.001	0.004	0.006	0.011

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the global and U.S. economy continues to evolve rapidly. DOE, together with other Federal agencies, will continue to review methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. DOE notes, however, that the adopted standards would be economically justified even without inclusion of monetized benefits of reduced GHG emissions.

DOE also estimated the monetary value of the economic benefits associated with NO_X and SO_2 emissions reductions anticipated to result from the considered TSLs for consumer conventional cooking products. The dollar-per-ton values that DOE used are discussed in section IV.L of this

document. Table V.38 presents the present value for NO_X emissions reduction for each TSL calculated using 7-percent and 3-percent discount rates, and Table V.39 presents similar results for SO_2 emissions reductions. The results in these tables reflect application of EPA's low dollar-per-ton values, which DOE used to be conservative. The time-series of annual values is presented for the selected TSL in chapter 14 of the direct final rule TSD.

Table V.38 Present Value of NO_X Emissions Reduction for Consumer Conventional Cooking Products; 30 Years of Shipments*

TSL	7% Discount Rate	3% Discount Rate
	million 2022$	
1	134.2	347.0
2	805.2	1,999.2
3	1,367.8	3,387.9

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

Table V.39 Present Value of SO_2 Emissions Reduction for Consumer Conventional Cooking Products; 30 Years of Shipments*

TSL	7% Discount Rate	3% Discount Rate
	million 2022$	
1	29.2	74.6
2	60.6	148.6
3	191.2	465.6

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1

Not all the public health and environmental benefits from the reduction of greenhouse gases, NO_X, and SO_2 are captured in the values above, and additional unquantified benefits from the reductions of those pollutants as well as from the reduction of direct PM and other co-pollutants may be significant. DOE has not included monetary benefits of the reduction of Hg emissions because the amount of reduction is very small.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) No other factors were considered in this analysis.

8. Summary of Economic Impacts

Table V.40 presents the NPV values that result from adding the estimates of the economic benefits resulting from reduced GHG and NO_X and SO_2 emissions to the NPV of consumer benefits calculated for each TSL considered in this rulemaking. The consumer benefits are domestic U.S. monetary savings that occur as a result of purchasing the covered products and are measured for the lifetime of products shipped during the period 2027–2056 for all TSLs except TSL 1 (the Recommended TSL) and 2028–2057 for TSL 1. The climate benefits associated with reduced GHG emissions resulting from the adopted standards are global benefits and are also calculated based on the lifetime of consumer conventional cooking products shipped during the period 2027–2056 for all TSLs except TSL 1 (the Recommended TSL) and 2028–2057 for TSL 1.

Table V.40 Consumer NPV Combined with Present Value of Climate Benefits and Health Benefits; 30 Years of Shipments*

Category	TSL 1	TSL 2	TSL 3**
Using 3% discount rate for Consumer NPV and Health Benefits (billion 2022$)			
5% Average SC-GHG case	2.0	2.8	(39.5)
3% Average SC-GHG case	2.2	3.8	(37.9)
2.5% Average SC-GHG case	2.3	4.4	(36.7)
3% 95th percentile SC-GHG case	2.6	6.2	(33.7)
Using 7% discount rate for Consumer NPV and Health Benefits (billion 2022$)			
5% Average SC-GHG case	0.9	0.8	(24.2)
3% Average SC-GHG case	1.0	1.7	(22.6)
2.5% Average SC-GHG case	1.2	2.4	(21.5)
3% 95th percentile SC-GHG case	1.5	4.2	(18.4)

*2027–2056 for all TSLs except TSL 1 (the Recommended TSL); 2028–2057 for TSL 1
**Negative values denoted in parentheses.

C. Conclusion

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

For this direct final rule, DOE considered the impacts of new and amended standards for consumer conventional cooking products at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers). Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings.

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forgo the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the MIA. Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 9 of the direct final rule TSD. However, DOE's current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[141]

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards, and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[142] DOE welcomes comments on how to

[141] P.C. Reiss and M.W. White. Household Electricity Demand, Revisited. *Review of Economic Studies.* 2005. 72(3): pp. 853–883. doi: *10.1111/0034–6527.00354.*

[142] Sanstad, A. H. *Notes on the Economics of Household Energy Consumption and Technology Choice.* 2010. Lawrence Berkeley National Laboratory. *www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf* (last accessed November 2, 2023).

more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

1. Benefits and Burdens of TSLs Considered for Consumer Conventional Cooking Product Standards

Table V.41 and Table V.42 summarize the quantitative impacts estimated for each TSL for consumer conventional cooking products. The national impacts are measured over the lifetime of consumer conventional cooking products purchased in the 30-year period that begins in the anticipated year of compliance with the new and amended standards (2027–2056 for all TSLs except TSL 1, the Recommended TSL; 2028–2057 for TSL 1). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. DOE is presenting monetized benefits of GHG emissions reductions in accordance with the applicable Executive Orders and would reach the same conclusion presented in this notice in the absence of the social cost of greenhouse gases, including the Interim Estimates presented by the Interagency Working Group. The efficiency levels contained in each TSL are described in section V.A of this document.

Table V.41 Summary of Analytical Results for Consumer Conventional Cooking Products TSLs: National Impacts

Category	TSL 1	TSL 2	TSL 3
Cumulative FFC National Energy Savings			
Quads	0.22	0.66	1.52
Cumulative FFC Emissions Reduction			
CO_2 (*million metric tons*)	3.99	21.16	36.69
CH_4 (*thousand tons*)	34.70	235.42	366.22
N_2O (*thousand tons*)	0.04	0.10	0.25
SO_2 (*thousand tons*)	1.15	2.26	6.96
NO_X (*thousand tons*)	7.61	51.14	80.03
Hg (*tons*)	0.01	0.01	0.05
Present Value of Benefits and Costs (*3% discount rate, billion 2022$*)			
Consumer Operating Cost Savings	1.63	4.30	3.97
Climate Benefits*	0.22	1.28	2.16
Health Benefits**	0.42	2.15	3.85
Total Benefits†	2.27	7.73	9.99
Consumer Incremental Product Costs‡	0.07	3.96	47.86
Consumer Net Benefits	1.56	0.34	(43.89)
Total Net Benefits	2.20	3.77	(37.87)
Present Value of Benefits and Costs (*7% discount rate, billion 2022$*)			
Consumer Operating Cost Savings	0.69	1.90	0.86
Climate Benefits*	0.22	1.28	2.16
Health Benefits**	0.16	0.87	1.56
Total Benefits†	1.07	4.04	4.58
Consumer Incremental Product Costs‡	0.04	2.30	27.21
Consumer Net Benefits	0.65	(0.40)	(26.34)
Total Net Benefits	1.03	1.74	(22.62)

Note: This table presents the costs and benefits associated with consumer conventional cooking products shipped during the period 2027−2056 for all TSLs except for TSL 1 (the Recommended TSL) and 2028–2057 for TSL 1. These results include benefits to consumers which accrue after 2056 from the products shipped during the period 2027−2056 for all TSLs except TSL 1 and 2057 from the products shipped during the period 2028–2057 for TSL 1.

* Climate benefits are calculated using four different estimates of the SC-CO_2, SC-CH_4 and SC-N_2O. Together, these represent the global SC-GHG. For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown, but DOE does not have a single central SC-GHG point estimate. To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for NO_X and SO_2) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. *See* section IV.L of this document for more details.

† Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate, but DOE does not have a single central SC-GHG point estimate. DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates.

‡ Costs include incremental equipment costs as well as installation costs.

Table V.42 Summary of Analytical Results for Consumer Conventional Cooking Products TSLs: Manufacturer and Consumer Impacts*

Category	TSL 1	TSL 2	TSL 3
Manufacturer Impacts			
Industry NPV (million 2022$) (No-new-standards case INPV = 1,601)	1,457–1,458	1,042–1,078	(302)–(25)
Industry NPV (% change)	(9.0)–(9.0)	(34.9)–(32.6)	(118.9)–(101.6)
Consumer Average LCC Savings (2022$)			
Electric Smooth Element Standalone Cooking Tops	62.80	8.54	(638.87)
Electric Smooth Element Cooking Top as a Component of a Combined Cooking Product	62.80	8.54	(638.87)
Gas Standalone Cooking Tops	3.09	(1.03)	(1.03)
Gas Cooking Top as a Component of a Combined Cooking Product	3.09	(1.03)	(1.03)
Electric Ovens	16.23	(39.55)	(24.87)
Gas Ovens	15.17	(24.16)	(24.16)
Shipment-Weighted Average**	23.34	(17.72)	(153.51)
Consumer Simple PBP (years)			
Electric Smooth Element Standalone Cooking Tops	0.6	4.0	170.4
Electric Smooth Element Cooking Top as a Component of a Combined Cooking Product	0.6	4.0	170.4
Gas Standalone Cooking Tops	6.6	10.5	10.5
Gas Cooking Top as a Component of a Combined Cooking Product	6.6	10.5	10.5
Electric Ovens	2.1	25.4	20.8
Gas Ovens	1.9	18.0	18.0
Shipment-Weighted Average**	2.7	16.1	50.7
Percent of Consumers that Experience a Net Cost			
Electric Smooth Element Standalone Cooking Tops	0%	52%	100%
Electric Smooth Element Cooking Top as a Component of a Combined Cooking Product	0%	52%	100%
Gas Standalone Cooking Tops	1%	38%	38%
Gas Cooking Top as a Component of a Combined Cooking Product	1%	38%	38%
Electric Ovens	0%	27%	81%
Gas Ovens	0%	21%	21%
Shipment-Weighted Average**	0%	34%	64%

Parentheses indicate negative (-) values.

* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.

** Weighted by shares of each product class in total projected shipments in 2022.

DOE first considered TSL 3, which represents the max-tech efficiency levels. TSL 3 would save an estimated 1.52 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would decrease compared to the no-new-standards case by $26.34 billion using a discount rate of 7 percent, and $43.89 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 36.69 Mt of CO_2, 6.96 thousand tons of SO_2, 80.03 thousand tons of NO_X, 0.05 tons of Hg, 366.22 thousand tons of CH_4, and 0.25 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 3 is $2.2 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 3 is $1.6 billion using a 7-percent discount rate and $3.9 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 3 is $22.6 billion less than the no-new-standards case. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 3 is $37.9 billion less than the no-

new-standards case. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At TSL 3, the average LCC impact is a loss of $638.87 for electric smooth element cooking top product classes, a loss $1.03 for gas cooking top product classes, a shipments-weighted average loss of $24.87 for electric ovens, and a shipment-weighted average loss of $24.16 for gas ovens. The simple payback period is 170.5 years for electric smooth element cooking top product classes, 10.5 years for gas cooking top product classes, 20.8 years for electric ovens, and 18.0 years for gas ovens. The fraction of consumers experiencing a net LCC cost is 100 percent for electric smooth element cooking top product classes, 38 percent for gas cooking top product classes, 81 percent for electric ovens, and 21 percent for gas ovens.

At TSL 3, the projected change in INPV ranges from a decrease of $1,903 million to a decrease of $1,626 million, which corresponds to decreases of 118.9 percent and 101.6 percent, respectively. DOE estimates that industry must invest $2,069.2 million to comply with standards set at TSL 3. DOE estimates that less than 1 percent of electric smooth element cooking top (standalone and component of a combined cooking product) shipments, 41 percent of gas cooking top (standalone and component of a combined cooking product) shipments, zero percent of electric standard oven (freestanding and built-in) shipments, zero percent of electric self-clean oven (freestanding) shipments, 2 percent of electric self-clean oven (built-in) shipments, 62 percent of gas standard oven (freestanding) shipments, 38 percent of gas standard oven (built-in) shipments, 93 percent of gas self-clean oven (freestanding) shipments, and 77 percent of gas self-clean oven (built-in) shipments would already meet the efficiency levels required at TSL 3 in 2027.

The Secretary concludes that at TSL 3 for consumer conventional cooking products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on many consumers (*e.g.,* negative LCC savings across all product classes), and the significant impacts on manufacturers, including the large conversion costs and the significant reduction in INPV. A significant fraction of consumers across all product classes would experience a net LCC cost and negative LCC savings. The consumer NPV is negative at both 3 and 7 percent. The potential reduction in INPV could be as high as 118.9 percent. Consequently, the Secretary has concluded that TSL 3 is not economically justified.

DOE next considered TSL 2, which represents EL 2 for all product classes. TSL 2 would save an estimated 0.66 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would decrease compared to the no-new-standards case by $0.40 billion using a discount rate of 7 percent, and increase compared to the no-new-standards case by $0.34 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 21.16 Mt of CO_2, 2.26 thousand tons of SO_2, 51.14 thousand tons of NO_X, 0.01 tons of Hg, 235.42 thousand tons of CH_4, and 0.10 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 2 is $1.3 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 2 is $0.9 billion using a 7-percent discount rate and $2.1 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 2 is $1.7 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 2 is $3.8 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At TSL 2, the average LCC impact is a savings of $8.54 for electric smooth element cooking top product classes, a loss of $1.03 for gas cooking top product classes, a shipments-weighted average loss of $39.55 for electric ovens, and a shipment-weighted average loss of $24.16 for gas ovens. The simple payback period is 4.0 years for electric smooth element cooking top product classes, 10.5 years for gas cooking top product classes, 25.4 years for electric ovens, and 18.0 years for gas ovens. The fraction of consumers experiencing a net LCC cost is 52 percent for electric smooth element cooking top product classes, 38 percent for gas cooking top product classes, 27 percent for electric ovens, and 21 percent for gas ovens.

At TSL 2, the projected change in INPV ranges from a decrease of $559 million to a decrease of $522 million, which corresponds to decreases of 34.9 percent and 32.6 percent, respectively. DOE estimates that industry must invest $576.5 million to comply with standards set at TSL 2. DOE estimates that approximately 15 percent of electric smooth element cooking top (standalone and component of a combined cooking product) shipments, 41 percent of gas cooking top (standalone and component of a combined cooking product) shipments, 38 percent of electric standard oven (freestanding) shipments, 30 percent of electric standard oven (built-in) shipments, 77 percent of electric self-clean oven (freestanding) shipments, 88 percent of electric self-clean ovens (built-in) shipments, 62 percent of gas standard oven (freestanding) shipments, 38 percent of gas standard oven (built-in), 93 percent of gas self-clean oven (freestanding) shipments, and 77 percent of gas self-clean oven (built-in) shipments would already meet or exceed the efficiency levels required at TSL 2 in 2027.

The Secretary concludes that at TSL 2 for consumer conventional cooking products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on many consumers, and the significant impacts on manufacturers, including the large conversion costs and the significant reduction in INPV. At TSL 2, consumers, on average, would experience a negative LCC savings for gas cooking tops, electric ovens, and gas ovens. For electric cooking tops, 52 percent of consumers would experience a net cost. At TSL 2, the simple payback period for electric and gas ovens would exceed the average product lifetime. Additionally, the consumer NPV is negative at 7 percent. The potential reduction in INPV could be as high as 34.9 percent. Consequently, the Secretary has concluded that TSL 2 is not economically justified.

DOE next considered the Recommended TSL, which represents EL 1 for all product classes. The Recommended TSL would save an estimated 0.22 quads of energy, an amount DOE considers significant. Under the Recommended TSL, the NPV of consumer benefit would be $0.65 billion using a discount rate of 7 percent, and $1.56 billion using a discount rate of 3 percent.

The cumulative emissions reductions at the Recommended TSL are 3.99 Mt of CO_2, 1.15 thousand tons of SO_2, 7.61 thousand tons of NO_X, 0.01 tons of Hg, 34.70 thousand tons of CH_4, and 0.04 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at the Recommended TSL is $0.22 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at the Recommended TSL is $0.16 billion using a 7-percent discount rate and $0.42 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at the Recommended TSL is $1.03 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at the Recommended TSL is $2.20 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At the Recommended TSL, the average LCC impact is a savings of $62.80 for electric smooth element cooking top product classes, a savings of $3.09 for gas cooking top product classes, a shipments-weighted average savings of $16.23 for electric ovens, and a shipment-weighted average savings of $15.17 for gas ovens. The simple payback period is 0.6 years for electric smooth element cooking top product classes, 6.6 years for gas cooking top product classes, 2.1 years for electric ovens, and 1.9 years for gas ovens. The fraction of consumers experiencing a net LCC cost is 0 percent for electric smooth element cooking top product classes, 1 percent for gas cooking top product classes, 0 percent for electric ovens, and 0 percent for gas ovens.

At the Recommended TSL, the projected change in INPV ranges from a decrease of $144 million to a decrease of $143 million, which corresponds to decreases of 9.0 percent and 9.0 percent, respectively. DOE estimates that industry must invest $66.7 million to comply with standards set at the Recommended TSL. DOE estimates that approximately 77 percent of electric smooth element cooking top (standalone and component of a combined cooking product) shipments, 97 percent of gas cooking top (standalone and component of a combined cooking product) shipments, 95 percent of electric standard oven (freestanding and built-in) shipments, 95 percent of electric self-clean oven (freestanding and built-in) shipments, 96 percent of gas standard oven (freestanding and built-in) shipments, and 96 percent of gas self-clean oven (freestanding and built-in) shipments would already meet or exceed the efficiency levels required at the Recommended TSL in 2028.

For all TSLs considered in this direct final rule—except for the Recommended TSL—DOE is bound by the 3-year lead time requirements in EPCA when determining compliance dates (*i.e.,* compliance with new and amended standards required in 2027). For the Recommended TSL, DOE's analysis utilized the January 31, 2028, compliance date specified in the Joint Agreement as it was an integral part of the multi-product joint recommendation. A 2028 compliance year provides manufacturers additional flexibility to spread capital requirements, engineering resources, and conversion activities over a longer period of time depending on the individual needs of each manufacturer. Furthermore, these delayed compliance dates provide additional lead time and certainty for supplier of components that improve efficiency.

After considering the analysis and weighing the benefits and burdens, the Secretary has concluded that at a standard set at the Recommended TSL for consumer conventional cooking products would be economically justified. At this TSL, the average LCC savings for all consumer conventional cooking product consumers is positive. A shipment-weighted 0 percent of conventional cooking product consumers experience a net cost, with the largest impact being 1 percent net cost for gas cooking top product classes. The FFC national energy savings are significant and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate. Notably, the benefits to consumers vastly outweigh the cost to manufacturers. At the Recommended TSL, the NPV of consumer benefits, even measured at the more conservative discount rate of 7 percent is over 4 times higher than the maximum estimated manufacturers' loss in INPV. The standard levels at the Recommended TSL are economically justified even without weighing the estimated monetary value of emissions reductions. When those emissions reductions are included—representing $0.22 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $0.42 billion (using a 3-percent discount rate) or $0.16 billion (using a 7-percent discount rate) in health benefits—the rationale becomes stronger still.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. The walk-down is not a comparative analysis, as a comparative analysis would result in the maximization of net benefits instead of energy savings that are technologically feasible and economically justified, which would be contrary to the statute. 86 FR 70892, 70908. Although DOE has not conducted a comparative analysis to select the new and amended energy conservation standards, DOE notes that the Recommended TSL has higher average LCC savings, a shorter average payback period, a lower fraction of consumers experiencing a net LCC cost, and higher consumer net present values compared to TSL 2 and 3.

Although DOE considered new and amended standard levels for consumer conventional cooking products by grouping the efficiency levels for each product class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis. For electric smooth element cooking top product classes, the Recommended TSL corresponds to EL 1, which incorporates low-standby-loss electronic controls. Setting a standard at EL 2 or EL 3 would result in a majority of consumers experiencing a net LCC cost and longer payback periods relative to EL 1. For gas cooking top product classes, the Recommended TSL corresponds to EL 1, which represents the efficiency level defined in the Joint Agreement and which would not preclude any combination of other features mentioned by manufacturers (*e.g.,* multiple HIR burners, continuous cast-iron grates, different nominal unit widths, sealed burners, at least one LIR burner, multiple dual-stacked and/or multi-ring HIR burners, and at least one extra-high input rate burner), as demonstrated by products from multiple manufacturers in the expanded test sample. Setting a standard at EL 2 would result in an average net LCC cost and a higher payback period relative to EL 1. For electric and gas ovens, the Recommended TSL corresponds to EL 1, which incorporates switch mode power supplies. A standard at EL 2 or EL 3 for electric ovens would result in a significantly higher percentage of consumers experiencing a net LCC cost and longer payback periods relative to EL 1. Similarly, for gas ovens, a standard at EL 2 would result in a larger

percentage of consumers experiencing a net LCC cost and longer payback periods relative to EL 1. The adopted levels at the Recommended TSL result in positive LCC savings for all product classes and a lower percentage of consumers experiencing a net cost to the point where DOE has concluded that they are economically justified, as discussed for the Recommended TSL in the preceding paragraphs.

Accordingly, the Secretary concludes that the Recommended TSL would offer the maximum improvement in efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy.

Therefore, based on the previous considerations, DOE adopts the energy conservation standards for consumer conventional cooking products at the Recommended TSL.

While DOE considered each potential TSL under the criteria laid out in 42 U.S.C. 6295(o) as previously discussed, DOE notes that the Recommended TSL for consumer conventional cooking products adopted in this direct final rule is part of a multi-product Joint Agreement covering six rulemakings (consumer conventional cooking products; residential clothes washers; consumer clothes dryers; dishwashers; refrigerators, refrigerator-freezers, and freezers; and miscellaneous refrigeration products). The signatories indicate that the Joint Agreement for the six rulemakings should be considered as a joint statement of recommended standards, to be adopted in its entirety. As discussed in section V.B.2.e of this document, many consumer conventional cooking product manufacturers also manufacture dishwashers; refrigerators, refrigerator-freezers, and freezers; residential clothes washers; consumer clothes dryers; and miscellaneous refrigeration products. Therefore, there are potential integrated benefits to the Joint Agreement. Rather than requiring compliance with five new and amended standards in a single year (2027),[143] the negotiated multi-product Joint Agreement staggers the compliance dates for the five amended standards over a 4-year period (2027–2030). In response to the February 2023 SNOPR, AHAM expressed concerns about the timing of ongoing home appliance rulemakings. Specifically, AHAM commented that DOE to abide by Process Rule requirements and take action to fully review the cumulative impacts its rules will have on manufacturers and consumers, with this review including examination of the potential impact on the economy and inflation as a result of the unprecedented stringency and close compliance dates of DOE's recently proposed standards. (AHAM, No. 2285 at pp. 44–47) AHAM commented that DOE's proposed levels for consumer clothes dryers, residential clothes washers, consumer conventional cooking products, refrigerators, refrigerator-freezers, freezers, and its final rule for room air conditioners will require significant redesign of products—and in the case of gas cooking tops and top-load residential clothes washers, the complete redesign of entire product lines. (*Id.*) AHAM repeated its request that DOE acknowledge this cumulative regulatory burden and take action, such as spacing out its final rules, allowing more lead-time by issuing final rules well before publishing them in the **Federal Register**, and reducing the stringency of standards such that fewer percentages of products would require complete re-design. (*Id.*) AHAM has submitted similar comments to other ongoing home appliance rulemakings. As AHAM is a key signatory of the Joint Agreement, DOE understands that the compliance dates recommended in the Joint Agreement would help reduce cumulative regulatory burden. These compliance dates help relieve concern on the part of some manufacturers about their ability to allocate sufficient resources to comply with multiple concurrent new and amended standards. The Joint Agreement also provides additional years of regulatory certainty for manufacturers and their suppliers.

The new and amended energy conservation standards for consumer conventional cooking products are shown in Table V.43 and Table V.44.

Table V.43 New and Amended Energy Conservation Standards for Conventional Cooking Tops

Product Class	Maximum integrated annual energy consumption (IAEC)
Electric Open (Coil) Element Cooking Tops	No standard
Electric Smooth Element Standalone Cooking Tops	207 *kWh/year*
Electric Smooth Element Cooking Top Component of a Combined Cooking Product	207 *kWh/year*
Gas Standalone Cooking Tops	1,770 *kBtu/year*
Gas Cooking Top Component of a Combined Cooking Product	1,770 *kBtu/year*

[143] The analyses for residential clothes washers (88 FR 13520); consumer clothes dryers (87 FR 51734); consumer conventional cooking products (88 FR 6818); dishwashers (88 FR 32514); and refrigerators, refrigerator-freezers, and freezers (88 FR 12452) utilized a 2027 compliance year for analysis at the proposed rule stage. Miscellaneous refrigeration products (88 FR 12452) utilized a 2029 compliance year for the NOPR analysis.

Table V.44 New and Amended Prescriptive Energy Conservation Standards for Conventional Ovens

Product Class	New and Amended Standards
Electric Ovens	Shall not be equipped with a control system that uses linear power supply.*
Gas Ovens	The control system for gas ovens shall: (1) Not be equipped with a constant burning pilot light; and (2) Not be equipped with a linear power supply.

The Secretary also concludes that an amended standard is not technologically feasible and economically justified for electric open (coil) element cooking tops. Therefore, DOE is not adopting any energy conservation standards for electric open (coil) element cooking tops.

2. Annualized Benefits and Costs of the Adopted Standards

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2022$) of the benefits from operating products that meet the adopted standards (consisting primarily of operating cost savings from using less energy), minus increases in product purchase costs, and (2) the annualized monetary value of the climate and health benefits.

Table V.45 shows the annualized values for consumer conventional cooking products under the Recommended TSL, expressed in 2022$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reductions, and the 3-percent discount rate case for GHG social costs, the estimated cost of the adopted standards for consumer conventional cooking products is $3.9 million per year in increased equipment installed costs, while the estimated annual benefits are $68.1 million from reduced equipment operating costs, $12.4 million in GHG reductions, and $16.1 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $92.6 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the adopted standards for consumer conventional cooking products is $4.0 million per year in increased equipment costs, while the estimated annual benefits are $90.8 million in reduced operating costs, $12.4 million from GHG reductions, and $23.5 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $122.7 million per year.

Table V.45 Annualized Benefits and Costs of Adopted Standards (Recommended TSL) for Consumer Conventional Cooking Products

	Million 2022$/year		
	Primary Estimate	Low-Net-Benefits Estimate	High-Net-Benefits Estimate
3% discount rate			
Consumer Operating Cost Savings	90.8	84.0	95.6
Climate Benefits*	12.4	11.9	12.5
Health Benefits**	23.5	22.6	23.8
Total Benefits†	126.7	118.4	131.9
Consumer Incremental Product Costs‡	4.0	4.1	3.8
Net Benefits	122.7	114.3	128.1
Change in Producer Cash Flow (INPV‡‡)	(13.8)	(13.8)	(13.8)
7% discount rate			
Consumer Operating Cost Savings	68.1	63.3	71.5
Climate Benefits* (3% discount rate)	12.4	11.9	12.5
Health Benefits**	16.1	15.5	16.3
Total Benefits†	96.6	90.7	100.3
Consumer Incremental Product Costs‡	3.9	4.0	3.8
Net Benefits	92.6	86.7	96.5
Change in Producer Cash Flow (INPV‡‡)	(13.8)	(13.8)	(13.8)

Note: This table presents the costs and benefits associated with consumer conventional cooking products shipped in 2028–2057. These results include consumer, climate, and health benefits that accrue after 2057 from the products shipped in 2028−2057. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low Net Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in sections IV.F.1 and IV.H.2 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC-GHG (see section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown, but DOE does not have a single central SC-GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to

assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. *See* section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate, but DOE does not have a single central SC-GHG point estimate.

‡ Costs include incremental equipment costs as well as installation costs.

‡‡ Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. *See* sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (the MIA). *See* section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cash flow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 9.1 percent that is estimated in the manufacturer impact analysis (*see* chapter 12 of the direct final rule TSD for a complete description of the industry weighted average cost of capital). For consumer conventional cooking products, the annualized change in INPV is -$13.8 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. *See* section V.C of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table, and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annualized change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this direct final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for this direct final rule, the annualized net benefits would be $108.9 million at 3-percent discount rate and would be $78.8 million at 7-percent discount rate. Parentheses () indicate negative values.

D. Reporting, Certification, and Sampling Plan

Manufacturers, including importers, must use product-specific certification templates to certify compliance to DOE. For consumer conventional cooking products, the certification template reflects the general certification requirements specified at 10 CFR 429.12 and the product-specific requirements specified at 10 CFR 429.23.

1. Sampling and Test Procedure Repeatability

In manufacturer interviews, multiple manufacturers expressed concern about the variability of cooking top test results and the potential impact on certifying compliance, but none provided information regarding how DOE should consider such variability in its analysis of potential energy conservation standards for conventional cooking tops. DOE notes that as part of the August 2022 TP Final Rule, a sampling plan for conventional cooking tops was established at 10 CFR 429.23, requiring that a sample of sufficient size be tested to ensure that any represented value of IAEC be greater than the mean of the sample or than the upper 97.5-percent confidence limit of the true mean divided by 1.05. DOE did not propose to amend the product-specific certification requirements for these products in the February 2023 SNOPR because it did not have information regarding whether the confidence limit should be adjusted. 88 FR 6818, 6895.

DOE sought comment and data to potentially re-evaluate the sampling plan for cooking tops in the context of any potential performance standards for these products. *Id.*

Consumers' Research noted that the DOE test method for conventional cooking tops was adopted in September 2022 and commented that DOE does not have any significant real-world data on how current gas cooking tops would perform under this testing and sampling method. (Consumers' Research, No. 2267 at pp. 3–4)

AHAM asserted that DOE regulations require manufacturers to test more than one unit in an effort to account for variation. (AHAM, No. 2285 at p. 11) AHAM commented that the data it presented in its comments coupled with DOE's findings related to test procedure variation should be considered in the context of certification and enforcement. (*Id.*) AHAM commented that DOE should ensure that its rules recognize the variation in this particular case, which exceeds that of other test procedures, and should account for that fact—which its own data and analysis demonstrate—rather than ignore it. (*Id.*)

DOE notes that it neither received nor is it aware of any new data in response to the February 2023 SNOPR upon which to re-evaluate the sampling plan for conventional cooking tops established at 10 CFR 429.23.

2. Single-Zone Conventional Cooking Tops

DOE notes that some conventional cooking tops are distributed in commerce with only a single cooking zone with a relatively high input power for electric cooking tops or high burner input rate for gas cooking tops. Single-cooking zone cooking tops do not provide the ability for consumers to cook multiple food loads at the same time and, particularly for gas cooking tops, may not operate over the full range of input rates associated with all typical cooking processes for which a conventional cooking top is used (*e.g.,* boiling, sautéing, simmering, reheating) or accommodate the complete range of typical cookware sizes. To achieve this full functionality, conventional cooking tops with single cooking zones are typically used in conjunction with one or more additional conventional cooking tops to provide the consumer with the choice of the number and type of cooking zones to use. Indeed, DOE observes that manufacturers of single-zone cooking tops that are not portable conventional cooking tops also typically manufacture and market comparable dual-zone cooking tops with similar construction and design features, and consumers may choose to install non-portable single-zone cooking units in

combination with one or more of such comparable dual-zone units to achieve full cooking functionality. As a result, DOE stated in the February 2023 SNOPR that it expects that evaluating the IAEC of a single-zone non-portable cooking top by itself would not be representative of the average use of the product, and therefore proposed that a more representative value of IAEC would be based on a tested configuration of the typical combination of a single-zone cooking top paired with one or more additional cooking tops, such that the combination of conventional cooking tops in aggregate provides complete functionality to the consumer. 88 FR 6818, 6837.

Based on DOE's review of commercially available products, single-zone and dual-zone non-portable cooking tops typically range in width from 12 inches to 15 inches; DOE therefore proposed in the February 2023 SNOPR that the most representative pairing for the tested configuration of a single-zone cooking top would be the combination of one single-zone cooking top and one comparable dual-zone cooking top, because the overall width of the combination would not exceed the width of typical conventional cooking tops with four to six cooking zones (24 inches to 36 inches) and because this is the minimum number of such cooking tops that would ensure complete functionality. *Id.* Based on its expectation that consumers will select, to the extent possible, matching products for this combination, DOE proposed to define the tested configuration of a single-zone non-portable cooking top as the single-zone unit along with the same manufacturer's dual-zone non-portable cooking top unit within the same product class and with similar design characteristics (*e.g.,* construction materials, user interface), and use the same heating technology (*i.e.,* gas flame, electric resistive heating, or electric inductive heating) and energy source (*e.g.,* voltage, gas type). *Id.* DOE stated that it expects that these products comprising the test configuration typically would be marketed as being within the same ''product line'' by manufacturers. *Id.* In instances where the manufacturer's product line contains more than one dual-zone non-portable cooking top unit, DOE proposed that the dual-zone unit with the least energy consumption, as measured using appendix I1, be selected for the tested configuration, which along with the single-zone counterpart, would span the full range of expected per-cooking zone energy efficiency performance. *Id.*

In the approach DOE proposed in the February 2023 SNOPR, the representative IAEC of the single-zone non-portable cooking top would factor in the performance of the two additional cooking zones included in the dual-zone cooking top that is part of the tested configuration. *Id.* That is, the IAEC would be based on the average active mode performance of the three cooking zones comprising the tested configuration. Because the single-zone non-portable cooking top contains one of the three burners, while the comparable dual-zone cooking top contains two, DOE additionally proposed that the IAEC of the single-zone non-portable cooking top unit under consideration be calculated as the weighted average of the measured IAEC of the single-zone cooking top and the IAEC dual-zone cooking top in the tested configuration, using the number of cooking zones as the basis for the weighting factors; *i.e.,* the single-zone IAEC would have a weighting of 1/3 and the dual-zone IAEC would have a weighting of 2/3. *Id.* Recognizing that the dual-zone cooking top in the tested configuration would already be separately tested to determine its IAEC value for certification purposes, to minimize testing burden associated with this approach, DOE proposed that the represented IAEC value of the dual-zone cooking top (determined separately) would be used in the calculation of the single-zone cooking top's represented IAEC value (*i.e.,* DOE would not require the dual-zone cooking top to be tested again for the purpose of determining the represented IAEC value of the single-zone cooking top). *Id.* DOE stated that it expected that this approach would produce results that are most representative for the tested configuration. *Id.* Further, DOE proposed that if there is no dual-zone non-portable cooking top within the same product class and with similar construction and design features as the single-zone non-portable cooking top being tested, then consumers are likely to purchase and install the single-zone cooking top for use on its own; in that case, the most representative IAEC of the single-zone cooking top is the IAEC of that product as measured according to appendix I1. *Id.*

DOE requested comment on its proposed tested configuration and determination of representative IAEC for single-zone non-portable cooking tops. *Id.*

In the February 2023 SNOPR, DOE additionally proposed that a cooking top basic model is an individual cooking top model and does not include any combinations of cooking top models that may be installed together. *Id.* Accordingly, as part of DOE's proposal, each individual cooking top model that may be installed in combination would be rated as a separate basic model, and any combination of such cooking top models that are typically installed in combination would not itself need to have a separate representation as its own basic model. *Id.* at 88 FR 6837–6838. In other words, DOE stated that it did not expect combinations to be separately represented or certified to the Department as their own basic models. *Id.* at 88 FR 6838. DOE stated that this proposal is consistent with the current definition of a basic model at 10 CFR 430.2, which specifies that the basic model includes all units of a given type of covered product (or class thereof) manufactured by one manufacturer; having the same primary energy source; and, which have essentially identical electrical, physical, and functional (or hydraulic) characteristics that affect energy consumption, energy efficiency, water consumption, or water efficiency. *Id.* Therefore, DOE stated that it believed this clarification would be helpful to provide specific context for cooking tops, but that DOE was not proposing specific amendments to the basic model definition in this rule. *Id.*

DOE requested comment on its proposal to not define ''basic model'' with respect to cooking products or cooking tops, and on possible definitions for ''basic model'' with respect to cooking products or cooking tops that could be used if DOE were to determine such a definition is necessary. *Id.*

The Joint Agreement signatories suggested that the IAEC calculation of a single-zone cooking top be based on the testing of the single-zone unit by itself, stating that this methodology would reduce burden, simplify the certification process for single-zone cooking tops, and remove any ambiguity associated with determining which dual-zone models are ''comparable.'' (Joint Agreement signatories, No. 12814 at p. 7)

In accordance with the Joint Agreement signatories' recommendation, for this direct final rule, DOE is not implementing any specific methodology for non-portable single-zone conventional cooking tops.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866, 13563, and 14094

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O.

13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this final regulatory action constitutes a ''significant regulatory action'' within the scope of section 3(f) of E.O. 12866. DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the final regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. These assessments are summarized in this preamble and further detail can be found in the technical support document for this rulemaking.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') and a final regulatory flexibility analysis (''FRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*).

DOE is not obligated to prepare a regulatory flexibility analysis for this rulemaking because there is not a requirement to publish a general notice of proposed rulemaking under the Administrative Procedure Act. See 5 U.S.C. 601(2), 603(a). As discussed previously, DOE has determined that the Joint Agreement meets the necessary requirements under EPCA to issue this direct final rule for energy conservation standards for consumer conventional cooking products under the procedures in 42 U.S.C. 6295(p)(4). DOE notes that the NOPR for energy conservation standards for consumer conventional cooking products published elsewhere in this **Federal Register** contains an IRFA.

C. Review Under the Paperwork Reduction Act

Under the procedures established by the Paperwork Reduction Act of 1995 (''PRA''), a person is not required to respond to a collection of information by a Federal agency unless that collection of information displays a currently valid OMB Control Number.

OMB Control Number 1910–1400, Compliance Statement Energy/Water Conservation Standards for Appliances, is currently valid and assigned to the certification reporting requirements applicable to covered equipment, including consumer conventional cooking products.

DOE's certification and compliance activities ensure accurate and comprehensive information about the energy and water use characteristics of covered products and covered equipment sold in the United States. Manufacturers of all covered products and covered equipment must submit a certification report before a basic model is distributed in commerce, annually thereafter, and if the basic model is redesigned in such a manner to increase the consumption or decrease the efficiency of the basic model such that the certified rating is no longer supported by the test data. Additionally, manufacturers must report when production of a basic model has ceased and is no longer offered for sale as part of the next annual certification report following such cessation. DOE requires the manufacturer of any covered product or covered equipment to establish, maintain, and retain the records of certification reports, of the underlying test data for all certification testing, and of any other testing conducted to satisfy the requirements of part 429, part 430, and/or part 431. Certification reports provide DOE and consumers with comprehensive, up-to-date efficiency information and support effective enforcement.

Revised certification data will be required for gas cooking tops and gas ovens at the time of compliance with this direct final rule. New certification data will be required for electric cooking tops and electric ovens at the time of compliance with this direct final rule. However, DOE is not amending or creating new certification or reporting requirements for consumer conventional cooking products in this direct final rule. Instead, DOE may consider proposals to establish certification requirements and reporting for consumer conventional cooking products under a separate rulemaking regarding appliance and equipment certification. DOE will address changes to OMB Control Number 1910–1400 at that time, as necessary.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act of 1969 (''NEPA''), DOE has analyzed this rule

in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in B5.1(b) apply, no extraordinary circumstances exist that require further environmental analysis, and it meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

E. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735.

DOE has examined this rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this direct final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this direct final rule meets the relevant standards of E.O. 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

This rule does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of $100 million or more in any one year by the private sector. As a result, the analytical requirements of UMRA do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Although this direct final rule would not have any impact on the autonomy or integrity of the family as an institution as defined, this rule could impact a family's well-being. When developing a Family Policymaking Assessment, agencies must assess whether: (1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; (3) the action helps the family perform its functions, or substitutes governmental activity for the function; (4) the action increases or decreases disposable income or poverty of families and children; (5) the proposed benefits of the action justify the financial impact on the family; (6) the action may be carried out by State or local government or by the family; and whether (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

DOE has considered how the proposed benefits of this rule compare to the possible financial impact on a family (the only factor listed that is relevant to this final rule). As part of its rulemaking process, DOE must determine whether the energy conservation standards contained in this direct final rule are economically justified. As discussed in section V.C.1 of this document, DOE has determined that the standards are economically justified because the benefits to consumers far outweigh the costs to manufacturers. Families will also see LCC savings as a result of this final rule.

Moreover, as discussed further in section V.B.1 of this document, DOE has determined that for low-income households, average LCC savings and PBP at the considered efficiency levels are improved (*i.e.,* higher LCC savings and lower payback period) as compared to the average for all households. Further, the standards will also result in climate and health benefits for families.

I. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this direct final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth new and amended energy conservation standards for consumer conventional cooking products, is not a significant energy action because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this direct final rule.

L. Information Quality

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and prepared a report describing that peer review.[144] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve DOE's analyses. DOE is in the process of evaluating the resulting report.[145]

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that the Office of Information and Regulatory Affairs has determined that this rule meets the criteria set forth in 5 U.S.C. 804(2).

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this direct final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

Signing Authority

This document of the Department of Energy was signed on January 26, 2024, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 29, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, DOE amends part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

[144] The 2007 ''Energy Conservation Standards Rulemaking Peer Review Report'' is available at the following website: *www.energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed July 10, 2023).

[145] The report is available at *www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.*

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.2 by adding in alphabetical order a definition for ''Portable indoor conventional cooking top'' to read as follows:

§ 430.2 Definitions.

* * * * *

Portable indoor conventional cooking top means a conventional cooking top designed—

(1) For indoor use; and

(2) To be moved from place to place.

* * * * *

■ 3. Amend § 430.32 by revising paragraphs (j)(1) and (2) and the heading to paragraph (j)(3) introductory text to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(j) * * *

(1) *Conventional cooking tops.* (i) Gas cooking tops, other than gas portable indoor conventional cooking tops, manufactured on or after April 9, 2012, and before January 31, 2028, shall not be equipped with a constant burning pilot light.

(ii) Gas portable indoor conventional cooking tops, manufactured on or after April 9, 2012, shall not be equipped with a constant burning pilot light.

(iii) Conventional cooking tops, other than portable indoor conventional cooking tops, manufactured on or after January 31, 2028, shall have an integrated annual energy consumption (IAEC), excluding any downdraft venting system energy consumption, no greater than:

Product class	Maximum integrated annual energy consumption (IAEC)
(A) Electric Smooth Element Standalone Cooking Tops	207 kWh/year.
(B) Electric Smooth Element Cooking Top Component of Combined Cooking Products	207 kWh/year.
(C) Gas Standalone Cooking Tops	1,770 kBtu/year.
(D) Gas Cooking Top Component of Combined Cooking Products	1,770 kBtu/year.

(2) *Conventional ovens.* The control system of a conventional oven shall:

(i) Not be equipped with a constant burning pilot light, for gas ovens manufactured on or after April 9, 2012; and

(ii) Not be equipped with a linear power supply, for electric and gas ovens manufactured on or after January 31, 2028.

(3) *Microwave ovens.* * * *

* * * * *

[FR Doc. 2024–02008 Filed 2–13–24; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2014–BT–STD–0005]

RIN 1904–AF57

Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including consumer conventional cooking products. In this notice of proposed rulemaking (''NOPR''), the U.S. Department of Energy (''DOE'') proposes new and amended energy conservation standards for consumer conventional cooking products identical to those set forth in a direct final rule published elsewhere in this issue of the **Federal Register**. If DOE receives adverse comment and determines that such comment may provide a reasonable basis for withdrawal of the direct final rule, DOE will publish a notice of withdrawal and will proceed with this proposed rule.

DATES: DOE will accept comments, data, and information regarding this NOPR no later than June 3, 2024. Comments regarding the likely competitive impact of the proposed standard should be sent to the Department of Justice contact listed in the **ADDRESSES** section on or before March 15, 2024.

ADDRESSES: See section IV of this document, ''Public Participation,'' for details. If DOE withdraws the direct final rule published elsewhere in this issue of the **Federal Register**, DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any meeting in the **Federal Register**.

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number EERE–2014–BT–STD–0005. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2014–BT–STD–0005, by any of the following methods:

(1) *Email: ApplicanceStandardsQuestions@ee.doe.gov.* Include the docket number EERE–2014–BT–STD–0005 in the subject line of the message.

(2) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

(3) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see section IV of this document.

Docket: The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2014-BT-STD-0005.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section IV of this document for information on how to submit comments through *www.regulations.gov.*

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Antitrust Division at *www.energy.standards@usdoj.gov* on or before the date specified in the **DATES** section. Please indicate in the ''Subject'' line of your email the title and Docket Number of this proposed rulemaking.

FOR FURTHER INFORMATION CONTACT: Dr. Carl Shapiro, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5649. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Melanie Lampton, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 751–5157. Email: *Melanie.Lampton@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Synopsis of the Proposed Rule

The Energy Policy and Conservation Act, Public Law 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B of EPCA [2]

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include consumer conventional cooking products, the subject of this proposed rule. (42 U.S.C. 6292(a)(10))

Pursuant to EPCA, any new or amended energy conservation standard must, among other things, be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

In light of the above and under the authority provided by 42 U.S.C. 6295(p)(4), DOE is proposing this rule establishing and amending the energy conservation standards for consumer conventional cooking products and is concurrently issuing a direct final rule elsewhere in this issue of the **Federal Register**. DOE will proceed with this NOPR only if it determines it must withdraw the direct final rule pursuant to the criteria provided in 42 U.S.C. 6295(p)(4). The new and amended standard levels in the proposed rule and direct final rule were proposed in a letter submitted to DOE jointly by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility. This letter, titled ''Energy Efficiency Agreement of 2023'' (hereafter, the ''Joint Agreement'' [3]), recommends specific energy conservation standards for consumer conventional cooking products that, in the commenters' view, would satisfy the EPCA requirements in 42 U.S.C. 6295(o). DOE subsequently received letters of support from States including New York, California, and Massachusetts [4] and utilities including San Diego Gas and Electric and Southern California Edison [5] advocating for the adoption of the recommended standards. As discussed in more detail in the accompanying direct final rule and in accordance with the provisions at 42 U.S.C. 6295(p)(4), DOE has determined that the recommendations contained in the Joint Agreement comply with the requirements of 42 U.S.C. 6295(o).

In accordance with these and other statutory provisions discussed in this document, DOE proposes new and amended energy conservation standards that are performance-based standards for conventional cooking tops and prescriptive standards for conventional ovens. The standards for conventional cooking tops are expressed in terms of integrated annual energy consumption (''IAEC''), measured in thousand British thermal units per year (''kBtu/year'') for gas cooking tops and in kilowatt-hours per year (''kWh/year'') for electric cooking tops, as measured according to DOE's current conventional cooking top test procedure codified at title 10 of the Code of Federal Regulations (''CFR'') part 430, subpart B, appendix I1 (''appendix I1'').

Table I.1 presents the proposed new and amended standards for conventional cooking tops. Table I.2 presents the proposed new and amended standards for conventional ovens. These proposed new and amended standards would exclude portable cooking products. The proposed standards are the same as those recommended by the Joint Agreement. These standards apply to all products listed in Table I.1 and Table I.2 manufactured in, or imported into, the United States starting on January 31, 2028, as recommended in the Joint Agreement.

TABLE I.1—PROPOSED ENERGY CONSERVATION PERFORMANCE STANDARDS FOR CONVENTIONAL COOKING TOPS

[Compliance starting January 31, 2028]

Product class	Maximum integrated annual energy consumption (IAEC)
Electric Open (Coil) Element Cooking Tops	No standard.
Electric Smooth Element Standalone Cooking Tops	207 *kWh/year.*
Electric Smooth Element Cooking Top Component of Combined Cooking Products	207 *kWh/year.*
Gas Standalone Cooking Tops	1,770 *kBtu/year.*
Gas Cooking Top Component of Combined Cooking Products	1,770 *kBtu/year.*

TABLE I.2—PROPOSED PRESCRIPTIVE ENERGY CONSERVATION STANDARDS FOR CONVENTIONAL OVENS

[Compliance starting January 31, 2028]

Product class	New and amended standards
Electric Ovens	Shall not be equipped with a control system that uses linear power supply.*
Gas Ovens	The control system for gas ovens shall: (1) Not be equipped with a constant burning pilot light; and (2) Not be equipped with a linear power supply.*

* A linear power supply produces unregulated as well as regulated power. The unregulated portion of a linear power supply typically consists of a transformer that steps alternating current (''AC'') line voltage down, a voltage rectifier circuit for AC to direct current (''DC'') conversion, and a capacitor to produce unregulated, direct current output. Linear power supplies are described in section IV.C.1.b of the direct final rule published elsewhere in this issue of the **Federal Register**.

II. Introduction

The following section briefly discusses the statutory authority underlying this proposed rule, as well as some of the relevant historical background related to the establishment of standards for consumer conventional cooking products.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain

[3] This document is available in the docket at: *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12811.*

[4] This document is available in the docket at: *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12812.*

[5] This document is available in the docket at: *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12813.*

industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. These products include consumer conventional cooking products, the subject of this document. (42 U.S.C. 6292(a)(10)) EPCA prescribed energy conservation standards for these products (42 U.S.C. 6295(h)(1)), and directed DOE to conduct future rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(h)(2)) EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)).

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (See 42 U.S.C. 6297(d)).

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedures for conventional cooking tops appear at appendix I1. There are currently no DOE test procedures for conventional ovens.

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including consumer conventional cooking products. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)).

Moreover, DOE may not prescribe a standard if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)).

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. A rule prescribing an energy conservation standard for a type (or class) of product must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group: (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE considers such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. (*Id.*) Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2)).

Additionally, pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, final rules for new or amended energy conservation standards promulgated after July 1, 2010, are required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a

single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedures for conventional cooking tops address standby mode and off mode energy use, as do the standards proposed in this NOPR.

Finally, EISA 2007 amended EPCA, in relevant part, to grant DOE authority to directly issue a final rule (*i.e.,* a ''direct final rule'') establishing an energy conservation standard upon receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, that contains recommendations with respect to an energy or water conservation standard. (42 U.S.C. 6295(p)(4)) Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly-submitted recommendation for an energy or water conservation standard satisfies 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable.

A NOPR that proposes an identical energy efficiency standard must be published simultaneously with the direct final rule, and DOE must provide a public comment period of at least 110 days on this proposal. (42 U.S.C. 6295(p)(4)(A)–(B)) Based on the comments received during this period, the direct final rule will either become effective, or DOE will withdraw it not later than 120 days after its issuance if (1) one or more adverse comments is received, and (2) DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, may provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(C)) Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner. (*Id.*) After withdrawing a direct final rule, DOE must proceed with the NOPR published simultaneously with the direct final rule and publish in the **Federal Register** the reasons why the direct final rule was withdrawn. (*Id.*)

DOE has previously explained its interpretation of its direct final rule authority. In a final rule amending the Department's ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products'' at 10 CFR part 430, subpart C, appendix A, DOE noted that it may issue standards recommended by interested persons that are fairly representative of relative points of view as a direct final rule when the recommended standards are in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. 86 FR 70892, 70912 (Dec. 13, 2021). But the direct final rule provision in EPCA, under which this proposed rule is issued, does not impose additional requirements applicable to other standards rulemakings, which is consistent with the unique circumstances of rules issued through consensus agreements under DOE's direct final rule authority. *Id.* DOE's discretion remains bounded by its statutory mandate to adopt a standard that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified—a requirement found in 42 U.S.C. 6295(o). *Id. As such, DOE's review and analysis of the Joint Agreement is limited to whether the recommended standards satisfy the criteria in 42 U.S.C. 6295(o).*

B. Background

1. Current Standards

In a final rule published on April 8, 2009 (''April 2009 Final Rule''), DOE prescribed the current energy conservation standards for consumer conventional cooking products that prohibit constant burning pilot lights for all gas cooking products (*i.e.,* gas cooking products with or without an electrical supply cord) manufactured on and after April 9, 2012. 74 FR 16040. These standards are set forth in DOE's regulations at 10 CFR 430.32(j)(1)–(2).

2. Current Test Procedure

On August 22, 2022, DOE published a test procedure final rule (''August 2022 TP Final Rule'') establishing a test procedure for conventional cooking tops, at 10 CFR part 430, subpart B, appendix I1, ''Uniform Test Method for the Measuring the Energy Consumption of Conventional Cooking Products.'' 87 FR 51492. The test procedure adopted the latest version of the relevant industry standard published by the International Electrotechnical Commission (''IEC''), Standard 60350–2 (Edition 2.0 2017–08), ''Household electric cooking appliances—Part 2: Hobs—Methods for measuring performance'' (''IEC 60350–2:2021''), for electric cooking tops with modifications including adapting the test method to gas cooking tops, normalizing the energy use of each test cycle to a consistent final water temperature, and including a measurement of standby mode and off mode energy use. *Id.* The standard levels proposed in this NOPR are based on the IAEC metric as measured according to appendix I1.

3. History of Standards Rulemaking for Consumer Conventional Cooking Products

The National Appliance Energy Conservation Act of 1987 (''NAECA''), Public Law 100–12, amended EPCA to establish prescriptive standards for gas cooking products, requiring gas ranges and ovens with an electrical supply cord that are manufactured on or after January 1, 1990, not to be equipped with a constant burning pilot light. (42 U.S.C. 6295(h)(1)) NAECA also directed DOE to conduct two cycles of rulemakings to determine if more stringent or additional standards were justified for kitchen ranges and ovens. (42 U.S.C. 6295(h)(2)).

DOE undertook the first cycle of these rulemakings and published a final rule on September 8, 1998 (''September 1998 Final Rule''), which found that no standards were justified for conventional electric cooking products at that time. 63 FR 48038. In addition, partially due to the difficulty of conclusively demonstrating at that time that elimination of standing pilot lights for gas cooking products without an electrical supply cord was economically justified, DOE did not include amended standards for gas cooking products in the September 1998 Final Rule. 63 FR 48038, 48039-48040. For the second cycle of rulemakings, DOE published the April 2009 Final Rule amending the energy conservation standards for consumer conventional cooking products to prohibit constant burning pilot lights for all gas cooking products (*i.e.,* gas cooking products with or without an electrical supply cord) manufactured on or after April 9, 2012. DOE decided to not adopt energy conservation standards pertaining to the cooking efficiency of conventional electric cooking products because it determined that such standards would not be technologically feasible and economically justified at that time. 74 FR 16040, 16085.[6]

4. The Joint Agreement

On September 25, 2023, DOE received a joint statement (*i.e.,* the Joint Agreement) recommending standards for consumer conventional cooking

[6] As part of the April 2009 Final Rule, DOE decided not to adopt energy conservation standards pertaining to the cooking efficiency of microwave ovens. DOE has since published a final rule on June 20, 2023, adopting amended energy conservation standards for microwave oven standby mode and off mode. 88 FR 39912. DOE is not considering energy conservation standards for microwave ovens as part of the direct final rule published elsewhere in this issue of the **Federal Register**.

products that was submitted by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility.[7] In addition to the recommended standards for consumer conventional cooking products, the Joint Agreement also included separate recommendations for several other covered products.[8] And, while acknowledging that DOE may implement these recommendations in separate rulemakings, the Joint Agreement also stated that the recommendations were recommended as a complete package and each recommendation is contingent upon the other parts being implemented. DOE understands this to mean that the Joint Agreement is contingent upon DOE initiating rulemaking processes to adopt all of the recommended standards in the agreement. That is distinguished from an agreement where issuance of an amended energy conservation standard for a covered product is contingent on issuance of amended energy conservation standards for the other covered products. If the Joint Agreement were so construed, it would conflict with the anti-backsliding provision in 42 U.S.C. 6295(o)(1), because it would imply the possibility that, if DOE were unable to issue an amended standard for a certain product, it would have to withdraw a previously issued standard for one of the other products. The anti-backsliding provision, however, prevents DOE from withdrawing or amending an energy conservation standard to be less stringent. As a result, DOE will be proceeding with individual rulemakings that will evaluate each of the recommended standards separately under the applicable statutory criteria. The Joint Agreement recommends new and amended standard levels for consumer conventional cooking products as presented in Table II.1. (Joint Agreement, No. 12811 at p. 10) Details of the Joint Agreement recommendations for other products are provided in the Joint Agreement posted in the docket.[9]

TABLE II.1—RECOMMENDED NEW AND AMENDED ENERGY CONSERVATION STANDARDS FOR CONSUMER CONVENTIONAL COOKING PRODUCTS

Product class	Standard level	Compliance date
Electric Coil	No standard	January 31, 2028.
Propose new class: Electric smooth Cooktop *	207 kWh/year.	
Propose new Class: Electric smooth range *	207 kWh/year.	
Propose new class: Gas cooktop *	1,770 *kBtu/year*.	
Propose new class: Gas range *	1,770 *kBtu/year*.	
Ovens (Electric and Gas) *	Electric: Baseline + SMPS Gas: Baseline + SMPS.	

* Excludes portable cooking products.

The Joint Agreement also stated that the signatories would propose separately to DOE the inclusion of an alternative simmer calculation in the DOE test procedure for use in certification. (*Id.*) The Joint Agreement specified that, for enforcement purposes, DOE would rely on the full simmer test, rather than the alternative simmer calculation (which would be similar to the triangulation method used for refrigerator/freezers at 10 CFR 429.134(b)(2)). (*Id.*) DOE received a comment on the cooking top test procedure from the Joint Agreement signatories [10] on January 5, 2024, and will address the issues raised in the comment in a separate test procedure rulemaking.

DOE has evaluated the Joint Agreement and believes that it meets the EPCA requirements for issuance of a direct final rule. As a result, DOE published a direct final rule establishing energy conservation standards for consumer conventional cooking products elsewhere in this issue of the **Federal Register**. If DOE receives adverse comments that may provide a reasonable basis for withdrawal and withdraws the direct final rule, DOE will consider those comments and any other comments received in determining how to proceed with this proposed rule.

For further background information on these proposed standards and the supporting analyses, please see the direct final rule published elsewhere in this issue of the **Federal Register**. That document and the accompanying technical support document (''TSD'') contain an in-depth discussion of the analyses conducted in evaluating the Joint Agreement, the methodologies DOE used in conducting those analyses, and the analytical results.

When the Joint Agreement was submitted, DOE was conducting a rulemaking to consider amending the standards for consumer conventional cooking products. As part of that process, DOE published a supplemental

[7] The signatories to the Joint Agreement include the Association of Home Appliance Manufacturers (''AHAM''), American Council for an Energy-Efficient Economy, Alliance for Water Efficiency, Appliance Standards Awareness Project, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, and Pacific Gas and Electric Company. Members of AHAM's Major Appliance Division that make the affected products include: Alliance Laundry Systems, LLC; Asko Appliances AB; Beko US Inc.; Brown Stove Works, Inc.; BSH Home Appliances Corporation; Danby Products, Ltd.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber; Fotile America; GE Appliances, a Haier Company; L'Atelier Paris Haute Design LLC; LG Electronics; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Appliances Refrigeration Systems (PAPRSA) Corporation of America; Perlick Corporation; Samsung Electronics America, Inc.; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; The Middleby Corporation; U-Line Corporation; Viking Range, LLC; and Whirlpool Corporation.

[8] The Joint Agreement contained recommendations for 6 covered products: refrigerators, refrigerator-freezers, and freezers; clothes washers; clothes dryers; dishwashers; cooking products; and miscellaneous refrigeration products.

[9] The Joint Agreement is available in the docket at *www.regulations.gov/comment/EERE-2014-BT-STD-0005-12811*.

[10] In the test procedure comment letter, only the following Joint Agreement signatories were included: AHAM, Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, the Northwest Energy Efficiency Alliance, and the Pacific Gas and Electric Company. Furthermore, AHAM noted that it represents the following companies who manufacture consumer conventional cooking products are members of the AHAM Major Appliance Division: Arcelik A.S.; Beko US, Inc.; Brown Stove Works, Inc.; BSH Home Appliances Corporation; Danby Products, Ltd.; De'Longhi America, Inc.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber S.p.A.; FOTILE America, LLC; GE Appliances, a Haier Company; Gradient, Inc.; Hisense USA Corporation; LG Electronics USA, Inc.; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; Panasonic Corporation of America; Samsung Electronics America Inc.; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; Viking Range, LLC; and Whirlpool Corporation.

notice of proposed rulemaking (''SNOPR'') and announced a public meeting on February 1, 2023, (''February 2023 SNOPR'') seeking comment on its proposed new and amended standards for consumer conventional cooking products to inform its decision consistent with its obligations under EPCA and the Administrative Procedure Act (''APA''). 88 FR 6818. The February 2023 SNOPR proposed new and amended standards for consumer conventional cooking products, consisting of maximum IAEC levels for electric and gas cooking tops and design requirements for conventional ovens. *Id.* Subsequently, on February 28, 2023, DOE published a notification of data availability (''NODA'') providing additional information to clarify the February 2023 SNOPR analysis for gas cooking tops. 88 FR 6818. Finally, on August 2, 2023, DOE published a second NODA updating its analysis for gas cooking tops based on the stakeholder data it received in response to the February 2023 SNOPR. 88 FR 50810. The February 2023 SNOPR TSD is available at: *www.regulations.gov/document/EERE-2014-BT-STD-0005-0090.*

III. Proposed Standards

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

DOE considered the impacts of new and amended standards for consumer conventional cooking products at each trial standard level (''TSL''), beginning with the maximum technologically feasible (''max-tech'') level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy. DOE refers to this process as the ''walk-down'' analysis.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers). Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings.

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forgo the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the manufacturer impact analysis (''MIA''). Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 9 of the direct final rule TSD[11] available in the docket for this rulemaking. However, DOE's current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[12]

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards, and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[13] DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

A. Benefits and Burdens of TSLs Considered for Consumer Conventional Cooking Product Standards

Table III.1 and Table III.2 summarize the quantitative impacts estimated for each TSL for consumer conventional cooking products. The national impacts are measured over the lifetime of consumer conventional cooking products purchased in the 30-year period that begins in the anticipated year of compliance with the new and amended standards (2027–2056 for all TSLs except TSL 1, *i.e.,* the ''Recommended TSL'' for consumer conventional cooking products, and 2028–2057 for TSL 1). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle (''FFC'') results. DOE is presenting monetized benefits of greenhouse gas (''GHG'') emissions reductions in accordance with the applicable Executive Orders and would

[11] The TSD is available in the docket for this rulemaking at *www.regulations.gov/docket/EERE–2014–BT–STD–0005/document.*

[12] P.C. Reiss and M.W. White. Household Electricity Demand, Revisited. *Review of Economic Studies.* 2005. 72(3): pp. 853–883. doi: *10.1111/0034–6527.00354.*

[13] Sanstad, A. H. *Notes on the Economics of Household Energy Consumption and Technology Choice.* 2010. Lawrence Berkeley National Laboratory. *www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf* (last accessed November 2, 2023).

reach the same conclusion presented in this NOPR in the absence of the social cost of greenhouse gases, including the Interim Estimates presented by the Interagency Working Group. The efficiency levels contained in each TSL are described in section V.A of the direct final rule published elsewhere in this issue of the **Federal Register**.

TABLE III.1—SUMMARY OF ANALYTICAL RESULTS FOR CONSUMER CONVENTIONAL COOKING PRODUCTS TSLS: NATIONAL IMPACTS

Category	TSL 1	TSL 2	TSL 3
Cumulative FFC National Energy Savings:			
Quads	0.22	0.66	1.52
Cumulative FFC Emissions Reduction:			
CO_2 (*million metric tons*)	3.99	21.16	36.69
CH_4 (*thousand tons*)	34.70	235.42	366.22
N_2O (*thousand tons*)	0.04	0.10	0.25
SO_2 (*thousand tons*)	1.15	2.26	6.96
NO_X (*thousand tons*)	7.61	51.14	80.03
Hg (*tons*)	0.01	0.01	0.05
Present Value of Benefits and Costs (*3% discount rate, billion 2022$*):			
Consumer Operating Cost Savings	1.63	4.30	3.97
Climate Benefits *	0.22	1.28	2.16
Health Benefits **	0.42	2.15	3.85
Total Benefits †	2.27	7.73	9.99
Consumer Incremental Product Costs ‡	0.07	3.96	47.86
Consumer Net Benefits	1.56	0.34	(43.89)
Total Net Benefits	2.20	3.77	(37.87)
Present Value of Benefits and Costs (*7% discount rate, billion 2022$*):			
Consumer Operating Cost Savings	0.69	1.90	0.86
Climate Benefits *	0.22	1.28	2.16
Health Benefits **	0.16	0.87	1.56
Total Benefits †	1.07	4.04	4.58
Consumer Incremental Product Costs ‡	0.04	2.30	27.21
Consumer Net Benefits	0.65	(0.40)	(26.34)
Total Net Benefits	1.03	1.74	(22.62)

Note: This table presents the costs and benefits associated with consumer conventional cooking products shipped during the period 2027 − 2056 for all TSLs except for TSL 1 (the Recommended TSL) and 2028–2057 for TSL 1. These results include benefits to consumers which accrue after 2056 from the products shipped during the period 2027 − 2056 for all TSLs except TSL 1 and 2057 from the products shipped during the period 2028–2057 for TSL 1.

* Climate benefits are calculated using four different estimates of the SC–CO_2, SC–CH_4 and SC–N_2O. Together, these represent the global SC–GHG. For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are shown, but DOE does not have a single central SC–GHG point estimate. To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for NO_X and SO_2) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. *See* section IV.L of the direct final rule published elsewhere in this issue of the **Federal Register** for more details.

† Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but DOE does not have a single central SC–GHG point estimate. DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates.

‡ Costs include incremental equipment costs as well as installation costs.

TABLE III.2—SUMMARY OF ANALYTICAL RESULTS FOR CONSUMER CONVENTIONAL COOKING PRODUCTS TSLS: MANUFACTURER AND CONSUMER IMPACTS *

Category	TSL 1	TSL 2	TSL 3
Manufacturer Impacts:			
Industry NPV (*million 2022$*) (No-new-standards case INPV = 1,601)	1,457–1,458	1,042–1,078	(302)–(25)
Industry NPV (*% change*)	(9.0)–(9.0)	(34.9)–(32.6)	(118.9)–(101.6)
Consumer Average LCC Savings (*2022$*):			
Electric Smooth Element Standalone Cooking Tops	62.80	8.54	(638.87)
Electric Smooth Element Cooking Top as a Component of a Combined Cooking Product	62.80	8.54	(638.87)
Gas Standalone Cooking Tops	3.09	(1.03)	(1.03)
Gas Cooking Top as a Component of a Combined Cooking Product	3.09	(1.03)	(1.03)
Electric Ovens	16.23	(39.55)	(24.87)
Gas Ovens	15.17	(24.16)	(24.16)
Shipment-Weighted Average **	23.34	(17.72)	(153.51)
Consumer Simple Payback Period (*years*):			
Electric Smooth Element Standalone Cooking Tops	0.6	4.0	170.4
Electric Smooth Element Cooking Top as a Component of a Combined Cooking Product	0.6	4.0	170.4

TABLE III.2—SUMMARY OF ANALYTICAL RESULTS FOR CONSUMER CONVENTIONAL COOKING PRODUCTS TSLS: MANUFACTURER AND CONSUMER IMPACTS *—Continued

Category	TSL 1	TSL 2	TSL 3
Gas Standalone Cooking Tops	6.6	10.5	10.5
Gas Cooking Top as a Component of a Combined Cooking Product	6.6	10.5	10.5
Electric Ovens	2.1	25.4	20.8
Gas Ovens	1.9	18.0	18.0
Shipment-Weighted Average **	2.7	16.1	50.7
Percent of Consumers that Experience a Net Cost:			
Electric Smooth Element Standalone Cooking Tops	0	52	100
Electric Smooth Element Cooking Top as a Component of a Combined Cooking Product	0	52	100
Gas Standalone Cooking Tops	1	38	38
Gas Cooking Top as a Component of a Combined Cooking Product	1	38	38
Electric Ovens	0	27	81
Gas Ovens	0	21	21
Shipment-Weighted Average **	0	34	64

Parentheses indicate negative (−) values.
* All TSLs except TSL 1 (the Recommended TSL) have a compliance year of 2027; TSL 1 has a compliance year of 2028.
** Weighted by shares of each product class in total projected shipments in 2022.

DOE first considered TSL 3, which represents the max-tech efficiency levels. TSL 3 would save an estimated 1.52 quads of energy, an amount DOE considers significant. Under TSL 3, the net present value (''NPV'') of consumer benefit would decrease compared to the no-new-standards case by $26.34 billion using a discount rate of 7 percent, and $43.89 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 36.69 million metric tons (''Mt'') [14] of carbon dioxide (''CO_2''), 6.96 thousand tons of sulfur dioxide (''SO_2''), 80.03 thousand tons of nitrogen oxides (''NO_X''), 0.05 tons of mercury (''Hg''),[15] 366.22 thousand tons of methane (''CH_4''), and 0.25 thousand tons of nitrous oxide (''N_2O''). The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average social cost of GHG (''SC–GHG'') at a 3-percent discount rate) at TSL 3 is $2.2 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 3 is $1.6 billion using a 7-percent discount rate and $3.9 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 3 is $22.6 billion less than the no-new-standards case. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 3 is $37.9 billion less than the no-new-standards case. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At TSL 3, the average life-cycle costs (''LCC'') impact is a loss of $638.87 for electric smooth element cooking top product classes, a loss $1.03 for gas cooking top product classes, a shipments-weighted average loss of $24.87 for electric ovens, and a shipment-weighted average loss of $24.16 for gas ovens. The simple payback period is 170.5 years for electric smooth element cooking top product classes, 10.5 years for gas cooking top product classes, 20.8 years for electric ovens, and 18.0 years for gas ovens. The fraction of consumers experiencing a net LCC cost is 100 percent for electric smooth element cooking top product classes, 38 percent for gas cooking top product classes, 81 percent for electric ovens, and 21 percent for gas ovens.

At TSL 3, the projected change in industry net present value (''INPV'') ranges from a decrease of $1,903 million to a decrease of $1,626 million, which corresponds to decreases of 118.9 percent and 101.6 percent, respectively. DOE estimates that industry must invest $2,069.2 million to comply with standards set at TSL 3. DOE estimates that less than 1 percent of electric smooth element cooking top (standalone and component of a combined cooking product) shipments, 41 percent of gas cooking top (standalone and component of a combined cooking product) shipments, zero percent of electric standard oven (freestanding and built-in) shipments, zero percent of electric self-clean oven (freestanding) shipments, 2 percent of electric self-clean oven (built-in) shipments, 62 percent of gas standard oven (freestanding) shipments, 38 percent of gas standard oven (built-in) shipments, 93 percent of gas self-clean oven (freestanding) shipments, and 77 percent of gas self-clean oven (built-in) shipments would already meet the efficiency levels required at TSL 3 in 2027.

The Secretary tentatively concludes that at TSL 3 for consumer conventional cooking products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on many consumers (*e.g.,* negative LCC savings across all product classes), and the significant impacts on manufacturers, including the large conversion costs and the significant reduction in INPV. A significant fraction of consumers across all product classes would experience a net LCC cost and negative LCC savings. The consumer NPV is negative at both 3 and 7 percent. The potential reduction in INPV could be as high as 118.9 percent. Consequently, the Secretary has tentatively concluded that TSL 3 is not economically justified.

DOE next considered TSL 2, which represents EL 2 for all product classes. TSL 2 would save an estimated 0.66 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would decrease compared to the no-new-

[14] A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO_2 are presented in short tons.

[15] DOE calculated emissions reductions relative to the no-new-standards-case, which reflects key assumptions in the *Annual Energy Outlook 2023* (''*AEO2023*''). *AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the Inflation Reduction Act. See section IV.K of the direct final rule published elsewhere in in this issue of the **Federal Register** for further discussion of *AEO2023* assumptions that effect air pollutant emissions.

standards case by $0.40 billion using a discount rate of 7 percent, and increase compared to the no-new-standards case by $0.34 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 21.16 Mt of CO_2, 2.26 thousand tons of SO_2, 51.14 thousand tons of NO_X, 0.01 tons of Hg, 235.42 thousand tons of CH_4, and 0.10 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 2 is $1.3 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 2 is $0.9 billion using a 7-percent discount rate and $2.1 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 2 is $1.7 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 2 is $3.8 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At TSL 2, the average LCC impact is a savings of $8.54 for electric smooth element cooking top product classes, a loss of $1.03 for gas cooking top product classes, a shipments-weighted average loss of $39.55 for electric ovens, and a shipment-weighted average loss of $24.16 for gas ovens. The simple payback period is 4.0 years for electric smooth element cooking top product classes, 10.5 years for gas cooking top product classes, 25.4 years for electric ovens, and 18.0 years for gas ovens. The fraction of consumers experiencing a net LCC cost is 52 percent for electric smooth element cooking top product classes, 38 percent for gas cooking top product classes, 27 percent for electric ovens, and 21 percent for gas ovens.

At TSL 2, the projected change in INPV ranges from a decrease of $559 million to a decrease of $522 million, which corresponds to decreases of 34.9 percent and 32.6 percent, respectively. DOE estimates that industry must invest $576.5 million to comply with standards set at TSL 2. DOE estimates that approximately 15 percent of electric smooth element cooking top (standalone and component of a combined cooking product) shipments, 41 percent of gas cooking top (standalone and component of a combined cooking product) shipments, 38 percent of electric standard oven (freestanding) shipments, 30 percent of electric standard oven (built-in) shipments, 77 percent of electric self-clean oven (freestanding) shipments, 88 percent of electric self-clean ovens (built-in) shipments, 62 percent of gas standard oven (freestanding) shipments, 38 percent of gas standard oven (built-in), 93 percent of gas self-clean oven (freestanding) shipments, and 77 percent of gas self-clean oven (built-in) shipments would already meet or exceed the efficiency levels required at TSL 2 in 2027.

The Secretary tentatively concludes that at TSL 2 for consumer conventional cooking products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on many consumers, and the significant impacts on manufacturers, including the large conversion costs and the significant reduction in INPV. At TSL 2, consumers, on average, would experience a negative LCC savings for gas cooking tops, electric ovens, and gas ovens. For electric cooking tops, 52 percent of consumers would experience a net cost. At TSL 2, the simple payback period for electric and gas ovens would exceed the average product lifetime. Additionally, the consumer NPV is negative at 7 percent. The potential reduction in INPV could be as high as 34.9 percent. Consequently, the Secretary has tentatively concluded that TSL 2 is not economically justified.

DOE next considered TSL 1, which corresponds to the TSL recommended in the Joint Agreement (the ''Recommended TSL'') and which represents EL 1 for all product classes. The Recommended TSL would save an estimated 0.22 quads of energy, an amount DOE considers significant. Under the Recommended TSL, the NPV of consumer benefit would be $0.65 billion using a discount rate of 7 percent, and $1.56 billion using a discount rate of 3 percent.

The cumulative emissions reductions at the Recommended TSL are 3.99 Mt of CO_2, 1.15 thousand tons of SO_2, 7.61 thousand tons of NO_X, 0.01 tons of Hg, 34.70 thousand tons of CH_4, and 0.04 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at the Recommended TSL is $0.22 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at the Recommended TSL is $0.16 billion using a 7-percent discount rate and $0.42 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at the Recommended TSL is $1.03 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at the Recommended TSL is $2.20 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At the Recommended TSL, the average LCC impact is a savings of $62.80 for electric smooth element cooking top product classes, a savings of $3.09 for gas cooking top product classes, a shipments-weighted average savings of $16.23 for electric ovens, and a shipment-weighted average savings of $15.17 for gas ovens. The simple payback period is 0.6 years for electric smooth element cooking top product classes, 6.6 years for gas cooking top product classes, 2.1 years for electric ovens, and 1.9 years for gas ovens. The fraction of consumers experiencing a net LCC cost is 0 percent for electric smooth element cooking top product classes, 1 percent for gas cooking top product classes, 0 percent for electric ovens, and 0 percent for gas ovens.

At the Recommended TSL, the projected change in INPV ranges from a decrease of $144 million to a decrease of $143 million, which corresponds to decreases of 9.0 percent and 9.0 percent, respectively. DOE estimates that industry must invest $66.7 million to comply with standards set at the Recommended TSL. DOE estimates that approximately 77 percent of electric smooth element cooking top (standalone and component of a combined cooking product) shipments, 97 percent of gas cooking top (standalone and component of a combined cooking product) shipments, 95 percent of electric standard oven (freestanding and built-in) shipments, 95 percent of electric self-clean oven (freestanding and built-in) shipments, 96 percent of gas standard oven (freestanding and built-in) shipments, and 96 percent of gas self-clean oven (freestanding and built-in) shipments would already meet or exceed the efficiency levels required at the Recommended TSL in 2028.

After considering the analysis and weighing the benefits and burdens, the Secretary has tentatively concluded that

at a standard set at the Recommended TSL for consumer conventional cooking products would be economically justified. At this TSL, the average LCC savings for all consumer conventional cooking product consumers is positive. A shipment-weighted 0 percent of conventional cooking product consumers experience a net cost, with the largest impact being 1 percent net cost for gas cooking top product classes. The FFC national energy savings are significant and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate. Notably, the benefits to consumers vastly outweigh the cost to manufacturers. At the Recommended TSL, the NPV of consumer benefits, even measured at the more conservative discount rate of 7 percent is over 4 times higher than the maximum estimated manufacturers' loss in INPV. The standard levels at the Recommended TSL are economically justified even without weighing the estimated monetary value of emissions reductions. When those emissions reductions are included—representing $0.22 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $0.42 billion (using a 3-percent discount rate) or $0.16 billion (using a 7-percent discount rate) in health benefits—the rationale becomes stronger still.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. The walk-down is not a comparative analysis, as a comparative analysis would result in the maximization of net benefits instead of energy savings that are technologically feasible and economically justified, which would be contrary to the statute. 86 FR 70892, 70908. Although DOE has not conducted a comparative analysis to select the new and amended energy conservation standards, DOE notes that the Recommended TSL has higher average LCC savings, a shorter average payback period, a lower fraction of consumers experiencing a net LCC cost, and higher consumer net present values compared to TSL 2 and 3.

Although DOE considered new and amended standard levels for consumer conventional cooking products by grouping the efficiency levels for each product class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis. For electric smooth element cooking top product classes, the Recommended TSL corresponds to efficiency level (''EL'') 1, which incorporates low-standby-loss electronic controls. Setting a standard at EL 2 or EL 3 would result in a majority of consumers experiencing a net LCC cost and longer payback periods relative to EL 1. For gas cooking top product classes, the Recommended TSL corresponds to EL 1, which represents the efficiency level defined in the Joint Agreement and which would not preclude any combination of other features mentioned by manufacturers (*e.g.,* multiple high input rate burners (''HIR burners''),[16] continuous cast-iron grates, different nominal unit widths, sealed burners, at least one low input rate burner (''LIR burner''),[17] multiple dual-stacked and/or multi-ring HIR burners, and at least one extra-high input rate burner), as demonstrated by products from multiple manufacturers in the expanded test sample. Setting a standard at EL 2 would result in an average net LCC cost and a higher payback period relative to EL 1. For electric and gas ovens, the Recommended TSL corresponds to EL 1, which incorporates switch mode power supplies (''SMPSs''). A standard at EL 2 or EL 3 for electric ovens would result in a significantly higher percentage of consumers experiencing a net LCC cost and longer payback periods relative to EL 1. Similarly, for gas ovens, a standard at EL 2 would result in a larger percentage of consumers experiencing a net LCC cost and longer payback periods relative to EL 1. The proposed levels at the Recommended TSL result in positive LCC savings for all product classes and a lower percentage of consumers experiencing a net cost to the point where DOE has tentatively concluded that they are economically justified, as discussed for the Recommended TSL in the preceding paragraphs.

Accordingly, the Secretary tentatively concludes that the Recommended TSL would offer the maximum improvement in efficiency that is technologically feasible and economically justified and would result in the significant conservation of energy.

Therefore, based on the previous considerations, DOE proposes to adopt the energy conservation standards for consumer conventional cooking products at the Recommended TSL.

The proposed new and amended energy conservation standards for consumer conventional cooking products, excluding portable cooking products, are shown in Table III.3 and Table III.4.

TABLE III.3—PROPOSED NEW AND AMENDED ENERGY CONSERVATION STANDARDS FOR CONVENTIONAL COOKING TOPS

Product class	Maximum integrated annual energy consumption (IAEC)
Electric Open (Coil) Element Cooking Tops	No standard.
Electric Smooth Element Standalone Cooking Tops	207 kWh/year.
Electric Smooth Element Cooking Top Component of a Combined Cooking Product	207 kWh/year.
Gas Standalone Cooking Tops	1,770 kBtu/year.
Gas Cooking Top Component of a Combined Cooking Product	1,770 kBtu/year.

TABLE III.4—PROPOSED NEW AND AMENDED PRESCRIPTIVE ENERGY CONSERVATION STANDARDS FOR CONVENTIONAL OVENS

Product class	New and amended standards
Electric Ovens	Shall not be equipped with a control system that uses linear power supply.*

[16] In this analysis, DOE defines an HIR burner as a burner rated at or above 14,000 Btu per hour (''Btu/h'').

[17] In this analysis, DOE defines an LIR burner as a burner with an input rate below 6,500 Btu/h.

TABLE III.4—PROPOSED NEW AND AMENDED PRESCRIPTIVE ENERGY CONSERVATION STANDARDS FOR CONVENTIONAL OVENS—Continued

Product class	New and amended standards
Gas Ovens	The control system for gas ovens shall: (1) Not be equipped with a constant burning pilot light; and (2) Not be equipped with a linear power supply.

The Secretary also tentatively concludes that an amended standard is not technologically feasible and economically justified for electric open (coil) element cooking tops. Therefore, DOE is not proposing any energy conservation standards for electric open (coil) element cooking tops.

B. Annualized Benefits and Costs of the Proposed Standards

The benefits and costs of the proposed standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2022$) of the benefits from operating products that meet the proposed standards (consisting primarily of operating cost savings from using less energy), minus increases in product purchase costs, and (2) the annualized monetary value of the climate and health benefits.

Table III.5 shows the annualized values for consumer conventional cooking products under the Recommended TSL, expressed in 2022$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reductions, and the 3-percent discount rate case for GHG social costs, the estimated cost of the proposed standards for consumer conventional cooking products is $3.9 million per year in increased equipment installed costs, while the estimated annual benefits are $68.1 million from reduced equipment operating costs, $12.4 million in GHG reductions, and $16.1 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $92.6 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the proposed standards for consumer conventional cooking products is $4.0 million per year in increased equipment costs, while the estimated annual benefits are $90.8 million in reduced operating costs, $12.4 million from GHG reductions, and $23.5 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $122.7 million per year.

TABLE III.5—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS (RECOMMENDED TSL) FOR CONSUMER CONVENTIONAL COOKING PRODUCTS

	Million 2022$/year		
	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
3% discount rate			
Consumer Operating Cost Savings	90.8	84.0	95.6
Climate Benefits*	12.4	11.9	12.5
Health Benefits**	23.5	22.6	23.8
Total Benefits†	126.7	118.4	131.9
Consumer Incremental Product Costs‡	4.0	4.1	3.8
Net Benefits	122.7	114.3	128.1
Change in Producer Cash Flow (INPV‡‡)	(13.8)	(13.8)	(13.8)
7% discount rate			
Consumer Operating Cost Savings	68.1	63.3	71.5
Climate Benefits* (3% discount rate)	12.4	11.9	12.5
Health Benefits**	16.1	15.5	16.3
Total Benefits†	96.6	90.7	100.3
Consumer Incremental Product Costs‡	3.9	4.0	3.8
Net Benefits	92.6	86.7	96.5
Change in Producer Cash Flow (INPV‡‡)	(13.8)	(13.8)	(13.8)

Note: This table presents the costs and benefits associated with consumer conventional cooking products shipped in 2028–2057. These results include consumer, climate, and health benefits that accrue after 2057 from the products shipped in 2028–2057. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low Net Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in sections IV.F.1 and IV.H.2 of the direct final rule published elsewhere in this issue of the **Federal Register**. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

*Climate benefits are calculated using four different estimates of the global SC–GHG (see section IV.L of the direct final rule published elsewhere in this issue of the **Federal Register**). For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are shown, but DOE does not have a single central SC–GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. *See* section IV.L of the direct final rule published elsewhere in this issue of the **Federal Register** for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but DOE does not have a single central SC–GHG point estimate.

‡ Costs include incremental equipment costs as well as installation costs.

‡‡ Operating Cost Savings are calculated based on the life-cycle costs analysis and national impact analysis as discussed in detail below. *See* sections IV.F and IV.H of the direct final rule published elsewhere in this issue of the **Federal Register**. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (the MIA). *See* section IV.J of the direct final rule published elsewhere in this issue of the **Federal Register**. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cash flow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 9.1 percent that is estimated in the manufacturer impact analysis (*see* chapter 12 of the direct final rule TSD for a complete description of the industry weighted average cost of capital). For consumer conventional cooking products, the annualized change in INPV is −$13.8 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. *See* section V.C of the direct final rule published elsewhere in this issue of the **Federal Register**. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table, and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annualized change in INPV in the above table, drawing on the MIA explained further in section IV.J of the direct final rule published elsewhere in this issue of the **Federal Register** to provide additional context for assessing the estimated impacts of the proposed rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A–4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for the proposed rule, the annualized net benefits would be $108.9 million at 3-percent discount rate and would be $78.8 million at 7-percent discount rate. Parentheses () indicate negative values.

IV. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule on the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document. Comments relating to the direct final rule published elsewhere in this issue of the **Federal Register** should be submitted as instructed therein.

Submitting comments via *www.regulations.gov.* The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

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DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (''faxes'') will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information

believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Public Meeting

As stated previously, if DOE withdraws the direct final rule published elsewhere in this issue of the **Federal Register** pursuant to 42 U.S.C. 6295(p)(4)(C), DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any meeting in the **Federal Register**.

V. Procedural Issues and Regulatory Review

The regulatory reviews conducted for this proposed rule are identical to those conducted for the direct final rule published elsewhere in this issue of the **Federal Register**. Please see the direct final rule for further details.

A. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') and a final regulatory flexibility analysis (''FRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*). DOE has prepared the following IRFA for the products that are the subject of this proposed rulemaking.

For manufacturers of consumer conventional cooking products, the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. (See 13 CFR part 121.) The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description and are available at *www.sba.gov/document/support-table-size-standards.* Manufacturing of consumer conventional cooking products is classified under NAICS 335220, ''Major Household Appliance Manufacturing.'' The SBA sets a threshold of 1,500 employees or fewer for an entity to be considered as a small business for this category.

1. Description of Reasons Why Action Is Being Considered

EPCA prescribed energy conservation standards for consumer conventional cooking products (42 U.S.C. 6295(h)(1)), and directs DOE to conduct future rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(h)(2)) EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) DOE is proposing amended energy conservation standards for consumer conventional cooking products in accordance with DOE's obligations under EPCA.

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

In light of the above and the requirements under 42 U.S.C. 6295(p)(4)(A)–(B), DOE is issuing this NOPR proposing energy conservation standards for consumer conventional cooking products. These standard levels were submitted jointly to DOE on September 25, 2023, by groups representing manufacturers, energy and environmental advocates, consumer groups, and a utility.[18] The Joint Agreement recommends specific energy conservation standards for consumer conventional cooking products that, in the commenters' view, would satisfy the EPCA requirements in 42 U.S.C. 6295(o).

2. Objectives of, and Legal Basis for, Rule

NAECA, Public Law 100–12, amended EPCA to establish prescriptive standards for gas cooking products, requiring gas ranges and ovens with an electrical supply cord that are manufactured on or after January 1, 1990, not to be equipped with a constant burning pilot light. (42 U.S.C.6295(h)(1)) NAECA also directed DOE to conduct two cycles of rulemakings to determine if more stringent or additional standards were justified for kitchen ranges and ovens. (42 U.S.C. 6295(h)(2)) EPCA additionally requires that, not later than 6 years after the issuance of a final rule establishing or amending a standard, DOE must publish either notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1))

3. Description on Estimated Number of Small Entities Regulated

DOE conducted a focused inquiry into small business manufacturers of the products covered by this rulemaking. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. The size standards are listed by NAICS code as well as by industry description and are available at *www.sba.gov/document/support-table-size-standards.* Manufacturing of consumer conventional cooking products is classified under NAICS 335220, ''major household appliance manufacturing.'' The SBA sets a threshold of 1,500 employees or fewer for an entity to be considered as a small business for this category. DOE used available public information to identify potential small

[18] The signatories to the Joint Agreement include AHAM, American Council for an Energy-Efficient Economy, Alliance for Water Efficiency, Appliance Standards Awareness Project, Consumer Federation of America, Consumer Reports, Earthjustice, National Consumer Law Center, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, and Pacific Gas and Electric Company. Members of AHAM's Major Appliance Division that manufacture the affected products include: Alliance Laundry Systems, LLC; Asko Appliances AB; Beko US Inc.; Brown Stove Works, Inc.; BSH Home Appliances Corporation; Danby Products, Ltd.; Electrolux Home Products, Inc.; Elicamex S.A. de C.V.; Faber; Fotile America; GE Appliances, a Haier Company; L'Atelier Paris Haute Design LLG; LG Electronics; Liebherr USA, Co.; Midea America Corp.; Miele, Inc.; PAPRSA Corporation of America; Perlick Corporation; Samsung Electronics America, Inc.; Sharp Electronics Corporation; Smeg S.p.A; Sub-Zero Group, Inc.; The Middleby Corporation; U-Line Corporation; Viking Range, LLC; and Whirlpool Corporation.

manufacturers. DOE accessed the Compliance Certification Database [19] (''CCD''), the Modernized Appliance Efficiency Database System [20] (''MAEDbS''), and the National Resources Canada database [21] (''NRCan'') to create a list of companies that import or otherwise manufacture the products covered by this NOPR. Once DOE created a list of potential manufacturers, DOE used market research tools to determine whether any companies met SBA's definition of a small entity—based on the total number of employees for each company including parent, subsidiary, and sister entities—and gather annual revenue estimates.

Based on DOE's analysis, DOE identified 35 companies that manufacture consumer conventional cooking products covered by this rulemaking. DOE screened out companies that have more than 1,500 total employees, are not original equipment manufacturers (*i.e.,* do not manufacture the products they sell), or are entirely foreign owned and operated, and therefore do not meet SBA's requirements to be considered a small entity. Of the 35 companies DOE identified as manufacturers of consumer conventional cooking products sold in the United States, 15 were identified as small businesses.

4. Description and Estimate of Compliance Requirements Including Differences in Cost, if Any, for Different Groups of Small Entities

DOE is proposing TSL 1 in this NOPR. For all conventional oven product classes, TSL 1 requires that the conventional ovens not be equipped with a linear power supply. Based on DOE's shipments analysis, more than 95 percent of conventional ovens use an SMPS and therefore are not equipped with a linear power supply. Based on DOE's shipment analysis, DOE assumed most, if not all, small businesses already use SMPSs for the conventional ovens they manufacture. If any small businesses do still use linear power supplies in their conventional ovens, there would be minimal conversion costs to these small businesses, as SMPSs can be purchased as a separate component and would most likely not require a significant redesign to incorporate these SMPSs. The remainder of this cost analysis focuses on the costs associated with complying with the proposed conventional cooking top energy conservation standards.

As stated in the previous section, DOE identified 15 small manufacturers of consumer conventional cooking products. All 15 of these small businesses manufacture conventional cooking tops. These 15 small businesses can be grouped into two manufacturing groups: those that manufacture premium cooking tops and those that manufacture non-premium cooking tops.

Gas cooking top non-premium products typically have thinner non-continuous grates with one or no HIR burner (although some of these small businesses may offer a limited number of models with thicker continuous grates). Electric cooking top non-premium products mostly have electric open (coil) element cooking tops (although a few small businesses may have up to 25 percent of their electric ranges or electric cooking tops using electric smooth element cooking tops). These non-premium small businesses usually compete on price in the market.

Gas cooking top premium products typically have thicker continuous grates with multiple HIR burners. Electric cooking top premium products use smooth elements, typically with induction technology. Small businesses manufacturing premium products do not offer electric open (coil) element cooking tops. Lastly, small businesses manufacturing premium products typically compete on the high quality and professional look and design of their products. These ranges or cooking tops are typically significantly more expensive than non-premium products.

Based on data from each small business's websites, DOE estimated the number of basic models each small business offers.

TABLE V.1—NUMBER OF UNIQUE BASIC MODELS FOR EACH SMALL BUSINESS

Manufacturer	Small business type	Number of cooking top basic models (by product class)	
		Gas	Electric—smooth element
Small Business 1	Non-Premium	4	4
Small Business 2	Non-Premium	.....	30
Small Business 3	Non-Premium	27	13
Small Business 4	Non-Premium	24	.....
Small Business 5	Non-Premium	14	.....
Small Business 6	Non-Premium	3	2
Small Business 7	Premium	11	.....
Small Business 8	Premium	24	5
Small Business 9	Premium	20	7
Small Business 10	Premium	16	.....
Small Business 11	Premium	14	1
Small Business 12	Premium	12	.....
Small Business 13	Premium	42	.....
Small Business 14	Premium	13	.....
Small Business 15	Premium	14	.....

DOE estimated the small business conversion costs and testing costs using the same methodology used to estimate the industry conversion costs, described in section IV.J.2.c of the direct final rule published elsewhere in this issue of the **Federal Register**. There are two types of conversion costs that small businesses could incur due to the proposed standards: product conversion costs (including any testing costs) and capital conversion costs. In the August 2022 TP

[19] U.S. Department of Energy Compliance Certification Management System, available at: *www.regulations.doe.gov/ccms.*

[20] California Energy Commission's Modernized Appliance Efficiency Database System, available at: *cacertappliances.energy.ca.gov/Login.aspx.*

[21] Natural Resources Canada searchable product list, available at: *oee.nrcan.gc.ca/pml-lmp/.*

Final Rule, DOE estimated a lower per-unit testing cost for testing done in-house and a more-costly third-party laboratory per-unit testing cost. For this IRFA, DOE assumed all small businesses would incur the more costly third-party laboratory per-unit testing cost, as most small businesses do not have in-house testing capabilities or capacity to test all their products in accordance with the DOE test procedure.

Product conversion costs are investments in research and development (''R&D''), testing, marketing, and other non-capitalized costs necessary to make product designs comply with new and amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled. Manufacturers would have to incur testing costs for all gas cooking tops and all electric smooth element cooking tops since DOE is proposing new performance-based energy conservation standards for cooking tops. Therefore, even products that meet the proposed energy conservation standards would incur testing costs to test these gas cooking tops and electric smooth element cooking tops to demonstrate compliance with the proposed energy conservation standards. However, manufacturers would only incur R&D product conversion costs and capital conversion costs if they have products that do not meet the proposed energy conservation standards.

Based on the estimated model counts for each conventional cooking top product class shown in Table V.1 and the conversion cost and testing cost methodology used to calculate industry conversion costs, DOE estimated the conversion costs and testing costs for each small business, displayed in Table V.2. DOE then used D&B Hoovers to estimate the annual revenue for each small business. DOE presents the estimated conversion costs and testing costs as a percent of the estimated 4 years of annual revenue for each small business.

TABLE V.2—ESTIMATED CONVERSION COSTS AND ANNUAL REVENUE FOR EACH SMALL BUSINESS

Manufacturer	Small business type	Total conversion and testing costs	Annual revenue	Conversion cost as a % of 4-years of annual revenue
Small Business 1	Non-Premium	$326,600	$950,000	9
Small Business 2	Non-Premium	573,002	8,780,000	2
Small Business 3	Non-Premium	611,001	58,630,000	<1
Small Business 4	Non-Premium	196,800	31,370,000	<1
Small Business 5	Non-Premium	114,800	23,980,000	<1
Small Business 6	Non-Premium	302,000	107,350,000	<1
Small Business 7	Premium	733,204	2,730,000	7
Small Business 8	Premium	1,224,306	5,000,000	6
Small Business 9	Premium	1,136,404	8,800,000	3
Small Business 10	Premium	774,204	7,990,000	2
Small Business 11	Premium	1,027,004	8,648,000	3
Small Business 12	Premium	741,404	10,970,000	2
Small Business 13	Premium	1,201,909	32,600,000	1
Small Business 14	Premium	749,604	19,800,000	1
Small Business 15	Premium	757,804	23,730,000	1

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the proposed rule.

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small businesses that would result from the proposed standards, represented by TSL 1. In reviewing alternatives to the proposed standards, DOE examined not setting energy conservation standards for consumer conventional cooking products. While not setting energy conservation standards for consumer conventional cooking products would reduce the impacts on small business manufacturers, it would come at the expense of 0.22 quads of energy savings and between $1.56 billion to $0.65 billion in consumer net benefits.

Establishing standards at TSL 1 would balance the benefits of the energy savings and consumer net benefits at TSL 1 with the potential burdens placed on consumer conventional cooking product manufacturers, including small business manufacturers. Accordingly, DOE is proposing to adopt TSL 1 and is not proposing any of the other policy alternatives examined as part of the regulatory impact analysis and included in chapter 17 of the direct final rule TSD.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. (42 U.S.C. 6295(t)) Additionally, manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, and Small businesses.

Signing Authority

This document of the Department of Energy was signed on January 26, 2024, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to

delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 29, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, DOE proposes to amend part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.2 by adding in alphabetical order, the definition of ''Portable indoor conventional cooking top'' to read as follows:

§ 430.2 Definitions.

* * * * *

Portable indoor conventional cooking top means a conventional cooking top designed—

(1) For indoor use; and

(2) To be moved from place to place.

* * * * *

■ 3. Amend § 430.32 by revising paragraphs (j)(1) and (2) and the heading to paragraph (j)(3) introductory text to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(j) * * *

(1) *Conventional cooking tops.* (i) Gas cooking tops, other than gas portable indoor conventional cooking tops, manufactured on or after April 9, 2012, and before January 31, 2028, shall not be equipped with a constant burning pilot light.

(ii) Gas portable indoor conventional cooking tops, manufactured on or after April 9, 2012, shall not be equipped with a constant burning pilot light.

(iii) Conventional cooking tops, other than portable indoor conventional cooking tops, manufactured on or after January 31, 2028, shall have an integrated annual energy consumption (IAEC), excluding any downdraft venting system energy consumption, no greater than:

Product class	Maximum integrated annual energy consumption (IAEC)
(A) Electric Smooth Element Standalone Cooking Tops	207 kWh/year.
(B) Electric Smooth Element Cooking Top Component of Combined Cooking Products	207 kWh/year.
(C) Gas Standalone Cooking Tops	1,770 kBtu/year.
(D) Gas Cooking Top Component of Combined Cooking Products	1,770 kBtu/year.

(2) *Conventional ovens.* The control system of a conventional oven shall:

(i) Not be equipped with a constant burning pilot light, for gas ovens manufactured on or after April 9, 2012; and

(ii) Not be equipped with a linear power supply, for electric and gas ovens manufactured on or after January 31, 2028.

(3) *Microwave ovens.* * * *

* * * * *

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Part IV

Department of Health and Human Services

Administration for Community Living

45 CFR Parts 1321, 1322, 1323, et al.

Older Americans Act: Grants to State and Community Programs on Aging; Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services; Grants for Supportive and Nutritional Services to Older Hawaiian Natives; and Allotments for Vulnerable Elder Rights Protection Activities; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

45 CFR Parts 1321, 1322, 1323, and 1324

RIN 0985–AA17

Older Americans Act: Grants to State and Community Programs on Aging; Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services; Grants for Supportive and Nutritional Services to Older Hawaiian Natives; and Allotments for Vulnerable Elder Rights Protection Activities

AGENCY: Administration for Community Living (ACL), Department of Health and Human Services (HHS or ''the Department'').

ACTION: Final rule.

SUMMARY: ACL is issuing this final rule to modernize the implementing regulations of the Older Americans Act of 1965 (''the Act'' or OAA). These changes advance the policy goals of the Act as articulated by Congress, including equity in service delivery, accountability for funds expended, and clarity of administration for ACL and its grantees. This final rule ultimately facilitates improved service delivery and enhanced benefits for OAA participants, particularly those in greatest economic need and greatest social need consistent with the statute.

DATES:

Effective date: This final rule is effective on March 15, 2024.

Compliance date: October 1, 2025.

FOR FURTHER INFORMATION CONTACT: Amy Wiatr-Rodriguez, Director of Regional Operations, Administration for Community Living, Department of Health and Human Services, 330 C Street SW, Washington, DC 20201. Email: *amy.wiatr-rodriguez@acl.hhs.gov,* Telephone: (312) 938–9858. Alice Kelsey, Deputy Director for the Administration on Aging, Administration for Community Living, Department of Health and Human Services, 330 C Street SW, Washington, DC 20201. Email: *alice.kelsey@acl.hhs.gov,* Telephone: (202) 795–7342.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: Upon request, the Department will provide an accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the regulations. To schedule an appointment for this type of accommodation or auxiliary aid, please call (312) 938–9858 or email *amy.wiatr-rodriguez@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

Congress passed the OAA in 1965 to expand and enhance community social services for older persons.[1] The original legislation established authority for grants to State agencies for community planning and social services, research and development projects, and personnel training in the field of aging. Subsequent reauthorizations expanded and enhanced the reach of the Act, including through the authorization of the Long-Term Care Ombudsman Program (LTCOP or Ombudsman program). The Act created the Administration on Aging (AoA) within the Department of Health, Education and Welfare, now the Department of Health and Human Services (HHS), to serve as the principal agency designated to carry out the provisions of the OAA and as the Federal focal point on matters concerning older persons.[2] It designated a Commissioner on Aging, now Assistant Secretary for Aging, to lead the activities of AoA and administer the OAA.[3] Since 2012, AoA has been housed in ACL.[4]

Title III of the OAA authorizes grants to State agencies on aging (State agencies), who in turn provide funding to area agencies on aging (AAAs or area agencies) to serve as advocates on behalf of older persons and create comprehensive and coordinated community-based continuums of services and supports.[5] In 2022 the national aging network included 56 State agencies (including the District of Columbia and five Territories), over 600 AAAs, and over 20,000 local service providers.[6]

Title III authorizes the largest OAA programs by population served and Federal funds expended as administered by ACL. These include supportive, nutrition, evidence-based disease prevention and health promotion, caregiver, legal, and other services.[7] Title III programs served 10.1 million older persons in 2020 (the most recent year for which data is available).[8] Title III accounted for nearly three quarters of the of the $2.378 billion OAA 2023 budget and funding for these programs is based on a statutory formula that determines yearly allocations to individual Territories and States.[9]

Title III services are available to persons aged 60 and older and family caregivers; however, they are prioritized to serve those with the greatest economic need and greatest social need, particularly low-income minority older individuals, older persons with limited English proficiency (LEP), older persons residing in rural areas, and older persons with disabilities.[10]

First included as a part of the 1978 reauthorization of the Act, Title VI authorizes funds for nutrition, supportive, and caregiver services to older Native Americans. The purpose of Title VI programs is to support the independence and well-being of Tribal elders and caregivers living in their communities consistent with locally determined needs. ACL awards funding directly to Federally recognized Tribal organizations, including Native Alaskan organizations, and a designated not-for-profit group representing Native Hawaiians. To be eligible for funding, a Tribal organization or Hawaiian Native grantee must represent at least 50 Native Americans aged 60 and older who reside in the service area. In FY2023, grants were awarded to 290 Tribal organizations representing approximately 400 Indian Tribes and Alaskan Native entities and one

[1] Public Law 89–73, 79 Stat. 218 (1965). 42 U.S.C. 3001 *et seq.*

[2] Section 201 of the OAA; 42 U.S.C. 3011.

[3] Section 202 of the OAA; 42 U.S.C. 3012. Title V of the OAA added in the 1978 reauthorization is administered by the Dep't of Labor.

[4] 80 FR 31389, 31391 (June 2, 2015).

[5] Title III of the OAA; 42 U.S.C. 3021 *et seq.*

[6] Cong. Research Serv., R43414, Older Americans Act: Overview and Funding (May 17, 2023), *https://crsreports.congress.gov/product/pdf/R/R43414.*

[7] Title III of the OAA; 42 U.S.C. 3021 *et seq.*

[8] Admin. for Cmty. Living, Overview of Older Americans Act Title III, VI, and VII Programs: 2020 Summary of Highlights and Accomplishments, p. III–2 (2022), *https://acl.gov/sites/default/files/news%202022-09/2020%20OAA%20Report_Complete%20Product%209-1-22_508.pdf.*

[9] Admin. For Cmty. Living, FY 2022 OAA Title III Annual Grant Awards (without transfers) (Apr. 27, 2022), *https://acl.gov/sites/default/files/about-acl/2022-05/Title%20III-2022.pdf.*

[10] Title III of the OAA; 42 U.S.C. 3021 *et seq.*

organization serving Native Hawaiian elders.[11]

Title VII authorizes the Ombudsman program, programs for elder abuse, neglect, and exploitation prevention, and a requirement for State agencies to provide a State Legal Assistance Developer.[12] States' Ombudsman programs investigate and resolve complaints related to the health, safety, welfare, and rights of individuals who live in long-term care facilities. Begun in 1972 as a demonstration program, Ombudsman programs today exist in all States, the District of Columbia, Puerto Rico, and Guam, under the authorization of the Act.[13] These States and Territories have an Office of the State Long-Term Care Ombudsman (the Office), headed by a full-time State Long-Term Care Ombudsman (the Ombudsman). In FY 2022, the program had a budget of $19.9 million.[14] That same year, Ombudsman fielded 182,000 complaints and provided more than 569,000 instances of information and assistance to individuals and long-term care facilities.[15] Title VII also authorizes grants to State agencies for program activities aimed at preventing and remedying elder abuse, neglect, and exploitation.

A. Statutory and Regulatory History

This final rule is published under the authority granted to the Assistant Secretary for Aging by the Older Americans Act of 1965, Public Law 89–73, 79 Stat. 218 (1965), as amended through the Supporting Older Americans Act of 2020, Public Law 116–131, 134 Stat. 240 (2020), sections 201(e)(3), 305(a)(1), 306(d)(1), 307(a), 307(d)(3), 331(a), 614(a), 624(a) and 712–713 (42 U.S.C. 3011(e), 42 U.S.C. 3025, 42 U.S.C. 3026(d), 42 U.S.C. 3027(a), 42 U.S.C. 3027(a), 3027(d), 42 U.S.C. 3057e, 42 U.S.C. 3057j, and 3058g–3058h, respectively). These provisions authorize the Assistant Secretary for Aging to prescribe regulations regarding designation of State agency activities; development and approval of State plans on aging; and funding for supportive, nutrition, evidence-based disease prevention and health promotion, family caregiver support, and legal services under Title III of the Act; funding for Indian Tribes, Tribal organizations, and a Hawaiian Native grantee to serve Hawaiian Native and Tribal elders and family caregivers under Title VI of the Act; and allotments for vulnerable elder rights protection activities, including the Long-Term Care Ombudsman Program under Title VII of the Act.

The OAA was passed in 1965 and vested authority for carrying out the purposes of the Act, including through the issuance of regulations, in the Assistant Secretary for Aging (then the Commissioner for Aging). Since its initial passage, the OAA has been amended a total of eighteen times. Regulations for programs authorized under the Act date from 1988.[16] Title III, except regarding the Ombudsman program, and Title VI implementing regulations have not been revised since that time, while Title VII regulations 45 CFR part 1324 *Allotments for Vulnerable Elder Rights Protection Activities, subpart A* and portions of 45 CFR part 1321—*Grants to State and Community Programs on Aging* regarding the Ombudsman program were published in 2015.[17]

There have been substantial statutory changes since 1988, as detailed by the Congressional Research Service in several summary publications.[18] *Title VII: State Long-Term Care Ombudsman and Vulnerable Elder Rights Protection* was added to the Act by the 1992 amendments (Pub. L. 102–375; 42 U.S.C. 3058g–3058i), which consolidated and expanded existing programs focused on protecting the rights of older persons. Title VII incorporated separate authorizations of appropriations for the Ombudsman program; the program for the prevention of elder abuse, neglect, and exploitation; elder rights and legal assistance development; and outreach, counseling, and assistance for insurance and public benefit programs. The 1992 amendments also strengthened requirements related to focusing Title III funding and services on populations in greatest need with particular attention to older low-income minority individuals. Other elements of the 1992 amendments authorized programs for assistance to caregivers of the frail elderly, clarified the role of Title III agencies in working with the private sector, and required improvements in AoA data collection.

The National Family Caregiver Support Program under Title III and Native American Caregiver Support Program under Title VI were authorized by the 2000 amendments (Pub. L. 106–501), which also permitted State agencies to impose cost-sharing, subject to limitations, for some Title III services certain older persons receive while retaining authority for voluntary contributions toward the costs of services. The 2006 amendments (Pub. L. 109–365) authorized the Assistant Secretary for Aging to designate an individual within AoA to be responsible for prevention of elder abuse, neglect, and exploitation and to coordinate Federal elder justice activities. In addition, the 2006 amendments expanded the reach of Aging and Disability Resource Centers (ADRCs), brought increased attention to services and supports related to mental health and mental disorders, required State agencies to conduct increased planning efforts related to the growing number of older people in coming decades, and focused attention on the needs of older people with LEP and those at risk of institutional placement.

The 2016 amendments (Pub. L. 114–144) provided additional flexibility to State agencies, AAAs, and social services providers in addressing the modernization of senior centers, falls prevention, and behavioral health screening, and codified existing practices, such as requiring ''evidence-based'' disease prevention and health promotion services. For the Ombudsman program, they clarified conflicts of interest (COI) provisions, strengthened confidentiality and Ombudsman training requirements, and improved resident access to representatives of the Office. They addressed coordination among ADRCs and other home and community-based service (HCBS) organizations providing information and referrals.

The Supporting Older Americans Act of 2020 (Pub. L. 116–131) added new definitions, including *person-centered* and *trauma-informed.* The legislation amended the Act to address a range of disease prevention and health promotion activities, such as chronic disease self-management and falls prevention, as well as address the negative effects of social isolation among older individuals. Congress focused on other reauthorization issues as well, including changes to nutrition

[11] U.S. Dep't of Health & Human Servs., Tracking Accountability in Government Grants System (TAGGS), *https://taggs.hhs.gov* (last visited Oct. 13, 2023).

[12] Title VII of the OAA; 42 U.S.C. 3058 *et seq.*

[13] Cong. Research Serv., R43414, Older Americans Act: Overview and Funding (May 17, 2023), *https://crsreports.congress.gov/product/pdf/R/R43414.*

[14] Admin. For Cmty. Living, Fiscal Year 2023 Justification of Estimates for Appropriations Committees, 132, *https://acl.gov/about-acl/budget.*

[15] *National Ombudsman Reporting System (NORS), Data at a Glance,* Admin. for Cmty. Living (last visited Jan. 18, 2023).

[16] 53 FR 33758 (Aug. 31, 1988).

[17] 80 FR 7704 (Feb. 11, 2015).

[18] Cong. Research Serv., R46439, Older Americans Act: A 2020 Reauthorization (July 1, 2020), *https://crsreports.congress.gov/product/pdf/R/R46439;* Cong. Research Serv., R43414, Older Americans Act: Overview and Funding (May 17, 2023), *https://crsreports.congress.gov/product/pdf/R/R43414.*

services programs and to programs that provide support to family caregivers.

We issued a Request for Information (RFI) on May 6, 2022 seeking input from the aging network, Indian Tribes, States, and Territories on challenges they face administering services, as well as feedback from individuals and other interested parties on experiences with services, providers, and programs under the Act.[19] Most of the comments we received focused on: equitably serving older adults and family caregivers from underserved and marginalized communities, the Ombudsman program, area plans on aging, and flexibilities within the nutrition and other programs.

On June 16, 2023, the **Federal Register** published a notice of proposed rulemaking (NPRM) regarding OAA Titles III, VI, and VII (88 FR 39568). Through this NPRM, ACL sought feedback regarding ACL's proposal to modernize the implementing regulations of the OAA, which have not been substantially altered since their promulgation in 1988. The NPRM addressed supportive, nutrition, evidence-based disease prevention and health promotion, caregiver, legal, long-term care ombudsman, and other services provided by State agencies, Tribal organizations and a Hawaiian Native grantee, AAAs, and service providers under the OAA. The 60-day comment period for the NPRM closed on August 15, 2023.

B. Overview of the Final Rule

This final rule adopts the same structure and framework as the proposed rule. Part 1321 addresses programs authorized under Title III of the Act and includes subpart A (basis, purpose, and definitions), subpart B (State agency responsibilities), subpart C (area agency responsibilities), subpart D (service requirements), and subpart E (emergency and disaster requirements). Part 1322 addresses programs authorized under Title VI of the Act and includes subpart A (basis, purpose, and definitions), subpart B (application), subpart C (service requirements), and subpart D (emergency and disaster requirements). Part 1324 includes programs authorized under Title VII of the Act and includes subpart A (State Long-Term Care Ombudsman Program), subpart B (programs for prevention of elder abuse, neglect, and exploitation), and subpart C (State legal assistance development).

ACL has made changes to several of the proposed rule's provisions based on public comments. Our final rule is a direct response to feedback from interested parties and reflects the evolving needs of both grantees and OAA program participants. In response to robust comment, we have clarified the flexibilities available during a major disaster, increased the amount of funds under Title III, part C–1 of the Act that may be used for shelf-stable, pick-up, carry-out, drive-through, or similar meals, and provided more information about implementing the definition of ''greatest social need'' in State and area plans, among other clarifications.

C. Severability

To the extent that any portion of the requirements arising from the final rule is declared invalid by a court, ACL intends for all other parts of the final rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. While our expectation is that all parts of the final rule that are operable in such an environment would remain in effect, ACL will assess at that time whether further rulemaking is necessary to amend any provisions subsequent to any holding that ACL exceeded its discretion, or the provisions are inconsistent with the OAA, or are vacated or enjoined on any other basis.

II. Provisions of the Final Rule and Analysis and Responses to Public Comments

We received 780 public comments from individuals and organizations, including State agencies, Tribes and Tribal organizations, AAAs, service providers, Ombudsman programs, advocacy groups, and private citizens. We thank commenters for their consideration of the proposed rule and appreciate all comments received. We particularly are grateful for the OAA program participants who wrote to share their experience of OAA services and their thoughts on what they enjoy and would like to see in the future regarding OAA programming. In the subsequent sections, we summarize the rule's provisions and the public comments received, and we provide our response.

General Comments on the NPRM

General Support

Comment: Commenters overwhelmingly supported most provisions in the proposed rule. Many commenters expressed general support for our updates to modernize the regulations. Other commenters appreciated the flexibilities in the rule and noted that they would like to work with their State and local leaders to identify other creative approaches to expanding services to older adults. A significant number of commenters requested additional funds to provide services under the Act.

Response: ACL appreciates these comments. We encourage collaboration at the State and local levels to identify solutions that are responsive to the needs and resources in local communities. Requests for funding are outside the scope of this rule.

Technical Corrections; Recommendations for Sub-Regulatory Guidance

Comment: A number of commenters identified technical corrections, including citation errors and a misnumbered preamble provision. Commenters also provided suggestions and raised questions that could be addressed in future sub-regulatory guidance on a variety of topics.

Response: We appreciate these comments and have made the recommended technical corrections. We have also clarified the regulation text to remove references to sub-regulatory guidance that has not yet been issued, and we have revised the regulation title to accurately reflect program titles. We look forward to providing technical assistance and guidance on a number of topics subsequent to promulgation of the final rule.

LGBTQI+ Older Adults and Older Adults Living With HIV

Comment: A significant number of comments focused on the importance of serving those in greatest economic need and greatest social need, including older adults and family caregivers who are lesbian, gay, bisexual, transgender, queer, intersex and/or have other sexual orientations, gender identities and expressions, and sex characteristics (LGBTQI+). Many commenters expressed support overall, and for specific provisions, concerning LGBTQI+ older adults and older adults with HIV. Specifically, commenters voiced support for full legal protections, protection of rights and privacy, and protection from discrimination when accessing services or meeting with providers. Commenters also supported quality, inclusive, and equitable legislation, regulations, aging policies, programs, services, and initiatives. Many commenters also suggested that staff and professionals working with older adults be trained in sensitivity, cultural competency, and needs specific to LGBTQI+ older adults and older adults with HIV. Specifically, commenters expressed the importance of ensuring that providers foster a welcoming, safe, and respectful

[19] 87 FR 27160 (May 6, 2022); section 2013A of the OAA, 42 U.S.C. 3013a.

environment. Several commenters noted the importance of considering other noneconomic factors, such as geographic location (*e.g.,* rural), disabilities, ethnicity, and the intersectional challenges of multiply marginalized populations. Several commenters noted the specific concerns of this community related to services funded under Title VII of the Act, such as the Ombudsman program and prevention of elder abuse, neglect, and exploitation.

A few commenters specifically recommended engaging State agencies, AAAs, and service providers in providing funding, outreach, and services specific to older adults with HIV. Additionally, a few commenters noted the importance of hiring LGBTQI+ service provider employees and professionals. Several commenters referenced support for and access to high quality and culturally competent medical and mental health care. Some commenters noted the importance of recognition of and respect for partners, friends, and families. One commenter suggested requiring inclusive language and graphics in marketing materials as a matter of compliance. One commenter observed that LGBTQI+ individuals and people with HIV have a greater need to overcome isolation. Several commenters expressed concerns about finding affordable senior supported living options.

Response: ACL appreciates these comments expressing concern for older adults and family caregivers who are LGBTQI+, as well as older adults and family caregivers with HIV. A majority of these comments are beyond the scope of this regulation because they do not relate to the substance of the rule, and in some cases address areas that are outside of ACL's statutory authority. However, we appreciate the numerous comments in support of these communities and believe the provisions at § 1321.3 (defining ''*Greatest social need*''), § 1321.11 (*Advocacy responsibilities*), § 1321.27 (*Content of State plan*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*), § 1321.75 (*Confidentiality and disclosure of information*), and § 1321.93 (*Legal assistance*) will improve services to these populations.

ACL funds the National Resource Center on LGBTQ+ Aging (*https://www.lgbtagingcenter.org*), which provides training and technical assistance to aging services providers, including those funded under the OAA, in their work to support and include LGBTQI+ older adults and family caregivers. In a partnership with the Office of the Assistant Secretary for Health, ACL has worked to support the development of innovative efforts that improve health outcomes and quality of life for people aging with HIV and long-term survivors in both rural and urban areas, particularly among underserved communities, including on the basis of race, ethnicity, and LGBTQI+ status.[20] We expect to build on these efforts and anticipate providing training and technical assistance following promulgation of the final rule to support effective implementation of these provisions.

Collaboration Between State Agencies and Area Agencies

Comment: ACL received many comments expressing concern that the rule allows State agencies to exert too much control in a variety of areas (*e.g.,* which programs AAAs implement under the Act, how AAAs implement programs, minimum expenditures for certain services, prioritization of services, voluntary contributions). Commenters also expressed concern that the extent of control afforded to State agencies by the rule will stifle AAAs' abilities to tailor programs to the needs of their respective planning and service areas (PSAs).

Response: Section 305 of the Act requires designated State agencies to ''[. . .] be primarily responsible for the planning, policy development, administration, coordination, priority setting, and evaluation of all State activities related to the objectives of this Act[.]'' [21] As the grantees under the Act, State agencies are responsible to ACL for monitoring the compliance of activities initiated under Title III with all applicable requirements to ensure grant awards are used for authorized purposes and are in compliance with Federal law. In light of these responsibilities, we believe the rule affords State agencies appropriate authority over the administration and implementation of the Act within their states.

Notwithstanding these State agency obligations, AAAs have a critical role in the development of State agency policies and procedures. Section 1321.9(a) requires that the policies and procedures be developed by State agencies in consultation with AAAs, program participants, and other appropriate parties in the State. As set forth in § 1321.61 (*Advocacy responsibilities of the area agency*), AAAs also have an obligation to monitor, evaluate, and comment on policies, programs, hearings, levies, and community actions which affect older persons and family caregivers; this includes regarding the policies and procedures developed and implemented by State agencies. Further, except for the Ombudsman program as set forth in 45 CFR part 1324, subpart A and where otherwise indicated, the State agency policies may allow for such policies and procedures to be developed at the AAA level. Accordingly, the final rule provides tools for State and area agencies to work in tandem with one another and to address the concerns raised by these comments.

The OAA is clear that State agencies and AAAs should work together to achieve the mission set forth in the Act. AAAs and State agencies have distinct but related roles that are all vitally important in providing services to older adults and family caregivers. ACL is available to provide technical assistance and support to State agencies and AAAs in maintaining positive working relationships, fulfilling their roles, and meeting the expectations of the OAA.

Housing, Housing Instability, and Homelessness

Comment: Many commenters expressed support for addressing housing, housing instability, and homelessness, including information and assistance/referral (I&A/R), partnerships with the U.S. Department of Housing and Urban Development (HUD), assistance with paying for housing costs and shared living options, advocacy regarding rising housing costs and development which displaces older residents, and legal assistance to assist with housing problems, including evictions.

Response: ACL appreciates these comments expressing concern for older adults and family caregivers who experience challenges with housing, housing instability, and homelessness. ACL notes the OAA's long-standing role in support of this topic, including State agency and AAA development of a comprehensive and coordinated network of services and supports; instances of co-location of congregate meal programs under Title III, part C–1 of the Act in affordable housing facilities; and the provision of legal assistance under the Act to respond to various housing and housing-related concerns. While regulating the provision of housing, including paying for housing costs, is beyond the scope

[20] *HHS Selects Phase 2 Winners of National HIV and Aging Challenges, HIV.gov, https://www.hiv.gov/blog/hhs-selects-phase-2-winners-of-national-hiv-and-aging-challenges/* (last updated Sept. 21, 2023).

[21] 42 U.S.C. 3025(a)(1)(C).

of the Act, we believe the provisions at § 1321.3 (defining ''*Access to services or access services,*'' ''*In-home supportive services,*'' and ''*Greatest social need*''), § 1321.27 (*Content of State plan*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*), § 1321.75 (*Confidentiality and disclosure of information*), § 1321.85 (*Supportive services*), and § 1321.93 (*Legal assistance*) will support the aging network in responding to issues relating to housing, housing instability, and homelessness. This includes local partnerships between AAAs and housing authorities or providers and enabling access to services and supports for older adults residing in HUD-assisted housing as well as the braiding of funding to support housing stability with service coordination and delivery.

ACL leads the Housing and Services Resource Center (*https://acl.gov/HousingAndServices*), a partnership between HHS and HUD. We expect to build on these efforts and anticipate providing training and technical assistance following promulgation of the final rule to support effective implementation of these provisions.

Accessibility and Civil Rights Obligations

Comment: Numerous commenters expressed concern with the elimination of the definition of ''severe disability,'' as well as the lack of a specific definition of disability, and the absence of specific incorporation of major sensory disabilities and accessibility in the definition of ''greatest social need.'' Many of these commenters reported instances in which OAA grantees and subrecipients had not respected the civil rights of people with sensory or mobility disabilities. Some shared specific accounts of AAAs and legal service providers failing to provide culturally competent, accessible services to older adult consumers who are blind, low-vision, deaf, hard-of-hearing, deafblind, or who have limited mobility. Many requested that we expand the definition of greatest social need to encompass these disability populations, codify the terms ''accessibility'' and ''vision rehabilitation services,'' require training in disability competency, and more clearly and forcefully require grantees to meet their civil rights obligations to older adults with disabilities.

Commenters also recommended that ACL direct resources specifically to research on aging and vision loss, treatment for diseases that result in vision loss, and supportive services for people with vision loss so that they may age in place—such as transportation and home care assistance.

Response: All recipients of Federal funding, including OAA grantees and subrecipients, must comply with the Americans with Disabilities Act,[22] Section 504 of the Rehabilitation Act,[23] Section 1557 of the Affordable Care Act,[24] and all other applicable laws that protect against discrimination, including against people with disabilities. These civil rights laws require OAA grantees and subrecipients to provide auxiliary aids and services to ensure effective communication and to ensure that no eligible person with a disability is denied access to OAA programs and services due to disability. Older adults with disabilities and advocates may file complaints with the HHS Office for Civil Rights if anyone is denied equitable access to OAA programs or services, including due to lack of effective communication.[25]

While we strongly recommend that OAA grantees and subrecipients train staff on cultural competency and disability accommodations as a best practice, training requirements in disability accommodation and cultural competency are beyond the scope of this rulemaking. We decline to adopt definitions of accessibility, vision rehabilitation services, and related terms, preferring to defer to existing definitions in relevant civil rights laws. However, we have reincorporated the definition of ''severe disability'' in this final rule. In addition, the definition of ''greatest social need'' already includes ''physical and mental disabilities,'' and this includes all severe disabilities and sensory and communication disabilities.

Directing resources for research on aging and vision loss is also outside the scope of this rule. However, we believe the provisions at § 1321.3 (defining ''*Access to services or access services*'' and ''*Greatest social need*''), § 1321.27 (*Content of State plan*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*), and § 1321.85 (*Supportive services*) will support the aging network in responding to issues relating to vision and hearing loss.

Age Discrimination in the Workplace

Comment: Several commenters expressed concern about age discrimination in the workplace.

Response: While addressing age discrimination in the workplace broadly is outside of the scope of these regulations, ACL notes that supportive services provided under Title III of the Act may be helpful to those experiencing work-related concerns. For example, age discrimination is one of the priority areas that may be addressed by legal assistance provided under the Act (§ 1321.93 *Legal assistance*). While Title V, the Senior Community Service Employment Program, is outside the scope of these regulations because it is implemented by the Department of Labor, programs funded under Title III, VI, and VII of the Act are encouraged to have referral mechanisms among programs funded under all Titles of the Act.

Administrative Burden, Implementation Costs, Implementation Timeframe

Comment: We received a significant number of comments related to concerns about the burden, cost, and amount of time regulated entities would need to implement the final rule (*e.g.,* costs and time needed to review and update existing policies and procedures, to create new policies and procedures, create or update state regulations, and to train staff), as well as concerns about the ongoing costs of monitoring compliance with the final rule. Some State agencies commented that they anticipate that consultants and/or additional staff will need to be hired and/or that changes will need to be made to information technology systems. Some State agencies asserted that ACL has greatly underestimated both the cost, and the amount of time, needed to come into compliance with the rule.

Response: A limited number of substantive changes were made by the 2020 reauthorization to the implementation of programs under the Act, and much of this final rule codifies the policies and procedures that Title VI grantees, State agencies, AAAs, and service providers already have or should have in place to administer programs and deliver services under the Act. Similarly, State and area agencies should already be engaging in monitoring activities for compliance with the Act and implementing regulations. State and area agencies will have to review and revise their existing practices, policies, and procedures to ensure they comply with the final rule. For example, State agencies and AAAs will need to update definitions of

[22] 42 U.S.C. 12101 *et seq.*

[23] 29 U.S.C. 794.

[24] 42 U.S.C. 18116.

[25] *How to File a Civil Rights Complaint,* U.S. Dept. of Health and Human Serv., Office for Civil Rights, *https://www.hhs.gov/civil-rights/filing-a-complaint/complaint-process/index.html* (last visited Oct. 11, 2023).

greatest social need and greatest economic need. However, this final rule does not require States to have regulations, and many of the new potentially burdensome aspects of the final rule are at the State agency's option to implement (for example, allowing shelf-stable, pick-up, carry-out, drive-through, or similar meals to complement the congregate meals program). We also note that public comments that provided State-specific cost estimates to implement and administer the final rule did not clearly differentiate between costs attributable to the statute and the incremental costs of implementing the final rule; accordingly, it is not feasible to incorporate this information into our analysis of the impact of the final rule. As more particularly discussed in the Regulatory Impact Analysis below, we anticipate that any costs to regulated entities associated with the final rule will not be onerous.

In consideration of comments related to the time required for implementation of the rule, we have decided to delay the compliance date of this rule until October 1, 2025. This should give all regulated entities sufficient time to come into compliance with these regulations. It will also allow time for State and area plans on aging that will be effective as of October 1, 2025, to incorporate the requirements of this final rule into new or amended plans.

Consistent with current practice, if State agencies encounter challenges implementing specific provisions of the rule, they should engage with ACL for technical assistance and support. In addition, State agencies that need additional time to comply with one or more provisions of the rule may submit a request to proceed under a corrective action plan. A request should include the reason the State needs additional time, the steps the State will take to reach full compliance, and how much additional time the State anticipates needing. The corrective action plan process is intended to be highly collaborative and flexible. Under a corrective action plan, States agencies and ACL will jointly identify progress milestones and a feasible timeline for the State agency to come into compliance with the provision(s) of the rule incorporated into the corrective action plan. State agencies must make a good faith effort at compliance to continue operating under a corrective action plan. Requests for corrective action plans will be reviewed after April 1, 2024, and ACL will provide guidance on this process after this rule takes effect.

Part 1321: Grants to State and Community Programs on Aging

A. Provisions Revised To Reflect Statutory Changes or Provide Clarity

The following provisions of this final rule reflect statutory changes (*e.g.,* changing ''Commissioner for Aging'' to ''Assistant Secretary for Aging'' throughout), revisions for clarity, and direction in response to requests for technical assistance from grantees and other interested parties, RFI responses, listening sessions, Tribal consultation, and public comment received on the NPRM.

Subpart A—Introduction

§ 1321.1 Basis and Purpose of This Part

Section 1321.1 sets forth the requirements of Title III of the Act to provide grants to State and community programs on aging. This final rule ensures consistency with statutory terminology and requirements, such as referring to evidence-based disease prevention and health promotion and caregiver services, specifying family caregivers as a service population, and listing the key roles of the State agency identified to implement Title III and Title VII of the Act.

Comment: Commenters expressed support for the priority given to services for those with the greatest economic and social need. One commenter requested § 1321.1(c)(4) also recognize the need for advocacy on behalf of family caregivers.

Response: We appreciate these comments and have revised § 1321.1(c)(4) to read, ''Serve as an advocate for older individuals and family caregivers[.]''

Comment: One commenter stated that given the authority for the State agency to allocate funds to the Ombudsman program, they strongly recommend language be added at § 1321.1(c)(7) to reflect allocation of funds for the Ombudsman program.

Response: ACL appreciates this comment and has revised § 1321.1(c)(7) to remove ''or'' in (i), add ''or'' to the end of (ii), and add (iii) to read, ''The Ombudsman program, as set forth in part 1324.''

§ 1321.3 Definitions

The final rule updates the definitions of significant terms in § 1321.3 by adding several new definitions, revising several existing definitions, and deleting definitions of terms that are obsolete or no longer necessary. The additions, revisions, and deletions are intended to reflect changes to the statute, important practices in the administration of programs under the Act, and feedback we have received from a range of interested parties.

We add definitions of the following terms: ''Access to services,'' ''Acquiring,'' ''Area agency on aging,'' ''Area plan administration,'' ''Best available data,'' ''Conflicts of interest,'' ''Cost sharing,'' ''Domestically produced foods,'' ''Family caregiver,'' ''Governor,'' ''Greatest economic need,'' ''Greatest social need,'' ''Immediate family,'' ''Local sources,'' ''Major disaster declaration,'' ''Multipurpose senior center,'' ''Native American,'' ''Nutrition Services Incentive Program,'' ''Older relative caregiver,'' ''Planning and service area,'' ''Private pay programs,'' ''Program development and coordination activities,'' ''Program income,'' ''Single planning and service area State,'' ''State,'' ''State agency,'' ''State plan administration,'' ''Supplemental foods,'' and ''Voluntary contributions.''

We retain and make minor revisions to the terms: ''Altering or renovating,'' ''Constructing,'' ''Department,'' ''Direct services,'' ''In-home supportive services,'' ''Means test,'' ''Official duties,'' ''Periodic,'' ''Reservation,'' ''Service provider,'' and ''Severe disability.'' We retain with no revisions the terms: ''Act'' and ''Fiscal year'' and we remove the terms: ''Frail'' and ''Human services.''

Comment: We received many comments in support of these updated definitions.

Response: We appreciate these comments. ACL's responses to comments of particular note follow.

''Access to Services'' or ''Access Services''

Comment: We received one comment requesting additional examples of access services.

Response: ACL appreciates this comment and acknowledges that service provision and technologies continue to evolve. In response to this comment, we have added ''options counseling'' to the list of examples.

''Acquiring,'' ''Altering or Renovating,'' and ''Constructing''

Comment: We received comments supporting the removal of the term ''multipurpose senior center'' from the definitions of ''altering or renovating'' and ''constructing.'' Other commenters expressed confusion related to these terms, because the rule only allows grantees to use OAA funding for ''acquiring'' and ''constructing'' multipurpose senior centers. Other commenters sought clarity as to whether these terms apply to minor home repairs

or modifications provided to individual service participants under the Act.

Response: We only use these terms to clarify how grantees may use OAA funds on facilities where OAA services are provided or facilities that are otherwise necessary to satisfy the administrative requirements of the Act. These terms do not apply to ''in-home supportive services'' provided to individuals, such as minor modification of homes or individual residences.

''Conflicts of Interest''

Recognizing the importance of ensuring the integrity of, and trust in, activities carried out under the Act, section 307(a)(7) of the Act requires State agencies to have mechanisms in place to identify and remove COI.[26] We include several provisions related to COI to provide clarity for State agencies, AAAs, and service providers: §§ 1321.3, 1321.47, and 1321.67. These provisions include a general definition of COI and specific requirements for State agencies and AAAs, respectively, which are discussed in more detail below. These provisions reflect the expanded potential for COI due to changes in the scope of activities undertaken by these entities since the Act was first passed and these regulations were first issued. The intent of the COI provisions is to ensure that State agencies, AAAs, and service providers carry out the objectives of the Act consistent with the best interests of the older people they serve.

''Cost Sharing''

We clarify the definition of cost sharing to implement the intent of section 315 of the Act.[27] The term ''cost sharing'' generally refers to the portion of the cost of an item or service for which an individual is responsible in order to receive that item or service. However, this term is used differently in the Act than it is commonly used in other settings. There are many restrictions on how cost sharing may be implemented under the Act, including that an eligible individual may not be denied service for failure to make a cost sharing payment. The OAA allows for cost sharing from certain individuals for some services,[28] but State agencies that wish to allow the practice of cost sharing must comply with a number of requirements, which are described in § 1321.9(c)(2)(xi).

''Cost Sharing'' and ''Voluntary Contributions''

Comment: We received a mix of comments on these definitions; some commenters felt the definitions were clear as drafted, while others disagreed or asked for further clarification.

Response: We have revised the definition of ''voluntary contributions'' to read, ''[. . .] means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.'' For consistency, we have also revised this definition in part 1322. We intend to address other suggestions and requests for clarification through technical assistance.

''Family Caregiver''

We define ''family caregiver'' to include the following subsets: adult family members or other individuals who are caring for an older individual, adult family members or other individuals who are caring for an individual of any age with Alzheimer's disease or a related disorder with neurological and organic brain dysfunction, and ''older relative caregivers'' (defined below). With this inclusive approach to defining ''family caregiver,'' we include those populations specified in the National Family Caregiver Support Program, as set forth in Title III, part E of the Act. For example, this includes unmarried partners, friends, or neighbors caring for an older adult.

Comment: We received one comment suggesting that individuals of working age who are not adults should be included in the definition of family caregiver.

Response: ACL appreciates this comment. Entities implementing services for family caregivers have the discretion to define an ''adult'' in this context or to consider such individuals as ''other individuals'' as used in the definition, so long as they comply with State agency policies and procedures, these regulations, and any other applicable Federal requirements.

Comment: We received many comments supporting an inclusive definition of family caregiver, as well as suggestions for expanded wording of the definition. One commenter recommended ACL consider alternatives to the term ''informal'' within the family caregiver definition to avoid minimizing their invaluable role and avoid inaccuracy due to some receiving financial compensation.

Response: ACL appreciates these comments and concurs that the definition includes non-traditional families and families of choice. We believe that the definition of ''an adult family member, or another individual'' and the subsequent preamble explanation that this ''includes unmarried partners, friends, or neighbors'' is sufficiently broad. To address family caregivers who may receive limited financial compensation, we have revised the definition to add, ''For purposes of this part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.'' We have also revised this definition in part 1322.

''Greatest Economic Need''

One of the basic tenets of the Act is focusing OAA services on individuals who have the greatest economic need. The definition of ''greatest economic need'' in the Act incorporates income and poverty status. The Act also permits State agencies to set policies, consistent with our regulations, that incorporate other considerations into the definition of ''greatest economic need.'' [29] Through its policies, the State agency may permit AAAs to further refine specific target populations of greatest economic need within their PSA.[30] A variety of local conditions and individual situations, other than income, could factor into an individual's level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition allows State agencies and AAAs to further refine target populations of greatest economic need.

Comment: We received multiple comments expressing support for focusing services on those in greatest economic need. One commenter stated that it would be beneficial to create a process of enabling local AAAs to set standards and definitions to reflect local needs.

Response: ACL appreciates these comments and notes that the preamble discussion supports local targeting. Furthermore, § 1321.27(d) and

[26] 42 U.S.C. 3027(a)(7).

[27] 42 U.S.C. 3030c–2.

[28] 42 U.S.C. 3030c–2(a)(2) prohibits a State agency from implementing cost sharing for the following services: information and assistance, outreach, benefits counseling, or case management; ombudsman, elder abuse prevention, legal assistance, or other consumer protection services; congregate and home-delivered meals; and any services delivered through Tribal organizations. 42 U.S.C. 3030c–2(a)(3) prohibits cost-sharing for any services delivered through a Tribal organization or to an individual whose income is at or below the FPL. State agencies are prohibited from considering assets and other resources when considering whether a low-income individual is exempt from cost-sharing, when creating a sliding scale for cost sharing, or when seeking a contribution from a low-income individual.

[29] 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa).

[30] 42 U.S.C. 3025(a)(1).

§ 1321.65(b)(2) permit the State agency and AAAs to further refine specific target populations of greatest economic need based on local and individual factors.

Comment: Some commenters noted that the definition in § 1321.3 of ''greatest social need'' does not entirely align with the text at § 1321.27 and § 1321.65.

Response: We appreciate commenters raising this issue; we have revised these provisions for consistency.

Comment: Some commenters expressed concern that the expanded definition of greatest social need could diminish the focus on those in greatest economic need if the revised definition results in changing an intrastate funding formula (IFF).

Response: Changes to IFFs are one, but not an exclusive, method of targeting and prioritizing services to those in greatest social need. We provide additional discussion on methods to target and prioritize services to those in greatest economic and greatest social need in the preamble discussion under § 1321.27.

''Greatest Social Need''

Focusing OAA services on individuals who have the greatest social need is one of the basic tenets of the Act. ''Greatest social need'' is defined in the Act as ''need caused by noneconomic factors'' including physical and mental disabilities, language barriers, and cultural, social, or geographic isolation, including isolation caused by racial or ethnic status that restricts the ability of an individual to perform normal daily tasks or threatens the capacity of the individual to live independently.[31] This definition allows for consideration of other noneconomic factors that contribute to cultural, social, or geographic isolation.

For example, in multiple places the Act requires special attention to the needs of older individuals residing in rural locations. In some communities, such isolation may be caused by religious affiliation. Isolation may also be related to sexual orientation, gender identity, or sex characteristics. For example, research indicates that LGBTQI+ older adults are at risk for poorer health outcomes and have lived through discrimination, social stigma, and the effects of prejudice, impacting their connections with families of origin, lifetime earnings, opportunities for retirement savings, and ability to trust health care professionals and aging services providers.[32] People aging with HIV are a growing population with distinct needs. The experience of HIV stigma may contribute to isolation and feelings of loneliness and be complicated by other stigmatized or marginalized components of an individual's identity, including age, race, sexual orientation, and gender identity. Older people with HIV report poor mental and physical health at higher rates than their HIV negative counterparts, as well as difficulty accessing necessary supports and services like transportation, nutrition, and housing.[33]

Other chronic conditions may also result in isolation or stigma, as may housing instability, food insecurity, lack of access to reliable and clean water supply, lack of transportation, utility assistance needs, or interpersonal safety concerns, including abuse, neglect, and exploitation.

We received many comments through the RFI and the NPRM comment period urging ACL to set clear and consistent expectations regarding the populations to be included, and our intent is to do so in this definition. As with ''greatest economic need,'' the Act permits State agencies to set policies, consistent with our regulations, that further define the noneconomic considerations that contribute to populations designated as having the ''greatest social need.'' [34] Through its policies, the State agency may permit AAAs to further refine specific target populations of greatest social need within their PSAs.[35] State agencies and AAAs are in the best position to understand additional conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition allows State agencies and AAAs to further refine target populations of greatest social need.

Comment: We received multiple comments expressing support for focusing services on those in greatest social need. One commenter stated it would be beneficial to create a process of enabling local AAAs to set standards and definitions to reflect local needs.

Response: ACL appreciates these comments and notes that the preamble discussion supports local targeting. Furthermore, § 1321.27(d) and § 1321.65(b)(2) permit the State agency and AAAs to further refine specific target populations of greatest social need based on local and individual factors.

Comment: Commenters suggested various additions to the list of non-economic factors, such as ''solo older adults,'' people living alone with cognitive impairments, older individuals who are experiencing abuse, neglect, self-neglect, and/or exploitation, and formerly incarcerated individuals. One commenter requested a modification from ''normal'' to ''routine'' in proposed (9)(i). Other commenters disagreed with the proposed definition and/or provided other suggestions. For example, some commenters raised the concern that the definition is inadequate regarding racial or ethnic status because it only mentions it in the context of isolation when impacts are far more extensive, including experiences of incarceration, higher rates of poverty and homelessness, health inequities such as being served in underperforming facilities, and lack of trust in external services and service providers. Commenters also requested clarification as to whether sensory loss or sensory impairment, including deafness, being hard of hearing, blindness, and having low vision, may be considered under ''physical and mental disabilities'' or ''chronic conditions.''

Response: ACL appreciates these comments and recognizes that there are various additional factors that a State agency or a AAA may wish to include within the category of ''[o]ther needs as further defined by State and area plans based on local and individual factors[.]'' Such factors may be included in the target populations that a State agency or a AAA may define pursuant to § 1321.27(d)(1) and § 1321.65(b)(2)(i), respectively. Additionally, we acknowledge that the concepts included in our definition may be expressed using different words. For example, ''solo older adults'' or ''older adults living alone'' may be included as examples of experiences of cultural, social, or geographical isolation due to ''any other status'' under (3)(x) of this revised definition. We have added ''routine'' to (3)(x)(a) in addition to the statutory term, ''normal.''

ACL recognizes the extensive impacts to older adults who may face cumulative effects of a lifetime of

[31] 42 U.S.C. 3002(24).

[32] Nat'l Resource Ctr. on LGBT Aging, Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies (2020), *https://www.lgbtagingcenter.org/resources/pdfs/Sage_GuidebookFINAL1.pdf.*

[33] State of Aging with HIV: Third National Survey, HealthHIV (2023) *https://healthhiv.org/stateof/agingwithhiv/?eType=EmailBlastContent&eId=883056c6-e9af-47dc-a653-022e1f4fb9fc;* Mark Brennan-Ing, *Emerging Issues in HIV and Aging,* prepared for the HIV and Aging Policy and Action Collation (May 11, 2020), *https://www.sageusa.org/wp-content/uploads/2020/07/emerging-issues-in-hiv-and-aging-may-2020.pdf.*

[34] 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa).

[35] 42. U.S.C. 3025(a)(1).

isolation caused by racial or ethnic status which restrict the ability of an individual to perform routine daily tasks or threaten the capacity of an individual to live independently, such as experiences of incarceration, higher rates of poverty and homelessness, health inequities due to being served in underperforming facilities, and lack of trust in external services and service providers. Considerations relating to racial or ethnic status may be further defined under ''(x) Other needs as further defined by State and area plans based on local and individual factors[.]''

ACL confirms that sensory loss or sensory impairment, including deafness, being hard of hearing, blindness, and having low vision, may be considered under ''Physical and mental disabilities,'' ''Chronic conditions,'' or separately defined as provided at ''Other needs as further defined by State and area plans based on local and individual factors[.]'' Older individuals who are experiencing abuse, neglect, self-neglect, and/or exploitation may be considered under ''Interpersonal safety concerns,'' as well as under several of the other population categories listed here, depending on the individual's personal situation.

Comment: A commenter recommended including the concept of ''lifesaving/preservation'' (relating to the availability of necessities such as water, access to food supplies, and electricity) in the definition of greatest social need. This comment was raised in the context of Indian reservations where, for example, water may need to be manually hauled and electricity may be unavailable.

Response: ACL appreciates these comments. We acknowledge that access to these types of necessities is important, and we have revised the definition to include lack of access to reliable and clean water supply. We have also amended the regulatory definition to better align with the structure of the statutory provision.

ACL has determined that the definition as proposed, with the revisions noted here, provides an appropriate balance in meeting the intent of the Act and allowing for State and local agency customization.

''Immediate Family''

Comment: We received one comment stating that the term ''immediate family'' should include non-relatives that are socially connected, especially including clan relationships in Tribal communities.

Response: This term is used specifically in the context of COI policies at § 1321.47 and § 1321.67 requiring State agencies and AAAs, respectively, to have policies and procedures ''[e]nsuring that no individual, or member of the immediate family of an individual, involved in administration or provision of a Title III program has a conflict of interest[.]'' ACL declines to expand the definition of immediate family to avoid creating an overly broad application of COI provisions in Tribal communities. ACL notes that the definition of ''family caregiver'' set forth in § 1321.3 and used in § 1321.91 for provision of family caregiver support services includes ''[. . .] an adult family member, or another individual [. . .]'' which includes non-relatives that are socially connected and clan relationships in Tribal communities.

''In-Home Supportive Services''

Comment: We received supportive comments regarding this provision, as well as comments requesting expansion of the in-home supportive services identified. We received comment asking for the definition to be altered or to otherwise remove the phrase ''[. . .] and that is not available under another program'' regarding the example of minor modification of homes for parity with the definition under part 1322, to allow for collaboration with other programs, and to avoid excessive burden in proving no other program is available.

Response: ACL appreciates these comments. We have revised (1) under this definition to read, ''Homemaker, personal care, home care, home health, and other aides[.]'' Recognizing that respite care of all types assists older adults in avoiding institutionalization, we have revised (4) under this definition to begin, ''Respite care for families[.]'' To facilitate consistency of definitions and avoid excessive burden, we have amended the phrase regarding minor modification of homes to state, ''[. . .] and that is not readily available under another program.'' We have similarly amended this definition in part 1322 for consistency.

''Means Test''

Comment: We received several comments questioning how to prioritize participants without means testing.

Response: The definition of ''means test'' in the final rule is very similar to the previous regulatory definition. We updated the definition to be consistent with the statute by adding family caregivers and made other edits for clarity. Under the Act, service providers may not determine an older adult or family caregiver to be ineligible for services due to the participant's income, assets, or other resources.[36] However, service providers may determine that due to limited resources and requirements to focus providing services to those in greatest economic need and greatest social need, they are unable to provide immediate service to some individuals. In such situations, service providers may include prospective participants on a waiting list; make referrals to other service providers or services; offer to provide services under a private pay program, as set forth in § 1321.9(c)(2)(xiii); and/or advocate for additional resources. Service providers may ask for financial information from prospective participants to assess for needs, screen for other benefits or services that may be available, establish priority for receipt of services, and collect data for needs assessment, reporting, evaluation, and other appropriate purposes.

For example, a family caregiver seeking respite assistance may be assessed by a AAA and found to have some financial resources, several other family members providing care as back-up to the primary caregiver, and a care recipient who has fewer care needs. A second family caregiver seeking respite assistance from the AAA is caring for a care recipient with very high care needs and is from an underserved community, as identified in the State and area plan. This second family caregiver may be prioritized for respite services by the AAA, as they have very limited financial resources and no nearby sources of back-up caregiving. The first family caregiver would not be ineligible for services, but due to the respite program's limited resources might be placed on a waiting list and referred to other services, including those under private pay arrangements. While not receiving respite services, the first family caregiver could also participate in caregiver support group and education services provided by the AAA under the Act.

The AAA could use the data collected regarding waiting lists and unmet needs in its advocacy efforts. With successful advocacy efforts resulting in an increase in funding for family caregiver programs, the first family caregiver could then receive respite services when those additional resources become available.

''Multipurpose Senior Center''

Comment: We received comments requesting a change from ''shall'' to ''may'' in the definition as proposed. We received comments questioning the use

[36] Section 315 of the OAA; 42 U.S.C. 3030c–2 (b)(3).

of the term ''multipurpose senior center'' to reference a service. We also received comment disagreeing with the definition, including with the inclusion of ''virtual facilities'' to the definition. Other commenters expressed appreciation for the inclusion of ''virtual facilities'' to reflect a growing number of programs and services offered online after the pandemic, noting this may make programs more accessible and equitable.

Response: We appreciate these comments and have revised § 1321.3 (*Definitions*) to indicate ''[. . .] as used in § 1321.85, facilitation of services in such a facility.'' We have determined that the inclusion of virtual facilities allows for the option of various service modalities and that the use of the term ''as practicable'' allows for appropriate variation in local circumstances, while remaining true to the definition of ''multipurpose senior center'' as set forth in the Act and the intent for facilitation of such services. We have made a corresponding revision to this definition in part 1322.

''Official Duties''

Comment: We received recommendations to clarify that representatives of the Office may be carrying out the duties ''[. . .] by direct delegation from, the State Long-Term Care Ombudsman'' in addition to the proposed ''[. . .] under the auspices and general direction of [. . .] the State Long-Term Care Ombudsman.''

Response: We appreciate the comments. We recognize that Ombudsman programs operate in a variety of organizational structures and that direct delegation is one way that programs are managed. We have modified the definition as recommended and made a corresponding revision to part 1324.

''Private Pay''

Comment: We received a comment requesting private pay and commercial relationship be defined separately.

Response: We define private pay as a type of commercial relationship. As discussed in our response to comments on § 1321.9(c)(2)(xiv), we have declined to define ''commercial relationship.''

''Program Development and Coordination Activities''

This term explains certain activities of State agencies and AAAs to achieve the goals of the Act. This work includes the development of innovative ways to address the evolving social service, health, and economic climates in which they operate. Separate from administering programs to provide direct services, State agencies and AAAs plan, develop, provide training regarding, and coordinate at a systemic level, programs and activities aimed at the Act's target populations. In addition to this definition, we include language in § 1321.27 to clarify requirements for these activities.

''Severe Disability''

Comment: A number of commenters objected to our proposal to eliminate the definition of ''severe disability'' from the regulation. Commenters expressed concern that people with disabilities would no longer sufficiently be considered within the definition of greatest social need.

Response: We have reincorporated the statutory definition of ''severe disability'' into the regulation. We reiterate that people with disabilities also meet the definition of the general term ''physical and mental disabilities.'' However, there are several statutory references that require specifically prioritizing people with ''severe disabilities,'' and so we have incorporated the statutory definition in this final rule.

Comment: We received other suggestions, program management recommendations, and implementation questions regarding the definitions in this provision.

Response: We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

Subpart B—State Agency Responsibilities

§ 1321.5 Mission of the State Agency

Section 1321.7 of the existing regulation (*Mission of the State agency*) is redesignated here as § 1321.5 for clarity with respect to other relevant provisions. Section 1321.5 sets forth the State agency's mission, role, and functions as a leader on all aging issues in the State, and it specifies that the State agency will designate AAAs in States with multiple PSAs to assist in carrying out the mission. We include minor revisions to align with reauthorizations of the statute, such as adding family caregivers as a service population per the 2000 amendments (Pub. L. 106–501). We also update regulatory references and revise language for clarity.

Comment: We received comments expressing support for the wording used in this section, including the additional detailed grant requirements for State agencies to develop comprehensive and coordinated systems of service delivery. We received several suggestions for other text to add to this section. Several commenters also recommended cultural humility and cultural competency training for the aging network, including regarding Tribal and disability issues.

Response: We appreciate these comments. We believe the text is sufficient as drafted and that further examples, explanation, and training opportunities may be addressed through technical assistance, as appropriate.

Comment: One commenter questioned the proposed change to ''[. . .] shall be the lead on all aging issues'' recommending instead ''be the leader,'' recognizing that some aging issues may be led by other entities within the State.

Response: ACL appreciates this comment and has revised this statement to ''[. . .] shall be a leader on all aging issues[.]''

§ 1321.7 Organization and Staffing of the State Agency

Section 1321.9 of the existing regulation (*Organization and staffing of the State agency*) is redesignated here as § 1321.7. We make several changes to the provision on organization and staffing for consistency and for clarification. Minor changes at § 1321.7(a), (c), and (d) reflect consistent wording with the State agency's obligations under 45 CFR part 1324 with respect to the administration of the Ombudsman program. The Ombudsman program is authorized under Title VII of the Act, and the implementing regulations for the program were promulgated in 2015 at 45 CFR part 1324. Section 1321.7(d) includes minor language changes to clarify the State agency's existing obligations to carry out the Ombudsman program in accordance with the Act's requirements, regardless of any applicable State law requirements.

Section 307(a)(13)[37] and section 731[38] of the Act require the State agency to ensure that there is a Legal Assistance Developer and other personnel, as needed, to provide State leadership in developing legal assistance programs for older individuals throughout the State. These staffing requirements are absent from the existing regulation regarding staffing; we add a new paragraph (e) to this provision that sets forth these requirements to assist State agencies to better understand their obligations under the Act related to staffing. The role of the Legal Assistance Developer is

[37] 42 U.S.C. 3027(a)(13).

[38] 42 U.S.C. 3058j.

discussed more fully in the preamble, below.

Comment: We received comments of support for language recognizing the Ombudsman as the head of the Office of the State Long-Term Care Ombudsman and for including expectations for the Legal Assistance Developer. Other commenters expressed concern that provisions regarding State agency oversight of the Ombudsman program would create complexities within their State agency's current organizational structure.

Response: We appreciate these comments. Regarding concerns with oversight of the Ombudsman program, the updates included in the proposed rule did not differ significantly from current regulatory expectations. We have made a minor revision to proposed § 1321.7(c) for clarity. ACL will provide technical assistance to help State agencies understand and satisfy these requirements.

Comment: We also received a recommendation that State agencies be allowed to enter into a contract or other arrangement to designate an individual as Legal Assistance Developer.

Response: State agencies have the discretion to make human resources decisions about how to staff their agencies in order to fulfill their obligations under the Act.

§ 1321.9 State Agency Policies and Procedures

We retitle the provision contained in § 1321.11 of the existing regulation (*State agency policies*) to better reflect the intent of the provision and to redesignate it here as § 1321.9. We also incorporate provisions contained in § 1321.45 (*Transfer between congregate and home-delivered nutrition service allotments*), § 1321.47 (*Statewide non-Federal share requirements*), § 1321.49 (*State agency maintenance of effort*), § 1321.67 (*Service contributions*), and § 1321.73 (*Grant related income under Title III–C*) within this provision to consolidate and streamline applicable requirements.

Section 305 of the Act requires the designated State agencies to ''[. . .] be primarily responsible for the planning, policy development, administration, coordination, priority setting, and evaluation of all State activities related to the objectives of this Act[.]'' [39] Consistent with that obligation, this final rule requires State agencies to promulgate policies and procedures related to a range of topics that fall within the State agency's authority to oversee compliance with the State plan in § 1321.9(c)(1) (policies and procedures related to direct service provision) and § 1321.9(c)(2) (policies and procedures related to fiscal requirements). The policy development process includes the establishment of procedures, which set forth the steps to follow to implement policies. Accordingly, we have included minor revisions to clarify that the policy development and implementation process includes the establishment of procedures, as well as policies.

The language at § 1321.9(a) is intended to (1) reflect statutory updates (*i.e.,* the LTCOP regulation (45 CFR part 1324) which was promulgated in 2015); (2) clarify that the State agency's obligations to develop policies and procedures extend to elder abuse prevention and legal assistance development programs; (3) confirm the ability of the State agency to allow procedures to be developed at the AAA level, except where specifically prohibited; and (4) clarify the State agency's responsibility for monitoring the compliance of activities initiated under Title III with all applicable requirements to ensure that grant awards are used for the authorized purposes and in compliance with Federal law.

The Act contains many programmatic and fiscal requirements of which State agencies must be aware and for which State agencies must have established policies and procedures. For clarity and ease of reference, we combine the areas for which State agencies must have established policies and procedures in this provision. The first area relates to data collection and reporting. Section 307 of the Act requires the collection of data and periodic (at a minimum, once each fiscal year) submission of reports to ACL regarding State agency and AAA activities.[40] ACL has implemented a national reporting system and reporting requirements that must be used by all State agencies to ensure timely and consistent reporting. Section 1321.9(b) sets forth the State agency's responsibility to have policies and procedures to ensure that its data collection and reporting align with ACL's requirements.

Section 1321.9(c)(1) describes policies and procedures that State agencies must establish to ensure that services provided under the Act meet the requirements of the Act and are provided equitably and in a consistent manner throughout the State, as appropriate.[41] In response to the RFI and the NPRM comment period, this section addresses comments from AAAs and service providers that requested State agencies provide transparency and clarity to AAAs and service providers about the policies and procedures that they must follow, including setting requirements for client eligibility, assessment, and person-centered planning; specifying a listing and definitions of services that may be provided; detailing any limitations on the frequency, amount, or type of service provided; defining greatest economic need and greatest social need, and specific actions the State agency will use or require to provide services to those identified populations; how AAAs can provide services directly; how voluntary contributions are to be collected; and the grievance process for older adults and family caregivers who are dissatisfied with or denied services under the Act. As indicated in § 1321.9(a), except for the Ombudsman program and where otherwise indicated, the State agency policies may allow for procedures to implement specific policies to be developed at the AAA level. ACL strongly encourages State agencies to make their OAA policies and procedures available to the public, either by posting them online or by providing a point of contact at the State agency to respond to requests for this information. Doing so may help ensure accountability to the public regarding the implementation of OAA programs and services.

Under section 306(a)(4)(A)(i)(I)(aa), AAAs are responsible for setting specific objectives, consistent with State agency policy, for provision of services to older individuals with greatest economic need and greatest social need.[42] Identifying such populations at the State level facilitates consistent messaging and outreach, collaboration with other State level organizations and interested parties, and development of specific plans for the State agency, AAAs, and service providers to implement, as intended by the Act. Definitions of these populations at the State level are intended to provide statewide direction, while maintaining the opportunity for additional definition of populations at greatest economic need and greatest social need specific to local circumstances as part of an area plan on aging as further set forth in § 1321.65. For example, a State agency might choose to define those at greatest economic need to include individuals or households with an income within a specific range (*e.g.,* up to 125 percent of the Federal poverty level (FPL)), and another State agency may include older

[39] 42 U.S.C. 3025(a).

[40] 42 U.S.C. 3027.

[41] 42 U.S.C. 3025(a)(2); 42 U.S.C. 3012(a)(9).

[42] 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa).

adults experiencing housing instability in their definition of greatest economic need. A State agency might also choose to define those at greatest social need to include people with low literacy, while another State agency may include grandparents raising grandchildren due to substance use disorder or loss of parents to COVID–19 in their definition of greatest social need. There are multiple circumstances where State level identification of needs may be further complemented at the AAA level, such as older adults experiencing economic need due to catastrophic flooding in a rural portion of a State, or a AAA including older refugees in the community in their definition of greatest social need.

The Act sets forth at section 307(a)(8)(A) that services will not be directly provided by a State agency or by a AAA, subject to certain conditions. AAAs must receive State agency approval to provide direct services. We clarify in this rule that the State agency must communicate how the area agencies may request approval to directly provide services.[43] This section also incorporates the requirement under section 307(a)(5)(B) of the Act that State agencies are required to issue guidelines applicable to grievance processes for any older adult or family caregiver who has a complaint about a service or has been denied a service.[44]

Section 1321.9(c)(2) requires State agencies to establish policies and procedures related to the fiscal requirements associated with being awarded funding for the Nutrition Services Incentive Program (NSIP),[45] Title III,[46] and Title VII [47] under the Act. Over the years, we have found that some State agencies may be unaware of certain requirements or may not understand their obligations under these requirements. Section 1321.9(c)(2) provides guidance on the following fiscal requirements: distribution of Title III [48] and NSIP [49] funds; non-Federal share (match) requirements; [50] permitted transfers of service allotments; [51] maximum allocation amounts for State, Territory, and area plan administration; [52] minimum funding expenditures for access to services, in-home supportive services, and legal assistance; [53] State agency maintenance of effort obligations; [54] requirements related to Ombudsman program expenditures and fiscal management; [55] minimum expenditures for services for older adults who live in rural areas; [56] reallotment of funds; [57] voluntary contributions, including cost-sharing at the election of the State agency; [58] use of program income; [59] private pay programs; [60] commercial relationships; [61] buildings, alterations or renovations, maintenance, and equipment; [62] prohibition against supplantation; [63] monitoring of State plan assurances; [64] advance funding; [65] and fixed amount subawards.[66] We provide further context for these fiscal requirements in the following paragraphs.

Comment: Many commenters, including but not limited to State and area agencies, expressed support for this section generally. One commenter expressed support for the proposed rule, specifically § 1321.9(a) and (b). Other commenters expressed support for specific portions of § 1321.9, including one commenter noted that the prohibition against means testing is a strength of the Act, and another expressed support for the requirement in § 1321.9(c)(2)(i) that State agency policies and procedures must provide for the prompt disbursement of Title III funds and NSIP funds. Commenters also supported the clarification in § 1321.9(c)(2)(vi) that excess State match reported on the Federal financial report does not become part of the maintenance of effort unless the State agency certifies the excess. Commenters additionally supported the requirement to have policies clarifying that funds awarded under certain sections of the Act cannot supplant existing Federal, State, and local funds (§ 1321.9(c)(2)(xvi)) and the requirement to have policies which address monitoring for compliance with assurances (§ 1321.9(c)(2)(xvii)).

Response: ACL appreciates the support for this provision, the purpose of which is to consolidate, and to make easier to locate, applicable requirements of the Act for which State agencies should have established policies and procedures.

Comment: A commenter sought guidance as to whether § 1321.9 requires State agencies to monitor the performance of Ombudsman programs.

Response: Regarding concerns with oversight of the Ombudsman program, the requirements in the final rule do not differ significantly from current regulatory expectations. ACL will provide technical assistance to help State agencies understand and sufficiently meet these requirements.

§ 1321.9(b)

Comment: ACL received several comments requesting additional guidance and direction with respect to the collection of data (such as data on sexual orientation and gender identity, data regarding populations experiencing greatest economic need and greatest social need, and data stratification). Some commenters expressed concern as to additional data collection that may be required in connection with the expansion of the definitions of greatest economic need and greatest social need. Other commenters were concerned about potential costs associated with changes to data collection expectations. We also received various comments asking for improvements in ACL's data collection efforts, including specific data collection on sexual orientation and gender identity.

Response: Section 307(a)(4) of the Act requires the collection of data and periodic submission of reports to ACL regarding State agency and AAA activities.[67] ACL has developed a system for these purposes and has implemented reporting requirements that must be used by all State agencies to ensure timely and consistent reporting, as well as the quality and accuracy of the data reported. These reporting requirements include, among other things, data that must be collected by all State agencies (at a minimum, once each fiscal year). Specific details on the reporting system and its related requirements are outside the scope of the final rule. ACL is available to provide technical assistance to State agencies regarding data collection and reporting.

Comment: Some commenters suggested that certain requirements be added to the proposed rule related to abuse and neglect of older adults. One commenter noted that the Ombudsman program is required to serve all residents and does not prioritize clients

[43] 42 U.S.C. 3027(a)(8)(A).
[44] *Id.* section 3027(a)(5)(B).
[45] 42 U.S.C. 3030a(e).
[46] 42 U.S.C. 3023.
[47] 42 U.S.C. 3058a.
[48] 42 U.S.C. 3025(a)(2)(C).
[49] 42 U.S.C. 3030a(d).
[50] 42 U.S.C. 3024(d), 3028(a)(1), 3029(b), 3030s–1(h)(2).
[51] 42 U.S.C. 3028(a)(4), (5).
[52] 42 U.S.C. 3024(d)(1), 3028(a), (b)(1)–(2).
[53] 42 U.S.C. 3026(a)(2).
[54] 42 U.S.C. 3029(c).
[55] 42 U.S.C. 3027(a)(9)(A).
[56] *Id.* section 3027(a)(3)(B)(i).
[57] 42 U.S.C. 3024(b), 3058b(b).
[58] 42 U.S.C. 3030c 2.
[59] *Id.* section 3030c–2(a)(5)(c).
[60] 42 U.S.C. 3020c; 42 U.S.C. 3026(g).
[61] 42 U.S.C. 3026(a)(13)–(14).
[62] 45 CFR 75; 42 U.S.C. 3030b, 3030d(b).
[63] 42 U.S.C. 3026(a)(9)(B), 3030c–2(b)(4)(E), 3030d(d), 3030s–2, 3058d(a)(4).
[64] 42 U.S.C. 3025(a)(1)(A)–(C).
[65] 45 CFR 75.305.
[66] *Id.* section 75.353.
[67] 42 U.S.C. 3027(a)(4).

based on greatest social need or greatest economic need and requested the proposed rule be clarified to acknowledge this distinction.

Response: ACL declines to add any requirements to part 1321 of the rule related to abuse and neglect of older adults. The Ombudsman program and programs for the prevention of elder abuse, neglect, and exploitation are established pursuant to Title VII of the Act.[68] ACL believes that Title VII of the Act and its accompanying regulation (45 CFR part 1324) adequately address requirements for these programs and that no additional clarification is needed in the final rule.

Comment: Some State agencies and AAAs expressed concern that the requirements in § 1321.9 regarding the promulgation of policies and procedures are too burdensome.

Response: The Act contains many programmatic and fiscal requirements of which State agencies should be aware, and section 305 of the Act requires State agencies to develop policies for ''[. . .] all State activities related to the objectives of this Act[.]'' [69] Substantially all requirements included in this section are set forth in the Act; accordingly, State agencies should be aware of them and already should have policies and procedures in place. For clarity and ease of reference, we combined the areas for which State agencies should have established policies and procedures in this provision to assist State agencies in understanding their obligations under, and ensuring their compliance with, the Act. ACL understands that some State agencies' existing policies and procedures may not address all areas included in this section. To give State agencies ample time to establish or update their policies and procedures, ACL has deferred the compliance date of the rule to October 1, 2025.

Comment: One commenter recommends that the term ''policies and procedures'' be defined to also include State administrative rules or contractual obligations.

Response: ACL declines to define ''policies and procedures'' in order to provide flexibility to the State agencies and to allow them to take into account applicable State requirements and standard practices with respect to the development of policies and procedures, which can vary from one State to another.

§ 1321.9(c)(1) Direct Service Provision

Comment: A commenter requested that the list in § 1321.9(c)(1) of topics related to direct services for State agencies be a suggested list, rather than a required list of topics to be covered.

Response: ACL declines to revise the regulatory language as requested. The topics covered are the minimum, essential areas for which State agencies should have policies and procedures to administer direct services as contemplated by the Act. State agencies may elect to adopt additional policies and procedures with respect to the provision of direct services under the Act.

Comment: With respect to § 1321.9(c)(1)(i), which requires State agencies to develop policies and procedures regarding requirements for client eligibility, periodic (at a minimum, once each fiscal year) assessment, and person-centered planning, one commenter suggested that ACL require AAAs to consider the full array of available long-term service and support options, inclusive of community-based long-term services and supports, such as Programs of All-Inclusive Care for the Elderly (PACE programs).

Response: ACL appreciates the comment, but ACL declines to direct State agencies as to the specific requirements that State agencies must include in these policies and procedures. State agencies are in the best position to make such decisions based on conditions and need in their States, and ACL leaves these determinations to the State agencies.

Comment: Section 1321.9(c)(1), requires State agencies to have policies and procedures regarding the definition of those with greatest economic need and those with greatest social need within their States. One commenter recommended that ACL provide more detailed guidance on strategies for reaching populations with the ''greatest economic need.'' The commenter also recommended that ACL provide guidance regarding methods for measuring their success in reaching such populations and requested additional guidance regarding the definition of ''greatest economic need'' to prevent ''unintended consequences'' and to ensure that vulnerable older adults receive essential services. Commenters also recommended that we impose additional limitations on State agency determinations related to the definitions of greatest social need and greatest economic need, including recommendations of other populations to include and how such determinations should be made and disclosed.

Response: ACL retains the regulatory text in § 1321.9(c)(1) as proposed. ACL believes the definitions in § 1321.3 of greatest economic need and greatest social need, as well as the requirements in § 1321.27 regarding information required to be included in the State plan, adequately address these concerns.

Regarding the comments raised with respect to the definition of ''greatest economic need,'' the definition in the Act incorporates income and poverty status. The Act also permits State agencies to set policies, consistent with ACL's regulations, that incorporate other considerations into the definition of ''greatest economic need,'' and the discussion in § 1321.3 above includes additional guidance for State agencies regarding how to define ''greatest economic need.'' [70] Through its policies, the State agency may permit AAAs to further refine specific target populations of greatest economic need within their PSAs. A variety of local conditions and individual situations, other than income, could factor into an individual's level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition allows State agencies and AAAs to further refine target populations of greatest economic need. To maximize the flexibility afforded to State agencies in making these determinations, ACL declines to provide more specific direction in the final rule. Any additional guidance that may be appropriate will be offered by ACL via technical assistance.

§ 1321.9(c)(2)(i) Intrastate funding formula (IFF).

The Act sets forth requirements for distribution of Title III funds within the State in section 305(a)(2)(C)–(D).[71] The Act requires distribution to occur via an IFF (further defined in § 1321.49) or funds distribution plan (further defined in § 1321.51). The IFF is required for States with multiple PSAs, and a funds distribution plan is required for single PSA States. Through this provision, we also require that funds be promptly disbursed using the IFF or funds distribution plan and to allow fixed amount subawards up to the simplified acquisition threshold, as set forth in 45 CFR 75.353.

Comment: Some commenters requested definitions of the terms ''promptly disbursed'' ''fixed amount subawards,'' and ''subaward'' as used in this section. One commenter asked how

[68] 42 U.S.C. 3058 *et seq.*

[69] 42 U.S.C. 3025(a)(1)(C).

[70] 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa); 42. U.S.C. 3025(a)(1).

[71] 42 U.S.C. 3025(a)(2)(C)–(D).

State agencies will be monitored for compliance.

Response: The requirement that funds be promptly disbursed can be found in section 311(d)(4) of the Act, and ACL declines to provide a definition for this term.[72] State agencies should define this term in their policies and procedures. Such definitions should include a reasonable time frame and should take into account State fiscal policy (which can vary from one State to another). For a definition of ''subaward'' see 2 CFR 200.1 and 45 CFR 75.2, and for an explanation of ''fixed amount subaward'' see 2 CFR 200.333 and 45 CFR 75.353. State agencies should have systems in place to monitor their compliance with the requirements of the Act, which ACL will regularly review as part of State plan review, in addition to ACL's other fiscal and program monitoring activities.

In the course of reviewing § 1321.9(c)(2)(i) in response to comments received, ACL has determined that the language in this section should be clarified. Accordingly, ACL has revised the regulatory text of § 1321.9(c)(2)(i). In addition, ACL has moved the language regarding fixed amount subawards from this section to a new § 1321.9(c)(2)(xix) and has simplified the language used in this provision. For a definition of ''simplified acquisition threshold'' see 2 CFR 200.1 and 45 CFR 75.2. ACL will provide technical assistance, as needed, regarding § 1321.9(c)(2)(xix).

Comment: ACL received several other suggestions, recommendations, and implementation questions regarding the IFF.

Response: We intend to address any additional issues related to the IFF through technical assistance.

§ 1321.9(c)(2)(ii) Non-Federal Share (Match)

The provision contained in § 1321.47 (*Statewide non-Federal share requirements*) of the existing regulation is redesignated here as § 1321.9(c)(2)(ii) and revised. The Act includes requirements for non-Federal share (match) funds from State or local sources, as set forth in sections 301(d)(1),[73] 304(c),[74] 304(d)(1)(A),[75] 304(d)(1)(D),[76] 304(d)(2),[77] 309(b),[78] 316(b)(5),[79] and 373(h)(2).[80] We consolidate and streamline the requirements by listing the requirements and considerations that apply to such funds. We have received frequent technical assistance requests concerning the allowability of using funding for services that are means tested for match. We clarify that State or local public resources used to fund a program which uses a means test shall not be used to meet match requirements. We also clarify that a State agency or AAA may determine match in excess of required amounts, and we clarify match requirements that apply to service and administration costs for each type of grant award under Title III of the Act. We also provide prior written approval for unrecovered indirect costs to be used as match.

Comment: One commenter suggested that ACL encourage State agencies to allow the use of unrecovered facilities and administrative or indirect costs as match for administration.

Response: ACL appreciates this comment and notes that the rule authorizes unrecovered indirect costs to be used as match (see § 1321.9(c)(2)(ii)(J)(*1*)). ACL encourages State agencies to consider this approach, subject to State agency policies and procedures. ACL will provide technical assistance, as requested.

Comment: We received multiple comments supporting the use of means tested funds to count toward the required match. In addition, many commenters requested clarification on, or objected to, § 1321.9(c)(2)(ii)(C), which provides that ''State or local public resources used to fund a program which uses a means test shall not be used to meet the match.''

Response: The prohibition against using State or local public resources which use a means test to count toward match is due to the prohibition against means testing in the OAA under section 315(b)(3).[81] Match for the federal grant is the non-federal share of the total project costs that a grantee is required to contribute to achieve the purposes of the award and allowability of costs must conform to any limitations or exclusions set forth in the Federal award, 2 CFR 200.403(b) and 45 CFR 75.403(b). Therefore, match must meet the same requirements that apply to allowed costs under the Act, and the Act prohibits means testing. Accordingly, we maintain the regulatory language of § 1321.9(c)(2)(ii)(C) as proposed. ACL will further address this requirement through technical assistance, as needed.

Comment: A commenter asked for clarification regarding the difference between means testing and prioritizing services for individuals of ''greatest economic need.''

Response: Means testing is a criterion used to determine an individual's financial eligibility for a program. If an individual's resources exceed the determined limit for a program, the individual is ineligible for a program—that individual cannot participate in the program even if the program has sufficient resources to be able to serve them. On the other hand, the use of ''greatest economic need'' is a way to prioritize services for those who are most in need of the service; it does not deem those of lesser economic need to be ineligible for the program.

Comment: Some commenters expressed concern that a State agency or AAA may determine a match in excess of amounts required under the Act.

Response: The Act does not prohibit a State agency or AAA from requiring a match in excess of amounts required under the Act, and ACL leaves these decisions to State agencies and AAAs to determine in accordance with State agency and AAA policies and procedures. ACL encourages State agencies to make requirements clear in terms and conditions of subaward agreements.

Comment: Some commenters requested that the match requirements be reduced.

Response: The match requirements are set by the Act, and ACL has no authority to reduce them.

Comment: Some commenters requested clarification regarding § 1321.9(c)(2)(ii)(I), which provides that other Federal funds may not be used as match for programs funded under Title III of the Act unless there is specific statutory authority.

Response: The Act does not provide statutory authority for other Federal programs to meet match requirements. ACL will provide additional guidance through technical assistance, as needed.

§ 1321.9(c)(2)(iii) Transfers

The provision contained in § 1321.45 of the existing regulation (*Transfer between congregate and home-delivered nutrition service allotments*) is redesignated here as § 1321.9(c)(2)(iii) and revised. The Act allows for transfer of service allotments to provide some flexibility to meet State and local needs. ACL allocates Title III funding to State agencies by parts of the Act (for example, the supportive services allocation is designated as part B and the nutrition services allocation is designated as part C, and further by subpart (for example, part C–1 funding is for congregate meals and part C–2

[72] 42 U.S.C. 3030a.
[73] 42 U.S.C. 3021(d)(1).
[74] 42 U.S.C. 3023(c).
[75] *Id.* section 3023(d)(1)(A).
[76] *Id.* section 3023(d)(1)(D).
[77] *Id.* section 3023(d)(2).
[78] 42 U.S.C. 3029(b).
[79] 42 U.S.C. 3030c–3(b)(5).
[80] 42 U.S.C. 3030s–1(h)(2).
[81] 42 U.S.C. 3030c–2(b)(3).

funding is for home-delivered meals)). We list the requirements and considerations that apply if a State agency elects to make transfers between allotments, including the parts and subparts of Title III which are subject to transfer of allocations, the maximum percentage of an allocation which may be transferred between parts and subparts, and a confirmation that such limitations apply in aggregate to the State agency. For example, a State may find that older individuals have a need for transportation to congregate meal sites. A State agency is able to transfer, within allowed limits, allotments from the congregate meal nutrition grant award (part C–1) to the supportive services grant award (part B) to provide transportation to meet State and local service needs.

Comment: ACL received several comments on this section, which addresses transfers between Title III, parts C–1 and C–2 and between Title III, parts B and C. The comments on this section were mixed. Some expressed support for the provision, while other commenters expressed that the transfer limitations are unnecessarily burdensome, and that AAAs should be able to make transfers as they see fit and without State agency approval.

Response: ACL does not have the authority to modify this requirement. Section 308(b) of the Act does not allow the State agency to delegate authority to make a transfer to a AAA or any other entity.[82] However, section 308 of the Act requires the State agency, in consultation with AAAs, to ensure that the process used by the State agency in transferring funds between Title III, parts C–1 and C–2 and between Title III, parts B and C is simplified and clarified to reduce administrative barriers. We have also clarified that for transfers between parts C–1 and C–2, State agencies must direct limited resources to the greatest nutrition service needs at the community level. We have added these requirements to § 1321.9(c)(2)(iii). Given the volume of comments on this issue, ACL will further address these requirements through technical assistance, as needed.

§ 1321.9(c)(2)(iv) State, Territory, and Area Plan Administration

Section 308 of the Act sets limits on the amount of Title III funds which may be used for State, Territory, and area plan administration.[83] In this provision, we specify the requirements and considerations that apply, including flexibilities that some State agencies of single planning and service States may exercise and how the State agency may calculate the maximum amounts available for AAAs to use. We receive regular requests for technical assistance about the use of funds for plan administration. This provision is intended to provide clarity to State agencies. For example, State agencies may either receive five percent of their funding allocation or $750,000 ($100,000 for certain Territories) of their total Title III allocation as set forth in the Act to complete the State plan administration activities required by the Act. Plan administration activities include planning, coordination, and oversight of direct services provided with the remainder of the Title III allocation. The State, Territory, and area plan administration allocation amounts may be taken from any same fiscal year Title III award allocation at any time during the grant period and may be allocated to any part of the same fiscal year Title III grant allocation, with the statutory exception of allocation of area plan administration to part D (which provides funding for evidence-based disease prevention and health promotion programs). In States with multiple PSAs, we clarify section 304(d)(1)(A) of the Act and better streamline implementation of maximum allocation amounts.[84] We specify that the maximum amount the State agency may make available for area plan administration is ten percent of the total amount of funding allocated to AAAs. This funding may be made available to AAAs in accordance with the IFF for the purpose of area plan administration, which we further address in § 1321.57(b).

Comment: We received comment asking ACL to limit the amount of area plan administration funds that may be spent on the development of private pay or other contracts and commercial relationships.

Response: Funds for area plan administration are limited to ten percent of the total funding allocated to AAAs. AAAs must complete the area plan activities required under the Act and as set forth by State agency policies and procedures; development of private pay programs or other contracts and commercial relationships is allowable, but not required. Given the levels of funding for Title III programs under the Act and the responsibility for State agencies to set policies and procedures, ACL does not believe further limitation is needed.

Comment: One commenter expressed that too much OAA funding is allocable to State and area plan administration and requested that the administration of OAA programs be streamlined, while another expressed that amounts available for area plan administration should be increased, noting that area plan administration costs exceed the maximum that can be made available under the Act.

Response: The maximum amounts for State and area plan administration are specified in the Act, and ACL does not have the authority to modify such amounts. Accordingly, ACL maintains the regulatory language for this provision as proposed.

§ 1321.9(c)(2)(v) Minimum Adequate Proportion

The Act sets forth requirements that the State plan must identify a minimum proportion of funds that will be spent on access services, in-home supportive services, and legal assistance. Our final rule requires the State agency to have policies and procedures to implement these requirements.

Comment: A commenter expressed concern about the impact of § 1321.9(c)(2)(v) in States that may lack continuity of leadership in their State agencies. The commenter also expressed concern that minimum expenditure requirements set by State agencies could impact the area agency and service provider network, given limited availability of OAA funds. Another commenter expressed concern that decisions on minimum adequate proportion amounts that will be expended on access services, in-home supportive services, and legal assistance will take away from current service levels in other areas without more funding being made available.

Response: ACL appreciates these concerns but declines to make any modifications to this section. Section 307(a)(2)(C) of the Act requires each State plan to specify a minimum proportion of Title III, part B funds that will be used by area agencies to provide access services, in-home supportive services, and legal assistance.[85] Accordingly, ACL does not have the authority to modify this requirement. Finally, the minimum expenditure requirements in this section are not new requirements; State and area agencies are already subject to these requirements.

Comment: A commenter suggested that ACL modify § 1321.9(c)(2)(v) to require each State plan to specify a minimum proportion of funds that will be used by area agencies to provide caregiver support services, in addition

[82] 42 U.S.C. 3028(b).

[83] *Id.* section 3028.

[84] 42 U.S.C. 3024(d)(1)(A).

[85] 42 U.S.C. 3027(a)(2)(C).

to access services, in-home supportive services, and legal assistance.

Response: ACL declines to make the requested change. The Act does not require that Title III, part B funds be used to provide caregiver support services, and ACL declines to impose such a requirement on State agencies. Title III, part E funds are specified to provide family caregiver support services. ACL leaves the decision to the State agencies as to whether to use Title III, part B funds for caregiver services in accordance with the Act, in order to afford flexibility to the State agencies as to how to allocate Title III, part B funding.

§ 1321.9(c)(2)(vi) Maintenance of Effort

The provision contained in § 1321.49 (*State agency maintenance of effort*) of the existing regulation is redesignated here as § 1321.9(c)(2)(vi) and revised. The final rule requires State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to sections 309(c)[86] and 374.[87] These requirements include expending specific minimum maintenance of effort amounts, which are calculated as required by the Act. In response to technical assistance requests, we also clarify that excess amounts reported in other reports, such as the Federal financial report (SF–425), do not become part of the amounts used in calculating the minimum required maintenance of effort expenditures, unless the State agency specifically certifies the excess amounts for such purpose.

Comment: Two commenters recommended that § 1321.9(c)(2)(vi) be amended to allow for one-time appropriations of State funding to be excluded from the Act's maintenance of effort requirement for Title III.

Response: ACL understands these concerns. ACL is unable to accommodate this suggestion, however, as this requirement is based on the language in section 309(c) of the Act, which provides that ''[a] State's allotment under section 304 [of the Act] for a fiscal year shall be reduced by the percentage (if any) by which its expenditures for such year from State sources under its State plan approved under section 307 [of the Act] are less than its average annual expenditures from such sources for the period of 3 fiscal years preceding such year.''[88]

Comment: A commenter recommended that § 1321.9(c)(2)(vi)(C) be removed. This paragraph provides that any amount of State resources included in the Title III maintenance of effort certification that exceeds the minimum amount required becomes part of the permanent maintenance of effort. The commenter expressed that this requirement may disincentivize States from providing more than the minimum amount of funds.

Response: ACL appreciates the comment but declines to remove this paragraph, in order to provide maximum flexibility to the State agencies. Contrary to the commenter's note, a State agency may have reason to employ this provision to increase the required maintenance of effort. In addition, as set forth in § 1321.9(c)(2)(vi)(D), excess State match reported on the Federal financial report does not become part of the maintenance of effort unless the State agency certifies the excess.

§ 1321.9(c)(2)(vii) State Long-Term Care Ombudsman Program

This final rule requires State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to section 307(a)(9).[89] These requirements include that the State agency will expend no less than the minimum amounts that are required to be expended by section 307(a)(9) of the Act. We also clarify that the State agency must provide the Ombudsman with information to complete Ombudsman program requirements and that the fiscal activities relating to the operation of the Office comply with the requirements set forth in § 1324.13(f).

Comment: Two commenters expressed support for this provision. Currently, the Act sets the required minimum expenditure amount at the amount expended by the State agency during fiscal year 2019 for the Ombudsman program under Titles III and VII of the Act,[90] and subsection (A) of § 1321.9(c)(2)(vii), which addresses the minimum expenditure amount, likewise refers specifically to fiscal year 2019. Several commenters recommended not including a specific fiscal year in § 1321.9(c)(2)(vii)(A), as such fiscal year may be modified as a result of future reauthorizations of the Act and recommends instead using language in § 1321.9(c)(2)(vii)(A) that avoids mentioning a specific fiscal year.

Response: ACL appreciates the support expressed for § 1321.9(c)(2)(vii). We agree with the suggestion to remove the reference to fiscal year 2019 and have revised subsection (A) accordingly.

Comment: A commenter expressed concern that the language in § 1321.9(c)(2)(vii)(A), which sets forth the minimum amount State agencies must expend for the Ombudsman program, is unclear.

Response: ACL will address any questions regarding minimum expenditures for the Ombudsman program through technical assistance, as needed.

§ 1321.9(c)(2)(viii)—Rural Minimum Expenditures

The final rule requires State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to section 307(a)(3)(B).[91] These requirements include that the State agency must: expend not less than the amount expended in accordance with the level set in the Act for services for older individuals residing in rural areas, project the cost of providing such services, and specify a plan for meeting the needs for such services. To implement these requirements, we set forth that the State agency establish a process and control for determining how rural areas within the State shall be defined.

Comment: A few commenters expressed support for § 1321.9(c)(2)(viii). Many commenters sought more clarity about the requirements in § 1321.9(c)(viii). One commenter shared the concern that State agencies will lack the necessary information to project the cost of providing services to rural areas.

Response: ACL appreciates the support of this provision. ACL appreciates these comments but declines to provide further direction in this final rule to State agencies as to how to comply with these requirements (which can be found in section 307(a)(3)(B) of the Act).[92] State agencies are best positioned to make these determinations.

The term ''rural'' appears many times in the Act with respect to the delivery and prioritization of services. In addition, State agencies may use the IFF to direct Title III funding to rural areas. There is no one universally accepted or mandated definition of what constitutes a ''rural area.'' Over the years, State agencies have determined what areas in their States are rural, and the factors that State agencies have used to make this determination can vary. In recognition of this variation in how State agencies determine what areas in their State are rural, the Act does not

[86] 42 U.S.C. 3029.

[87] 42 U.S.C. 3030s–2.

[88] 42 U.S.C. 3029.

[89] 42 U.S.C. 3027(a)(9).

[90] *Id.*

[91] 42 U.S.C. 3027(a)(3)(B).

[92] *Id.*

mandate a definition of rural areas, and ACL declines to limit the flexibility afforded to the State agencies by the Act.

Likewise, State agencies are better positioned than ACL to project the cost of providing services and to develop a plan for meeting the needs for services in the rural areas of their respective States. We note that State agencies provide these projections in their current State plans on aging, as this is an existing requirement. For clarity, we have revised the final rule to specify that the minimum amount as set forth in the Act must be maintained. ACL will provide technical assistance with respect to this requirement, as needed.

Comment: Two commenters raised questions about the relationship between the requirement in § 1321.9(c)(2)(viii) that State agencies develop a process for determining how ''rural areas'' are defined and the Older Americans Act Performance System (OAAPS) definition of ''rural'' for reporting purposes. Another commenter raised a concern that this requirement conflicts with the OAAPS definition of ''rural.''

Response: ACL appreciates these questions and concerns and acknowledges the potential for confusion due to the requirement of § 1321.9(c)(2)(viii) related to defining ''rural areas'' and the separate requirement to submit annual performance report data on ''rural'' program participants. OAAPS is the reporting tool that State agencies and, in some cases area agencies, use to submit their annual performance report data on program participants, services, and expenditures related to the Act. OAAPS uses rural-urban commuting area (RUCA) codes defined at the ZIP code level to determine whether an individual program participant resides in a rural or non-rural area.[93] With respect to those clients for whom demographic data must be reported into OAAPS, all State agencies must use this definition and tool to report on ''rural'' program participants. State agencies are not required to use this definition of ''rural'' for any other purpose.

Section 1321.9(c)(2)(viii) of the final rule, by contrast, relates to the State agency's projections, plans, and expenditures pertaining to its implementation and administration of programs and services under the Act. The definition of ''rural areas'' referred to in this section may be separate and distinct from the definition of ''rural areas'' that is required to be used for annual program reporting on individual program participants.

Comment: A commenter expressed concern that the language of § 1321.9(c)(2)(viii)(B), which requires State agencies to expend annually on services for older individuals residing in rural areas no less than the amount expended for such services as set forth in the Act, may cause State agencies to believe they are not allowed to spend on such services more than the required minimum expenditure.

Response: ACL appreciates this comment but disagrees with this interpretation of the section (the language of which is the same as that found in section 307(a)(3)(B) of the Act).[94] The language provides the minimum amount that State agencies must spend; it does not impose a maximum amount that State agencies may spend on services for older adults residing in rural areas.

Comment: With respect to the requirement in § 1321.9(c)(2)(viii)(B) that State agencies expend annually on services for older individuals residing in rural areas no less than the amount expended for such services as set forth in the Act, a commenter proposed that State agencies be required to demonstrate how their IFFs meet the needs of older adults with greatest social need and with greatest economic need, in lieu of a policy of requiring minimum expenditure levels for one category of older adults (*i.e.,* older adults residing in rural areas).

Response: There is a requirement that State agencies expend annually on services for older individuals residing in rural areas no less than the amount as set forth in section 307(a)(3)(B) of the Act.[95] This provision is included to further implementation of this statutory requirement. ACL requires State agencies to include in the IFF a descriptive statement and application of the State agency's definitions of greatest economic need and greatest social need (see § 1321.49); we believe this requirement addresses the concern.

Comment: A few commenters expressed concern as to how State agencies will be able to comply with the rural minimum expenditure amount requirement set forth in § 1321.9(c)(2)(viii)(B) when the rule allows for various definitions among the State agencies. Another commenter recommends that ACL add clarifying language requiring State agencies to address their application of the rural minimum expenditure requirement, including how this requirement relates to each State agency's IFF.

Response: ACL appreciates the above comments related to rural minimum expenditure requirements set forth § 1321.9(c)(2)(viii)(B) but maintains the regulatory language as proposed. Regarding potential varying definitions of what constitutes rural areas, each State agency only compares what it will spend for each fiscal year against what was spent in that State as set forth in the Act. The definitions applied in other States will be irrelevant to this calculation. In addition, § 1321.9 (c)(2)(viii)(A) requires the State agency to establish a process and control for determining the definition of rural areas within their State in part so that the State agency will be able to comply with the rural minimum expenditure requirement.

Regarding the recommendation that State agencies be required to address their application of the rural minimum expenditure requirement, section 307(a)(3) of the Act requires State agencies to provide assurances in their State plans with respect to their compliance with the rural minimum expenditure.[96] ACL declines to impose additional requirements.

Comment: Two commenters noted that without additional funding, the requirements of § 1321.9(c)(2)(viii) may result in decreased services to metropolitan areas with a higher proportion of older adults.

Response: The commenters' concerns relate to the distribution of Title III funds throughout the State, which is addressed elsewhere in the rule. Section 305(a)(2)(C) through (D) of the Act[97] requires distribution of Title III funds to occur via an IFF (further defined in § 1321.49) or funds distribution plan (further defined in § 1321.51). The IFF is required for States with multiple PSAs, and a funds distribution plan is required for single PSA States. Sections 1321.49 and 1321.51 require State agencies to develop the IFF or funds distribution plan, through a process that allows for input from area agencies, interested parties, and the public; the concerns raised by the commenters can be addressed during this public input process.

[93] Specifically, OAAPS uses Categorization C of the Rural-Urban Commuting Area (RUCA) codes to determine geographic distribution between rural and non-rural. *See* The Rural Health Research Ctr., *http://depts.washington.edu/uwruca/ruca-uses.php* (last visited Oct. 25, 2023). For additional information and background on the zip code-based RUCA, *see also Rural-Urban Commuting Area,* The U.S. Dep't. of Agric., Econ. Research Serv., *https://www.ers.usda.gov/data-products/rural-urban-commuting-area-codes/documentation/* (last visited Oct. 25, 2023).

[94] 42 U.S.C. 3027(a)(3)(B).

[95] *Id.*

[96] *Id.* section 3027(a)(3).

[97] 42 U.S.C. 3025(a)(2)(C–D).

Comment: A commenter expressed concern that the OAAPS definition of rural is an inaccurate reflection of rural areas and could negatively impact area agencies. Another commenter expressed concerns as to U.S. Census data used in the OAAPS definition of rural.[98]

Response: States are not required to use the OAAPS definition of rural in their IFFs; accordingly, the commenter's concern that the OAAPS definition could negatively impact area agencies is misplaced. The comments regarding the inaccuracy of, and the data used in, the OAAPS definition of rural are outside of the scope of the rule, which does not address the OAAPS reporting system. ACL is available to provide technical assistance regarding defining and serving rural areas.

§ 1321.9(c)(2)(ix) Reallotment

Our final rule requires State agencies to develop fiscal policies and procedures related to a State agency's voluntary release of funds (reallotment), corresponding with sections 304(b)[99] and 703(b)[100] of the Act. These policies and procedures include that the State agency must communicate annually to ACL if the State agency has funding that will not be expended in the grant period to be voluntarily reallotted to the Assistant Secretary for Aging that will then be redistributed to other State agencies who identify as being able to utilize funds within the grant period. Additionally, the State agency should communicate annually to ACL whether they are able to receive and expend within the grant period any reallotted funds that may become available from the Assistant Secretary for Aging. We also clarify that the State agency must distribute any such reallotted funds it receives in accordance with the IFF or funds distribution plan, as set forth in § 1321.49 or § 1321.51.

§ 1321.9(c)(2)(x) Voluntary Contributions; § 1321.9(c)(2)(xi) Cost Sharing

The provision contained in § 1321.67 of the existing regulation (*Service contributions*) is redesignated here as § 1321.9(c)(2)(x) (*Voluntary contributions*) and revised, and we add § 1321.9(c)(2)(xi) (*Cost sharing*) to delineate between the two types of consumer contributions. Section 315 of the Act allows for consumer contributions which may take the form of (1) an individual voluntarily contributing toward the cost of a service (a voluntary contribution)[101] and (2) the State agency establishing a cost sharing policy, creating a structured system for collecting sliding scale payments from some service participants for some services (cost sharing).[102] For many decades, State and area agencies and service providers have collected voluntary contributions from participants receiving services under the Act. Such voluntary contributions allow service participants to demonstrate their support of these services and for expansion of services to others in the community. For example, in FY 2021 State agencies reported nearly $166 million in program income for Title III-funded services to ACL, a significant amount we estimate was in the form of voluntary contributions.

Cost sharing provisions were added in the 2000 amendments to the OAA (Pub. L. 106–501). Because the Act includes many restrictions regarding cost sharing, in practice ACL has seen cost sharing implemented for a few limited services such as transportation and respite. For example, a State agency may wish to pursue cost sharing under the Act as a way of more consistently soliciting contributions or for administrative simplicity to align with services provided under other funding sources that use a cost sharing model. Many State agencies choose not to pursue cost sharing as they find no benefit in comparison to the traditional model of collecting voluntary contributions.

We discuss these two provisions together because ACL has received many questions about how voluntary contributions and cost sharing compare. We discuss voluntary contributions first because, as explained above, State agencies have a long history of requesting voluntary contributions and are less likely to pursue cost sharing arrangements.

We specify in § 1321.9(c)(2)(x) that the Act states that voluntary contributions are allowed and may be solicited for all services, as long as the method of solicitation is non-coercive.[103] In contrast, we also list the services for which the Act prohibits cost sharing, which include information and assistance, outreach, benefits counseling, and case management services; long-term care ombudsman, elder abuse prevention, legal assistance, and other consumer protection services; congregate or home-delivered meals; and any services delivered through Tribal organizations.[104]

In § 1321.9(c)(2)(xi) we list applicable requirements to include how suggested contribution levels for cost sharing are established, which individuals are encouraged to contribute, the manner of solicitation of contributions, a prohibition on means testing, provisions that apply to all service recipients, a prohibition on denial of services, procedures that are to be established, that amounts collected are considered to be program income, and further provisions that apply to cost sharing. Both § 1321.9(c)(2)(x) and § 1321.9(c)(2)(xi) are intended to clarify that services may not be denied, even when a State agency has a cost sharing policy and or a voluntary contribution policy, if someone cannot or chooses not to contribute or to pay a suggested cost sharing amount. In other words, any State agency cost sharing and consumer contribution policies must not be required for OAA program participants, and State agencies must ensure that program participants are aware that they are not required to contribute, and services will not be impacted if they choose not to contribute. We also clarify that State agencies, AAAs, and service providers are prohibited from using means testing to determine eligibility for or to deny services to older people and family caregivers, as set forth in section 315(a)(5)(E)[105] and (b)(3),[106] and we confirm that both voluntary contribution and cost sharing solicitation amounts are to be based on the actual cost of services.

In specifying differences between voluntary contributions and cost sharing, voluntary contributions are encouraged for individuals whose self-declared income is at or above 185 percent of the FPL, while the Act further restricts the implementation of cost sharing and does not allow it to be imposed on service participants who are at or below the FPL or are otherwise low-income as specified by the State agency. Cost sharing is also prohibited for services delivered through Tribal organizations.

Additionally, if a State agency chooses to establish a cost sharing policy, it must be implemented statewide at all AAAs in the State, with limited exceptions, where a State agency approves a waiver request from a AAA where the AAA demonstrates that a significant proportion of persons receiving services under the Act have incomes below a certain threshold or that applying the cost sharing policy would place an unreasonable burden

[98] *Supra* note 93.

[99] 42 U.S.C. 3024(b).

[100] 42 U.S.C. 3058b(b).

[101] 42 U.S.C. 3030c–2(b).

[102] *Id.* section 3030c–2(a).

[103] 42 U.S.C. 3030c–2.

[104] *Id.* section 3030c–2(a)(2).

[105] *Id.* section 3030c–2(a)(5)(E).

[106] *Id.* section 3030c–2(b)(3).

upon the AAA, as set forth in section 315(a)(6).[107]

§ 1321.9(c)(2)(x) Voluntary Contributions

Comment: A few commenters expressed support for § 1321.9(c)(2)(x) and § 1321.9(c)(2)(xi), which detail requirements related to voluntary contributions and cost sharing, respectively, and expressed appreciation for the distinctions made between the two concepts.

Response: ACL appreciates the support for these provisions.

Comment: A few commenters recommended removal of the requirement in § 1329.9(c)(2)(x)(B) that voluntary contributions be encouraged for individuals whose self-declared income is at or above 185 percent of the FPL. One commenter requested clarity as to whether this requirement applies to both registered and non-registered services, as defined in OAAPS.[108] The commenter also suggested that an exception be added to this provision for non-registered services under OAAPS where self-reported income is not collected as part of service delivery. Another commenter recommended that the voluntary donation policy be eliminated for Title III, part C meal programs and replaced with an income-based charge for meals.

Response: ACL appreciates these comments but does not have the authority to modify this requirement because it is mandated by section 315 of the Older Americans Act.[109] However, § 1329.9(c)(2)(x)(B) does not require an agency to obtain the income levels of all clients to determine whether the clients should be encouraged to voluntarily donate; rather, the provision merely requires that voluntary contributions be encouraged for individuals whose self-declared income is at or above 185 percent of the FPL.

Comment: ACL received a few comments objecting to allowing Ombudsman programs to seek voluntary contributions, noting a concern that it could be a barrier to residents accessing ombudsman services.

Response: The language of the rule is permissive, and we defer to Ombudsman programs to make determinations about voluntary contributions. We decline to make further revisions to this provision.

§ 1321.9(c)(2)(xi) Cost Sharing

Comment: ACL received many comments regarding this section. There was disagreement among the commenters about this section. Some commenters expressed that the section helped to clarify the requirements of the Act. Most commenters, however, had issues with the concept of cost sharing as set forth in the provision (some felt the concept should be eliminated) or had issues with the process as set forth in the provision (many felt decisions as to cost sharing should be made at the area agency level).

Response: ACL appreciates these comments but declines to make the commenters' requested changes to this section. The requirements in § 1329.9(c)(2)(xi) is mandated by section 315 of the Act.[110]

Comment: Some commenters expressed confusion regarding the distinctions between voluntary contributions and cost sharing, and one commenter's understanding was that cost sharing is not voluntary.

Response: For many decades, State and area agencies and service providers have collected voluntary contributions from participants receiving services under the Act. Cost-sharing provisions were added in the 2000 amendments to the Act (Pub. L. 106–501). Because the Act includes many restrictions and requirements regarding cost sharing, in practice ACL has only seen cost sharing implemented for a few limited services, such as transportation and respite. Many State agencies choose not to pursue cost sharing as they find limited or no benefit in comparison to the traditional model of collecting voluntary contributions. We clarify in § 1321.9(c)(2)(x) that voluntary contributions are allowed and may be solicited for all services, as long as the method of solicitation is noncoercive. In contrast, we also list the services for which the Act prohibits cost sharing.

In § 1321.9(c)(2)(xi) we list applicable requirements to include how suggested contribution levels for cost sharing are established, which individuals are encouraged to contribute, the manner of solicitation of contributions, a prohibition on means testing, provisions that apply to all service recipients, a prohibition on denial of services, procedures that are to be established, that amounts collected are considered to be program income, and further provisions that apply to cost sharing. Both § 1321.9(c)(2)(x) and (xi) are intended to clarify that services may not be denied, even when a State agency has a cost-sharing policy and a voluntary contribution policy, if someone cannot or chooses not to contribute or to pay a suggested cost-sharing amount. In other words, all State agency cost sharing and consumer contribution policies must be voluntary for OAA program participants, and State agencies must ensure that program participants are aware that they are not required to contribute.

ACL will offer technical assistance to any State agencies that request assistance in implementing voluntary contributions and cost sharing.

Comment: One commenter expressed concern regarding the applicability of cost sharing to Tribal organizations and requested that Tribal organizations be allowed to request a waiver from such requirements.

Response: ACL appreciates the comment but believes the commenter's concerns are adequately addressed in the rule. Section 315(a) of the Act[111] and § 1321.9(c)(2)(xi)(D)(*3*)(*iv*) expressly prohibit cost sharing for any services delivered through Tribal organizations.

Comment: One commenter requested that AAAs be allowed to implement cost sharing for Title III, part C nutrition programs (congregate and home-delivered meals). The commenter also expressed concern that some clients with the financial means to voluntarily contribute to the cost of the meals do not do so, which can impact a AAA's ability to provide services to those at greatest social need and greatest economic need.

Response: Section 315(a) of the Act[112] expressly prohibits cost sharing for congregate and home-delivered meals. Even if cost sharing were permitted for these services, an area agency would not be permitted to deny the service to any client who is unwilling to contribute, as discussed above. Section 1321.9(c)(2)(x) requires that voluntary contributions be encouraged for clients whose self-reported income is at or above 185 percent of the FPL. In addition, serving clients with the ''greatest social need'' could include clients of considerable financial means.

§ 1321.9(c)(2)(xii) Use of Program Income

The provision contained in § 1321.73 of the existing regulation (*Grant related income under Title III–C*) is redesignated here as § 1321.9(c)(2)(xii) and revised. We clarify the fiscal requirements that apply to program income, which include voluntary contributions and cost-sharing

[107] *Id.* section 3030c–2(a)(6).

[108] Registered services are certain services for which demographic and other information are collected from each client and reported into OAAPS (such as home-delivered meals), while non-registered services are those for which no client demographic information is required to be reported in OAAPS (such as public information sessions).

[109] 42 U.S.C. 3030c–2.

[110] *Id.* section 3030c–2.

[111] *Id.* section 3030c–2(a).

[112] *Id.*

payments. For example, we clarify that State agencies are required to report contributions as program income and set forth restrictions on the use of program income.

Comment: ACL received comments requesting clarification of the requirement in § 1321.9(c)(2)(xii)(B) that ''[p]rogram income collected must be used to expand the service category by part of Title III of the Act, as defined in § 1321.71, for which the income was originally collected;'' as well as requesting that § 1321.9(c)(2)(xii) be modified to permit area agencies the flexibility to allow program income to be used to expand any Title III service.

Response: Section 315 of the Act [113] does not authorize ACL to permit area agencies to use program income collected under one part of Title III to expand a service provided under another part of Title III.

In addition, in the course of reviewing these comments, ACL has determined that contributions must be used to expand a service funded under the Title III grant award pursuant to which the income originally was collected, and that the language of this section was in need of revision. Accordingly, § 1321.9(c)(2)(xii)(B) has been revised to state that program income collected must be used to expand a service funded under the Title III grant award pursuant to which the income was originally collected.

Thus, a contribution for transportation (a supportive service under Title III, part B) can only be reported as income and used to expand Title III, part B supportive services such as transportation or multipurpose senior centers. Similarly, if someone pays a portion of the cost of a Title III, part B transportation service under a cost-sharing arrangement, that portion must be reported as income to the Title III, part B supportive services program. In addition, because Title III, part C–1 funding for congregate meals and Title III, part C–2 funding for home-delivered meals are issued under separate grant awards, contributions for services under these two awards cannot be commingled. A contribution for the nutrition service of home-delivered meals must be reported as income to the home-delivered nutrition program and used to expand home-delivered nutrition services, such as home-delivered meals, or nutrition education for home-delivered meals clients; it cannot be used to expand congregate meals services.

[113] *Id.* section 3030c–2.

§ 1321.9(c)(2)(xiii) Private Pay Programs

AAAs and service providers may, in addition to programs supported by funding received under the Act, offer separate private pay programs for which individual consumers agree to pay to receive services. These private pay programs may offer similar or the same services as those funded under Title III. We add paragraph (c)(2)(xiii) to this provision to provide guidance as to policies and procedures that should be in place to ensure that private pay programs offered by AAAs and service providers do not compromise core responsibilities under the Act. One such core responsibility, for example, is to ensure that individuals who receive information about private pay programs and who are eligible for services provided with Title III funds also are made aware of Title III-funded services and waitlist opportunities for those services.

§ 1321.9(c)(2)(xiv) Contracts and Commercial Relationships

AAAs and service providers may receive and administer funding from multiple sources as they seek to provide comprehensive services to older adults. In doing so, they may enter into contracts and commercial relationships with various entities to accomplish the delivery of comprehensive services, as authorized in sections 212 [114] and 306(a)(13) and (14) of the Act.[115]

The Act has always contemplated an aging network that plans, coordinates, and facilitates comprehensive and coordinated systems for supportive, nutrition, and other services, leveraging resources beyond what the OAA alone can support. The aging network has growing opportunities to braid different sources of government with private funding to serve older adults in need, which has been accomplished through contracts and commercial relationships with organizations such as Medicaid managed care plans and health systems, among others. Congress further strengthened this flexibility in the 2020 reauthorization of the OAA.[116]

In response to numerous questions about the appropriate roles, responsibilities, and oversight of such activities, feedback received in response to the RFI and the NPRM, and based on our observations of program activities, this final rule clarifies the policies and procedures that State agencies must establish related to all contracts and commercial relationships in subsection § 1321.9(c)(2)(xiv). We intend this rule to respond to numerous concerns from AAAs regarding inconsistent State agency approaches to contracts and commercial relationships, as well as concerns from State agencies about the level of risk and associated oversight required. We encourage a review and approval process that complies with the statutory requirements found in section 212 [117] and throughout Title III but is not onerous, can be implemented easily, and does not cause undue delay. We anticipate providing technical assistance in this area to State agencies and AAAs.

As a component of these policies and procedures, and consistent with their authority under sections 305(a)(1)(C),[118] 306(a),[119] 306(b),[120] and 212(b)(1),[121] State agencies must establish processes for AAAs to receive prior approval for contracts and commercial relationships permitted under section 212 of the Act.[122] We expect such processes to be flexible and streamlined. This provision will help ensure that the activities of recipients and subrecipients of funding further the intended benefits of the Act and do not compromise core responsibilities or the statutory mission of State agencies, AAAs, and service providers. Through these requirements, we intend to promote and expand the ability of the aging network to engage in business activities.

Comment: Several commenters recommended that we define ''commercial relationships.'' Commenters also sought clarity as to whether this provision applies to contracts or commercial relationships to provide services to non-profit entities in addition to ''profitmaking'' entities (under section 212 of the Act).[123] We have received several questions through public comments and requests for technical assistance seeking to understand when a business arrangement is or is not a ''commercial relationship.''

Response: Typically, an organization seeking clarity on this issue either wants to or is already engaged in a business arrangement and is trying to understand whether certain OAA requirements apply to that arrangement. Our intent is to broadly define ''commercial relationships.'' Whether they are contracts, ''business arrangements,'' ''agreements,'' ''business transactions,''

[114] 42 U.S.C. 3020c.

[115] 42 U.S.C. 3026(a)(13)–(14).

[116] 42 U.S.C. 3027(a)(26) (2018) as amended by Public Law 116–131 (2020).

[117] 42 U.S.C. 3020c.

[118] 42 U.S.C. 3025(a)(1)(C).

[119] 42 U.S.C. 3026(a).

[120] *Id.* section 3026(b).

[121] 42 U.S.C. 3020c(b)(1).

[122] *Id.* section 3020c.

[123] *Id.*

or any other term that an organization might use to describe the activity, it is broadly encompassed within the statutory term ''contracts or commercial relationships.''

The Act only uses the phrase ''commercial relationship'' in tandem with ''contracts'' or ''contractual.'' [124] We have sought to consistently adopt the phrase ''contracts and commercial relationships'' throughout the NPRM and in this final rule. When we are not referring to all ''contracts and commercial relationships,'' we explain which subset is relevant. For example, the phrase ''contracts and commercial relationships that fall under section 212 of the Act'' would refer to the agreements described in section 212 of the Act.[125] It is not relevant to distinguish between a ''contract'' and a ''commercial relationship'' under section 212; the same requirements apply, regardless of how an organization defines the agreement.

We appreciate comments seeking a clearer definition of ''private pay'' in the final rule. We have revised the definitions of ''area plan administration,'' ''private pay programs'' and ''program development and coordination activities'' to use ''contracts and commercial relationships,'' consistent with our use throughout the rest of the rule.

We also decline to provide a regulatory definition of ''profitmaking'' as used in section 212 of the Act, which lays out the circumstances under which a recipient may enter ''[. . .] an agreement with a profitmaking organization for the recipient to provide services to individuals or entities not otherwise receiving services under this Act[.]'' [126] We interpret ''profitmaking'' as referring to entities that are not non-profits. However, because section 212 establishes a framework for understanding how and when these arrangements are consistent with the intent of the Act, we think it is reasonable for a State agency to apply the same opportunities and obligations in the context of agreements with non-profit entities. In other words, if an agreement would be permitted under section 212 with a for-profit entity, a State agency could determine that a similar agreement with a non-profit entity is permissible so long as the other requirements of section 212 are met. We encourage State agencies to take this approach or otherwise explain why they decline to do so in their policies and procedures.

Comment: We received a significant number of comments related to contracts and commercial relationships, generally focusing on approval requirements for agreements that fall under section 212 of the Act.[127] Many commenters raised concerns about the appropriate degree of State oversight and the role of the State agency. Commenters had concerns about how time-consuming State agency approval processes can be, both out of concern for the burden and potential cost to State agencies and because of the potential delay in executing contracts and commercial relationships and subsequent impact on potential partnerships. Several commenters were concerned that this provision could deter OAA grantees from innovating and forming relationships with health and social sector commercial entities.

All commenters that raised this issue agreed that oversight of contracts and commercial relationships should be streamlined and not overly burdensome. Several commenters described the proposed policies and procedures as an expansion of State agency control and were concerned that ''excessive approval requirements'' would usurp local decision-making. Other commenters suggested that ACL limit the State agency approval process to a generic review of AAA activity, and that State agencies should not be authorized to review and approve of specific contracts or contract details. Commenters recommended relying solely on assurances in AAA contracts that reflect adherence to all key principles within the OAA as a maximum degree of State oversight. One commenter suggested that State agency approval should be limited to approval of standard language for AAAs to incorporate into agreements with third-party entities, as appropriate.

Many comments related to the State approval process under section 212 of the Act,[128] including requests for more clarity about how comprehensive the process should be. One commenter recommended incorporating more specific information about the nature of State agency ''approval'' into the regulation and establishing a right of appeal if a State agency opts not to approve of a contract or commercial relationship. Several commenters noted that State agencies are not a party to the contract they are responsible for approving, and thus should not have approval authority; other commenters asked whether the State agency became a party to the contract by virtue of its review and approval role.

Several comments included requests for information that we believe would be better incorporated into sub-regulatory guidance to assist in implementing this provision. For example, how should State agencies deal with contract amendments; can ACL provide examples of streamlined State agency review processes; what degree of oversight does a State agency have over a separate non-profit entity established by a AAA; what is the scope of State liability in the event of an issue that arises due to a contract or commercial relationship approved by the State agency; and what the remedy is if the State agency identifies an issue related to the proposed contract or commercial relationship.

Response: We appreciate these comments. We agree that State agency oversight policies and procedures should be streamlined, transparent, not overly burdensome to either the State or the subrecipients of Federal funds, and commensurate to the degree of risk associated with a specific contract or commercial relationship. Like most commenters who raised this issue, we do not believe it should usually be necessary for State agencies to review contract documents in order to approve the establishment of a contract or commercial relationship. As we stated in the proposed rule, we expect State agency approval processes to be flexible, reflecting the needs of the older individuals served and the abilities of AAAs and service providers to engage in contracts and commercial relationships.[129] We believe that requiring State agencies to establish clear policies and procedures for approval processes, developed in consultation with AAAs, will expedite the establishment of important partnerships.

States agencies could use a number of different approaches to streamline the approval processes. For example, a State agency could adopt standard assurances related to COI (and other concerns) to be adopted into all AAA agreements to provide services and decide not to review case-by-case information related to COI. A State agency could pre-approve a AAA to engage in a general category of contracts and commercial relationships with a certain type of organization, subject to certain conditions and a commitment to provide information about the agreement annually, as required under

[124] 42 U.S.C. 3026; 42 U.S.C. 3027; 42 U.S.C. 3012.

[125] 42 U.S.C. 3020c.

[126] 42 U.S.C. 3020c(a).

[127] *Id.* section 3020c.

[128] 42 U.S.C. 3020c.

[129] 88 FR 39578 (June 16, 2023).

section 306(a).[130] The State agency could decide as a matter of policy that all contracts and commercial relationships to expand the reach of services will be approved unless certain concerning conditions exist (for example, if a AAA is under a corrective action plan). Under such a policy, AAAs would provide assurances that proposed agreements do not meet any exclusionary criteria. State agencies might decide that certain kinds of arrangements pose more risk than others. For example, contracts that involve a AAA on a corrective action plan or contracts that are disproportionately large compared to a AAA's overall budget may be considered to pose more risk. As we discussed in the proposed rule, State agencies could consider the potential risks of different kinds of contracts and commercial relationships as they develop and implement the most efficient and least burdensome approval processes possible.[131] State agencies have the discretion to decide whether it is appropriate to incorporate template language into agreements, standard assurances, or to use other methods of standardization.

We hope that having clear statewide policies and procedures will help to establish best practices nationwide. We strongly encourage State agencies to seek input on proposed approval processes from AAAs to help achieve a balanced and feasible approach that will achieve the goal of minimizing risks while enabling the expansion of services to reach older adults with unmet needs.

Commenters raised questions related to compliance and State agency liability for unsuccessful contracts or commercial relationships approved under State agency policy. We appreciate these concerns and reiterate here that the activities described in section 212 (both successful and unsuccessful) are allowable costs under the grant.[132] The State agency must establish and follow policies and procedures that are compliant with this final rule and comply with any other applicable requirements for recipients of Federal grants.

The structure of the Act is such that State agencies (as Federal grantees) are ultimately responsible for ensuring the appropriate use of funds, while AAA subrecipients are predominantly responsible for using those funds to develop the aging services network. This framework may lead State agencies to err on the side of caution (which is appropriate in overseeing the use of Federal funds) so as not to be held responsible for risky subrecipient activities. However, too much caution in this area may inhibit the provision of vital services and the sustainable growth of the network at a time when there is a growing population of older adults and greater demand for services. Section 212[133] and section 306(g)[134] highlight the importance of leveraging existing knowledge, expertise, and relationships to expand the reach of the aging services network.[135] All new business endeavors represent some degree of risk; we intend the policies and procedures under this provision to help mitigate, not eliminate, that risk. The intent of sections 212 and 306(g) can only be realized if the full weight of the potential failure of new contracts and commercial relationships does not fall on State agencies. We can alleviate that concern by clarifying that activities under section 212 are allowable costs so long as they comply with State agency policies and procedures.

We agree with commenters who noted that State agencies are not parties to these contracts and commercial relationships; however, that has no bearing on their authority to review and approve them. State agencies are responsible for reviewing and approving certain contracts and commercial relationships, consistent with sections 305(a)(1)(C),[136] 306(a),[137] 306(b),[138] and 212(b)(1) of the Act.[139] Engaging in these responsibilities does not make the State agency a party to the contract or commercial relationship under review.

Commenters encouraged ACL to develop regulatory text that sets an appropriate Federal regulatory floor for State agencies to meet but that remains flexible enough for State agencies with capacity or need to establish processes or standards that meet their State-specific priorities. We intend the regulatory text that we have set forward to be just that: a standard regulatory floor that defers to State agency discretion to develop policies and procedures to appropriately review contracts and commercial relationships that require State agency approval.

We prefer to leave State agencies the discretion to decide the details of their policies and procedures related to review and approval of contracts and commercial relationships (including pre-approval of agreements described in section 212 of the Act)[140] because circumstances vary across States and the State agency is ultimately responsible for ensuring the appropriate use of Federal funds granted to the State. However, in developing their policies and procedures, State agencies should consider the government interests in reviewing the potential contract or commercial relationship (including, among other concerns, any potential COI and whether appropriate firewalls exist to mitigate them; whether the AAA is meeting existing obligations under the Act; and potential risks to the AAA, the aging services network, or to the individuals served by the AAA associated with the proposed contract or commercial relationship). Section 306(a) of the Act sets forth many of these interests in the form of assurances that AAAs must offer for area plan approval.[141] State agencies have the discretion to request to review contract documents if they deem it necessary to determine whether the contract or commercial relationship may be approved, consistent with their policies and procedures. However, subrecipients should generally be able to provide sufficient information to address these concerns without having to share contract documents for review. This should include, at a minimum, information related to the proposed partnering entity,[142] the proposed services to be provided, and specific assurances related to other requirements under section 212(b).[143] We intend to provide tools and examples that State agencies may, at their discretion, adapt and use. We intend the delayed compliance date for this provision to provide adequate time for State agencies and subrecipients to adopt compliant policies and to engage in technical assistance as needed.

Comment: We received several comments recommending against incorporating any prior approval process for contracts and commercial relationships into the area plan approval process. Commenters also recommended that State agencies be required to provide timely approval.

Response: We agree that State agencies should establish a prior approval process that is distinct from the area plan approval process, as opportunities may arise outside of

[130] 42 U.S.C. 3026(a)(13).

[131] 88 FR 39578 (June 16, 2023).

[132] 42 U.S.C. 3020c.

[133] *Id.* section 3020c.

[134] 42 U.S.C. 3026(g).

[135] 42 U.S.C. 3020c; 42 U.S.C. 3026(g).

[136] 42 U.S.C. 3025(a)(1)(C).

[137] 42 U.S.C. 3026(a).

[138] *Id.* section 3026(b).

[139] 42 U.S.C. 3020c(b)(1).

[140] 42 U.S.C. 3020c(b)(1).

[141] 42 U.S.C. 3026(a)(13).

[142] In deference to non-disclosure agreements, this may include the type of organization and not the identity of the specific entity. However, the State agency may require the AAA to attest that the proposed agreement is *not* with a specific entity.

[143] 42 U.S.C. 3020c(b).

standard area plan timeframes and requests for prior approval may not need to meet the same expectations for public input, advisory council review, and other requirements. Subrecipients can only successfully establish contracts and commercial relationships that require prior approval if approval can be granted in a timely fashion. However, we encourage State agencies to use the area plan approval process as an additional opportunity to discuss any new business under development.

Comment: A number of commenters were particularly interested in minimizing the State's oversight role with respect to contracts and commercial relationships described in section 212 of the Act [144] that are executed by AAAs without expending OAA funding. Several commenters argued that the Act does not apply to such agreements, and thus oversight is not appropriate. Some commenters raised concerns that the State pre-approval required under section 212 of the Act conflicts with section 306(g) of the Act, which states that, ''Nothing in this Act shall restrict an area agency on aging from providing services not provided or authorized by this Act[.]'' [145] On the other hand, one AAA commenter strongly supported the approval role of the State agency and suggested that statewide standardization of the process to engage in contracts and commercial relationships under section 212 of the Act would help improve the AAA network's ability to equitably engage in such business.

Response: We disagree with commenters who described State oversight in this area as an overreach. Our interpretation of the statute is that the Act applies to agreements ''[. . .] to provide services to individuals or entities not otherwise receiving services under this Act [. . .]'' [146] regardless of whether OAA funds are directly expended as part of the agreement. We seek to clarify here our interpretation of the statutory language and the Federal interests (as articulated in the Act) in responsible oversight of any contract or commercial relationship that falls within the category of ''agreements'' described in section 212.

Section 212(a) of the Act states that, subject to the conditions set forth in 212(b), ''[. . .] this Act shall not be construed to prevent a recipient of a grant or a contract under this Act (other than title V) from entering into an agreement with a profitmaking organization for the recipient to provide services to individuals or entities not otherwise receiving services under this Act[.]'' [147] We interpret this paragraph as defining ''an agreement'' for the purposes of section 212 as any arrangement with a profitmaking organization to provide services to individuals or entities not otherwise receiving services under this Act. Consistent with section 306(g),[148] such agreements must be permitted, provided they meet the conditions laid out in section 212, and that a subrecipient seeking pre-approval has followed the State agency policy and procedures established under this provision. A State agency should not arbitrarily deny approval of an agreement that satisfies the requirements of section 212 and of the State's own policies and procedures.

Subsection (a) continues in paragraphs (a)(1) through (3) by providing three limiting conditions that are only relevant to certain agreements:

- Paragraph (a)(1) states that if funds provided under this Act to such recipient are initially used by the recipient to pay part or all of a cost incurred by the recipient in developing and carrying out such agreement, such agreement guarantees that the cost is reimbursed to the recipient.[149] We interpret this paragraph to mean that if agreements are developed and carried out using OAA funds, those funds must be reimbursed. Importantly, agreements may also be entered into *without* using OAA funds, in which case this condition does not apply, and reimbursement of OAA funds is not relevant.
- Paragraph (a)(2) states that if such agreement provides for the provision of one or more services, of the type provided under this Act by or on behalf of such recipient, to an individual or entity seeking to receive such services [150] certain additional conditions apply. Individuals and entities may only purchase services at a fair market rate; all costs incurred (and not otherwise reimbursed under (a)(1)) must be reimbursed; and recipients must report rates and rates must be consistent with the prevailing market rate in the relevant geographic area. We interpret this paragraph to mean that if the agreement is for the recipient to provide one or more OAA-authorized services to OAA service participants or clients, these additional conditions apply. As in (a)(1), we also interpret this paragraph to mean that an agreement might be entered into under section 212 that does *not* provide for the provision of one or more OAA services.
- Paragraph (a)(3) describes any amount of payment to the recipient under the agreement that exceeds reimbursement under this subsection of the recipient's costs is used to provide, or support the provision of, services under this Act.[151] We interpret this paragraph to mean that if an agreement is profitable beyond the required reimbursement of any OAA funds if used (under (a)(1)) and the reimbursement of any other costs incurred by the recipient (under (a)(2)(B)), any profits must be used to support the provision of OAA services to OAA clients.

Section 212(b) lists the limitations that apply to all agreements under section 212. An agreement described in paragraph (a) may not:

- be made without the prior approval of the State agency (or, in the case of a grantee under title VI, without the prior recommendation of the Director of the Office for American Indian, Alaska Native, and Native Hawaiian Aging and the prior approval of the Assistant Secretary), after timely submission of all relevant documents related to the agreement including information on all costs incurred.[152] We interpret this paragraph to require State agency pre-approval for all agreements under section 212. We have discussed at length the requirement in this final rule for State agencies to develop policies and procedures to implement this provision;
- have the effect of ''[. . .] paying, reimbursing, subsidizing, or otherwise compensating an individual or entity in an amount that exceeds the fair market value of the services subject to such an agreement[.]'' [153] This paragraph applies the limitation in section 212(a)(2)(A) to all agreements under section 212;
- result in the displacement of services otherwise available to an older individual with greatest social need, an older individual with greatest economic need, or an older individual who is at risk of institutional placement; or
- in any other way compromise, undermine, or be inconsistent with the objective of serving the needs of older individuals, as determined by the

[144] 42 U.S.C. 3020c.

[145] 42 U.S.C. 3026(g).

[146] 42 U.S.C. 3020c(a).

[147] *Id.* section 3020c(a).

[148] 42 U.S.C. 3026(g) Nothing in this Act shall restrict an area agency on aging from providing services not provided or authorized by this Act, including through—(1) contracts with health care payers; (2) consumer private pay programs; or (3) other arrangements with entities or individuals that increase the availability of home- and community-based services and supports.

[149] 42 U.S.C. 3020c(a)(1).

[150] *Id.* section 3020c(a)(2).

[151] 42 U.S.C. 3020c(a)(3).

[152] *Id.* section 3020c(b)(1).

[153] *Id.* section 3020c(b)(2).

Assistant Secretary.[154] Agreements under section 212 may not compromise OAA services to OAA program participants or clients and may not be inconsistent with the objective of serving older individuals. The Assistant Secretary for Aging has the discretion to determine whether an agreement violates this provision.

Section 212(c), (d), and (e) relate to monitoring and reporting requirements, timely reimbursement, and defining ''cost'' in this section, respectively.[155] We did not receive significant comments related to interpreting these provisions.

Section 212 [156] cannot be read without the context provided by section 306(a),[157] which sets forth the requirements for the development of area plans, which lay out in detail the work that a AAA must do to fulfill their obligations under the Act, inclusive of compliance with section 212. Both sections 306(a) and 212 require subrecipients to provide information for State agency review and approval about the contracts and commercial relationships in which they are engaged, or in which they intend to engage. Section 306(a) incorporates the requirements of section 212 and enumerates the assurances the AAAs must offer as part of developing an area plan. Among other attestations, AAAs are required to provide assurances that they will:

- maintain the integrity and public purpose of services provided, and service providers, under this title in all contractual and commercial relationships;
- disclose the identity of each nongovernmental entity with which they have a contract or commercial relationship relating to providing any service to older individuals and the nature of such contract or such relationship;
- demonstrate that a loss or diminution in the quantity or quality of the services provided, or to be provided, under this title by such agency has not resulted and will not result from such contract or such relationship;
- demonstrate that the quantity or quality of the services to be provided under this title by such agency will be enhanced as a result of such contract or such relationship;
- if requested, disclose all sources and expenditures of funds such agency receives or expends to provide services to older individuals;
- avoid giving preference in receiving services under this title to particular older individuals as a result of a contract or commercial relationship that is not carried out to implement this title; and use funds provided under this title to provide benefits and services to older individuals, giving priority to older individuals identified in section 306(a)(4)(A)(i),[158] and in compliance with these assurances and the limitations specified in section 212.[159] [.]''

The OAA established the AAA designation, and AAAs have since grown into a nationally recognized network of entities working on behalf of older adults. The assurances laid out in section 306(a) [160] are a clear statement of the Federal interests in ensuring that the integrity of the network is not compromised by any contracts and commercial relationships in which recipients and subrecipients engage; and that services to OAA clients will be enhanced (and not diminished) as the result of such agreements.

Even commenters who felt that certain activities described in section 212 of the Act [161] were ''not related to the OAA'' shared comments that nevertheless indicated an understanding that these interests apply to those activities. For example, a commenter noted that AAAs should be able to demonstrate that the work aligns with their mission and should keep their State agency informed about their work, albeit without ''seeking permission.'' One commenter who wrote in favor of relying solely on assurances for pre-approval noted that AAAs could be required to attest that contracting work to provide services outside the OAA would not in any way harm the goals of the Act or compromise the agency's responsibilities within the Act. Another comment noted further that any potential ''profits'' made from these kinds of contracts or commercial relationships are put back into services or the development of new programs for older adults, a reinvestment that is required under section 212—though the commenter claims that such agreements do not fall under the purview of section 212.

Both section 212 [162] and section 306(a) [163] establish an important oversight role for State agencies. As we noted in the proposed rule, we intend this provision to help ensure that the activities in which recipients and subrecipients of funding under the Act engage further the intended benefits of the Act and do not compromise core responsibilities or the statutory mission of State agencies, AAAs, and service providers.

Comment: A few commenters raised concerns related to sharing proprietary information or violating non-disclosure agreements as part of the review process. One commenter specifically asked about the relationship between State public records laws and State agency oversight of contracts between AAAs and health care entities with non-disclosure agreements.

Response: Generally, the application of State public records laws is beyond the scope of our regulation. However, we are not aware of any State that does not include certain exceptions for trade secrets or other proprietary information. In addition, we encourage State agencies to request and review the minimum information appropriate to the circumstances in order to approve of a contract or commercial relationship.

§ 1321.9(c)(2)(xv) Buildings, Alterations or Renovations, Maintenance, and Equipment

ACL has received technical assistance and clarification requests from State agencies and AAAs seeking to apply funding awarded under Title III to costs related to buildings and equipment (such as maintenance and repair). However, the Act provides limited standards regarding this use of funding. We add paragraph § 1321.9(c)(2)(xv) to provide clarification to ensure that funding will be used for costs that support allowable activities. In addition, section 312 of the Act provides that funds used for construction or acquisition of multipurpose senior centers are to be repaid to the Federal Government in certain circumstances.[164] To ensure that third parties will be on notice of this requirement, we include in this paragraph a requirement that a Notice of Federal Interest be filed at the time of acquisition of a property or prior to construction, as applicable.

Comment: One commenter requested definitions for: ''alterations,'' ''renovations,'' and ''construction.'' Two commenters suggested including ''retrofitting'' in the definition of ''alterations'' for clarity. Another commenter requested that ACL maximize flexibility for State agencies to make infrastructure investments.

Response: ACL appreciates these comments but declines to add the

[154] *Id.* section 3020c(b)(3),(4).

[155] *Id.* section 3020c(c),(d),(e).

[156] 42 U.S.C. 3020c.

[157] 42. U.S.C. 3026(a).

[158] 42 U.S.C. 3026(a)(4)(A)(i).

[159] 42 U.S.C. 3020c.

[160] 42 U.S.C. 3026(a).

[161] 42 U.S.C. 3020c.

[162] *Id.*

[163] 42 U.S.C. 3026(a)

[164] 42 U.S.C. 3030b.

requested changes, as ''altering or renovating'' and ''constructing'' are defined in § 1321.3 of the rule. ''Infrastructure'' is a broad term, and ACL lacks authority under the Act to allow for such a broad use of OAA funds. Section 321 of the Act only allows construction activities for multipurpose senior centers.[165]

Comment: A commenter noted that the term ''constructing,'' as defined in the current regulation, specifically refers only to ''multipurpose senior centers,'' while the definition of the term ''constructing'' in § 1321.3 of the proposed rule makes no reference to senior centers. The commenter sought clarity as to whether constructing activities only are permitted for multipurpose senior centers.

Response: ACL appreciates this comment. Section 1321.9(c)(2)(xv)(C) of the rule expressly states that construction activities only are allowable for multipurpose senior centers.

Comment: One commenter expressed the concern that § 1321.9(c)(2)(xv) does not adequately address equipment.

Response: In response to this comment, we have revised the introductory statement of this section as follows: ''Buildings and equipment, where costs incurred for [. . .] repair, and upkeep [. . .] to keep buildings and equipment in an efficient operating condition, including acquisition and replacement of equipment, may be an allowable use of funds and the following apply[.]'' We also have made a technical correction to the cross-references in § 1321.9(c)(2)(xv)(D) to specify the applicability of this provision. Finally, we have added a provision at § 1321.9(c)(2)(xv)(F) to specify that prior approval by the Assistant Secretary for Aging does not apply.

Comment: In connection with the acquisition or construction of a multipurpose senior center, ACL received a comment requesting guidance and training related to the requirement to file a Notice of Federal Interest in the appropriate official records of the jurisdiction where the property is located.

Response: ACL will address this comment through technical assistance, as needed.

§ 1321.9(c)(2)(xvi) Supplement, Not Supplant

The Act sets forth requirements in sections 306(a)(9)(B),[166] 315(b)(4)(E),[167] 321(d),[168] 374,[169] and 705(a)(4)[170] that OAA funds must supplement, and not supplant existing funds. We have received numerous questions about what these requirements mean and how State agencies can ensure that Federal funding is not used inappropriately to supplant other funds. For example, a State or local government might inappropriately decide to reduce State funding to support services for family caregivers due to an increase in Federal Title III, part E funding. In this example, the result would be that the increased Federal funds supplant, not supplement, the reduced State or local funding, with no increase in revenue available to the entity to provide additional services and in contradiction of section 374.[171] This provision requires a State agency policy and procedure on supplementing, not supplanting existing funds for the programs where specified in the Act.

Comment: ACL received a comment requesting guidance as to § 1321.9(c)(2)(xvi), which provides that funds awarded under certain sections of the Act must not supplant existing Federal, State, and local funds.

Response: ACL will address requests for guidance regarding this requirement through technical assistance, as needed.

§ 1321.9(c)(2)(xvii) Monitoring of State Plan Assurances

The Act sets forth many assurances to which State agencies must attest as a part of their State plans and to which AAAs must attest as a part of their area plans. The final rule specifies that the State agency must have policies and procedures to monitor compliance with these assurances. We made a technical edit to remove ''and area'' from the proposed language in this provision, as monitoring of area plan assurances is addressed in § 1321.9(c)(4).

§ 1321.9(c)(2)(xviii) Advance Funding

In response to comments received at listening sessions and increased requests for technical assistance from State agencies, AAAs, and service providers, ACL specifies that State agencies may advance funding to meet immediate cash needs of AAAs and service providers, and if a State agency chooses to do so, the State agency must have policies and procedures that comply with all applicable Federal requirements.

Comment: One commenter expressed support for § 1321.9(c)(2)(xviii). Other commenters expressed concern that this section includes requirements that may be difficult to comply with, given the diverse needs of area agencies.

Response: ACL appreciates these comments, but we decline to revise this provision. We do not have the authority to modify or waive Federal requirements that apply to advance payments.

§ 1321.9(c)(2)(xix) Fixed Amount Subawards

The rule allows fixed amount subawards up to the simplified acquisition threshold, as set forth in 2 CFR 200.333 and 45 CFR 75.353. The NPRM included this point in § 1321.9(c)(2)(i). In the course of reviewing § 1321.9(c)(2)(i) in response to comments received, ACL has determined that the language from that section regarding fixed amount subawards should be in a separate provision. Accordingly, ACL has added a new § 1321.9(c)(2)(xix) which states that fixed amount subawards up to the simplified acquisition threshold are allowed.

For a definition of ''simplified acquisition threshold'' see 2 CFR 200.1 and 45 CFR 75.2. ACL will provide technical assistance, as needed, regarding § 1321.9(c)(2)(xix).

§ 1321.9(c)(4) Area Plan Process

We add paragraphs § 1321.9(c)(3) and (4) to ensure the integrity and transparency of the State plan process and, in States with multiple PSAs, of the area plan process. The final rule requires the State agency to have policies and procedures that align with the requirements for State and area plans in §§ 1321.27, 1321.29, and 1321.65. In this final rule we have revised these requirements to clarify that State and area agencies must establish and comply with a reasonable minimum time period (at least 30 calendar days, unless a waiver has been granted) for public review of and comment on State and area plans.

§ 1321.11 Advocacy Responsibilities

Section 1321.13 of the existing regulation (*Advocacy responsibilities*) is redesignated here as § 1321.11. Section 1321.11 sets forth the advocacy responsibilities of State agencies. As indicated, these include advocacy, technical assistance, and training activities. We make additional minor revisions to these provisions to include activities related to the National Family Caregiver Support Program. Section 305(a) of the Act provides that the State agency should serve as ''an effective and visible advocate'' for older individuals

[165] 42 U.S.C. 3030d.

[166] 42 U.S.C. 3026(a)(9)(B).

[167] 42 U.S.C. 3030c–2(b)(4)(E).

[168] 42 U.S.C. 3030d(d).

[169] 42 U.S.C. 3030s–2.

[170] 42 U.S.C. 3058d(a)(4).

[171] 42 U.S.C. 3030s–2.

and family caregivers.[172] Accordingly, we revise § 1321.11(a)(3) to clarify that the State agency's obligations to comment on applications to Federal and State agencies for assistance related to the provision of needed services for older adults and family caregivers are not limited to instances in which the State agency receives a request to do so.

Comment: We received comment supporting inclusion of advocacy responsibilities, such as including family caregivers, and offering suggestions for strengthening these expectations. One commenter requested we require State agencies to incorporate diversity, inclusion, and cultural competency training, while another commenter requested removing local plans from the items the State agency is expected to review, monitor, evaluate, and provide comment on.

Response: We appreciate these comments. We have revised § 1321.11(a)(1) from ''[. . .] recommend any changes in these which the State agency considers to be appropriate'' to ''[. . .] recommend any changes in these which the State agency considers to be aligned with the interests identified in the Act[.]'' At § 1321.61(b)(1), we also have revised the regulations to remove the phrase ''where appropriate'' and add ''which the area agency considers to be aligned with the interests identified in the Act[.]''

We agree with the commenter that diversity, inclusion, and cultural competency are essential, and we encourage State agencies to incorporate these concepts throughout their trainings. However, we decline to expressly require such training. State agencies must provide training related to all of the topics listed in this regulation, including on how to provide services to those in the greatest economic and greatest social need. ACL encourages State agencies to work with Tribes and Tribal organizations, organizations representing those identified as in the greatest economic need and greatest social need, and others with lived experience in providing such trainings.

Additionally, State agencies are encouraged to provide review and comment on local plans and activities as part of their statewide oversight responsibilities. The State agency may benefit from learning about local innovations and developments, and the local agency may benefit from feedback on and connections to State agency initiatives and activities.

[172] 42 U.S.C. 3025(a).

§ 1321.13 Designation of and Designation Changes To Planning and Service Areas

Section 1321.29 of the existing regulation (*Designation of planning and service areas*) is redesignated here as § 1321.13 and is retitled to better reflect the content of the revised provision.

Section 305 of the Act requires the State agency to divide the State into distinct PSAs and subsequently designate a AAA to serve each PSA.[173] The Act allowed for exceptions for some State agencies to designate the entire State as a single PSA; however, this option only remains for States that did so on or before October 1, 1980. Single PSA States may be geographically small, such as Rhode Island, or may be sparsely populated relative to their geography, such as Alaska. Dividing States into distinct PSAs allows for a local approach to the planning, coordination, advocacy, and administration responsibilities as required under the Act. We revise this section to affirm the State agencies' obligations to have policies and procedures in place to ensure that the State agency process of designating and changing PSAs will be transparent, will hold the State agency accountable for its decisions, and will afford due process to affected parties. We also describe factors that a State agency should take into account when it considers changing a PSA designation, consistent with the aims of the Act. These factors include the geographical distribution of older individuals in the State, the incidence of the need for services under the Act, the distribution of older individuals with greatest economic need and greatest social need, the distribution of older individuals who are Native Americans, the distribution of resources under the Act, the boundaries of existing areas within the State, and the location of units of general purpose local government. Since all States now have designated PSAs, we provide greater detail on the requirements for changing PSAs, as specified in the Act, based on questions we have received and areas of confusion that have been expressed. For example, we anticipate that our requirement that State agencies must consider the listed factors will resolve confusion over how State agencies should make decisions about whether and how to change PSA designations.

Comment: One commenter pointed out a technical correction: the reference in § 1321.13(e) to § 1321.15(d) should instead reference § 1321.13(d).

[173] *Id.* section 3025.

Response: We are grateful to the commenter and have made this revision.

Comment: We received comments expressing support for the clarity of these provisions. One commenter also noted Tribes may request changes to better serve Native American elders.

Response: We appreciate these comments and encourage consideration of PSA changes that may better serve older adults and family caregivers, including Native American elders and family caregivers.

§ 1321.15 Interstate Planning and Service Area

Section 1321.43 of the existing regulation (*Interstate planning and service area*) is redesignated here as § 1321.15. Revisions are made to this provision to clarify the nature of an interstate PSA (per section 305(b) of the Act),[174] as well as the process for requesting the Assistant Secretary for Aging to designate an interstate PSA. Minor revisions have also been made to reflect statutory updates, including language reflecting the distribution of family caregiver support services funds under the Act, and updates to cross-references to other provisions within the regulation.

Comment: We received comment emphasizing the need for coordination especially when Tribal reservations cross State lines.

Response: We appreciate this comment. ACL is available to provide technical assistance in coordinating among State agencies, AAAs, and Tribal aging programs regarding interstate PSAs.

§ 1321.17 Appeal to the Departmental Appeals Board on Planning and Service Area Designation

Section 1321.31 (*Appeal to Commissioner)* is redesignated and modified here as § 1321.17 (*Appeal to the Departmental Appeals Board on planning and service area designation).* Section 305(a)(1)(E) [175] of the Act provides State agencies authority to divide the State into distinct PSAs to administer the Act's services and benefits. A local government, region, metropolitan area, or Indian reservation may appeal a State agency's denial of designation under the provisions of section 305(a)(1)(E) [176] to the Assistant Secretary for Aging who must then afford the entity an opportunity for a hearing pursuant to section 305(b)(4) [177] of the Act. There have historically been

[174] *Id.* section 3025(b).

[175] *Id.* section 3025(a)(1)(E).

[176] *Id.*

[177] *Id.* section 3025(b)(4).

very few appeals under section 305(a)(1)(E).[178]

Through this provision, appeals of State agency decisions for designation of PSAs are delegated to the HHS Departmental Appeals Board (DAB) in accordance with the procedures set forth in 45 CFR part 16. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to issuing a decision. This change aligns with §§ 1321.23 and 1321.39. We believe it continues to fulfill the Act's mandate to provide an opportunity for a hearing while streamlining administrative functions and providing robust due process protections to appellants. The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this change will provide clarity and consistency to State agencies and AAAs and is aligned with the intent of the Act.

Comment: We received comments supporting PSA designation appeals to the DAB. We also received comments requesting additional clarification.

Response: ACL intends for appeals regarding any PSAs, including those in which an interstate Indian reservation is located, as set forth in § 1321.15 (*Interstate planning and service area)* to be considered by the DAB. We have revised § 1321.17 to clarify that PSA designation changes may be appealed.

As stated in § 1321.17(b), ''Any applicant for designation as a planning and service area whose application is denied, and who has been provided a hearing and a written decision by the State agency, may appeal the denial to the Departmental Appeals Board (DAB)[.]'' Any applicant includes Tribes who apply.

§ 1321.19 Designation of and Designation Changes to Area Agencies

Section 1321.33 of the existing regulation (*Designation of area agencies*) is redesignated here as § 1321.19 and is retitled to better reflect the content of the revised provision. Section 305(b) of the Act requires State agencies not located in single PSA States to designate a AAA to serve each PSA.[179] We specify that only one AAA shall be designated to serve each PSA and that an organization may be designated as a AAA for more than one PSA. The Act intends that the AAA will proactively carry out, under the leadership and direction of the State agency, a wide range of functions designed to lead to the development or enhancement of comprehensive and coordinated community-based systems in, or serving, each community in the PSA. It is essential that each AAA has the capacity to carry out such responsibilities and that each AAA meets the Act's qualification requirements. The existing regulation, however, contains only a few basic procedural requirements under the Act related to the designation of AAAs and provides no direction to State agencies with respect to this important function.

We revise this provision to clarify the State agencies' obligations to have policies and procedures in place to ensure that the process of designating AAAs, as well as the voluntary or involuntary de-designation of a AAA (*i.e.,* withdrawal of AAA designation), will be transparent, will hold the State agency accountable for its decisions, and will afford due process to affected parties. We provide greater clarity to assist State agencies in understanding the designation process pursuant to section 305 of the Act and the types of agencies permitted by the Act to serve as AAAs.[180] Consistent with the Act's requirements, we retain the existing restriction against a regional or local State office serving as a AAA, and the provision continues to reference the State agency's obligations under section 305 of the Act to provide a right of first refusal to a unit of general purpose local government for AAA designation and to give preference in such designation to an established office on aging if the unit of general purpose local government elects not to exercise its first refusal right.[181]

Comment: We received comments in support of these clarifying provisions. We received suggestions for additional language and a recommendation that further regulation and oversight be added when an area agency on aging serves more than one PSA.

Response: ACL appreciates these comments. We expect that State agencies will exercise appropriate oversight of each PSA. We have revised this provision to clarify that an area agency that serves more than one PSA must maintain separate funding, planning, and advocacy responsibilities for each PSA.

For consistency, we similarly revised § 1321.49 (*Intrastate funding formula*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.63 (*Area agency advisory council*), and § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*).

§ 1321.21 Withdrawal of Area Agency Designation

Section 1321.35 of the existing regulation (*Withdrawal of area agency designation*) is redesignated here as § 1321.21. We include changes to paragraph (a) to clarify the circumstances under which a State agency may withdraw a AAA designation. These include failure to comply with all applicable Federal requirements or policies and procedures established and published by the State agency; a State agency decision to change one or more PSA designations; and a AAA voluntary request for withdrawal of their designation. In paragraph (b) we include a clarification that changes to the designation of a AAA must be included in the State plan on aging or an amendment to the State plan, with appropriate cross-references. In paragraph (d) we detail that a State agency may request an extension of time to perform the responsibilities of a AAA after such designation has been withdrawn if the State agency has made reasonable but unsuccessful attempts to procure another entity to be designated as the AAA.

Comment: We received comments expressing appreciation for the clarifications made in this section. We also received a concern that an attempt to procure a new AAA no less than once per State plan on aging period was too long.

Response: We appreciate these comments. We have modified the final rule to remove the following sentence from § 1321.21(d)(3), ''Reasonable attempts include conducting a procurement for an applicant to serve as an area agency no less than once per State plan on aging period.'' The requirement for the Assistant Secretary for Aging to approve any extensions will allow for the Assistant Secretary for Aging to determine if an extension is appropriate. We decline to make any other changes to this provision and will provide technical assistance, as appropriate.

§ 1321.25 Duration, Format, and Effective Date of the State Plan

Section 1321.15 of the existing regulation (*Duration, format, and effective date of the State plan*) is redesignated here as § 1321.25. Minor changes have been made to update cross-references to other provisions, to reflect updates to statutory language, and to clarify the authority of the Assistant Secretary for Aging to provide instructions to State agencies regarding the formulation, duration, and formatting of State plans.

[178] *Id.* section 3025(a)(1)(E).

[179] *Id.* section 3025(a).

[180] *Id.* section 3025.

[181] *Id.*

Comment: ACL received comments in support of this provision, as well as recommendations regarding implementation of this provision. One commenter also recommended additional coordination opportunities relating to State plans on aging.

Response: ACL appreciates these comments. We intend to provide technical assistance regarding implementation of this provision and additional coordination opportunities that may be available as State agencies develop their State plans on aging.

§ 1321.27 Content of State Plan

Section 1321.17 of the existing regulation (*Content of the State plan*) is redesignated here as § 1321.27. As part of their responsibilities, State agencies must develop and administer a multi-year State plan on aging. The State plan delineates goals and objectives related to assisting older individuals and family caregivers and serves as a blueprint for achieving the goals and objectives during the plan period. Section 307 of the Act sets forth requirements that State plans must meet and content that must be included in the State plan and authorizes the Assistant Secretary for Aging to prescribe criteria for State plan development and content.[182]

We also include additional required core elements for the State plan, including that the State plan: must provide evidence that it is informed by, and based on, area plans in States with multiple PSAs; explain how individuals with greatest economic need and greatest social need are determined and served; include the State agency's IFF or funds distribution plan; demonstrate outreach to older Native Americans and coordination with Title VI programs under the Act; certify that program development and coordination activities will meet requirements; specify the minimum proportion of funds that will be expended on certain categories of services; provide information if the State agency allows for Title III, part C–1 funds to be used as set forth in § 1321.87(a)(1)(i); describe how the State agency will meet its responsibilities for the Legal Assistance Developer; explain how the State agency will use its elder abuse prevention funding awarded pursuant to Title VII of the Act; and describe how the State agency will conduct monitoring of the assurances to which they attest. The provision also clarifies the Assistant Secretary for Aging's authority to establish objectives for State plans, including objectives related to Title VII of the Act.

The State plan must define greatest economic need and greatest social need, including for the following populations: people with disabilities; people who experience language barriers; people who experience cultural, social, or geographical isolation, including due to racial or ethnic status, Native American identity, religious affiliation, sexual orientation, gender identity, or sex characteristics, HIV status, chronic conditions, housing instability, food insecurity, lack of access to reliable and clean water supply, lack of transportation, or utility assistance needs, interpersonal safety concerns, rural location; and people otherwise adversely affected by persistent poverty or inequality as the State agency defines it in the State plan. The Act directs State agencies and AAAs to focus attention, advocacy, and service provision toward those in greatest economic need and greatest social need. The listed populations include those identified in Executive Order 13985 *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.* The final rule establishes standard expectations for whom State agencies must include in their definitions of greatest economic need and greatest social need, while still allowing for State agencies to flexibly include other populations that are specific to their circumstances. For example, one State agency may also identify a population within their State that has specific dietary requirements that will be included in their definition of greatest social need. When determining the definition of greatest economic need, another State agency may also include persons experiencing housing instability. Another State agency may not specify any additional populations to be included in their definitions of greatest economic need and greatest social need at the State plan level but encourage such additions at the area plan level (for which we further discuss requirements in § 1321.65).

We also specify that upon identifying the populations of greatest economic need and greatest social need, the State plan must include how the State agency will target services to these populations, including how funds under the Act may be distributed in accordance with listed IFF or funds distribution plan requirements at § 1321.49 or § 1321.51, respectively. For example, a State agency may specify that it will use one factor based on the low-income and rural population of individuals age 60 and older in its IFF to meet populations identified as in greatest economic need and greatest social need. Another State agency may use two separate factors, one for low-income individuals age 60 and older and another for rural individuals age 60 and older. These State agencies may use methods other than IFFs or funds distribution plans for targeting services to those with certain dietary requirements, experiencing housing instability, and as determined at the area plan level.

As a part of their responsibilities under the State plan, State agencies engage in program development and coordination activities to meet the needs of older adults. State agencies are also encouraged to translate activities, data, and outcomes into proven best practices, which can be used to leverage additional funding and to build capacity for long-term care systems and services in the State, beyond what the Act alone can support. State agencies also work in conjunction with and support of AAAs who lead such efforts, including integrating health and social services delivery systems. The final rule requires State agencies to certify as a part of their State plans that they will meet certain requirements, including what funding sources can be used for program development and coordination activities and what conditions apply to use of these funds. We specify that funds for program development and coordination activities may only be expended as a cost of State plan administration, area plan administration, or Title III, part B supportive services, under limited circumstances.

The final rule requires State agencies to specify the minimum proportion of funds that will be expended on certain categories of services as required by the Act in section 307(a)(2)(C), consistent with the legal assistance section at § 1321.93.[183]

The provision also includes a new requirement for State agencies to provide certain information regarding any permitted use of Title III, part C–1 funds (funds for meals served in a congregate setting) for shelf-stable, pick-up, carry-out, drive-through, or similar meals, as permitted by new § 1321.87(a)(1)(i). The congregate meal program is a core Title III program; in addition to a healthy meal, the program provides opportunities for social interaction and health promotion and wellness activities. In response to the COVID–19 Public Health Emergency (PHE), ACL provided guidance on innovative, permissible service delivery options that grantees could use to provide meals to older individuals and other eligible recipients of home-delivered meals with Title III, part C–2

[182] 42 U.S.C. 3027.

[183] *Id.* section 3027(a)(2)(C).

funds.[184] In response to comments from grantees and interested parties on the RFI, we included a new provision at § 1321.87 to allow these meal delivery methods through the use of Title III, part C–1 congregate meal funds, subject to certain terms and conditions. As this represents an expansion of the permitted use of congregate meals funds, State agencies must provide information about this use of Title III, part C–1 funds in their State plans to ensure that the State agencies are aware of, and will comply with, the applicable terms and conditions so that ACL will be aware of the extent to which State agencies plan to implement this new allowable use of Title III, part C–1 funds.

We remove redundant provisions in § 1321.27 that are addressed in other more appropriate sections of the revised regulation (such as requirements related to State agency policies, voluntary contributions, and means testing, which are addressed in § 1321.9). We also make minor revisions to the provision to remove outdated references.

Comment: We received comments expressing support for this provision and for service to persons in greatest economic need and greatest social need. Commenters also shared concerns about how State agencies and AAAs can serve all the populations listed and how they will measure whether the targeted populations are being served, given lack of funding, incomplete data sources, and data privacy concerns.

Response: ACL appreciates these comments and concerns related to how to provide targeted services given limited funds and how to use data appropriately and sensitively. We expect State agencies to: (1) identify and consider populations in greatest economic need and greatest social need; (2) describe how they target the identified populations for service provision; (3) establish priorities to serve one or more of the identified target populations, given limited availability of funds and other resources; (4) establish methods for serving the prioritized populations; and (5) use data to evaluate whether and how the prioritized populations are being served.

For the first step, the State agency must assess and identify populations in greatest economic need and greatest social need within the State. For example, a State agency may review demographic and service data; engage in Tribal consultation; conduct needs assessments with older adults, family caregivers, and other community members; hold public hearings; and accept other feedback in determining how the State agency will define populations in greatest economic need and greatest social need. A State agency must establish a definition to include those populations identified pursuant to § 1321.27(d)(1) and also could include formerly incarcerated individuals as a population in greatest social need.

Next, the State agency must describe how it will target each of the populations included in the definitions of greatest social need and greatest economic need for service delivery. This description may be combined with the determination of priority populations outlined in the next paragraph. For example, the State agency might explain that it will market the availability of OAA services to statewide advocacy groups serving each of the populations identified pursuant to § 1321.27(d). The State agency could describe its plans to issue a monthly newsletter, highlighting a different targeted population each month.

For the third step, the State agency could determine that of the populations included in its definition, it will prioritize people living at or below 100 percent of the FPL; communities that experience isolation due to racial or ethnic status, Native American identity, sexual orientation, gender identity, or sex characteristics, and rural location; as well as formerly incarcerated individuals. The State agency might decide to prioritize these communities because of the State's demographics, resources, and needs; information that should be collected consistent with the practices established through the State agency's policies and procedures (§ 1321.9(c)(3)); review of area plans (§ 1321.27(c)); and public participation process (§ 1321.29).

For the fourth step (establishing methods to serve the prioritized populations), we note that distributing funds under an IFF or funds distribution plan is an important strategy, but not a required or exclusive one. To clarify this, ACL has modified the provision at § 1321.27(d)(2) to state, ''The methods the State agency will use to target services to the populations identified in § 1321.27(d)(1), including how funds under the Act may be distributed to serve prioritized populations in accordance with requirements as set forth in § 1321.49 or § 1321.51, as appropriate.''

For example, the State agency might use multiple methods to serve the priority populations in the example above. To serve minority individuals and people living at or below 100 percent of the FPL, the State agency might use an IFF factor based on Census data, along with a base amount of funding to ensure service to people living in rural areas. In addition, the State agency might target services to formerly incarcerated individuals by partnering with organizations providing re-entry services, developing referral protocols, and amending a statewide intake form to include optional disclosure of membership in this population. Finally, the State might focus services to LGBTQI+ older adults and family caregivers, by conducting trainings for service providers, offering outreach events in each PSA in the State, and updating their web page, social media accounts, and other materials.

For the final step, the State agency would collect data to evaluate its success in its targeting and prioritization efforts. Data collection and analysis efforts may encompass a number of quantitative and qualitative methods to determine the success of efforts, such as counting leading indicators like the number of new partnerships implemented; analyzing output data, such as the number of activities taking place in certain settings and/or focused toward prioritized populations; reviewing demographic data of individual program participants collected (which may or may not be reported in the State Program Report or other data collection that the State agency may require); conducting focus groups of service recipients and/or service providers; and completing outcome surveys with service recipients or community leaders. In any such data collection efforts, provisions of § 1321.75 (*Confidentiality and disclosure of information*) apply.

Comment: One commenter would like to see language added directing State agencies to include solo older adults as a target audience in their State plan, including how such individuals will be identified and served. Additionally, the commenter would like State agencies to identify amounts of funds to be directed toward meeting the needs of solo older adults.

Response: ACL appreciates this comment and recognizes that older adults living alone are a frequently prioritized population for provision of OAA services. In fact, a number of State agencies use the number of individuals within a PSA who are ''Living Alone'' as a single or combined factor in

[184] For example, *Reopening Considerations for Senior Nutrition Programs* (April 2021), available at *https://acl.gov/sites/default/files/programs/Senior_Nutrition/SNP_ReopeningConsiderations.Final.pdf;* and, Congregate or Home-Delivered Meal Decision Tree (June 2022), available at *https://acl.gov/sites/default/files/nutrition/Title%20III%20C1%20and%20C2%20Service%20Delivery%20Decision%20Tree%206.15.22%20508.pdf.*

distributing funds under their IFF, consistent with § 1321.49. We recognize that persons living alone may be included in the target populations that State agencies or AAAs may define under § 1321.27(d)(1) and § 1321.65(b)(2)(i), respectively. Given that State agencies may consider and use various factors in distributing funds via an IFF or funds distribution plan (per § 1321.49 or § 1321.51(b)), and service providers may receive funds to serve various priority populations, we do not believe it would be feasible to identify specific amounts of funds to be directed toward meeting the needs of such individuals. However, we note that if ''solo older adults,'' individuals living alone, or some other priority population is defined by a State agency or a AAA, the State agency or a AAA should explain how such individuals will be served, which may include how funds are distributed.

Comment: In response to ACL's solicitation of input on ways ACL and State agencies can support improvements in I&A/R systems, one commenter highlighted the potential value of having one I&A/R database system for all AAAs and/or the entire aging network in a State, as well as potential added enhancements such as an internal referral system from one service area to another along with community resources. The commenter recommended one-time contract investments to secure such a system. Another commenter noted that improvements in I&A/R systems are not limited to State agencies and recommended that the contributions of AAAs and others be recognized and encouraged.

Response: ACL appreciates this feedback and notes that such investments may be considered match, subject to § 1321.9(c)(2)(ii). Additionally, a State agency may establish policies and procedures requiring use of a standardized database system as set forth in § 1321.73. ACL enthusiastically recognizes and encourages the innovations of AAAs, service providers, and others in modernization and innovation efforts in provision of services under the Act.

Comment: We received a comment recommending that the State agency communicate with Tribes, Tribal organizations, and native communities regarding how greatest economic need and greatest social need are determined and addressed, including regarding the provision at § 1321.27(d).

Response: We appreciate this comment and have revised the provision at (g) to add that the determination of greatest economic need and greatest social need specific to Native American persons is identified pursuant to communication among the State agency and Tribes, Tribal organizations, and Native communities.

Comment: A commenter was concerned that § 1321.27 is overly prescriptive.

Response: As part of their responsibilities, State agencies must develop and administer a multi-year State plan on aging. The State plan delineates goals and objectives related to assisting older individuals, their families, and caregivers, and serves as a blueprint for achieving the goals and objectives during the plan period. Section 307 of the Act sets forth requirements that State plans must meet and content that must be included and authorizes the Assistant Secretary for Aging to establish criteria for State plan development and content.[185] State agencies have considerable discretion in developing goals, objectives, and strategies for the State plan, in establishing the IFF or resource allocation plan (as applicable), and in prioritizing and reaching targeted populations for service delivery.

Comment: A commenter recommended we require State agencies to demonstrate outreach to older Native Americans who do not live on Tribal lands in addition to coordination with Title VI programs.

Response: ACL appreciates this comment. We note that § 1321.27(d)(1) requires the inclusion of those who experience isolation due to their Native Americans identity in the State agency's definition of populations in the greatest economic need and greatest social need that must be addressed in the State plan. Native Americans, as defined in the rule, are not limited to Native Americans who live on Tribal lands. We have revised this provision to read, ''[. . .] where there are older Native Americans in any planning and service area, including those living outside of reservations and other Tribal lands.''

Comment: ACL received comments with recommendations of topics that should be required to be included in State plans, such as aligning State plans with master plans for aging, age-friendly initiatives, and No Wrong Door systems;[186] and encouraging intergenerational programming.

Response: As part of their responsibilities, State agencies must develop and administer a multi-year State plan on aging. The State plan delineates goals and objectives related to assisting older individuals, their families, and caregivers, and serves as a blueprint for achieving the goals and objectives during the plan period. Section 307 of the Act sets forth requirements that State plans must meet and content that must be included and authorizes the Assistant Secretary for Aging to establish criteria for State plan development and content.[187]

In response to the RFI and other requests for clarification, we establish additional required core elements for the State plan in § 1321.27, including that the State plan: must provide evidence that it is informed by, and based on, area plans in States with multiple PSAs; explain how individuals with greatest economic need and greatest social need are identified and served; include the State agency's IFF or funds distribution plan; demonstrate outreach to older Native Americans and coordination with Title VI programs under the Act; certify that program development and coordination activities will meet requirements; specify the minimum proportion of funds that will be expended on certain categories of services; provide information if the State agency allows for Title III, part C–1 funds to be used as described in § 1321.87(a)(1)(i); describe how the State agency will meet its responsibilities for the Legal Assistance Developer; explain how the State agency will use its elder abuse prevention funding awarded pursuant to Title VII of the Act; and describe how the State agency will conduct monitoring of the assurances to which they attest.

This provision also clarifies the Assistant Secretary for Aging's authority to establish objectives for State plans, including objectives related to Title VII of the Act. Significant issues that should be addressed through State plans will change over time, and conditions will vary from one State to another. For these reasons, we decline to establish additional specific content requirements for State plans through regulation.

Comment: Regarding § 1321.27(j), which addresses the permitted use, subject to certain terms and conditions, of Title III, part C–1 funds (funds for

[185] *Id.* section 3027.

[186] The No Wrong Door (NWD) System initiative is a collaborative effort of ACL, the Centers for Medicare & Medicaid Services (CMS), and the Veterans Health Administration (VHA). The NWD System initiative builds upon the Aging and Disability Resource Center (ADRC) program and CMS' Balancing Incentive Program No Wrong Door requirements that support state efforts to streamline access to long-term services and support (LTSS) options for older adults and individuals with disabilities. NWD Systems simplify access to LTSS, and are a key component of LTSS systems reform. For more information, see: *https://acl.gov/programs/connecting-people-services/aging-and-disability-resource-centers-programno-wrong-door.*

[187] 42 U.S.C. 3027.

meals served in a congregate setting) for shelf-stable, pick-up, carry-out, drive-through, or similar meals, a commenter requested clarification as to how to project that the provision of such meals will enhance, rather than diminish the congregate meal program.

Response: ACL will address this comment through technical assistance, as needed.

Comment: A commenter noted that § 1321.27(c) requires that all State plans are to be informed by and based on area plans, while single PSA States have no area plans.

Response: We appreciate this comment and have revised the provision to clarify.

Comment: ACL received suggestions, recommendations, and implementation questions regarding § 1321.27(h), which addresses requirements related to program development and coordination activities. Some comments requested that use of funds in this manner not be subject to public review and comment requirements.

Response: This provision does not substantively change the requirements for use of Title III–B funds for program development and coordination activities in the existing regulation. Because this provision allows for use of funds that would otherwise be required to be used for direct services to older adults to be used for program development and coordination purposes, we believe it is appropriate to retain the public review and comment requirement. ACL will address other questions regarding this provision through technical assistance, as needed.

§ 1321.29 Public Participation

Section 1321.27 of the existing regulation (*Public participation*) is redesignated here as § 1321.29. The Act requires State agencies to periodically solicit the views of older individuals, family caregivers, service providers, and the public regarding the development and administration of the State plan and the implementation of programs and services under the Act.[188] Subsections 1321.29(a) and (b) set forth obligations for public input, including that opportunities for public participation should occur periodically (at a minimum, once each fiscal year) and should include the views of family caregivers and service providers, with particular attention to those of greatest economic need and greatest social need. In response to comments to the RFI and the NPRM, we have revised this provision to clarify that the public must be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the Assistant Secretary for Aging) within which to review proposed State plans and that State plan documents be readily available to the public for review. Pursuant to Federal civil rights laws, the State plan document should be available in alternative formats and other languages if requested.

Comment: We received comments from individual older adults expressing they feel unheard and that there are not sufficient opportunities to provide input.

Response: We appreciate the feedback from individual older adults, especially those who wish to be engaged in planning efforts for services under the Act. Sections 1321.29 (*Public participation*) and 1321.65(b)(4) (*Submission of an area plan and plan amendments to the State agency for approval*) are intended to make clear the importance of soliciting and using feedback from individual older adults and family caregivers.

Comment: ACL received several comments requesting more specificity and direction regarding the requirement that State agencies obtain input on a periodic basis.

Response: Section 307(a)(4) of the Act requires that State agencies procure public input on a ''periodic'' basis.[189] The final rule defines ''periodic'' (at a minimum, once each fiscal year) and sets forth minimum requirements related to data collection and client assessments, as well as State and area plans and activities thereunder. The final rule otherwise affords State agencies flexibility in determining how to meet this requirement; ACL declines to impose additional conditions for State agencies to meet this requirement, as circumstances may vary from one State to another.

Comment: ACL received comments requesting additional direction to State agencies in § 1321.29 to ensure that individuals from underserved communities, as well as Tribal governments, have an opportunity to participate.

Response: ACL appreciates the comments and confirms § 1321.29 requires State agencies to focus on those in greatest economic need and in greatest social need in seeking public input, and the definition of greatest social need includes Native Americans.

Comment: One commenter requested that the public participation requirements of § 1321.29 also apply to area agencies. Another commenter recommended that ACL require each State agency to implement standard area plan needs assessment and data tools for use by all area agencies in the State.

Response: Section 1321.65 requires State agencies to have in place requirements for public input with respect to area plans. ACL declines to impose additional requirements as to how State agencies must cause area agencies to seek public input, as conditions may vary from one State to another and from one region of a State to another. Accordingly, ACL maintains the regulatory text in § 1321.29.

§ 1321.31 Amendments to the State Plan

Section 1321.19 of the existing regulation (*Amendments to the State plan*) is redesignated here as § 1321.31. We make substantial revisions to this provision to clarify the circumstances under which amendments to the State plan are necessary. The revised provision also clarifies which amendments require prior approval by the Assistant Secretary for Aging and which only need to be submitted for purposes of notification. Amendments requiring prior approval are those necessary to reflect new or revised statutes or regulations as determined by the Assistant Secretary for Aging; an addition, deletion, or change to a State agency's goal, assurance, or information requirement statement; a change in the State agency's IFF or funds distribution plan for Title III funds; a request to waive State plan requirements; or other required changes. Amendments for purposes of notification only are those necessary to reflect a change in a State law, organization, policy, or State agency operation; a change in the name or organizational placement of the State agency; distribution of State plan administration funds for demonstration projects; a change in a PSA designation; a change in AAA designation; or exercising of major disaster declaration flexibilities, as set forth in § 1321.101. We also make minor revisions to reflect statutory updates.

Comment: Several commenters expressed concern regarding delayed response times due to State plan amendment requirements for funding set aside to address disasters. We also received comments requesting that we clarify the timeframes for State plan amendment submissions in § 1321.31(b).

Response: As set forth in this provision and in § 1321.101, the State plan amendment required when using funds set aside to address disasters does not require prior approval by the Assistant Secretary for Aging. ACL intends this requirement to facilitate

[188] *Id.*

[189] *Id.* section 3027(a)(4).

transparency and communication in times of emergency and disaster and does not intend to delay response times. Through this requirement we intend to ensure that a State agency's plan on aging accurately reflects current circumstances, facilitates communication, and promotes transparency. We have revised § 1321.31(b) to read ''[. . .] whenever necessary and within 30 days of the action(s) listed in (1) through (6) of this paragraph[.]'' For clarity, we have removed the redundant provision at § 1321.31(b)(6) and renumbered accordingly. We have also amended the other provisions of § 1321.31(b) for consistency.

Comment: ACL received a comment requesting guidance regarding the timing for State plan amendments that may be required as a result of the implementation of this final rule. One commenter requested clarification as to what would constitute ''[a] significant change in a State law, organization, policy, or State agency operation'' as set forth in § 1321.31(b)(1). ACL also received a comment inquiring as to the status of the guidelines prescribed by the Assistant Secretary for Aging, referred to in § 1321.31(c), regarding the submission of information required by § 1321.31.

Response: This final rule is effective 30 days after publication in the **Federal Register**. In consideration of comments related to the time required for implementation of the rule, we have decided to delay the compliance date of this rule until October 1, 2025. This will allow time for State agencies to incorporate the requirements of this final rule into State plan amendments, as needed, by October 1, 2025.

ACL will address these comments further through technical assistance, as needed.

§ 1321.33 Submission of the State Plan or Plan Amendment to the Assistant Secretary for Aging for Approval

Section 1321.21 of the existing regulation (*Submission of the State plan or plan amendment to the Commissioner for approval*) is redesignated here as § 1321.33 and has been retitled to reflect statutory updates. ACL's Regional Offices play a critical role in ACL's administration and oversight of State plans on aging. They provide technical assistance to State agencies regarding the preparation of State plans and amendments and are responsible for reviewing those that are submitted for compliance with the Act. Previously, the regulations required State agencies to submit a plan or amendment for approval, signed by the Governor or the Governor's designee, 45 calendar days prior to its proposed effective date. This 45-day period does not provide adequate time for proper Regional Office review and provision of appropriate technical assistance, for the State agency then to make any changes that are required, and for the State agency to re-submit the plan or amendment for further review and approval. The failure to have a State plan or amendment approved in a timely manner could result in significant ramifications to a State agency, such as a lapse in funding under the Act. In addition, if a State agency only submits a final, signed plan or amendment for review, and if changes are needed in order to bring the plan or amendment into compliance with the Act or the Assistant Secretary for Aging's guidance, the State agency could find itself in the difficult position of having to arrange for the Governor (or the Governor's designee) to re-execute the document. We aim to improve the State plan and amendment submission and review process by adding to this provision a requirement that the State agency submit a draft of the plan or amendment to its assigned ACL Regional Office at least 120 calendar days prior to the proposed effective date and a requirement that the State agency cooperate with the Regional Office in the review of the plan or amendment for compliance with applicable requirements.

Comment: ACL received several comments expressing concern that the requirement under § 1321.33(b) to submit a draft for review at least 120 calendar days prior to the proposed effective date is too burdensome.

Response: We appreciate these concerns but retain the requirement that drafts be submitted at least 120 calendar days prior to the proposed effective date of the plan or amendment. We have added clarification that the plan be submitted at least 90 calendar days before the proposed effective date of the plan or plan amendment. Submission of a draft is necessary to provide sufficient time for review and revision before the 90-day deadline to submit the plan or plan amendment to the Assistant Secretary for Aging. We understand from comments that there may be exceptional circumstances that could prevent a State agency from being able to meet the 120- and 90-day time frames. In response to these concerns, § 1321.33(b) permits State agencies to request a waiver from the Assistant Secretary for Aging in the event of exceptional circumstances. We have added similar language to allow for a similar waiver with respect to the 90-day time frame.

§ 1321.35 Notification of State Plan or State Plan Amendment Approval or Disapproval for Changes Requiring Assistant Secretary for Aging Approval

The provision contained in § 1321.23 of the existing regulation (*Notification of State plan or State plan amendment approval*) is retitled and redesignated here as § 1321.35. We also make changes to § 1321.35(b) for consistency with other related provisions that address appeals to the Assistant Secretary for Aging regarding disapproval of State plans or amendments.

Comment: Several commenters requested that ACL commit to either an estimated or a specific response time frame for State plan and State plan amendment submissions that require prior approval.

Response: ACL will use reasonable efforts to respond to State plan and State plan amendment submissions that require prior approval within 90 calendar days of receipt. This general timeframe may not be suitable in every case, as there may be conditions that warrant additional time for review. Examples of factors that may cause delays beyond these 90 days include incomplete or incorrect State plan or State plan amendment submissions and need for consultation or coordination with parties outside of ACL.

§ 1321.39 Appeals to the Departmental Appeals Board Regarding State Plan on Aging

Section 1321.77 of the existing regulation (*Scope*) is redesignated here at § 1321.39, retitled, and modified. Sections 305 [190] and 307 [191] of the Act, respectively, require a State to designate a State agency to carry out Title III programs and develop a State plan on aging to be submitted to the Assistant Secretary for Aging for approval. Per section 307(c)(1) [192] the Assistant Secretary for Aging shall not make a final determination disapproving any State plan, or any modification thereof, or make a final determination that a State agency is ineligible under section 305,[193] without first affording the State agency reasonable notice and opportunity for a hearing.

In the past, the Assistant Secretary for Aging would have facilitated the appeals process. Consistent with § 1321.17 and new § 1321.23, appeals have been delegated to DAB in

[190] 42 U.S.C. 3025.

[191] 42 U.S.C. 3027.

[192] *Id.* section 3027(c)(1).

[193] 42 U.S.C. 3025.

accordance with the procedures set forth in 45 CFR part 16. The Board will hear the appeal and may refer an appeal to the DAB's Alternative Dispute Resolution Division for mediation prior to issuing a decision.

Delegation of appeals to the DAB will continue to fulfill the statutory mandate to afford a State agency reasonable notice and opportunity for a hearing, while streamlining administrative functions and providing robust due process protections. The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this change will provide clarity and consistency to State agencies and is aligned with the intent of the Act.

§ 1321.41 When a Disapproval Decision Is Effective

In this section, redesignated from existing § 1321.79, retitled, and modified, we remove reference to the ''Commissioner for Aging'' and replace it with ''the Departmental Appeals Board'' to align with changes made to § 1321.39.

§ 1321.43 How the State Agency May Appeal the Departmental Appeals Board's Decision

In this section, redesignated from § 1321.81 and retitled, we remove reference to the ''Commissioner for Aging'' and replace it with ''the Departmental Appeals Board'' to align with changes made to § 1321.39.

§ 1321.45 How the Assistant Secretary for Aging May Reallot the State Agency's Withheld Payments

The provision contained in § 1321.83 of the existing regulation (*How the Commissioner may reallot the State's withheld payments*) is redesignated here as § 1321.45. The provision has been retitled, and minor, non-substantive changes have been made to the provision to reflect statutory updates.

§ 1321.49 Intrastate Funding Formula

The provision contained in § 1321.37 of the existing regulation (*Intrastate funding formula*) is redesignated here as § 1321.49. In states with multiple PSAs, State agencies provide funding to AAAs through the IFF. Section 305 of the Act sets forth requirements for the IFF while, at the same time, affording State agencies some flexibilities in its development and implementation.[194] The changes to this provision are designed to assist State agencies in developing IFFs in compliance with the Act's requirements; to clarify the options available to State agencies; and to aid them in implementation of their IFFs. In paragraph (a), we specify that the State agency must include the IFF in the State plan, in accordance with guidelines issued by the Assistant Secretary for Aging and using the best available data; that the formula applies to supportive, nutrition, evidence-based disease prevention and health promotion, and family caregiver services provided under Title III of the Act; and that a separate formula for evidence-based disease prevention and health promotion may be used, as per section 362 of the Act.[195]

In paragraph (b) we clarify the elements of the IFF. The elements include a descriptive statement and application of the State agency's definitions of greatest economic need and greatest social need; a statement that discloses any funds deducted for allowable purposes of State plan administration, the Ombudsman program, or disaster set aside funds, as set forth in § 1321.99; whether a separate formula for evidence-based disease prevention and health promotion is used; how the NSIP funds will be distributed; a numerical mathematical statement that describes each factor for determining how funds will be allotted and the weight used for each factor; a listing of the data to be used for each PSA in the State; a statement of the allocation of funds to each PSA in the State; and the source of the best available data used to allocate the funding.

In paragraph (c) we identify prohibitions related to the IFF. Prohibitions include that the State agency may not: withhold funds from distribution through the formula, except where expressly allowed for State plan administration, disaster set aside funds as set forth at § 1321.99, or the Ombudsman program; exceed State plan and area plan administration caps as detailed at § 1321.9(c)(2)(iv); use Title III, part D funds for area plan administration; distribute funds to any entity other than a designated AAA, except where expressly allowed for State plan administration funds, Title III, part B Ombudsman program funds, and disaster set-aside funds as set forth in § 1321.99; and use funds in a manner that is in conflict with the Act.

In paragraph (d) we specify other requirements that apply to distribution of NSIP funds, including that cash must be promptly and equitably disbursed to nutrition projects under the Act and provisions relating to election of agricultural commodities. In paragraph (e) we state that Title VII funds or Title III, part B Ombudsman program funds under the Act may be distributed outside the IFF. This subsection also allows the State agency to determine the amount of funding available for area plan administration before deducting funds for Title III, part B Ombudsman program and disaster set-aside funds. We include that a State agency may reallocate funding within the State when the AAA voluntarily or otherwise returns funds, subject to the State agency's policies and procedures. Revisions to paragraph (f) reflect statutory updates and cross-reference to other provisions within the regulation.

Comment: A commenter observed that § 1321.49(a) states, ''The formula shall reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic need or greatest social need[.]'' The commenter noted that the phrase should read instead ''greatest economic need and greatest social need.''

Response: ACL appreciates this comment and has made the revision.

Comment: Some commenters expressed that ACL should consider allowing other examples of ''best available data'' that capture experiences of LGBTQI+ populations.

Response: ACL appreciates the comment but does not believe any changes to the rule are necessary. Section 1321.49(b)(5) allows for ''[o]ther high quality data available to the State agency'' to be used in the IFF.

Comment: Some commenters expressed a need for a transparent process for the development of the IFF in a State, and more transparency in the content of the IFF. Other commenters requested clarification when a AAA serves more than one PSA.

Response: ACL appreciates these comments. The provision at § 1321.49 requires the IFF to be developed in consultation with the State's area agencies, requires the proposed IFF to be published for public review and comment, and includes a list of specific information that must be included in an IFF. In response to comments, we have clarified that the public must be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the Assistant Secretary for Aging) for review and comment. ACL declines to further dictate a specific process for the procurement of public input in a proposed IFF, as conditions may vary from one State to another. Instead, ACL leaves it to the discretion of each State agency to determine an appropriate public input process. ACL further believes the information required by

[194] *Id.*

[195] 42 U.S.C. 3030n.

§ 1321.49 to be included in the IFF provides for adequate transparency. Aside from clarifying the minimum reasonable period of time for public comment, ACL maintains the regulatory language as proposed.

We expect that State agencies will exercise appropriate oversight of each PSA, and we agree that additional clarification of expectations for area agencies on aging that serve more than one PSA could be helpful. Therefore, we have clarified that the requirements under § 1321.49 should be, ''specific to each planning and service area.'' For consistency, we have similarly revised § 1321.19 (*Designation of and designation changes to area agencies*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.63 (*Area agency advisory council*), and § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*) regarding specificity to each PSA.

Comment: Some commenters expressed concerns as to particular populations that they felt should be considered in an IFF. One commenter suggested prohibiting State agencies from considering OAA Title VI awards in their States in considering how to allocate Title III funding via the IFF.

Response: ACL appreciates these comments but declines to revise § 1321.49, because it already contains a mechanism to address these concerns via the IFF development process and the requirement for public input. However, ACL confirms that Title III funds must supplement, not supplant, Title VI funds and that Title VI funds should not be considered to be ''in place of'' or a substitute for Title III funding to serve those prioritized as being in the greatest economic need and greatest social need.

Comment: ACL received comments and questions related to the process involved in revising an IFF, how often IFF demographic data should be updated, and the disbursement of NSIP funds.

Response: ACL will address these comments and questions through technical assistance, as needed.

§ 1321.51 Single Planning and Service Area States

The provision contained in § 1321.41 of the existing regulation (*Single state planning and service area*) is redesignated here as § 1321.51 and retitled. Most of the language of the existing provision relates to confirming the approval of an application of a State which, on or before October 1, 1980, was a single PSA, to continue as a single PSA if the State agency met certain requirements. Only State agencies currently designated as a single PSA State may have such status; accordingly, we remove this language and clarify the specific requirements that apply to operating as a single PSA State. Single PSA States are addressed elsewhere in our final regulations, including definitions in § 1321.3 and regarding designation of and changes to PSAs in § 1321.13.

Based on questions we have received from such State agencies, we detail clarifications that single PSA State agencies must meet requirements for AAAs, unless otherwise specified. In paragraph (b), we clarify that single PSA State agencies, as part of their State plan, must include a funds distribution plan that mirrors many of the requirements of the IFF for States with multiple PSAs, minus distribution to AAAs. The State agency must also provide justification if it wishes to provide services directly and believes it meets applicable requirements to do so, as set forth in section 307(a)(8)(A).[196] In paragraph (c) we set forth that single PSA State agencies may revise their funds distribution plans, subject to their policies and procedures and prior approval of the Assistant Secretary for Aging. In response to comments, we have specified that the public be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the Assistant Secretary for Aging) for review and comment of any proposed changes to the funds distribution plan. We include these changes to promote transparency and good stewardship of public funds. Revisions also are made to reflect statutory updates.

Subpart C—Area Agency Responsibilities

§ 1321.55 Mission of the Area Agency

The provision contained in § 1321.53 of the existing regulation (*Mission of the area agency*) is redesignated here as § 1321.55. This provision specifies the AAA's mission, role, and functions as the lead on aging issues in its PSA under the Act.

The social services systems in which AAAs and their community partners operate today differs greatly from that which existed in 1988 when the existing regulation was promulgated. For example, in 1988 much of the work of AAAs involved the establishment and maintenance of focal points, which at that time were identified as ''a facility established to encourage the maximum collocation and coordination of services for older individuals.'' The existing language set forth in § 1321.53(c) regarding a AAA's obligations with respect to focal points goes well beyond the requirements with respect to focal points that are set forth in section 306(a) of the Act.[197] Focal points in previous § 1321.53(c) focused on the need for brick-and-mortar facilities such as multipurpose senior centers. In light of the social service systems climate in which AAAs operate today, the existing language limiting these focal points to facilities could impede a AAA's ability to develop and enhance comprehensive and coordinated community-based systems in, or serving, its PSA, as contemplated by the Act. Accordingly, we remove the language from this paragraph related to a AAA's obligations with respect to focal points.

We also make minor revisions to this provision to align with updates to statutory terminology and requirements resulting from reauthorizations (*e.g.,* adding family caregivers as a service population per the 2000 amendments) and to emphasize the Act's aim that priority be given to serving older adults with greatest economic need and greatest social need.

Comment: ACL received several comments about the redesignation of § 1321.53 to § 1321.55 and the removal of focal points, which in prior regulations were identified as facilities ''[. . .] established to encourage the maximum collocation and coordination of services for older individuals[.]'' Many of these commenters voiced support for the removal of focal points to encourage maximum flexibility for area agencies to engage a broad range of community-based partners to provide OAA services. Additional commenters expressed concern about the removal of the language because of concerns about the impact on current brick-and-mortar multipurpose senior centers. One commenter specifically requested retaining ''special consideration'' of multipurpose senior centers and updating to provide flexibility to designate an entity rather than a facility, which can include virtual focal points.

Response: As commenters noted, the removal of focal points recognizes the shifting social services environment and promotes flexibility surrounding the development of community-based systems that reflect the needs of a AAA's PSA. The rule removes an obligation for all AAAs to establish and maintain brick-and-mortar facilities, though it does not preclude any AAA from operating multipurpose senior centers based upon a determination of the needs of their individual PSAs.

[196] 42 U.S.C. 3027(a)(8)(A).

[197] 42 U.S.C. 3026(a).

Thus, we maintain the regulatory language for § 1321.55 to provide AAAs the flexibility to develop and enhance a comprehensive and coordinated community-based system, which may include multipurpose senior centers, that meets the needs of their PSA.

Comment: Some commenters requested a definition of ''community-based system'' in § 1321.55(a). Other commenters recommended adding ''implementation'' to the mission of the area agency on aging and voiced concern that consumers will not be impacted unless implementation also occurs.

Response: We appreciate these comments, but retain the text as proposed. Section 1321.55(b) details general requirements for comprehensive and coordinated community-based systems and give an area agency the discretion to decide additional details of their comprehensive and coordinated community-based system as it pertains to the needs of their PSA.

Comment: Some commenters sought more clarity in § 1321.55(b)(3) and asked what it means to assure that the range of available public and private long-term care services and support options are readily accessible to all older persons and their family caregivers, no matter their income. Others shared concerns about assuring resources given that the accessibility of publicly funded services and programs is dependent upon available funding. One commenter specifically requested that ACL shift the language from ''[a]ssure that these options are readily accessible [. . .]'' to ''prioritize making these options readily accessible.''

Response: ACL appreciates comments regarding assurances that the range of available public and private long-term care services and support options are readily accessible to all older persons and their family caregivers, no matter their income. We are maintaining the regulatory language and emphasize that the language applies to available public and private long-term care services and support options.

Comment: Some commenters asked ACL to clarify what it means to ''offer special help or targeted resources'' for the most vulnerable older persons, family caregivers, and those in danger of losing their independence under § 1321.55(b)(6).

Response: ACL appreciates these comments and reiterates that an area agency must prioritize services and supports for eligible populations with the greatest economic and greatest social need. ACL will provide technical assistance related to offering special help or targeted resources to people with the greatest economic and greatest social need, including those who are most vulnerable and in danger of losing their independence.

Comment: Many commenters shared concerns about § 1321.55(b)(10) related to an area agency board of directors. Several commenters recommended that ACL amend the provision to eliminate the phrase ''board of directors'' and to instead require area agencies to have an advisory council or to ''engage with'' leaders in the community, including leaders from groups identified as in the greatest economic need and greatest social need. Some commenters noted that many area agencies are part of local governments and may not have the authority to establish a board of directors. Other commenters recommended that ACL remove the requirement for a board of directors to include leaders from groups identified as in greatest economic and greatest social need.

Response: ACL appreciates the comments related to the regulatory text in § 1321.55(b)(10) and notes that both governmental and not-for-profit area agencies need an entity to be responsible for governance, including legal and fiduciary responsibilities. The OAA requires area agencies to establish advisory councils which have distinct responsibilities related to the responsibilities of an area agency that are separate and apart from the governance responsibilities of a board of directors.[198] We note that this provision contains only minor changes from the existing rule which stated, ''(10) Be directed by leaders in the community who have the respect, capacity and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change and plan community responses for the present and for the future.''

Thus, we decline to eliminate the regulatory text which states, ''(10) Have a board of directors comprised of leaders in the community, including leaders from groups identified as in greatest economic need and greatest social need, who have the respect, capacity and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change, and plan community responses for the present and for the future.''

We acknowledge that governance responsibilities for government-based area agencies often reside with an elected Board of Commissioners or other elected officials. In this specific governance structure, an area agency may not have authority to establish a separate board of directors for the area agency or to broaden the composition of an elected board to include leaders from groups identified as in the greatest economic and greatest social need. For this reason, ACL will provide technical assistance regarding government-based area agencies who do not have the authority to establish a separate board of directors that includes leaders of groups identified as in greatest economic need and greatest social need to ensure the needs of these populations are reflected in the composition of the board of directors for the AAA.

Comment: Some commenters shared concerns related to the feasibility of monitoring an area agency under § 1321.55(d) to ensure that it is not engaging in activities that are inconsistent with the mission of the Act or State agency policies.

Response: ACL appreciates comments related to ensuring that area agencies activities are in alignment with the provisions detailed in §§ 1321.55 and 1321.9. We decline to amend the regulatory language because subpart C is specific to the responsibilities of an area agency. The State agency's responsibilities include monitoring the programs and activities initiated under part 1321, including AAA activities under this part.

§ 1321.57 Organization and Staffing of the Area Agency

The provision contained in § 1321.55 of the existing regulation (*Organization and staffing of the area agency*) is redesignated here as § 1321.57.

The existing language in paragraph (a)(2) of this provision prohibits a separate organizational unit within a multipurpose agency which functions as the AAA from having any purpose other than serving as a AAA. The Act promotes AAAs as innovative, collaborative organizations which adapt to ever-evolving social service, health, and economic climates. We eliminate this prohibition to provide more flexibility to AAAs to conduct their operations, subject to State agency policies and procedures. Adequate safeguards exist in the Act and in the regulation (such as requirements with respect to COI) to render this restriction unnecessary.

We also make a minor revision to paragraph (a)(1) to take into account the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106–501). We also include minor revisions to this provision to update cross-references to other sections of the regulation.

[198] *Id.* section 3026(a)(6)(D).

Comment: ACL received many comments about the proposed elimination of the requirement in the prior regulation (§ 1321.55(a)(2)), which prohibited a separate organizational unit within a multipurpose agency which functions as the AAA from having any purpose other than serving as an area agency. Most of these commenters expressed support for the proposed elimination of this requirement and observed that this change reflects the range of area agency governance structures and provides an area agency the flexibility to expand service offerings and funding sources. Other commenters shared concerns about the potential for the proposed language to restrict State agency approval authority and the importance of policies and procedures for area agencies within larger multipurpose agencies.

Response: As commenters noted, the elimination of the requirement referred to in the paragraph above in the prior regulation at § 1321.55(a)(2) and re-numbered in this final rule as § 1321.57(a)(2) reflects the current range of area agency governance structures. It also promotes AAAs as innovative, collaborative organizations which adapt to ever-evolving social service, health, and economic climates. The elimination of this requirement provides more flexibility to AAAs to conduct their operations. ACL maintains that adequate safeguards exist in the Act and the regulations, such as requirements with respect to COI and adherence to State agency policies and procedures, to ensure that area agency activities align with the provisions detailed in § 1321.55.

Comment: Some commenters requested that § 1321.57(a)(1) be amended to provide flexibility to an area agency to provide programs to other populations, beyond older adults and family caregivers, including adults with disabilities.

Response: The Act provides area agencies with the statutory authority to serve adults aged 60 years and older, including those with disabilities, and their family caregivers. ACL made a minor revision to § 1321.57(a)(1) to account for the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106–501) and declines to add additional service populations because we do not have the statutory authority to do so.

Comment: One commenter recommended the elimination of § 1321.57(b) due to concerns regarding the costs associated with administrative functions for area agencies.

Response: ACL appreciates comments regarding the financial costs associated with administrative functions of area agencies. However, in light of the area agency responsibilities detailed throughout subpart C, area agencies need adequate and qualified staff to implement the provisions throughout this subpart. For this reason, we maintain this provision as proposed.

§ 1321.61 Advocacy Responsibilities of the Area Agency

We make minor revisions to this provision for clarity and to take into account the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106–501).

Comment: We received one comment asserting that the AAA's role is to investigate abuses in government and asking for AAAs to have the right to administrative hearings with ACL.

Response: ACL disagrees with the commenter that the advocacy role of AAAs is to investigate abuses in government. As stated in the Act, the role of the State agency is to, ''serve as an effective and visible advocate for older individuals by reviewing and commenting upon all State plans, budgets, and policies which affect older individuals and providing technical assistance to any agency, organization, association, or individual representing the needs of older individuals[.]'' [199] Subsequently, the Act states that the AAA will, ''serve as the advocate and focal point for older individuals within the community by (in cooperation with agencies, organizations, and individuals participating in activities under the plan) monitoring, evaluating, and commenting upon all policies, programs, hearings, levies, and community actions which will affect older individuals[.]'' [200]

Under Title III of the Act, the State agency is the grantee of ACL.[201] Title III of the Act provides for appeals by the grantee (the State agency), for which provisions are set forth at § 1321.39 and § 1321.43. Title III of the Act also provides for appeal by applicants seeking designation as a PSA, as set forth at § 1321.17, and if a State agency initiates an action or proceeding to withdraw designation of an area agency on aging, as set forth at § 1321.23.

Under § 1321.9, the State agency is responsible for developing, implementing, monitoring, and enforcing policies and procedures governing all aspects of part 1321 and part 1324. Such policies and procedures may include appeals processes at the State level. The intent of the Act is to foster a cooperative approach between State and community-based entities. When conflicts occur, we expect that application of State agency policies and procedures, in addition to technical assistance and robust discussion, will assist all parties in finding resolution that maximizes the intent of the Act.

Comment: Several commenters expressed support for the additional clarity surrounding the advocacy responsibilities of an area agency in § 1321.61, including the addition of family caregivers as a service population. One commenter asked for the definition of family caregiver to be expanded to include older relative caregivers. Several commenters noted barriers to successfully implementing the advocacy responsibilities of the area agency, including representing the interests of older persons and family caregivers to local level and executive branch officials, public and private agencies, or organizations, as required by the Act and this regulation. Other commenters requested clarification about the application of this provision when a AAA serves more than one PSA.

Response: ACL appreciates the comments related to the advocacy responsibilities of an area agency and notes that the definition of family caregiver in § 1321.3 includes older relative caregivers to ensure the consideration of older relative caregivers as advisory council members. ACL will also continue to provide technical assistance surrounding best practices related to serving as a public advocate for the development or enhancement of comprehensive and coordinated community-based systems of services, including consistently conducting outreach to the public related to the needs of older persons and family caregivers in PSAs.

We expect that State agencies will exercise appropriate oversight of each PSA, and we agree that additional clarification of expectations for area agencies on aging that serve more than one PSA could be helpful. Therefore, we have added clarification at § 1321.61 (*Advocacy responsibilities of the area agency*) to state, ''and specific to each'' in reference to the PSA. For consistency, we have similarly revised § 1321.19 (*Designation of and designation changes to area agencies*), § 1321.49 (*Intrastate funding formula*), § 1321.63 (*Area agency advisory council*), and § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*) regarding specificity to each PSA.

[199] 42 U.S.C. 3025(a)(1)(D).

[200] 42 U.S.C. 3026(a)(6)(B).

[201] 42 U.S.C. 3025.

§ 1321.63 Area Agency Advisory Council

The provision contained in § 1321.57 of the existing regulation (*Area agency advisory council*) is redesignated here as § 1321.63. Section 306 of the Act [202] requires AAAs to seek public input with respect to the area plan; accordingly, we include new language in this section clarifying the AAA's advisory council duties with regard to soliciting and incorporating public input. Minor changes are made to the language describing the required composition of the advisory council, in order to clarify (1) that council members should include individuals and representatives of community organizations from or serving the AAA's PSA, including individuals identified as in greatest economic need and individuals identified as in greatest social need; (2) that a main focus of the council should be to assist the AAA in targeting individuals of greatest social need and greatest economic need; and (3) that providers of the services provided pursuant to Title III of the Act, as well as representatives from Indian Tribes and older relative caregivers, should be represented in the council.

We also make minor revisions to this provision to take into account the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106–501).

Comment: Commenters shared concerns that service providers on a council may inappropriately influence decisions related to awarding OAA funds, even if they abstain from voting on funding decisions. ACL received many comments on § 1321.63(b), § 1321.63(b)(4), and § 1321.63(b)(5) regarding the inclusion of Title III service delivery representatives and representatives of health care provider organizations as members of an area agency advisory council. Most commenters expressed concern about the participation of service providers or representatives of health care provider organizations on an area agency advisory council due to the potential for COI and the perception that participation may benefit one service provider over a different potential service provider. Some commenters expressed support for the inclusion of Title III service delivery representatives, including volunteer service delivery providers, on an area agency advisory council.

Response: ACL appreciates the comments regarding the inclusion of Title III service delivery representatives and health care representatives as members of an area agency advisory council. We decline to revise the regulatory text at § 1321.63(b) introductory text and (b)(4) and (5) because the primary focus of the council should be to assist the area agency in developing and coordinating community-based systems of services, including targeting individuals of the greatest economic and greatest social need. Service providers and health care provider representatives are fundamental to developing community-based systems of services that reach these populations. To clarify, the advisory council is required to function as a separate body from the AAA's governing body. The governing body is responsible for making funding decisions and other matters related AAA leadership. In contrast, the advisory council is responsible for providing local feedback from the community to assist the governing body's leadership in developing, administering, and operating the area plan on aging. The OAA requires that service providers be among the members of the AAA's advisory council.[203] ACL recognizes the concerns regarding COI and has established COI requirements at § 1321.47 (*Conflicts of interest policies and procedures for State agencies*) and § 1321.67 (*Conflicts of interest policies and procedures for area agencies on aging*). These provisions specifically list advisory council members among the individuals to whom these provisions apply.

Further, § 1321.67 of this rule requires area agencies to develop and maintain COI policies, including related to governing boards and advisory councils, to avoid actual, perceived, or potential COI. We believe the COI policy requirement serves as an adequate guardrail against the concern raised by commenters related to service providers and health care provider organizations serving on area agency advisory councils.

Comment: Several commenters requested revisions to clarify the role of an area agency advisory council and the distinction between an advisory council and a board of directors. Specifically, commenters recommended adding language restricting an advisory council from also operating as a board of directors and prohibiting members from serving on both the area agency advisory council and the board of directors. Some commenters requested guidance on the decision-making authority of advisory councils, especially regarding the development and submission of the area plan. Other commenters questioned whether an AAA that is designated to serve multiple PSAs as allowed by § 1321.19(a) is required to have an advisory council for each PSA or may have an advisory council subcommittee for each PSA.

Response: ACL appreciates the requests for clarity related to the role of an area agency advisory council. The primary focus of the area agency advisory council should be to assist the area agency in developing community-based systems of services targeting individuals with the greatest social need and greatest economic need. Section 1321.63(a)(1) through (5) details how the advisory council can assist an area agency in ensuring that individuals with the greatest social need and greatest economic need are prioritized in an advisory capacity. Except for the change noted below, we are maintaining the language as is in § 1321.63(a)(1) through (5) because it details the primary functions of an advisory council as advisors to an area agency.

Regarding AAAs which serve multiple PSAs, we have revised § 1321.63(a) to specify, ''The council shall carry out advisory functions which further the area agency's mission of developing and coordinating community-based systems of services for all older persons and family and older relative caregivers specific to each planning and service area.'' We decline to provide further detail in the rule regarding how each PSA will be addressed and leave this to State and area agency policies and procedures to accomplish.

In light of the comments received regarding both the role of an advisory council and the role of a board of directors, ACL will provide technical assistance regarding the functions of an advisory council, the functions of a board of directors or governing body, corresponding best practices regarding AAAs serving multiple PSAs, and COI policies and procedures for advisory and governing bodies. In response to comments, we have added new § 1321.63(d), clarifying that an advisory council may not operate as a board of directors, and prohibiting members from serving on both the advisory council and the board of directors.

Comment: A couple of commenters requested revisions to clarify the requirements for public hearings related to the area plan and the role of the advisory council. Other commenters requested expansion of the language in § 1321.63(a)(3) to include ''or otherwise ensuring community engagement and obtaining community input.'' Some

[202] 42 U.S.C. 3026.

[203] *Id.* section 3026.

noted support for the additional clarity surrounding the advisory council's role in soliciting and incorporating public input into the area plan.

Response: ACL appreciates comments related to public hearings related to the area plan, and the role of the advisory council in soliciting and incorporating public input into the area plan. Section 306 of the Act requires area agencies to seek public input with respect to the area plan.[204] The rule at § 1321.63 clarifies that the council must advise the area agency in conducting public hearings, among other activities. For example, the advisory council may advise the area agency on how to ensure that individuals of the greatest social and greatest economic need are included in the hearings. We maintain the language in § 1321.63(a)(3) and reference in § 1321.63(c) which clarifies that the advisory council shall review and provide comments related to the area plan to the area agency prior to the area agency's submission of the plan to the State agency for approval. In light of the comments received, ACL will provide technical assistance related to the parameters for public hearings, the role of the advisory council in soliciting and incorporating public input, and best practices soliciting and incorporating public input, especially from individuals with the greatest social and greatest economic need, into the area plan.

Comment: A couple of commenters asked us to clarify the meaning of ''[r]epresentatives from Indian Tribes, Pueblos, or Tribal aging programs'' as proposed in § 1321.63(b)(9)(i) and one specifically recommended that the proposed provision be revised to include both unofficial and official representatives.

Response: In § 1321.63(b) ACL lists the individuals and representatives of community organizations who shall comprise the AAA's advisory council. These may include both official and unofficial representatives. For example, a AAA serving a large metropolitan area may serve Native Americans from multiple Indian Tribes, including those a far distance from the AAA's service area. The provision at § 1321.63(b)(9)(i) encourages individuals who represent Indian Tribes, Pueblos, or Tribal aging programs, whether formally or informally, to be considered as members of the AAA's advisory council. We encourage official representation by Indian Tribes, Pueblos, or Tribal aging programs to be provided in AAA advisory council composition.

[204] *Id.*

Comment: ACL received many comments regarding proposed § 1321.63(b)(1) which requires that the majority, or more than 50 percent, of area agency advisory council members be older persons, including minority individuals who are participants or who are eligible to participate in the programs. Most of these commenters expressed support for this requirement and noted the importance of ensuring that the service populations' perspectives are included in area agency plans and policies. Some commenters specifically supported the inclusion of older adults with the greatest economic or greatest social need, including LGBTQI+ older adults and people with HIV. Other commenters requested flexibility surrounding advisory council composition because of concerns related to recruiting volunteer advisory council members, including those in rural communities, and with the greatest economic or greatest social need. One commenter specifically requested that we define the term ''efforts'' in relation to including those identified as in the greatest economic need and greatest social need.

Response: ACL appreciates comments regarding the proposed requirements that the majority of advisory council members be older persons who are eligible to participate in area agency programming and that area agencies must intentionally seek to include those in the greatest economic and greatest social need. The primary focus of the advisory council is to assist the area agency in coordinating community-based systems of services for all older persons and family and older relative caregivers in the PSA. The inclusion of older adult members who have the greatest economic or greatest social need will help to ensure that the perspectives of these communities are represented in the area plan. For this reason, we are maintaining § 1321.63(b)(1) as proposed and emphasize that the language encourages but does not require area agencies to appoint advisory council members representing those identified as in the greatest economic or greatest social need. This provides area agencies the flexibility sought by several commenters regarding council composition due to concerns about volunteer recruitment. ACL will continue to provide technical assistance regarding recruiting older adult advisory council member volunteers in diverse geographical settings, including those identified as in the greatest economic or greatest social need, including how an area agency can demonstrate ''effort'' to recruit older adult advisory council members with the greatest economic or greatest social need.

Comment: Several commenters voiced support for the inclusion of family caregivers in area agency advisory council membership, as proposed in § 1321.63(b)(3) and § 1321.63(b)(9)(ii). Some commenters specifically requested that ACL add ''kinship caregivers'' to § 1321.63(b)(3) to ensure that older relative caregivers raising grandchildren are included in an area agency's advisory council.

Response: ACL appreciates comments related to the inclusion of family caregivers and older relative caregivers as members of area agency advisory councils. The 2000 amendments to the Act (Pub. L. 106–501) added family caregivers as a service population and the revision at § 1321.63(b)(3) reflects this addition. As commenters noted, many older adults are kin or grandparent caregivers, and § 1321.3 includes older relative caregivers in the definition of family caregiver. We further specify ''Older relative caregivers, including kin and grandparent caregivers of children or adults age 18 to 59 with a disability'' in § 1321.63(b)(9)(ii). Therefore, we are maintaining the language for § 1321.63(b)(3).

§ 1321.65 Submission of an Area Plan and Plan Amendments to the State Agency for Approval

The provision contained in § 1321.52 (*Evaluation of unmet need*) and § 1321.59 (*Submission of an area plan and plan amendments to the State for approval*) of the existing regulation are combined and redesignated here as § 1321.65. The State agency is responsible for ensuring that area plans comply with the requirements of section 306 of the Act.[205] The final rule includes revisions to this provision to clarify for State agencies the area plan requirements that should be addressed by State agency policies and procedures. These include identification of populations in the PSA of greatest economic need and greatest social need; evaluation of unmet needs; public participation in the area plan development process; plans for which services will be provided, how services will be provided, and how funding will be distributed; a process for determining if a AAA meets requirements to provide certain direct services pursuant to section 307(a)(8)[206] of the Act; minimum adequate proportion requirements per section 306(a)(2)[207] of

[205] *Id.*

[206] 42 U.S.C. 3027(a)(8).

[207] 42 U.S.C. 3026(a)(2).

the Act; and requirements for program development and coordination activities as set forth in § 1321.27(h). State agencies may include other requirements that meet State-specific needs.

We make an addition to area plan requirements to reflect changes in the nutrition program, as discussed above. Consistent with § 1321.87, if State agency policies and procedures allow for the service option to provide shelf-stable, pick-up, carry-out, drive-through, or similar meals under Title III, part C–1, AAAs will be required to provide this information in their area plans to ensure AAAs are aware of, and in compliance with, the applicable terms and conditions for use of such funds. It will also provide State agencies and ACL necessary information to determine the extent to which AAAs plan to implement this allowable use of Title III, part C–1 funds for new service delivery methods.

In paragraphs (c) and (d) we include additions to reflect statutory updates with respect to inclusion of hunger, food insecurity, malnutrition, social isolation, and physical and mental health conditions and furnishing of services consistent with self-directed care in area plans. In response to questions received, we clarify in paragraph (e) that area plans must be coordinated with and reflect State plan goals. This provision parallels § 1321.27(c), which requires the State plan to provide evidence the plan is informed by and based on area plans. State plans and area plans may have cycles that align or vary, based on multiple considerations. With this provision, we clarify that State plans and area plans processes should be iterative, where each informs the other.

Comment: One commenter expressed support for the clarified requirements for area plans and associated activities. Other commenters requested that we clarify application of this provision to AAAs that serve more than one PSA.

Response: We appreciate these comments. We expect that State agencies will exercise appropriate oversight of each PSA, and we agree that additional clarification of expectations for area agencies that serve more than one PSA would be helpful. Therefore, we have revised § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*) to state, ''specific to each planning and service area.'' For consistency, we have made similar revisions to § 1321.19 (*Designation of and designation changes to area agencies*), § 1321.49 (*Intrastate funding formula*), § 1321.61 (*Advocacy responsibilities of the area agency*), and § 1321.63 (*Area agency advisory council*) regarding specificity to each PSA.

Comment: ACL received many comments about the proposed regulatory language for § 1321.65(b)(2) which requires an area agency to identify populations at the greatest economic need and greatest social need within the PSA. Most of the commenters expressed support for area agencies identifying populations at the greatest economic need and greatest social need in their PSAs as part of the area plan process. Some commenters observed that it may be difficult for area agencies to identify and collect data related to populations at the greatest economic need and greatest social need. Other commenters argued for broader language to encourage local flexibility in determining those with the greatest economic and greatest social need.

A few commenters recommended that ACL require area agencies to work in partnership with organizations that serve populations with the greatest economic need and greatest social need to determine prioritization of programs and services for these populations. Specifically, a couple of commenters recommended that ACL require State agencies to grant area agencies and Centers for Independent Living (CILs) equal responsibility for determining and prioritizing populations with the greatest economic need and greatest social need for an area plan.

Response: ACL appreciates the comments regarding identifying older adults with the greatest economic need and greatest social need as part of the area plan. As commenters noted, the rule at § 1321.65(b) provides area agencies with the flexibility to identify populations within their individual PSAs and ensures that area plans prioritize serving older individuals with the greatest economic need and greatest social need. We require the area agency to identify select populations and encourage area agencies to select additional populations as needed based upon the unique characteristics of their PSAs for the area plan. We have revised the regulatory text at § 1321.65(b)(2)(i) to clarify our expectations for area plans. In accordance with policies and procedures established by the State agency, we expect AAAs to: (1) identify and consider populations in greatest economic need and greatest social need; (2) describe how they target the identified populations for service provision; (3) establish priorities to serve one or more of the identified target populations, given limited availability of funds and other resources; (4) establish methods for serving the prioritized populations; and (5) use data to evaluate whether and how the prioritized populations are being served.

ACL also appreciates comments related to ensuring that representatives from groups with the greatest economic need and greatest social need are involved in the identification of these groups and in the related prioritization of programs and services. The Act requires area agencies to form advisory councils and § 1321.63 clarifies the role of the council, including in assisting area agencies in targeting individuals of greatest economic need and greatest social need, and requires the majority of members be older adults, including older adults with disabilities. The advisory council should seek to ensure that the area plan accurately identifies communities of greatest economic need and greatest social need and that public input from these individuals be incorporated into the area plan.

As the responsibility for the area plan is statutorily required to be with the State agency and the area agency, we cannot assign such responsibilities to other entities. However, we encourage area agencies to work collaboratively with other entities in the community in development and administration of the area plan on aging.

Comment: ACL received many comments related to proposed § 1321.65(b)(3) which requires area plans to provide an assessment and evaluation of unmet need for supportive services, nutrition services, evidence-based disease prevention and health promotion, family caregiver support, and multipurpose senior centers. Most commenters specifically expressed appreciation for the inclusion of an assessment and evaluation of unmet needs in area plans and noted that the requirement may enable area agencies to address local need more intentionally. Some commenters recommended that area agencies support culturally responsive outreach and data collection programming to ensure that the needs of populations with the greatest economic need and greatest social need, including LGBTQI+ persons and people with HIV, be included in the assessment and evaluation. Other commenters recommended that ACL expand the proposed assessment and evaluation to include other programs and service areas that impact older adults, including supportive services that disseminate information and provide access to assistive technology devices through a State assistive technology entity.

A variety of commenters shared concerns about the capacity and training needed to develop specific data collection strategies to implement

proposed § 1321.65(b)(3). These commenters generally recommended that ACL provide area agencies flexibility surrounding strategies for conducting assessment and evaluation.

Response: ACL appreciates the comments related to assessment and evaluation of unmet need. As commenters noted, § 1321.65(b)(3) equips area agencies with the data needed to prioritize resources and to address need more intentionally within the PSA. In recognition of the challenges of collecting statistically valid data, we modify the language to read, ''[. . .] objectively collected, and where possible, statistically valid, data with evaluative conclusions[.]'' The language also broadly includes ''supportive services'' which provides area agencies the flexibility to conduct assessments and evaluation of unmet need based upon considerations within the PSA. Additionally, § 1321.65(c) requires area plans to incorporate services which address the incidence of hunger, food insecurity and malnutrition, social isolation, and physical and mental health conditions. Further, the language does not limit the evaluation to programs exclusively funded by the Act. Therefore, we are making no further changes to § 1321.65(b)(3). However, in light of the comments received regarding the training and capacity needed to develop specific data collection strategies and to implement this section, ACL will provide technical assistance regarding best practices and tools for assessing and evaluating unmet need within a PSA.

Comment: Several commenters voiced support for proposed regulatory language at § 1321.65(b)(4) which requires public participation, specifically from older adults with the greatest economic need and the greatest social need, in area plan development. Comments generally supported public participation in area plan development though also expressed concern about the proposed ''minimum time period'' and effective date of the new area plan requirements. Some comments noted concern about the proposed requirements' impact on administrative capacity.

Response: ACL appreciates comments related to public participation in area plan development and has revised the regulatory language at § 1321.65(b)(4) to specify that the public must be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the State agency). Area agency advisory councils should provide area agencies with additional capacity to support the solicitation of public participation in area plan development through public hearings and related opportunities for feedback, especially for older adults with the greatest economic need and greatest social need. In light of the feedback received, we will offer technical assistance regarding best practices for timely solicitation and reporting related to public participation for area agencies and their advisory councils.

Subpart D—Service Requirements

§ 1321.71 Purpose of Services Allotments Under Title III

The provision contained in § 1321.63 of the existing regulation (*Purpose of services allotments under Title III*) is redesignated here as § 1321.71. We make minor revisions to this provision to reflect statutory updates with respect to services provided under Title III, as well as to provide consistency with other updates to the regulation. For example, we make minor revisions to this provision to take into account the addition of the National Family Caregiver Support Program and family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106–501). Additional minor revisions are included for clarity, such as distinctions in the manner in which Title III funds are awarded between single PSA States and States with AAAs, with cross-references to language on IFFs, funds distribution plans, and provision of direct services by State agencies and AAAs.

Comment: We received comments of support for including family caregivers as a service population.

Response: We appreciate these comments.

Comment: We received comment asking us to clarify whether information technology systems that support direct service provision may be funded with direct services funding under Title III of the Act.

Response: ACL appreciates this concern and confirms that Title III direct services funds may be used for reasonable, allowable, and allocable expenses necessary for the provision of direct services, subject to appropriate procurement and other policies and procedures. This may include information technology systems; devices, such as laptop or tablet computers and smartphones; and training of staff and volunteers.

Comment: We received comment expressing concern that the Ombudsman program was not listed as an allowable supportive service.

Response: As proposed, § 1321.85(a) references the twenty-six items listed at section 321 of the Act, of which ombudsman services are included.[208] ACL confirms that ombudsman services are an acceptable use of funds appropriated under Title III, part B.

Comment: We received a suggestion to clarify that the IFF referenced in § 1321.71(c) is the one set forth at § 1321.49.

Response: We are grateful to commenters for noting this and correct the provision to read ''[. . .] as set forth in § 1321.49.''

§ 1321.73 Policies and Procedures

The provisions contained in § 1321.65 of the existing regulation (*Responsibilities of service providers under area plans)* are redesignated and revised in part here as § 1321.73 and § 1321.79. Revised § 1321.73 sets forth requirements to ensure AAAs and local service providers develop and implement policies and procedures to meet requirements set by State agency policies and procedures, in accordance with § 1321.9. Accordingly, we move the requirements previously set forth in (b)–(g) to other sections. We also specify that the State agency and AAAs must develop monitoring processes, the results of which are strongly encouraged to be made available to the public. Doing so may be one way to ensure accountability and stewardship of public funds, as required by the Act.

Comment: We received comments supporting this provision, as well as requesting clarity on the expectations for an ''independent qualitative and quantitative monitoring process.'' We received other comments requesting clarification on whether assessments and assessment policies must be made available to the public. Other comments requested development of a core set of services to be provided by all AAAs with standardized quality measures.

Response: ACL expects that the State agency and AAAs will conduct qualitative and quantitative monitoring of the programs and services funded under the Act. Use of funds provided for State and area plan administration for such monitoring is appropriate. ACL acknowledges the wide range of circumstances and resources for conducting monitoring and determining independence of those conducting monitoring. We believe this provision strikes the appropriate balance between providing sufficient guidance to State agencies and AAAs for implementation while maintaining flexibility to respond to local needs and circumstances. This includes determinations regarding whether to make quality monitoring and

[208] 42 U.S.C. 3030d.

measurement results available to the public. ACL is available to provide technical assistance on these topics.

Title III of the Act contains certain core required services and standards (such as the provision of meals that meet mandated dietary guidelines in accordance with requirements of Title III–C of the Act and the provision of evidence-based health promotion programs with Title III–D funds; reporting standards and requirements; establishment by the State agency of a minimum proportion of funds that will be spent on access services, in-home supportive services, and legal assistance; prohibition against means testing; and voluntary contribution requirements, etc.). At the same time, the Act provides latitude to State agencies to determine how best to implement the Act in order to respond to local needs and circumstances. The State agency may also, in turn, offer such flexibility to AAAs. Conditions can vary from one State to another and from one region of a State to another, and State agencies also are required, and are in the best position, to monitor the quality and effectiveness of services provided under the Act. ACL believes that the Act and this final rule strike an appropriate balance between required services and standards and flexibilities offered to State agencies in implementation of the Act. ACL declines to impose requirements beyond what is contemplated by the Act regarding required services and standards.

Comment: We received various comments requesting improvements in services, such as meal presentation.

Response: ACL recognizes the importance of meals and other services provided under the Act being appealing to participants. Services must be person-centered, as set forth in § 1321.77. Additionally, we expect that feedback from service participants will be solicited and used to the greatest extent possible in the ongoing provision of services as set forth in § 1321.73(c). To further clarify the importance of the participant experience, we have added ''[. . .] and preferences,'' to this provision under the expectations for monitoring participant needs.

§ 1321.75 Confidentiality and Disclosure of Information

Section 1321.75 reorganizes and redesignates existing § 1321.51. The revised section sets forth updated requirements for State agencies' and AAAs' confidentiality procedures. State agencies and AAAs collect sensitive, legally protected information from older adults and family caregivers during their work. Our revisions will enhance the protections afforded to OAA participants. Revised § 1321.75 also adds ''family caregivers'' as a service population under the Act to reflect the 2000 amendments to the Act (Pub. L. 106–501).

We clarify the obligation of State agencies, AAAs, or other contracting, granting, or auditing agencies to protect confidentiality. For example, the provision prohibits providers of ombudsman services to reveal any information protected under the provisions in 45 CFR part 1324, subpart A. Similarly, State agencies, AAAs, and others subject to this provision shall not require a provider of legal assistance under the Act to reveal any information that is protected by attorney client privilege, including information related to the representation of the client.[209]

The policies and procedures required under this section must ensure that service providers promote the rights of each older individual who receives services, including the right to confidentiality of their records. We require that the policies and procedures comply with all applicable Federal requirements. The State agency may also require the application of other laws and guidance for the collection, use, and exchange of both Personal Identifiable Information (PII) and personal health information.

Section 1321.75 includes exceptions to the requirement for confidentiality of information. PII may be disclosed with the informed consent of the person or of their legal representative, or as required by court order. The final rule also allows disclosure for program monitoring and evaluation by authorized Federal, State, or local monitoring agencies. State and area agencies that are covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) [210] are also required to disclose records to the Secretary for the purpose of assessing compliance with the HIPAA Rules.[211] Under the revised provision, State agencies' policies and procedures may explain that individual information and records may be shared with other State and local agencies, community-based organizations, and health care providers and payers to provide services, and we encourage agencies to develop memoranda of understanding regarding access to records for such purposes.

Comment: We received a comment encouraging organizations to abide by Tribal data sovereignty policies.

Response: ACL appreciates this comment and encourages organizations to coordinate and to abide by Tribal data sovereignty policies where appropriate. In response to this comment, we have added a statement at § 1321.75(f) that State agencies are encouraged to consult with Tribes regarding any Tribal data sovereignty expectations that may apply.

Comment: We received comments expressing support for inclusion-focused language and highlighting the importance of protecting PII and personal health information. Another commenter requested more guidance regarding criteria for the definitions, including reporting requirements. Other commenters responded to ACL's request for comment on whether ACL sufficiently set forth exceptions to OAA confidentiality requirements, offering strong support of the new language in (b), including that the language helps clarify the Ombudsman's obligation to protect program records and not disclose them to any State agency, area agency, or auditing agency.

Response: ACL is committed to the protection of confidential information collected in the provision of services under the Act and believes this provision will reduce confusion, including regarding the Ombudsman program. In recognition of these comments, ACL notes that § 1321.9(b) states that, ''[P]olicies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by the Assistant Secretary for Aging.'' ACL anticipates providing training and technical assistance upon promulgation of the final rule to support effective implementation of these provisions. We believe that State agencies should be allowed to place restrictions on information sharing when necessary and appropriate, and this final rule provides that discretion.

Comment: One commenter noted that expressly including HIPAA in this provision may cause confusion and might imply that all OAA-funded activities are implicated under that law.

Response: ACL appreciates this comment. To avoid confusion, we have removed the reference to HIPAA and have clarified that State agencies' policies and procedures must comply with all applicable Federal

[209] *Model Rules of Professional Conduct: Rule 1.6 Confidentiality of Information,* The Am. Bar Assn. (1983), *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.*

[210] Public Law 104–191; 110 Stat. 1936.

[211] 45 CFR 160.310.

requirements. However, we note that it is increasingly common for OAA recipients to be engaged in activities that make them HIPAA-covered entities and we encourage grantees and subrecipients to be aware of any associated legal obligations.

§ 1321.79 Responsibilities of Service Providers Under State and Area Plans

The provision contained in § 1321.65 of the existing regulation (*Responsibilities of service providers under area plans*) is redesignated in part here as § 1321.79 and at § 1321.73 and is retitled for clarity. Minor revisions are made to this provision to reflect statutory updates with respect to family caregiver services provided under Title III, as well as to emphasize that providers should seek to meet the needs of individuals in greatest economic need and greatest social need. We encourage providers to offer self-directed services to the extent feasible and acknowledge service provider responsibility to comply with local adult protective services (APS) requirements, as appropriate. The final rule sets forth that this provision applies to both State plans, as well as to area plans, as there are circumstances in which a service provider may provide services under a State plan (such as in a single PSA State). The language in paragraph (a) of the existing provision (reporting requirements) has been moved to § 1321.73, which addresses accountability requirements applicable to service providers.

Comment: We received comment questioning the provisions at § 1321.79(d) allowing for sharing of information with local APS without the consent of the older person or their legal representative, especially for legal assistance and ombudsman services.

Response: We appreciate this comment and have clarified § 1321.79(d) to state, ''[. . .] in accordance with local adult protective services requirements, except as set forth at § 1321.93, part 1324, subpart A, and where appropriate, bring to the attention of[.]''

Comment: We received other comments discussing importance of sharing information for purposes of program analysis, research, and other worthwhile endeavors. Other commenters provided program management and implementation recommendations regarding this provision.

Response: We appreciate these comments and decline to make further changes to this provision. We intend to address other suggestions and requests for clarification through technical assistance.

§ 1321.83 Client and Service Priority

The provision contained in § 1321.69 of the existing regulation (*Service priority for frail, homebound or isolated elderly*) is redesignated here as § 1321.83 and is retitled for clarity. We received numerous inquiries about how State agencies and AAAs should prioritize providing services to various groups. Questions included whether there was an obligation to serve everyone who sought services and whether services were to be provided on a first-come, first-served basis. Questions about prioritization were particularly prevalent in response to demand for services created by the COVID–19 PHE. Entities sought clarification on whether they are permitted to set priorities, who is permitted to set priorities, and the degree to which entities have discretion to set their own priority parameters.

Section 1321.83 clarifies that entities may prioritize services and that they have flexibility to set their own policies in this regard. It also clarifies that State agencies are responsible for setting services priorities, but may establish policies and procedures to grant AAAs and/or service providers the discretion to set service priorities at the local level. We also include revisions to this provision to account for the addition of the National Family Caregiver Support Program, family caregivers as a service population, and priorities for serving family caregivers pursuant to the 2000 amendments to the Act (Pub. L. 106–501).

Comment: Some commenters expressed support of this provision. Others stated confusion regarding the priorities proposed in (c) of this provision.

Response: We appreciate these comments. To reflect that service to older relative caregivers is at the option of the State agency and/or a AAA, we have replaced the word ''When'' in § 1321.83(c)(3) with ''If'' for clarity. Given limited availability of resources, service to older relative caregivers is not required by the Act. However, in this provision we clarify that if older relative caregivers are to be served, older relative caregivers of those with severe disabilities are to be given priority.

Comment: Some commenters questioned whether funds for the Ombudsman program provided under Title III, part B are subject to the requirements at § 1321.83(b).

Response: We appreciate this comment and have revised § 1321.83(b) to read, ''[. . .] services under Title III, parts B (except for Ombudsman program services which are subject to provisions at part 1324), C, and D[.]''

Comment: We received other suggestions, program management recommendations, and implementation questions regarding this provision.

Response: We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through sub-regulatory guidance and technical assistance.

§ 1321.93 Legal Assistance

The provision contained in § 1321.71 of the existing regulation (*Legal assistance*) is redesignated here as § 1321.93. We are modifying § 1321.93 to better reflect the purpose of the Act, including the application of section 101 [212] to elder rights and legal assistance, and to clarify and simplify implementation of the statutory requirements of State agencies, AAAs, and the legal assistance providers with which the AAAs or State agencies, where appropriate, must contract to procure legal assistance for qualifying older adults. Section 101(10), in particular, finds that older people are entitled to ''Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect, and exploitation.'' [213] Legal assistance programs funded under Title III, part B of the Act play a pivotal role in ensuring that this objective is met. Additionally, legal assistance programs further the mission of the Act as set forth in section 102(23) and (24) by serving the needs of those with greatest economic need or greatest social need, including, historically underrepresented, and underserved populations, such as minority older individuals, LGBTQI+ older adults, those who have LEP, and those who are isolated by virtue of where they live, such as rural elders, those who are homebound and those residing in congregate residential settings.[214]

ACL intends to offer technical assistance, pursuant to section 202(a)(6) of the Act,[215] to State agencies, AAAs, and legal assistance service providers, to enable all parties to understand and most effectively coordinate with each other to carry out the provisions of this section.

[212] 42 U.S.C. 3001.

[213] *Id.* section 3001(10).

[214] 42 U.S.C. 3002(23) and (24).

[215] 42 U.S.C. 3012(a)(6).

The final rule combines all regulatory provisions relevant to legal assistance into one section. The purpose of this revision is to mitigate historic and existing confusion and misconceptions about legal assistance, achieve clarity and consistency, and create greater understanding about legal assistance and elder rights. We further include a technical correction to change the reference to statutory language in section (a) of the prior regulation from section 307(a)(15) [216] to 307(a)(11),[217] which sets forth State plan requirements for legal assistance. Section 307(a)(15) sets forth requirements for serving older people with LEP.[218]

Section 1321.93(a) provides a general definition of legal assistance based on the definition in section 102(33) of the Act.[219] Section 1321.93(b) sets forth the requirements for the State agency to add clarity about its responsibilities. The State agency is required to address legal assistance in the State plan and to allocate a minimum percentage of funding for legal assistance. The State plan must assure that the State agency will make reasonable efforts to maintain funding for legal assistance. Funding for legal assistance must supplement and not supplant funding for legal assistance from other sources, such as the grants from the Legal Services Corporation (LSC). The State agency is also obligated to provide advice, training, and technical assistance support for the provision of legal assistance as provided in revised § 1321.93 and section 420(a)(1) of the Act.[220] As part of its oversight role, the State agency must ensure that the statutorily required contractual awards by AAAs to legal assistance providers meet the requirements of § 1321.93(c).

Section 1321.93(c) sets forth the requirements for the AAA regarding legal assistance. Similar to the State agency requirement to designate a minimum percentage of Title III, part B funds to be directed toward legal assistance, the AAAs must take that minimum percentage from the State agency and expend at least that sum, if not more, in an adequate proportion of funding on legal assistance and enter into a contract to procure legal assistance. The final rule reflects the statute and existing regulation in stating requirements for the AAAs to follow when selecting the best qualified provider for legal assistance, including that the selected provider demonstrate expertise in specific areas of law that are given priority in the Act, which are income, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age discrimination, and defense against guardianship. Section 1321.93(e) also sets forth standards for contracting between AAAs and legal assistance providers, including requiring the selected provider to assist individuals with LEP, including in oral and written communication. The selected provider must also ensure effective communication for individuals with disabilities, including by providing appropriate auxiliary aids and services where necessary. We also clarify that the AAA is precluded from requiring a pre-screening of older individuals seeking legal assistance or from acting as the sole and exclusive referral pathway to legal assistance.

We call particular attention to two areas of law given priority in section 307(a)(11)(E) of the Act.[221] The first is long-term care, which we interpret to include rights of individuals residing in congregate residential settings and rights to alternatives to institutionalization. Legal assistance staff with the required expertise in alternatives to institutionalization would be knowledgeable about Medicaid programs such as the Money Follows the Person demonstration, which helps individuals transition from an institutional setting to a community setting, as well as Medicaid HCBS authorities and implementing regulations, including HCBS settings requirements, that allow individuals to receive Medicaid-funded services in their homes and community. To demonstrate this expertise, staff would exhibit the ability to represent individuals applying for such programs; to appeal denials or reductions in the amount, duration, and scope of such services; and to assist individuals who want to transition to the community. Regarding expertise around alternatives to institutionalization, ACL expects legal assistance staff to work very closely with the Ombudsman program to protect resident rights, including the right to seek alternatives to institutionalization and the right to remain in their chosen home in a facility by manifesting the knowledge and skills to represent residents and mount an effective defense to involuntary discharge or evictions.

The other area of focus is guardianship and alternatives to guardianship. Section 307(a)(11)(E) of the Act also states: ''[. . .] area agencies on aging will give priority to legal assistance related to [. . .] defense of guardianship[.]'' [222] We interpret this provision to include advice to and representation of older individuals at risk of guardianship to oppose appointment of a guardian and representation to seek revocation of or limitations on a guardianship. It also includes assistance that diverts individuals from guardianship to less restrictive, more person-directed forms of decision support such as health care and financial powers of attorney, advance directives and supported decision-making, whichever tools the client prefers, whenever possible.

Despite the clear prioritization of legal assistance to defend against imposition of guardianship of an older person, the Act in section 321(a)(6)(B)(ii) also states Title III, part B legal services may be used for legal representation ''in guardianship proceedings of older individuals who seek to become guardians, if other adequate representation is unavailable in the proceedings[.]'' [223] The language in section 321(a)(6)(B)(ii) [224] and the language in section 307(a)(11)(E) [225] have been interpreted by some AAAs and some contracted legal providers as meaning funding under the Act can be used to petition for guardianship of an older adult, rather than defending older adults against guardianship.

Specifically, our goal is to clarify the role of legal assistance providers to promote self-determination and person-directedness and support older individuals to make their own decisions in the event of future diminished decisional capacity. Additionally, public guardianship programs in some States, and private practitioners in all States, are generally more available and willing to represent petitioners to establish guardianship over another adult than they are to represent older adults over whom guardianship is sought. The primary role of legal assistance providers is to represent older adults who are or may be subjected to guardianship to advance their values and wishes in decision-making. Legal assistance resources are scarce and accordingly should be preserved to represent older adults' basic rights to make their own decisions. ACL believes that legal assistance should not be used to represent a petitioner for guardianship of an older person except in the rarest of circumstances.

[216] 42 U.S.C. 3027(a)(15).
[217] *Id.* section 3027(a)(11).
[218] *Id.* section 3027(a)(15).
[219] 42 U.S.C. 3002(33).
[220] 42 U.S.C. 3032i(a)(1).
[221] 42 U.S.C. 3027(a)(11)(E).
[222] *Id.*
[223] 42 U.S.C. 3030d(a)(6)(B)(ii).
[224] *Id.*
[225] 42 U.S.C. 3027(a)(11)(E).

The final rule includes the statutory exception in the regulations, and it will apply in the very limited situation of (1) someone who is eligible for Older Americans Act services, (2) who seeks to become a guardian of another individual when no other alternatives to guardianship are appropriate, and (3) where no other adequate representation is available. The legal assistance provider undertaking such representation would have to establish that the petitioner is over 60, and that no alternatives to guardianship, as discussed above, are available. The provider would also have to establish that no other adequate representation is available through public guardianship programs that many States have established, through bar associations and other pro bono services, or through hospitals, nursing homes, APS, or other entities and practitioners that represent petitioners for guardianship. A legal assistance program that would bring guardianship proceedings as part of its normal course of business, that represents a relative of an older person as petitioner at the request of a hospital or nursing facility to seek the appointment of a guardian to make health care decisions, or that undertakes representation at the behest of APS would not satisfy our interpretation of the limited applicability of the exception. These parties have access to counsel for representation in petitioning for guardianship.

Section 1321.93(d) sets forth the requirements for selecting legal assistance providers. Providers must provide legal assistance to meet complex and evolving legal needs that may arise involving a range of private, public, and governmental entities, programs, and activities that may impact an older adult's independence, choice, or financial security, and the standards AAAs must use to select the legal assistance provider or providers with which to contract. The provider selected as the ''best qualified'' by a AAA must have demonstrated capacity to represent older individuals in both administrative and judicial proceedings. Representation is broader than providing advice and consultation or drafting simple documents; it encompasses the entire range of legal assistance, including administrative and judicial representation, including in appellate forums.

Legal assistance providers must maintain the expertise required to capably handle matters related to all the priority case type areas under the Act, including income, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age discrimination and defense against guardianship. Under our final rule, a legal assistance provider that focuses only on one area, especially an area not specified by the Act as a priority case type, such as drafting testamentary wills, and that does not provide a broader range of services designated by the Act as priorities or represent individuals in administrative and judicial proceedings, would not meet the requirements of this section and the Act. A AAA that contracted with such a provider would also not meet their obligations under revised § 1321.93(c) and under the Act.

We describe that, as required by the Act and existing regulation, legal assistance providers must maintain the capacity to collaborate and support the Ombudsman program in their service area. Legal assistance providers must cooperate with the Ombudsman in entering into the Memorandum of Understanding proffered by the Ombudsman as required pursuant to section 712(h)(8) of the Act.[226] Legal assistance programs are required to collaborate with other programs that address and protect elder rights. We encourage coordination and collaboration with APS programs, State Health Insurance Assistance Programs, Protection and Advocacy systems, AAAs and ADRC options counselors and I&A/R specialists, nutrition programs, and similar partners where such coordination and collaboration promote the rights of older adults with the greatest economic need or greatest social need. Similarly, existing statutory and regulatory provisions urge legal assistance providers that are not housed within LSC grantee entities to coordinate their services with existing LSC projects. Such coordination will help ensure that services under the Act are provided to older adults with the greatest economic need or greatest social need and are targeted to the specific legal problems such older adults encounter. We will provide technical assistance on all these required practices.

As indicated in § 1321.9(c)(2)(xi), cost sharing for legal assistance services is prohibited. This means that a client may not be asked or required to provide a fee to the provider, as is sometimes the practice with some Bar Association referral services. Likewise, the Act prohibits requesting contributions from legal assistance clients before or during representation. Only after the conclusion of representation may a request for a contribution be made. If a client chooses to voluntarily contribute, the proceeds must be applied to expanding the service category.

The final rule precludes a legal assistance program from asking an individual about their personal or family financial information as a condition of establishing eligibility to receive legal assistance. Such information may be sought when it is relevant to the legal service being provided. Requesting financial information would be appropriate, for example, when an older person is seeking assistance with an appeal of denial of benefits, such as Medicaid and Supplemental Nutrition Assistance Program (SNAP), that have financial eligibility requirements.

The final rule requires legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys to adhere to the applicable Rules of Professional Conduct for attorneys. Such non-attorney staff may include law students, paralegals, nurses, social workers, case managers, and peer counselors. Even if such non-attorney staff have their own rules of professional conduct, they must still adhere to the applicable Rules of Professional Conduct in their work in a legal assistance program office because their services are under the supervision of attorney staff. Non-disclosure of confidential client information is a critical component of adhering to Rules of Professional Conduct for both attorney and non-attorney staff, even if, for example, the non-lawyer staff may otherwise be subject to mandatory reporting of suspected elder maltreatment.

The final rule maintains the prohibition against a legal assistance provider representing an older person in a fee-generating case and includes the limited exceptions to that prohibition. The final rule also addresses prohibited activities by legal assistance providers, including prohibiting the use of Older American Act funds for political contributions, activities, and lobbying. The prohibition against lobbying using Title III funds clarifies that lobbying does not include contacting a government agency for information relevant to understanding policies or rules, informing a client about proposed laws or rules relevant to the client's case, engaging with the AAA, or testifying before an agency or legislative body at the request of the agency or legislative body.

Comment: Proposed § 1321.93(a) provides the general definition for the provision of legal assistance under the Act. We received several comments asking us to amend proposed § 1321.93(a)(2), where we define legal

[226] 42 U.S.C. 3058g(h)(8).

assistance as ''[. . .] legal advice and/or representation provided by an attorney[.]'' [227] The commenters pointed out that non-lawyers, including paralegals and law students, may engage in legal advice and/or even legal representation in certain circumstances, and that State law may permit such representation.

Response: ACL appreciates these comments and notes that § 1321.93(a)(2) currently states that ''[l]egal assistance may include, to the extent feasible, counseling, or other appropriate assistance by a paralegal or law student under the direct supervision of an attorney, and counseling or representation by a non-lawyer as permitted by law.'' Additionally, we acknowledge such representation in § 1321.93(b)(1)(vi), (e)(2)(v) where we require non-lawyer personnel under the supervision of attorneys to adhere to the same Rules of Professional Conduct as an attorney. We understand the important role that paralegals and law students and other non-legal professionals play in providing legal representation to older people. Our goal is to assure high quality legal representation by requiring such professionals to be supervised by attorneys and to be bound by the same rules of conduct, as provided in the Older Americans Act. One commenter requested that we provide more detail about the Rules of Professional Conduct established by State judicial systems and bar associations. We decline to do so as this is beyond the scope of these regulations.

AAA information and referral services, State Health Insurance Assistance Programs, ADRCs, Long-Term Care Ombudsman Programs, and Centers for Independent Living (CIL) may work with legal assistance programs to provide information, education, and referral services. One commenter suggested that where a particular service of a legal nature might be able to be facilitated through a non-legal provider, a AAA should be allowed to do so, provided its actions are documented, accountable, and demonstrate that the AAA has made the best effort to provide the most comprehensive legal services. We believe our regulations encourage collaboration, especially in areas of education, cross-training of professionals and referrals to appropriate services and allowing older individuals to decide where and how to receive the services they want or need. AAAs may want to consider maintaining documentation of such collaboration as a best practice. However, as we note below, the Act requires that every AAA make an assessment that the selected legal assistance program is the entity best able to provide legal assistance services. Many legal interventions related to the OAA-designated priority case types require the full representational services of attorneys and non-lawyers under the supervision of attorneys to appropriately redress the legal problems experienced by older adults, and may not be provided by community partners, in accordance with applicable Rules of Professional Conduct. An example is representation opposing guardianship in judicial proceedings of an older adult who has been proposed for guardianship.

Comment: Another commenter raised concerns about the ability to continue to use pro bono attorneys.

Response: Section 307(a)(11) of the Act specifically requires contracts for legal assistance services to encourage coordination with the private bar for pro bono or reduced fee services for older Americans.[228] Section 1321.93(e)(2)(iv) requires, as a standard for contracting, that the selected legal assistance provider undertake reasonable efforts to engage the private bar to furnish services on a pro bono or reduced fee basis. While pro bono attorneys are an important resource to increase the amount of representation for OAA clients, we remind State agencies and AAAs that section 307(a)(2)(C) of the Act also requires State agencies to designate a minimum proportion of Title III, part B funds for direct legal services.[229] See also § 1321.93(b)(2), (c)(1) of these regulations. AAAs that receive these allotments must dedicate this amount, the ''adequate proportion'' per section 306(a)(2)(C) of the Act, to contracting for the provision of legal assistance.[230] A AAA that relies only on pro bono attorneys to provide legal assistance would not meet the requirement to fund legal assistance programs. Additionally, § 1321.93(d)(1), standards for legal assistance provider selection, requires the providers to exhibit the capacity to retain staff with requisite expertise. A program that utilizes only pro bono attorneys does not meet this requirement.

Comment: As stated above, proposed § 1321.93(b)(2) and (c)(1) require AAAs or State agencies in a State with a single planning area to establish and spend a minimum proportion of Title III, part B funds for legal assistance. We received comments concerning the variation in the amount of funding set aside by each State agency, making it difficult for legal assistance providers to represent those with the greatest economic and greatest social needs across the range of priority areas set forth in the OAA and in the regulations. Several commenters discussed the need for adequate funding, not minimum funding. Commenters suggested that the regulations provide clear guidance on how States should establish an adequate minimum proportion of funding for legal assistance to ensure a reasonable number of full-time attorneys are supported across the State.

Response: In this final rule, we require adequate minimum funding to maintain a robust legal assistance program as required by the OAA. We decline to provide detailed processes for State agencies in this regulation, given the variations and size of the older population in each State, and because we do not provide similar requirements in the rule for the proportion of funding to go to other services. However, we will provide technical assistance to State agencies on how to achieve the goal of adequate minimum funding for legal assistance. We also received comments about the lack of sufficient funding for legal assistance programs. We thank the commenters for these observations; however, such comments are beyond the scope of this regulation.

Comment: Commenters supported the requirements for formalized agreements for coordination and collaboration among other aging providers, citing work with long-term care ombudsmen, APS programs, Senior Health Insurance Programs (SHIPs), law enforcement, States Attorneys, CILs, and others. They particularly agreed with § 1321.93(b)(1), which lays out requirements for legal services. One commenter, however, asked that we require OAA funds to be used as a last resort to provide services to older people so that OAA funds could not be used if the provider had LSC funding available.

Response: We decline to make the change. Section 307(a)(11)(D) of the OAA provides that ''to the extent practicable'' OAA-supported legal assistance will be provided ''in addition to any legal assistance for older individuals being furnished with funds from sources other than this Act[.]'' [231] This provision recognizes the flexibilities needed to assure adequate and high-quality legal assistance is available to all older Americans with economic or social need. It does not set up a standard of OAA legal assistance

[227] 88 FR 39628 (June 16, 2023).

[228] 42 U.S.C. 3027(a)(11).

[229] *Id.* section 3027(a)(2)(C).

[230] *Id.* section 3026(a)(2)(C).

[231] *Id.* section 3027(a)(11)(D).

as ''a last resort.'' Moreover, the same provision of the Act goes on to require, ''that reasonable efforts will be made to maintain existing levels of legal assistance for older individuals;'' which is consistent with many comments we received. Finally, LSC funding has more restrictive eligibility criteria, and different priorities along with additional restrictions. We agree, instead, with a legal services provider who described the importance of OAA Title III, part B funding for legal aid and noted how such funding enabled them to double the number of older clients served. The commenter appreciated deference to the legal assistance program in how to use funds for each case and in coordination with other funding. We thank commenters for these comments.

Comment: ACL sets forth in § 1321.93(d) that the selected legal assistance provider must retain staff with expertise in specific areas of law affecting older persons with economic or social need, including public benefits, resident rights, and alternatives to institutionalization. ACL also requires the providers to demonstrate expertise in specific areas of law given priority in the OAA, including income and public entitlement benefits, health care, long-term care, nutrition, housing, utilities, protectives services, abuse, neglect, age discrimination, and defense of guardianship.

Many commenters agreed with the list of statutorily mandated substantive areas in which legal assistance providers should be knowledgeable. One commenter suggested we amend § 1321.93(d)(1) to include all the legal priority areas in section 307(a)(11)(E) of the Act, rather than the three priority areas listed.[232] Other commenters raised questions about the list of statutorily mandated substantive areas. These commenters suggest that AAAs should consider the greatest needs of those in their community, or that it may be hard to find attorneys with requisite knowledge in rural areas. One commenter asked that we add consumer law as a priority to the specific areas of law, consistent with the goal of helping older adults who desire to age in their own home. Another commenter suggested we add pensions as a priority area. Other commenters raised concerns that, by further defining defense of guardianship in § 1321.93(d)(2)(i), ACL intended that priority be given to those cases over other priority areas.

Response: We appreciate the comment regarding § 1321.93(d)(1) and have amended the subsection as requested.

The list of substantive focus areas in § 1391.93(d)(2) sets forth the priority legal areas in section 307(a)(11)(E) of the OAA; the proposed rule did not expand upon these areas as one commenter stated.[233] However, within each community the AAA-contracted legal assistance provider may determine, in communication with the State agency, AAA, and others within their community, how to focus on implementing the required case priorities to meet the needs of older individuals with economic or social need within their community. Moreover, the balancing of priorities could change over time as circumstances evolve. For example, a legal assistance provider in a community where many older people are losing their Medicaid because of the Medicaid renewal process may focus on Medicaid fair hearings. In another community where many older people are sued for medical debt, the provider may decide to prioritize representation in those cases. Still another community may focus on a growing trend of evictions and homelessness among older adults, representing individuals facing eviction and fighting homelessness, while another community could be on an Indian reservation in a very isolated area with legal issues related to other federal laws. Our objective is that, as the Act requires, the legal assistance providers contracted by AAAs have expertise in specified areas of importance to older people with greatest economic or greatest social need who receive services under the OAA. Most private practitioners of law for example, generally do not have such expertise. We note, also, that ACL provides technical assistance to legal assistance programs, as well as to AAAs and ADRCs, the Ombudsman program, general legal services programs, and disability programs, on legal problems included in the priority areas, including assistance in representation of individuals in administrative and court hearings. The technical assistance can provide support to help ensure high quality representation in the areas of focus under the OAA. Finally, particularly in rural areas, for services that cannot be provided by non-legal providers, the AAA may be able to facilitate delivery of the required legal assistance through arrangements with legal assistance programs in other parts of the State, using available technological solutions to fulfill the requirements of the Act. Technical assistance has been and will continue to be available from ACL to assist legal assistance providers, AAAs, and collaborating partners in rural areas. Legal assistance programs are encouraged to develop and strategically disseminate self-help materials, in areas where appropriate, developed by knowledgeable and respected expert consumer-facing organizations. Additionally, as noted in several comments and discussed above, State law may permit a nonlawyer to engage in counseling or representation in certain circumstances.

In response to these comments, we have modified § 1321.93(d)(2) as follows. We have added ''consumer law'' to the list of legal areas in which legal assistance providers demonstrate expertise. Consumer law issues can fall within the statutory case priority categories related to income, housing, health care, long-term care, and abuse, for example. We have not added ''pensions,'' as requested by a commenter, since pensions are income, which is already included. We note that ACL funds pension counseling services in accordance with section 215 of the Act.[234] We have also corrected the numbering of provisions of § 1321.93(d)(3) though (5). We have also revised § 1321.93(e)(2)(i), which requires the selected legal assistance provider to maintain expertise in the specific areas described in § 1321.93(d)(2). We have also clarified, as noted above, that legal assistance providers may prioritize their work from among the focus areas identified in the regulations based on the needs of the community they serve.

Comment: In § 1321.93(d)(2)(i) we define what is meant by the term ''defense of guardianship.'' Several commenters were confused by the term ''defense of guardianship,'' and interpreted it as being inconsistent with the intent of the proposed rule to promote self-determination and alternatives to guardianship. One commenter suggested changing the language to defense against guardianship, while another suggested using the funding to promote guardianship prevention measures. Another commenter suggested we clarify that the term guardianship includes conservatorship and other similar fiduciary proceedings analogous to guardianship. Several commenters suggested we update the terms ''proposed protected persons'' and ''protected persons'' to ''older individual at risk of guardianship'' and ''older individual subject to guardianship'' as more in keeping with the Uniform Guardianship,

[232] *Id.* section 3027(a)(11)(E).

[233] *Id.*

[234] 42 U.S.C. 3020e–1.

Conservatorship, and Other Protective Arrangements Act (UGCOPAA).[235]

Response: We reiterate that we use ''defense of guardianship'' in these regulations because it is the language used in section 307(a)(11)(E) of the OAA.[236] We also agree that, unlike the other priority areas of law set forth in § 1321.93(d)(2), the term is very confusing. That is why while we will keep the term to retain consistency with the Act, we have chosen to include a separate subsection, § 1321.93(d)(2)(i), to define defense of guardianship. Our definition includes what commenters described as guardianship prevention, including execution of advance directives and supportive decision arrangements as chosen by older individuals. We agree with the commenter that the term guardianship includes conservatorship and other similar fiduciary proceedings analogous to guardianship. We have also revised § 1321.93(d)(2)(i) and replace ''proposed protected persons'' and ''protected persons'' with ''older individuals at risk of guardianship'' and ''older individuals subject to guardianship.'' We have made a technical correction at § 1321.93(e)(2)(i) to correct the cross-reference from ''paragraph (c)(1)(ii)(B)(*1*)(*ii*)'' to ''paragraph (d)(1), (2).''

Comment: Several commenters asked us to go beyond the proposed definition of defense of guardianship. For example, they asked that we require someone's beliefs about guardianship be memorialized in their person-centered plan. Other commenters asked that we require the person subject to guardianship be involved to the maximum extent possible. Others asked that we require all people subject to guardianship proceedings be represented by an attorney.

Response: ACL is very supportive of person-centered planning. In § 1321.77(b), we give older adults and family caregivers an opportunity to develop a person-centered plan that discusses the services they may receive under the Act, where appropriate. Service providers who assist in developing these plans may want to include the view of older adults and family caregivers on guardianship and whether they have alternatives in place. Person-centered plans as developed in the context of receipt of certain Medicaid benefits are outside the scope of this regulation, as it does not address Medicaid requirements. The request to involve the person subject to guardianship to the maximum extent possible is consistent with the existing obligations of attorneys under Rules of Professional Conduct in representing someone who is the subject of a guardianship proceeding or who seeks to modify or revoke a guardianship. State law, not Federal law, governs how the individual under guardianship will be involved in working with the guardian, and accordingly this request is beyond the scope of these regulations. We note that attorneys representing persons under guardianship retain all the requisite duties of loyalty to the client imposed by the ethical obligations of the Rules of Professional Conduct of their State. Similarly, State law, not Federal law, governs whether the person subject to a guardianship petition is entitled to have an attorney appointed to represent them.

Comment: Another commenter requested that we modify § 1321.93(d)(2)(i) to require that limitation of guardianship be sought both when a guardianship is initially established and in subsequent petitions to modify the guardianship. The same commenter recommended amending § 1321.93(d)(2)(ii)(A), (B) to reference promoting limited guardianship.

Response: We appreciate the comments and have revised these provisions. While attorneys representing persons proposed for and subject to guardianship are generally expected to seek diversion from and alternatives to guardianship, we recognize and agree that limitations on guardianship may be appropriate in certain cases.

Comment: We received many comments from organizations that represent older people or people with disabilities on guardianship itself in response to our discussion about the meaning of the term ''defense of guardianship'' in the proposed rule. All commenters agreed that guardianship should be avoided. Some commenters discussed alternatives to guardianship, including those referenced in the proposed regulations, as discussed above. Others suggested complimentary approaches, such as increased education about advance planning and expressing each person's preferences. Many discussed the role that aging and disability organizations play in representing and protecting the interests of older people.

Regarding our request for comments on the role of legal assistance and AAAs in defense of guardianship, one commenter agreed that public guardianship is a last resort and that it is critical to have firewalls between AAA functions and guardianship functions to avoid COIs or the appearance of COIs. The commenter objected, however, to precluding AAAs from serving as guardians, particularly for older adults with significant barriers to functioning and without other supports.

Response: We appreciate the concerns raised by the commenter. Our regulatory approach is to promote alternatives to guardianship and to support limitations on the imposition of guardianship. Our COI provisions are designed to prevent conflicts that could arise if a AAA receives outside funding to serve as a guardian, while at the same time contracting with legal assistance entities that represent people to oppose, divert from, or find alternatives to guardianship or who want to revoke an existing guardianship. Similar conflicts may arise if a Title III, part B legal assistance program is housed in a program funded by the LSC, and the LSC program brings a petition for guardianship while the OAA-funded component is asked to represent the individual over whom the guardianship is sought. Rules of Professional Conduct would apply to that conflict, as would standard legal services processes for checking conflicts among clients.

Comment: Several commenters provided examples of when OAA-funded legal services programs might appropriately petition for guardianship. Examples include petitioning for guardianship over a minor grandchild or other relative; or where appealing a Social Security termination or reduction may require a decision-maker, yet there is no authorized representative on file and the older individual lacks decisional capability to consent to the representation; or similarly where there is a need to assert rights by appealing Medicaid denials where appeal may only be brought by a power of attorney or guardian and there is no agent under a power of attorney; preventing eviction or foreclosure; or taking action against someone engaged in adult maltreatment. According to the commenters, all the examples resulted in an older person continuing to serve as primary care giver for a minor; or as a caregiver of another older individual endeavoring to retain public benefits; to live in the individual's preferred residence; and/or to remain in the community. One commenter pointed out that, although pro bono attorneys may be willing to file for guardianship, they may feel uncomfortable or unknowledgeable about bringing a Medicaid or Social Security appeal and may not be equipped to explain to the court why

[235] Nat'l. Conference of Comm'rs. on Unif. State Laws, Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (2017), *https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c.*

[236] 42 U.S.C. 3027(a)(11)(E).

the temporary guardianship is needed to appeal the public benefit denial. Other commenters said that they petition for guardianship because there are no attorneys available to bring the petition in the rural area they serve. Several CILs asked that CILs be added to the list of entities available to bring guardianship petitions.

Response: We thank the commenters for their responses. We emphasize the imperative of identifying the least restrictive means of pursuing rights such as those described above. OAA-funded legal assistance providers should consistently strive to avoid guardianship as a remedy in these circumstances, unless they can document that no other option is available. Additionally, however, we believe that the CILs who asked to identify CILs as entities available to bring guardianship petitions misunderstood the context of the discussion and therefore, we decline to make the change. Petitioning for guardianship is inconsistent with the mission of CILs to promote autonomy and self-direction. We intend to offer technical assistance to provide additional clarification based on the comment responses.

Comment: Section 1321.93(d)(2)(ii)(A) contains an exception to defense of guardianship in limited circumstances involving guardianship proceedings of older individuals who seek to become guardians when no other alternatives to guardianship are appropriate, and only if other adequate representation is unavailable in the proceeding. The exception is stated in section 321(a)(6)(B)(ii) of the Act.[237] In addition to the comments discussed above that provide examples of when legal assistance providers use this exception, we received comments asking us to strengthen the language to ensure the exception is used only in limited circumstances. Several commenters said the language could be strengthened by requiring providers to document the efforts they made to explore less restrictive alternatives, why none of those options were appropriate or available, and how the provider determined that no other adequate representation was available.

Response: Many State statutes require this kind of documentation from all parties to guardianship proceedings; [238] we accept the comments and have modified the language accordingly. Commenters also suggested making the exception to defense of guardianship a separate section to clarify what we mean by defense of guardianship. We accept these comments as well. Accordingly, we have modified § 1321.93(d)(2)(ii)(A) to create a new § 1321.93(d)(2)(ii)(C) that sets forth the limited circumstances in which a legal assistance program may bring a guardianship petition on behalf of an older individual, *i.e.,* only if other adequate representation is unavailable; and the provider documents the circumstances as described above.

Comment: Section 1321.93(e) establishes standards for contracting between AAAs and legal assistance providers. We received comments from legal assistance providers that support the provision. They strongly supported § 1321.93(e)(3)(i), clarifying that area agencies are precluded from requiring a pre-screening to receive legal services or from being the sole and exclusive referral pathway for older adults to access legal assistance, to avoid creating unnecessary barriers to such assistance. They found the provision consistent with the Rules of Professional Conduct, as well as a means to avoid potential COI with the area agency. Commenters also cited the requirement in § 1321.93(e)(1)(v) referencing adherence to the Rules of Professional Conduct as helpful, particularly when AAAs with which they contract want them to provide confidential information about their clients without authorization from the client in contravention of the Rules of Professional Conduct.

Regarding OAA-funded legal assistance programs that are located within a LSC grantee entity, commenters were particularly appreciative of § 1321.93(e)(3)(v)(c). That section enables the Assistant Secretary for Aging to exempt additional restrictions on activities and client representation that would otherwise be prohibited for legal assistance providers housed within a LSC grantee entity. This provision implements section 307(a)(11)(A) of the Act.[239] The commenters noted that such restrictions can prevent legal assistance providers from advocating for individuals in the greatest social and economic need and require assistance in the very areas that the OAA identified as priorities.

Response: We thank commenters for their comments.

Comment: Section 1321.93(f) sets out legal assistance provider requirements. These requirements include taking reasonable steps to ensure meaningful access to legal assistance by older individuals with LEP and other communication needs, including providing access to interpretation, translation, and auxiliary aids and services. Several commenters raised concerns that people who are deaf and rely on American Sign Language (ASL) or who rely on Communication Real Time Access (CART), as well as people with visual impairments and other sensory disabilities, have had difficulties accessing legal assistance.

Response: We appreciate the concerns raised by these commenters and reiterate that the regulations require the legal assistance provider to provide the necessary accommodations. We agree with commenters that interpretation and translation services must be provided through qualified individuals. The use of qualified individuals is particularly critical, given the technical nature of discussions about legal rights. The use of untrained laypersons for interpretation and translation could lead to dangerous or detrimental outcomes, and conflicts with civil rights obligations.

Comment: Section 1321.93(f) also prohibits the use of funds for lobbying. Subsection 1321.93(f)(4)(ii)(A)(*5*) clarifies that the section is not intended to prohibit legal assistance providers from testifying before a government agency, legislative body, or committee at the request of the government agency, legislative body, or committee. One commenter asked that we remove the requirement that the legal assistance provider may testify when requested to do so by the entity before which they propose to testify. The commenter pointed out that the legal assistance provider may have important information to share and a technical understanding of older adults' experience with the issue but may not be able to obtain a timely request from the government agency, legislative body, or committee.

Response: We decline to make the edit, as the language is consistent with other requirements for recipients of Federal funding.

B. New Provisions Added To Clarify Responsibilities and Requirements Under Grants to State and Community Programs on Aging

We include the following new provisions to provide direction in response to inquiries and feedback received from grantees and other interested parties and changes in the provision of services, and to clarify requirements under the Act.

[237] 42 U.S.C. 3030d(a)(6)(B)(ii).

[238] *See e.g.* Tex. Estate Code Ann. § 1101.001; Ariz. Rev. Stat. Ann. section 14–5303; Wash. Rev. Code Ann. section 11.130.265.

[239] 42 U.S.C. 3027(a)(11)(A).

Subpart B—State Agency Responsibilities

§ 1321.23 Appeal to the Departmental Appeals Board on Area Agency on Aging Withdrawal of Designation

Section 305(a)(2)(A) of the Act empowers State agencies to designate eligible entities as AAAs.[240] Section 305(b)(5)(C)(i) of the Act affords a AAA the right to appeal a State agency's decision to revoke its designation including up to the Assistant Secretary for Aging.[241] Per section 305(b)(5)(C)(iv) the Assistant Secretary for Aging may affirm or set aside the State agency's decision.[242] Historically, appeals of AAA designation to the Assistant Secretary for Aging have been extremely rare.

Under new § 1321.23, the HHS Departmental Appeals Board (DAB) will preside over appeals under the OAA. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to issuing a decision. We believe this will streamline administrative functions and provide robust due process protections to AAAs. This aligns with §§ 1321.17 and 1321.39. The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this regulation will provide clarity and consistency to State agencies and AAAs.

§ 1321.37 Notification of State Plan Amendment Receipt for Changes Not Requiring Assistant Secretary for Aging Approval

Sections 1321.19 and 1321.23 of the existing regulation, redesignated as §§ 1321.31 and 1321.35, address submission of amendments to the State plan and notification of State plan or amendment approval; however, they lack a process for notification of receipt of State plan amendments that are required to be submitted, but not approved by the Assistant Secretary for Aging. We include this new section to provide for notification of receipt of State plan amendments that do not require Assistant Secretary for Aging approval.

§ 1321.47 Conflicts of Interest Policies and Procedures for State Agencies

Section 307(a)(7)(B) of the Act directs State agencies to include assurances against COI in their State plans.[243] As explained earlier, § 1321.3 defines two broad categories of conflict: one or more conflicts between the private interests and the official responsibilities of a person in a position of trust; and/or one or more conflicts between competing duties of an individual, or between the competing duties, services, or programs of an organization, and/or portion of an organization. State agencies may wish to identify other COI based on State law or other requirements.

Section 1321.47 requires State agencies to have policies and procedures that establish mechanisms to avoid both actual and perceived COI and to identify, remove, and remedy any existing COI at organizational and individual levels. They include providing a mechanism for informing relevant parties of COI responsibilities and identifying and addressing conflicts when they arise. Procedures to mitigate COI could include establishing firewalls between or among individuals, programs, or organizations involved in the conflict, removing an individual or organization from a position, or termination of a contract. Whether the potential COI is actual or perceived, it is essential that the State agency pursue solutions that preserve the integrity of the mission of the Act.

Comment: Many commenters supported proposed § 1321.47 and appreciated the clarification related to COI for OAA grantees and subrecipients. Several commenters provided suggestions to strengthen the rule. One commenter suggested requiring provisions related to COI in State plans on aging. Another commenter suggested establishing an appeals process for entities should a State agency identify a COI. A commenter suggested requiring training for individuals, including leadership, on COI. One commenter recommended a two-year timeframe for review and implementation of the rule's COI provisions.

Response: We appreciate these suggestions for strengthening the rule. Section 307(a)(7)(B) of the Act requires assurances related to COI in State plans, including that no officer, employee, or other representative of the State or area agency is subject to a COI prohibited under this Act.[244] We decline to require additional COI provisions in State plans in this regulation because such provisions, if determined appropriate by the State agency, are best determined at the State level. State agencies may include such provisions in their State plans if they believe it will assist in implementation and enforcement of the rule's COI requirements. We likewise decline to require the establishment of an appeals process. Such a process, if determined appropriate by the State agency, is best developed at the State level. We agree training for staff on COI is necessary and appropriately incorporated in the training required by § 1321.5(a). We intend to provide State agencies with technical assistance on this final rule's COI provisions. We believe the timeframe specified for implementation of the rule is sufficient for State agencies to come into compliance.

Comment: A few commenters pointed out the potential for COI when a State agency or a AAA is lobbied by private interest or establishes contracts and commercial relationships with private entities.

Response: We agree that COI may arise in the context of contracts and commercial relationships with private entities. As detailed in the discussion of § 1321.9(c)(2), a State agency should consider the potential for a heightened risk of COI when developing policies and procedures for approving such agreements.[245] ACL will continue to provide sub-regulatory guidance and technical assistance related to COI in contracts and commercial relationships for grantees and subrecipients.

Comment: A few commenters sought to clarify that it may not be a COI for a State agency to operate both OAA programs and APS or a public guardianship program, for example. A commenter noted that such arrangements strengthen the ability of an agency to improve the lives of older adults and influence policy. Comments reiterated that this situation is not uncommon and requested clarity as to whether specific scenarios represent COI that cannot be mitigated. We received several comments that described how the commenters mitigated the potential COI with guardianship programs. For example, they only served as guardian of last resort; promoted the use of alternatives to guardianship; provided for defense of guardianship through another funding source; and generally adhered to the ethical standards for guardians developed by the National Guardianship Association.

Response: Whether a COI exists due to co-location of APS and guardianship programs, and whether it can be mitigated, is fact-dependent. This provision does not suggest that certain programs may not be located in State agencies. Rather, State agencies should carefully evaluate the potential for COI to arise when programs are co-located and should create and maintain robust

[240] 42 U.S.C. 3025(a)(2)(A).

[241] *Id.* section 3025(b)(5)(C)(i).

[242] *Id.* section 3025(b)(5)(C)(iv).

[243] 42 U.S.C. 3027(a)(7)(B).

[244] *Id.* section 3027(a)(7)(B).

[245] 88 FR 39572 (June 16, 2023).

polices, firewalls, monitoring, and remediation as necessary. To address concerns, however, we have amended § 1321.47 to require the State agency to document COI mitigation strategies, as necessary and appropriate, when a State agency or Title III program operates an APS or guardianship program.

Comment: A few commenters requested eliminated or revising § 1321.47(a)(3), which requires ''robust monitoring and oversight.'' Commenters asserted that such monitoring would be too costly and burdensome to implement. Another commenter suggested that State plans on aging include provisions for the State agency to perform continual monitoring for COI.

Response: We appreciate the comments. Given the importance of this provision to ensuring access to vital services, we decline to make changes.

Comment: One commenter suggests that ACL add definitions for ''financial interest'' and ''agent of the State'' or give State agencies the discretion to adopt a State law or common definition. The commenter also asks whether ''agent of the State'' includes a AAA, employees of a AAA, and AAA providers.

Response: As with all terms not defined in the Act or in this final rule, State agencies may use reasonable definitions for ''financial interest'' or ''agent of the State'' or any other term the State agency chooses to define (or chooses not to define) including State law or common definitions.

§ 1321.53 State Agency Title III and Title VI Coordination Responsibilities

New § 1321.53 sets forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in sections 306(a)(11)(B),[246] 307(a)(21)(A),[247] 614(a)(11),[248] and 624(a)(3)[249] of the Act. We received inquiries and feedback from grantees and other interested parties asking for clarification on their obligation to coordinate activities under Title III and Title VI. Questions included whether coordination is required or discretionary, what coordination activities entities must undertake, and which entities are responsible for coordination. We clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees, and that State agencies must have specific policies and procedures to guide coordination efforts within the State.

Comment: Commenters overwhelmingly expressed support for coordination between Title III and Title VI programs. Comments expressed concern regarding the lack of coordination with Title VI grantees by State agencies, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how Tribes can apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed they thought the proposed language regarding coordination was too permissive. We received a comment recommending specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance for State agencies on their roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

Response: To make clear the responsibilities of State agencies under the Act, explicit expectations for coordination between Title III and Title VI programs are specified in this rule. The provision at § 1321.53 is complementary with the provisions for AAAs and service providers under Title III of the Act as set forth at § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*) and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), as well as for Title VI grantees under the Act as set forth at § 1322.31 (*Title VI and Title III coordination*). This rule makes clear that all entities are responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees. Based on the comments received, we revised each provision to use consistent language, where appropriate. We explain the changes made in the following paragraphs.

We have reordered the opening paragraph in § 1321.53 as § 1321.53(a) and have reordered the subsequent paragraphs accordingly. ACL also recognizes the variability of local circumstances, resources, and needs. We appreciate the comment recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have further revised the language at reorganized § 1321.53(a) to read, ''For States where there are Title VI programs, the State agency's policies and procedures, developed in coordination with the relevant Title VI program director(s) as set forth in § 1322.13(a), must explain how the State's aging network, including area agencies and service providers, will coordinate with Title VI programs to ensure compliance with sections 306(a)(11)(B) (42 U.S.C. 3026(a)(11)(B)) and 307(a)(21)(A) (42 U.S.C. 3027(a)(21)(A)) of the Act. State agencies may meet these requirements through a Tribal consultation policy that includes Title VI programs.''

We have created a reordered paragraph § 1321.53(b) and have revised this provision to clarify the topics that the policies and procedures set forth in paragraph (a) ''[. . .] must at a minimum address[.]'' As such, we have clarified that coordination is required. We further enumerate how outreach and referrals will be provided to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII; remove duplicate language which was incorporated into revised paragraph (a); revise ''such as'' to ''to include'' in reference to meetings, email distribution lists, and public hearings and add ''Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities,'' to the list of communication opportunities; clarify collaboration on and sharing of program information and changes; add ''How services will be provided in a culturally appropriate and trauma-informed manner;'' and add ''Opportunities to serve on advisory councils, workgroups, and boards, including area agency advisory councils, as set forth in § 1321.63.''

Regarding provision of Title III funding to Tribes, the amount of available Title III funding is limited to what is appropriated for such purposes. State agencies are required to distribute such funding to AAAs via an IFF in States with multiple PSAs, as required by the Act and as set forth at § 1321.49. In some States, Tribes have been designated as AAAs and receive Title III funds. Single PSA State agencies are required to distribute funds in accordance with a funds distribution plan as set forth at § 1321.51(b), and Title VI programs may receive funds under a contract or grant with a State agency in such States. State agencies and AAAs are required to establish and follow procurement policies in awarding Title III funds under the Act,

[246] 42 U.S.C. 3026(a)(11)(B).
[247] 42 U.S.C. 3027(a)(21)(A).
[248] 42 U.S.C. 3057e(a)(11).
[249] 42 U.S.C. 3057j(a)(3).

which may allow for awarding of funds to Title VI grantees, Tribes, and other Tribal organizations. ACL encourages Tribes and Tribal organizations to apply to provide Title III-funded services. However, the statute does not allow for a requirement that Title III funds be provided to Title VI grantees outside of the procurement policies in place for awarding of Title III funds under the Act.

There are multiple successful examples of such coordination that ACL is committed to sharing and expanding. As such expectations were not explicitly stated in the prior regulation, we believe that the promulgation of these regulations will provide a significant opportunity to further coordination between Title III and Title VI programs, including improving ACL's monitoring of programs for compliance. ACL anticipates providing technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

Subpart C—Area Agency Responsibilities

§ 1321.59 Area Agency Policies and Procedures

Section 306 of the Act sets forth the responsibilities of AAAs regarding programs operated under the Act. [250] Section 306, in conjunction with other language throughout the Title III of the Act, establishes the AAA's role with relation to the State agency and service providers.[251] However, we have received inquiries and feedback from AAAs and others that indicates a lack of clarity as to, for example, the scope of State agency versus AAA responsibility.

New § 1321.59 states that AAAs shall develop policies and procedures governing all aspects of programs operated under the Act, in compliance with State agency policies and procedures. It also clarifies that the scope of AAA responsibility includes consulting with other appropriate parties regarding policy and procedure development, monitoring, and enforcing their own policies and procedures. We also incorporate the provision previously set forth at § 1321.25 (*Restriction of delegation of authority to other agencies*) within this new provision.

Comment: ACL received many comments regarding the roles of both area agencies and State agencies in developing policies and procedures for the area agency. Most of these comments expressed support for the proposed provision as detailed in § 1321.59(a) and the reinforcement of an area agency's responsibility for developing their own policies and procedures, in compliance with the State agency's rules. A variety of commenters recommended that State agencies and program participants explicitly be consulted with surrounding the development of area agency policies and procedures.

Response: ACL appreciates comments regarding the development of area agency policies and procedures. As commenters noted, area agencies have the authority and responsibility to develop their own policies and procedures. These policies and procedures must be developed in compliance with all State agency policies and procedures, including those detailed in § 1321.9, and be in alignment with the Act and all applicable Federal requirements, and, where appropriate, in consultation with other parties in the PSAs. ACL maintains that the rule provides area agencies the flexibility to develop policies and procedures that align with the needs of their individual PSAs. Area agencies have full authority to consult with State agencies in the development of policies and procedures, as appropriate. Further, the Act requires area agencies to establish advisory councils who help with developing and administering the area plan; § 1321.63 requires the councils to be representative of program participants or those that are eligible to participate and to solicit and incorporate public input into the area plan, which will help ensure that the perspectives of older adults are incorporated into area agency policies and procedures.

Comment: Some commenters requested that ACL revise § 1321.59(b) to require area agencies to make quality monitoring and measurement results publicly available and specifically requested that they be available to the public in ''plain language format designed to support and provide information and choice.''

Response: ACL appreciates comments related to the transparency of quality monitoring and measurement results and the importance of sharing information with the public in a manner that is easily accessible and understood. We maintain that § 1321.59(b) encourages both transparency and accessibility surrounding quality monitoring and measurement results and decline to revise the provision. ACL will continue to provide technical assistance to encourage area agencies to ensure that quality monitoring and measurement results are available to the public and provide technical assistance surrounding best practices for communicating in plain language.

Comment: One commenter voiced concern that § 1321.59(d), which clarifies that area agencies may not delegate the authority to award or administer funds to another agency, could be understood to prohibit provider subgrants which would disrupt program and service delivery. The commenter provided a specific example in which an area agency may contract with a county-based service provider which then in-turn provides subawards for home-delivered meals.

Response: ACL appreciates the request for clarity surrounding § 1321.59(d). This section requires the area agency to be responsible for approving and administering funding for all subawards; area agencies may not delegate the authority to award or administer funds to another agency. In the example provided, the area agency would need to approve all subawards by the service provider and would be responsible for administering all funding under the subawards. ACL will provide technical assistance regarding this requirement, as needed.

Comment: One commenter proposed setting requirements for eligibility beyond age and need, assessment, planning, and detailing the limitation of the frequency or type of services provided. The commenter also stated that if there is a limit of service and hours, there would need to be a staffing procedure to allow for the circumstances when additional hours are necessary.

Response: Given the wide variation in resources, needs, and available services, ACL believes that this regulation sufficiently requires establishment of policies and procedures at the AAA level, in accordance with State agency policies and procedures. State agencies and AAAs may establish additional policies and procedures, as long as they are in accordance with the Act and all applicable Federal requirements.

§ 1321.67 Conflicts of Interest Policies and Procedures for Area Agencies on Aging

As previously discussed, § 1321.3 defines COI, and § 1321.47 explains the responsibilities of State agencies to avoid and mitigate COI. Similarly, § 1321.67 explains the responsibilities of AAAs to meet the requirements of section 307(a)(7)(B) of the Act.[252] AAAs must have policies and procedures to identify both organizational and individual COI. The policies must

[250] 42 U.S.C. 3026.

[251] *Id.*

[252] 42 U.S.C. 3027(a)(7)(B).

establish the actions and procedures the AAA will require employees, contractors, grantees, volunteers, and others in a position of trust or authority to take to remedy or remove such conflicts. AAAs have expanded their business activities over the last decade, necessitating additional guidance on preventing and mitigating COI so they may engage in the new activities and carry out the objectives of the Act.

Comment: Several commenters requested more information and assistance in identifying and addressing COI, including examples, training, tools, and best practices. Commenters noted that there is currently no process in place for Title III providers or AAA administrators to comply with the proposed rule to ''ensure that no individual or immediate family of and individual involved in Title III program has a conflict of interest'' and noted that the additional screening could be burdensome for programs. One commenter emphasized the need for flexibility as State agencies and AAAs address and mitigate COI.

Response: We intend to provide technical assistance to AAAs and State agencies on COI requirements. We welcome ongoing feedback as we develop these materials. In policies involving COI, and throughout this rule, we recognize the need to balance flexibility and ease of administration for grantees and subrecipients while adhering to the requirements of the Act.

Comment: We received numerous comments on COI related to guardianship programs administered by AAAs. Several commenters wrote in support of allowing AAAs to serve as public guardians. Some noted that such programs are a last resort. A commenter offered that allowing a AAA to serve as a guardian was preferable to relying on a for-profit entity, where the presence of a profit motive heightens the risk of abuse. One commenter wrote that guardianship programs hosted by AAAs were particularly important in rural communities, where other options may not be readily available.

Many commenters stressed the necessity of appropriate safeguards and firewalls for guardianship programs co-located in or administered by AAAs. Some commenters provided examples of successful guardianship programs administered by AAAs. Commenters stressed that such programs can be ethically and efficiently administered alongside other Title III programs with appropriate measures to protect from COI and further detailed the process by which their State agency or a AAA establishes firewalls to protect against conflicts. As discussed in response to comments to § 1321.47, commenters described mitigation strategies such as serving as guardian of last resort; promoting the use of alternatives to guardianship; and providing for defense of guardianship through another funding source.

A number of other commenters, however, held that it is in the public interest to prohibit AAAs from being appointed as guardians and that an inherent and irremediable COI exists for a AAA hosting a guardianship program. One commenter offered an example wherein individuals remained in a nursing home when they should have received care in the community due to a COI in a AAA guardianship program.

Response: We appreciate commenters who responded to our request for input regarding AAAs conducting guardianship programs or being appointed the guardian for an older person.

We recognize the potential for COI and are sensitive to the gravity of such situations and concerns of commenters who believe such conflicts are irredeemable. However, we decline to completely prohibit AAAs from hosting guardianship programs or serving as guardians to older adults. As noted by some commenters, oftentimes these programs and appointments exist because no other alternative is available. Furthermore, some State statutes appoint the AAA or State agency to serve as guardian in cases where no other entity is available or appropriate.

We agree that policies and procedures including firewalls and other safeguards are necessary to protect against COI for AAAs that serve as guardians. Therefore, we have amended both § 1321.47 and § 1321.67 to require documentation of COI mitigation strategies, as necessary and appropriate, when a State agency, AAA, or Title III program operates an Adult Protective Services or guardianship program. We will continue to provide technical assistance to State agencies and AAAs.

Comment: A commenter expressed support for APS and Ombudsman programs co-located within AAAs provided there are appropriate safeguards and firewalls in place. Another commenter sought to clarify whether an organizational COI necessarily exists when a AAA provides both OAA and non-OAA services. The commenter noted deeming such a situation a COI may create an administrative burden and increase programmatic costs.

Response: Many APS and Ombudsman programs are located in AAAs. We agree such placement is advantageous in many situations; however, appropriate COI policies and procedures are necessary. As stated in response to the previous comment, we have amended §§ 1321.47 and 1321.67 to require documentation of mitigation strategies when a State agency or AAA also houses the APS program.

We also wish to clarify that a AAA providing both OAA and non-OAA services is not a per se COI. We recognize this is an extremely common occurrence and encourage AAAs to develop dynamic and diverse service delivery systems. The COI standards for AAAs in this final rule apply across organizations, providers, and service relationships. Furthermore, some non-OAA programs offered by a AAA may be governed by their own COI rules, for example the State Health Insurance Assistance Program or Medicaid managed care plans. Ombudsman program COI requirements are governed by this rule at § 1324.21.

Comment: A few commenters noted that in small communities, particularly rural and frontier areas, many AAAs with limited providers may be serving family members. Agency staff may be related to staff of organizations that receive Title III funding. A commenter noted that nearly everyone wears multiple hats and has relationships within the organization and community.

Response: We understand that in smaller communities the possibility for individual and organizational COI may be more likely to arise simply by nature of communities' size and structure. Whether and how actual or potential COI may be remedied through appropriate policies and procedures is fact-dependent. Factors to consider include whether the individual in question is a decision maker, whether firewalls or other safeguards can be erected between organizations and individuals, and what monitoring protocols are in place for a potentially conflicted situation. Similarly, if a conflict arises, a AAA may ask whether it can be remediated and what the likely impact will be on the quality of services and the credibility of the AAA, its employees, and agents.

§ 1321.69 Area Agency on Aging Title III and Title VI Coordination Responsibilities

Consistent with new § 1321.53 (*State agency Title III and Title VI coordination responsibilities*), new § 1321.69 sets forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in sections 306(a)(11)(B),[253]

[253] 42 U.S.C. 3026(a)(11)(B).

307(a)(21)(A),[254] 614(a)(11),[255] and 624(a)(3) [256] of the Act. We clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees. The section complements the language at § 1321.53 for State agencies, and includes specific considerations for AAAs, such as opportunities for representatives of Title VI grantees to serve on AAA advisory councils, workgroups, and boards and opportunities to receive notice of Title III and other funding opportunities.

Comment: Commenters overwhelmingly expressed support for coordination between Title III and Title VI programs. Comments expressed concern regarding the lack of coordination with Title VI grantees, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how to apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed they thought the proposed language regarding coordination was too permissive. We received a comment recommending specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance on roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

Response: To make clear the responsibilities of area agencies under the Act, explicit expectations for coordination between Title III and Title VI programs are included as new provisions in this rule. The provision at § 1321.69 is complementary with the provisions for State agencies and service providers under Title III of the Act as set forth at § 1321.53 (*State agency Title III and Title VI coordination responsibilities*) and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), as well as for Title VI grantees under the Act as set forth at § 1322.31 (*Title VI and Title III coordination*). This rule makes clear that all entities are responsible for coordination, including AAAs, State agencies, service providers, and Title VI grantees. Based on the comments received, we have revised each provision to use consistent language, where appropriate. We explain the changes we have made in the following paragraphs.

We have reordered the opening paragraph in § 1321.69 as § 1321.69(a) and have reordered the subsequent paragraphs accordingly. ACL also recognizes the variability of local circumstances, resources, and needs. We appreciate the comment recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have revised the language at § 1321.69(a) to read, ''For planning and service areas where there are Title VI programs, the area agency's policies and procedures, developed in coordination with the relevant Title VI program director(s) as set forth in § 1322.13(a), must explain how the area agency's aging network, including service providers, will coordinate with Title VI programs to ensure compliance with section 306(a)(11)(B) (42 U.S.C. 3026(a)(11)(B)) of the Act.''

We have created a reordered paragraph § 1321.69(b) and have revised this provision to clarify the topics that the policies and procedures set forth in paragraph (a) ''must at a minimum address[.]'' As such, we clarify that coordination is required. We have further made edits to require how outreach and referrals will be provided to Tribal elders and family caregivers regarding services for which they may be eligible under Title III; revise ''such as'' to ''to include'' in reference to meetings, email distribution lists, presentations, and public hearings and add ''Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities,'' to the list of communication opportunities; clarify collaboration on and sharing of program information and changes to include coordinating with service providers where applicable; add how services will be provided in a trauma-informed, as well as culturally appropriate, manner; and add ''Opportunities to serve on advisory councils, workgroups, and boards, including area agency advisory councils, as set forth in § 1321.63.'' We have removed duplicate provisions that were otherwise incorporated into revised paragraph (b).

Regarding provision of Title III funding to Tribes, the amount of available Title III funding is limited to what is appropriated for such purposes. State agencies are required to distribute such funding to AAAs via an IFF in States with multiple PSAs, as required by the Act and as set forth at § 1321.49. In some States, Tribes have been designated as AAAs and receive Title III funds. Single PSA State agencies are required to distribute funds in accordance with a funds distribution plan as set forth at § 1321.51(b), and Title VI programs may receive funds under a contract or grant with a State agency in such States. State agencies and AAAs are required to establish and follow procurement policies in awarding Title III funds under the Act, which may allow for awarding of funds to Title VI grantees, Tribes, and other Tribal organizations. ACL encourages Tribes and Tribal organizations to apply to provide Title III-funded services. However, the statute does not allow for a requirement that Title III funds be provided to Title VI grantees outside of the procurement policies in place for awarding of Title III funds under the Act.

There are multiple successful examples of such coordination that ACL is committed to sharing and expanding. As such expectations were not explicitly stated in the prior regulation, we believe that the promulgation of these regulations will provide a significant opportunity to further coordination between Title III and Title VI programs, including improving ACL's monitoring of programs for compliance. ACL anticipates providing sub-regulatory guidance and technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

Subpart D—Service Requirements

§ 1321.77 Purpose of Services—Person- and Family-Centered, Trauma-Informed

New § 1321.77 clarifies that services under the Act should be provided in a manner that is person-centered and trauma-informed. Consistent with the direction of amendments to section 101 of the Act as reauthorized in 2020, recipients are entitled to an equal opportunity to the full and free enjoyment of the best possible physical and mental health, which includes access to person-centered and trauma-informed services.[257]

Comment: We received comments supporting person-centered and trauma-informed services in the regulations, consistent use of these terms throughout the regulations, and in-depth training on diversity, equity, inclusion, and accessibility being offered to every

[254] 42 U.S.C. 3027(a)(21)(A).

[255] 42 U.S.C. 3057e(a)(11).

[256] 42 U.S.C. 3057j(a)(3).

[257] 42 U.S.C. 3001.

person who provides services and programs for older adults.

Response: ACL appreciates these comments and notes that training by State agencies, AAAs, and service providers is required at § 1321.77(c). However, we defer to entities to determine the specific content of the required training.

Comment: Another commenter stressed that as part of person-centered supports and planning, assistance with activities of daily living and independent activities of daily living should be provided, with interagency and intergovernmental promotion of these services.

Response: ACL appreciates these supportive comments and notes that assistance with activities of daily living and independent activities of daily living may be provided with funds under the Act, as set forth at § 1321.85 (*Supportive services*). Further, coordination and interagency collaboration are listed as expectations under § 1321.5 (*Mission of the State agency*) and § 1321.55 (*Mission of the area agency*).

Comment: A commenter suggested edits regarding person-centered services.

Response: We appreciate this suggestion and add the following, ''Person-centered services may include community-centered and family-centered approaches consistent with the traditions, practices, beliefs, and cultural norms and expectations of older adults and family caregivers'' in § 1321.77(a).

Comment: We received other suggestions, program management recommendations, and implementation questions regarding this provision.

Response: We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

§ 1321.81 Client Eligibility for Participation

To be eligible for services under the Act, recipients must be age 60 or older at the time of service, except in the case of limited services, such as nutrition and family caregiver support services. We received inquiries, requests for technical assistance, and comments demonstrating misunderstandings among State agencies, AAAs, service providers, and others in the aging network about eligibility requirements. For example, we received feedback expressing confusion as to whether any caregivers of adults of any age are eligible to receive Title III program services, which is not allowable under the Act.

New § 1321.81 clarifies eligibility requirements under the Act and explains that State agencies, AAAs, and service providers may adopt additional eligibility requirements, if they do not conflict with the Act, the implementing regulation, or guidance issued by the Assistant Secretary for Aging.

Comment: We received comments asking for the age of eligibility for services under Title III to be lowered to allow for service to Tribal elders to coincide with the age of eligibility set by the Tribe and to allow for service to individuals of young onset of Alzheimer's disease and related dementias. We also received comment requesting an increase of the age for eligibility of service to 65 years old.

Response: The Act defines ''older individual'' in section 102(40), ''The term ''older individual'' means an individual who is 60 years of age or older.'' [258] As such we do not have the authority to modify this provision in response to comments. Title III allows for services to family caregivers of individuals of any age with Alzheimer's or related disorder at section 302(3), ''[t]he term ''family caregiver'' means an adult family member, or another individual, who is an informal provider of in-home and community care to an older individual or to an individual of any age with Alzheimer's disease or a related disorder with neurological and organic brain dysfunction,'' [259] along with service to ''older relative caregivers,'' as further defined below.

The regulation for services provided under Title VI at § 1322.3 provides the following definition, ''*Older Indians,* means those individuals who have attained the minimum age determined by the Indian Tribe for services.''

Comment: One commenter expressed concern that no requirements were set forth that address service to unlawfully present individuals.

Response: There is no requirement that recipients of services be citizens of the United States nor be lawfully present to receive services under the OAA. In September 2022, the Department of Homeland Security (DHS) finalized a rule defining the criteria it uses when determining whether a person can be denied a visa and/or legal residency because they are likely to become a ''public charge.'' Services provided under the OAA are not among those considered in determining whether a person is likely to become a ''public charge.'' [260] State agencies, AAAs, and service providers under the Act should not require that recipients of services be citizens of the United States nor be lawfully present to receive services under the Older Americans Act.

Comment: We received comment that Ombudsman program services be included among the list of exceptions in § 1321.81(a).

Response: We appreciate this comment and add (4) to read, ''Ombudsman program services, as provided in part 1324.''

Comment: We received comments asking for clarity regarding § 1321.81(a)(2). We received another comment noting that ''age 55 or older'' is redundant in § 1321.81(a)(2)(ii) and (iii), as that is a component of the definition of ''older relative caregiver.''

Response: We appreciate these comments and have revised § 1321.81(a)(2)(i) to read, ''Adults caring for older adults and adults caring for individuals of any age with Alzheimer's or a related disorder[.]'' We have also removed the redundant language in § 1321.81(a)(2)(ii) and (iii). To clarify, ''family caregiver'' does not include the following categories of individuals: (1) an individual under age 55 caring for an adult under age 60 without Alzheimer's or a related disorder; (2) an individual under age 55 caring for a child under age 18; and (3) an individual age 55 or older who is caring for a child under age 18, where the individual's relationship to the child is that of biological or adoptive parent, not including adoptive parents who are also grandparents.

Comment: We received various comments in support of this provision, as well as other suggestions, program management recommendations, and implementation questions regarding this provision.

Response: We appreciate the comments of support and decline to make further changes to this provision. We intend to address other suggestions and requests for clarification through technical assistance.

§ 1321.85 Supportive Services

New § 1321.85 clarifies the supportive services set forth in Title III, part B, section 321 of the Act, which includes in-home supportive services, access services, and legal services. It also clarifies allowable use of funds, including for acquiring, altering or renovating, and constructing multipurpose senior centers and that those funds must be distributed through

[258] *Id.* section 3001(40).

[259] 42 U.S.C. 3021(3).

[260] Public Charge Ground of Inadmissibility, 8 CFR 212.20 *et seq.*

an approved IFF or funds distribution plan, as articulated in the State plan.[261]

Comment: We received various comments noting need for the types of in-home supportive services that may be provided under this provision, including help with housework like cleaning and laundry and home maintenance and repairs. Some commenters noted that while needed, such services are not available.

Response: In-home supportive services provided under the Act may include homemaker services (to help with routine household tasks like cleaning and doing laundry) and repairs to and minor modification of homes to allow an older adult to age in place.

ACL acknowledges that the need for such services is likely to exceed the available funding under the Act. With these regulations, ACL intends to clarify how funds under the Act may be used, in coordination with the other provisions set forth at §§ 1321.27 and 1321.65 regarding identifying persons in greatest economic need and greatest social need who should be prioritized in receiving services under the Act, as well as the role of public participation in guiding how funds under the Act are used in State and area plans on aging.

Comment: We received a comment noting need for the types of access services that may be provided under this provision, including free or affordable transportation in rural areas. The commenter noted that while needed, such services are not available.

Response: Access services provided under the Act may include transportation. ACL acknowledges that the need for such services is likely to exceed the available funding under the Act. With these regulations, ACL intends to clarify how funds under the Act may be used, in coordination with the other provisions set forth at §§ 1321.27 and 1321.65 regarding identifying persons in greatest economic need and greatest social need who should be prioritized in receiving services under the Act, as well as the role of public participation in guiding how funds under the Act are used in State and area plans on aging.

Comment: Several commenters recommended changes to this section to make clear that while expenditures for multipurpose senior centers should be allowable, a multipurpose senior center is not in and of itself a service.

Response: In referencing supports which may be provided with funds under the Act, multipurpose senior centers are mentioned multiple times, including in section 301(a)(1) regarding the purpose of Title III,[262] section 303 regarding authorization of appropriations and uses of funds,[263] section 304 regarding allotment and Federal share,[264] section 306(a)(1) regarding area plans on aging,[265] and in the title of Part B, ''Supportive Services and Senior Centers.'' [266] We note that some in the aging network may implement multipurpose senior centers as a service, consistent with section 321(a),[267] which authorizes services that promote or support social connectedness and reduce negative health effects associated with social isolation and any other services necessary for the general welfare of older individuals.

The service of multipurpose senior centers may track measures such as number of visits, number of unduplicated persons served, and hours of staff/volunteer time. For the purposes of including multipurpose senior centers as an allowable expenditure of funds appropriated under Title III, part B as set forth at § 1321.71(a)(1) and an allowable access service to meet minimum adequate proportion provisions as set forth at § 1321.27(i), we consider multipurpose senior centers to be a supportive service and decline to make changes to this provision. We have made an edit at § 1321.3 (*Definitions*) to indicate ''[. . .] as used in § 1321.85, facilitation of services in such a facility.''

Comment: We received other suggestions regarding this provision, including specifying other services that may be allowable.

Response: As referenced in this provision, section 321 of the Act sets forth twenty-six types of supportive services that may be provided.[268] State agencies and AAAs also have certain flexibility to craft service definitions and requirements to reflect their specific circumstances and meet local needs. For these reasons, we decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

§ 1321.87 Nutrition Services

New § 1321.87 clarifies the nutrition services set forth in Title III, part C of the Act—which includes congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.[269] Based on experiences during the COVID–19 PHE and numerous requests for flexibility in provision of meals, we set forth that meals provided under Title III, part C–1 of the Act may be used for shelf-stable, pick-up, carry-out, drive-through or similar meals, if they are done to complement the congregate meal program and comply with certain requirements as set forth.

We also clarify that home-delivered meals may be provided via home delivery, pick-up, carry-out, or drive-through and that eligibility for home-delivered meals is not limited to those who may be identified as ''homebound,'' that eligibility criteria may consider multiple factors, and that meal participants may also be encouraged to attend congregate meals and other activities, as feasible, based on a person-centered approach and local service availability.

We specify that nutrition education, nutrition counseling, and other nutrition services may be provided with funds under Title III, parts C–1 or C–2 of the Act. As required by section 331(1), we set forth requirements to determine the frequency of meals in areas where five or more days a week of service is not feasible.[270] This provision also clarifies that funds must be distributed through an approved IFF or funds distribution plan, as articulated in the State plan.

Finally, this provision sets forth requirements for NSIP allocations. NSIP allocations are based on the number of meals reported by the State agency which meet certain requirements, as specified. State agencies may choose to receive their allocation grants as cash, commodities, or a combination thereof. NSIP funds may only be used to purchase domestically produced foods (definition included in § 1321.3) used in a meal, as set forth under the Act. We intend for this provision to answer many questions we have received regarding the proper use of funds under the NSIP.

Comment: We received many comments for individual participants in nutrition programs funded under the Act who shared what they liked about the nutrition program and their suggestions for maintaining and improving the nutrition program.

Response: We are grateful for the feedback from individual participants and will use their feedback in promulgating these regulations, as well

[261] 42 U.S.C. 3030d.

[262] 42 U.S.C. 3021(a)(1).

[263] 42 U.S.C. 3023.

[264] 42 U.S.C. 3024.

[265] 42 U.S.C. 3026(a)(1).

[266] 42 U.S.C. Ch. 35, Subch. III, Pt. B.

[267] 42 U.S.C. 3030d(a).

[268] *Id.* section 3030d.

[269] 42 U.S.C. 3030d; 42 U.S.C. 3030e; 42 U.S.C. 3030f; 42 U.S.C. 3030g.

[270] 42 U.S.C. 3030e(1).

as in considering other technical assistance.

Comment: We received comments noting a technical correction needed at § 1321.87(a)(1)(ii).

Response: We are grateful for these comments, and revise this provision to read ''Meals provided as set forth in (i) shall[.]''

Comment: We received various comments requesting improved meal presentation.

Response: ACL recognizes the importance of meals and other services provided under the Act being appealing to participants. Such services are to be person-centered, as set forth in § 1321.77. Additionally, we expect that feedback from service participants will be solicited and used to the greatest extent possible in the ongoing provision of services as set forth in § 1321.73(c). To further clarify the importance of the participant experience, we have added ''[. . .] and preferences,'' to the expectations for monitoring participant needs set forth in § 1321.73(c).

Comment: We received many comments expressing support for shelf-stable, pick-up, carry-out, drive through, ''grab and go,'' and similar options. Other commenters disagreed with broadening congregate meal program requirements, allowing for virtual congregate meals programming, and expanding the circumstances allowable for home-delivered meal service provision. We also received comment in support of groceries being included under other nutrition services.

Response: ACL appreciates the comments in support of various nutrition services and delivery options to meet the purposes and requirements of the Act. We also recognize the evolution of service models that were initiated during the COVID–19 PHE being adapted into ongoing practice. We note that while these regulations set forth the types of services that may be provided, State agencies, AAAs, and service providers will likely need to make decisions about what services are provided and any applicable limitations, due to limited resources available, the need to prioritize service to individuals in the greatest economic need and greatest social need, and other factors as set forth at § 1321.81(b).

Comment: We received a comment expressing that local program requirements hinder the nutrition program.

Response: Given the wide variation in resources, needs, and available services, ACL believes that this regulation sufficiently requires establishment of policies and procedures at the State agency, AAA, and/or service provider levels as set forth in § 1321.73(a). For consistency, we have revised § 1321.87(b) to be clear that AAAs may develop policies and procedures regarding this provision as delegated by the State agency. State agencies, AAAs, and service providers may establish additional policies and procedures, as long as they are in accordance with the Act and all applicable Federal requirements. Such additional policies and procedures should further the purposes of the Act and be consistent with a person-centered manner of service provision, as set forth at § 1321.77. Additional information on how State agencies, AAAs, and service providers have implemented various policies and procedures is available at ACL's Nutrition and Aging Resource Center: *https://acl.gov/senior-nutrition.*

Comment: We received many comments noting the importance of the nutrition programs provided under the Act, as well as culturally appropriate meals, medically tailored meals, fresh produce, and locally sourced food. Other commenters noted support for the clarifications included in this provision.

Response: We appreciate these comments.

Comment: We received comments asking to allow State agencies and/or AAAs to make decisions on whether to provide shelf-stable, pick-up, carry-out, drive-through, or similar meals with Title III, part C–1 funds as set forth in § 1321.87(a)(1)(i), without AAAs requiring the State agency's approval, the provision of such meals statewide, or demonstration that such meals complement the congregate meal program.

Response: Congress appropriates separate funds for congregate and home-delivered meals, as set forth by the Act. The State agency is responsible for policies and procedures to implement programs under the Act, as well as for making the decision about whether or not to permit the provision of shelf-stable, pick-up, carry-out, drive-through, or similar meals. The State agency is responsible for ensuring program requirements are met, including reporting to ACL. We note that nothing in this provision requires this option to be offered statewide; if State agencies choose to permit the provision of these types of meals using Title III, part C–1 funds, that decision must be incorporated into the applicable State and area plans. For these reasons, we decline to amend the requirements in the final rule. We encourage that if this option is pursued, the State agency and area agencies use streamlined processes for documenting the use of this option in State and area plans, for monitoring the use of this option, and for reporting on the use of this option.

Comment: We received comments asking to modify the 20 percent limit on shelf-stable, pick-up, carry-out, drive-through, or similar meals with Title III, part C–1 funds as set forth in § 1321.87(a)(1)(ii) and to clarify if the 20 percent limit is to be calculated based on the original allocation to the State or after completion of any transfers.

Response: Congress appropriates separate funds for congregate and home-delivered meals, as set forth by the Act. ACL believes that offering a limited number of shelf-stable, pick-up, carry-out, drive-through, or similar meals to complement the congregate meals program and meet unique needs of program participants in greatest economic need and greatest social need is allowable and aligned with the purpose of these funds as appropriated. Based on the feedback we received, we believe that a limit of up to 25 percent, to be calculated based on the final amount of the Title III, part C–1 award after all transfers as set forth in § 1321.9(c)(2)(iii), is a reasonable approach to provide some flexibility while retaining the important aspects of the congregate meals program. As a result, ACL has modified the provisions at § 1321.87(a)(1)(ii)(A) to read ''Not exceed 25 percent of the funds expended by the State agency under Title III, part C–1, to be calculated based on the amount of Title III, part C–1 funds available after all transfers as set forth in § 1321.9(c)(2)(iii) are completed;'' and at § 1321.87(a)(1)(ii)(B) to read, ''Not exceed 25 percent of the funds expended by any area agency on aging under Title III, part C–1, to be calculated based on the amount of Title III, part C–1 funds available after all transfers as set forth in § 1321.9(c)(2)(iii) are completed.''

Comment: Several commenters asked ACL to remove distinctions between funding for congregate meals and home-delivered meals. We also received comments expressing hope that if another pandemic occurs that carry-out and similar meals would be allowed without the 20% restriction.

Response: Congress appropriates separate funds for congregate and home-delivered meals, as set forth by the Act. ACL is unable to make changes to statutory provisions. As they did during the COVID–19 PHE through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Congress may also enact measures that allow for flexible use of funds for specific disaster situations. Should another pandemic or large-scale disaster occur, ACL set forth at §§ 1321.99 and 1321.101 additional

flexibilities that could be exercised. ACL's Nutrition and Aging Resource Center at *https://acl.gov/senior-nutrition* provides many useful resources for how existing OAA flexibilities can be utilized to manage emergencies.

Comment: We received request for clarification regarding meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the OAA.[271]

Response: We appreciate this inquiry and confirm that meals provided with funds under the Act must meet the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339.[272] We have revised § 1321.87(a)(1) and (2) to read ''[. . .] are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 (42 U.S.C. 3030g–21) provided[.]''

Comment: Some commenters had questions on the expectations for nutrition education and nutrition counseling, including if nutrition education and nutrition counseling may also be provided with funding under Title III, part B, if these services may be provided to individuals not receiving meal services, and whether the requirements must adhere to the Nutrition Care Process of the Academy of Nutrition and Dietetics.

Response: ACL differentiates and sets forth requirements for nutrition education and nutrition counseling at § 1321.87(a)(3) and (4), respectively. We acknowledge that due to various issues, including limited resources and local variation, implementation decisions that are consistent with the Act and all applicable Federal requirements are determined by the State agency, AAA, and/or service provider. The provisions in this rule allow for nutrition education and nutrition counseling to be provided in various modalities, including telephonic and virtual delivery to expand access to the services. Nutrition education content is to be consistent with the Dietary Guidelines for Americans; accurate, culturally sensitive, regionally appropriate, and considerate of personal preferences; and overseen by a registered dietitian or individual of comparable expertise, as set forth in section 339(1) of the OAA.[273]

Section 321 of the Act sets forth supportive services that may be provided with funds under Title III, part B of the Act, including ''(17) health and nutrition education services, including information concerning prevention, diagnosis, treatment, and rehabilitation of age-related diseases and chronic disabling conditions;'' [274] and ''(26) any other services necessary for the general welfare of older individuals; if such services meet standards prescribed by the Assistant Secretary and are necessary for the general welfare of older individuals.'' [275] Expectations for nutrition education or nutrition counseling that are provided as supportive services are set forth in this rule at § 1321.85. The Act and these provisions do not require individuals receiving nutrition education and nutrition counseling to receive meal services, although nutrition education and nutrition counseling should be provided based on the needs of meal participants. For example, eligible individuals who have significant or multiple dietary restrictions for which Title III, part C meals may not be appropriate (*e.g.,* medically required tube feedings, severe allergies which cannot be reasonably accommodated), may participate in nutrition education or nutrition counseling. The Academy of Nutrition and Dietetics does not require the Nutrition Care Process approach for documenting nutrition counseling sessions. Therefore, we have removed the requirement to follow the Nutrition Care Process approach from § 1321.87(a)(4) and have made other minor edits in this provision for consistency.

Comment: We received a request for clarification if § 1321.87(d)(1)(i) means that meals provided to eligible individuals receiving family caregiver support services under the Act could be reported by the State agency for use in determining the State agency's NSIP allocation.

Response: Yes, we confirm this is allowable, if reported in alignment with NSIP reporting requirements, as set forth by the Assistant Secretary for Aging.

Comment: We received comment requesting clarification that a voluntary contribution made by an individual receiving nutrition program services under the Act is not a ''payment'' for purposes of section 170(e)(3) of the Internal Revenue Code, which provides for deductions of qualified contributions of food inventory.

Response: Issues relating to the Internal Revenue Code and requirements relating to United States Department of Agriculture (USDA)-donated foods are outside the scope of this regulation. While ACL does not consider voluntary contributions under the Act to be payments, the ACL-funded National Resource Center on Nutrition & Aging fact sheet on Partnerships with Foodbanks and Other USDA Programs at *https://acl.gov/sites/default/files/nutrition/Partnerships-with-Foodbanks-and-Other-United-States-Department-of-Agriculture-non-COVID_508.pdf* may be of interest in working with other programs and partners.

Comment: We received comments requesting clarity on the State agency's role regarding provision of meals less than five days per week.

Response: In response to this request for clarification, we have revised the provision at § 1321.87(b) to be clear regarding the State agency's role. The State agency must establish policies and procedures that define a nutrition project and include how nutrition projects will provide meals and nutrition services five or more days per week in accordance with the Act. The definition established by the State agency must consider the availability of resources and the community's need for nutrition services as described in the State and area plans.

Comment: We received various comments suggesting requirements that should be used for eligibility determination, speed of service initiation, reporting, and other program management topics.

Response: Given the wide variation in resources, needs, and available services, ACL believes that this regulation sufficiently requires establishment of policies and procedures at the State agency, AAA, and/or service provider levels as set forth in § 1321.73(a). State agencies, AAAs, and service providers may establish additional policies and procedures, as long as they are in accordance with the Act and all applicable Federal requirements. Additional information on how State agencies, AAAs, and service providers have implemented various policies and procedures is available at ACL's Nutrition and Aging Resource Center: *https://acl.gov/senior-nutrition.*

We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

§ 1321.89 Evidence-Based Disease Prevention and Health Promotion Services

New § 1321.89 clarifies evidence-based disease prevention and health promotion services set forth in Title III, part D of the Act, and states that programs funded under this provision must be evidence-based, as required in the Act as amended in 2016. It also

[271] 42 U.S.C. 3030g–21.

[272] *Id.*

[273] 42 U.S.C. 3030g–21(1).

[274] 42 U.S.C. 3030d(a)(17).

[275] *Id* section 3030d(a)(26).

clarifies allowable use of funds and that those funds must be distributed through an approved IFF or funds distribution plan, as articulated in the State plan.

Comment: We received a comment that programs that are considered to be evidence-based often do not include Native American populations. An absence of an evidence-base for programs addressing Native American populations results in further inequity and lack of service to populations in need of disease prevention and health promotion services. The commenter recommended that promising practices be allowed to serve populations where an evidence base is lacking. We received other comments that provision of evidence-based services is challenging in rural and frontier communities given the small amount of funding appropriated under the Act.

Response: ACL appreciates this comment. Section 361 of the Act requires evidence-based programs and allows the Assistant Secretary for Aging to provide technical assistance on the delivery of such services in different settings and for different populations.[276] ACL recently commissioned and is evaluating a study of the Evidence-Based Review Process to examine the existing review process and explore opportunities that would enhance the review process so it is equitable and responsive to program needs across different populations and settings, including Native American populations. The ACL-funded National Chronic Disease Self-Management Education Resource Center and National Falls Prevention Resource Center hold a bi-monthly Evidence-Based Program Advisory Council meeting that includes members of the National Resource Center on Native American Aging and Native American leadership and organizations on the unique needs of Native American populations in evidence-based programming. The ACL-supported Evidence-Based Program Registry lists health promotion and disease prevention programs that may be adapted and culturally tailored for different populations and settings. More information is available at *https://acl.gov/programs/health-wellness/disease-prevention.* Additional information on how State agencies, AAAs, and service providers can engage rural and frontier communities is available at the ACL-funded National Chronic Disease Self-Management Education Resource Center and National Falls Prevention Resource Center. ACL also intends to provide technical assistance regarding providing services under Title III, part D of the Act.

Comment: Some commenters asked what expenses may be covered with funds provided under Title III, part D of the Act.[277]

Response: ACL appreciates this concern and confirms that funds provided under Title III, part D of the Act may be used for reasonable, allowable, and allocable expenses necessary for the direct provision of evidence-based disease prevention and health promotion services, subject to appropriate procurement and other policies and procedures. This may include information technology systems; devices, such as laptop or tablet computers and smartphones; program licensing fees; program materials and supplies; and training of staff and volunteers.

Comment: We received comments recommending education and prevention activities to be considered as evidence-based programming. Some commenters suggested strategic partnerships with local health and public health entities. Other commenters noted challenges with meeting evidence-based program expectations. We received other suggestions, program management recommendations, and implementation questions regarding this provision.

Response: ACL recently commissioned and concluded an evaluation study of the Evidence-Based Review Process to examine the existing review process and explore opportunities that would enhance the review process. Activities alone may not qualify as evidence-based programs, as evidence-based programs must demonstrate improved the health and well-being or reduce disease, disability and/or injury among older adults over time. Additional information on how States, AAAs, and service providers have implemented various policies and procedures is available at the ACL-funded National Chronic Disease Self-Management Education Resource Center[278] and National Falls Prevention Resource Center.[279] We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

§ 1321.91 Family Caregiver Support Services

In the 2000 amendments to the Act (Pub. L. 106–501), Congress added Title III, part E to set forth allowable expenses for family caregiver support services. New § 1321.91 clarifies the family caregiver support services available under the Act and eligibility requirements for respite care and supplemental services, as set forth in section 373(c)(1)(B).[280] It also clarifies allowable use of funds and that those funds must be distributed through an approved IFF or funds distribution plan, as articulated in the State plan.

Comment: One commenter expressed support for clear, consistent, and durable regulations regarding the National Family Caregiver Support Program. Other commenters stated support for regulations regarding caregiver support programs, including caring for someone with Alzheimer's disease or related dementia and the special subset of caring for someone with young onset of Alzheimer's or related dementia. Several commenters also urged ACL to align this rule with the National Strategy to Support Family Caregivers.

Response: We appreciate this support. ACL is committed to aligning this rule with the National Strategy to Support Family Caregivers, as appropriate.

Comment: One commenter requested ACL clarify the meaning of ''limited basis'' in the provision of supplemental services. Other commenters expressed support for the flexibility for State agencies and AAAs to determine ''limited basis.''

Response: The rule includes the following, ''State agencies and AAAs shall define ''limited basis'' for supplemental services and may consider limiting units, episodes or expenditure amounts when making this determination.'' ACL agrees this provides sufficient guidance for State agencies and AAAs, while maintaining flexibility to respond to local needs and circumstances.

Comment: We received comment expressing concern in providing all five services statewide given direct care worker shortages, limited funding, and other challenges.

Response: ACL appreciates the challenges faced by the aging network in providing services across the country. ACL's expectation is that there is a plan for all five services to be available in each PSA in each State with multiple

[276] 42 U.S.C. 3030m(a).

[277] *Id.* section 3030m; 42 U.S.C. 3030n.

[278] *National CDSME Resource Center for Professionals,* The Nat'l Council on Aging, *https://www.ncoa.org/professionals/health/center-for-healthy-aging/national-cdsme-resource-center* (last visited October 13, 2023).

[279] *National Falls Prevention Resource Center for Professionals,* The Nat'l Council on Aging, *https://www.ncoa.org/professionals/health/center-for-healthy-aging/national-falls-prevention-resource-center* (last visited Oct. 13, 2023).

[280] 42 U.S.C. 3030s–1(c)(1)(B).

PSAs, or that there is a plan for statewide availability of services for single PSA States, subject to availability of funds under the Act. This plan may include provision of services with funding sources other than the OAA, based on the resources and needs of local communities. For clarity, we have revised (b) to state, ''State agencies shall ensure that there is a plan to provide each of the services authorized under this part in each planning and service area, or statewide in accordance with a funds distribution plan for single planning and service area States, subject to availability of funds under the Act.''

Comment: Some commenters expressed confusion whether the term ''family caregiver'' also includes older relative caregivers, and if so, recommended it be clear that the same eligibility requirements apply.

Response: Family caregiver support services listed in § 1321.91(a)(1) through (5) may be provided to family caregivers, including older relative caregivers. In other words, ''older relative caregivers'' is a subset of ''family caregivers.'' In § 1321.3, this rule includes a definition of ''family caregiver'' that includes older relative caregivers, as well as a definition of ''older relative caregiver,'' since the Act includes requirements specific to services provided to non-older relative caregivers at section 373(c)(1)(B).[281] This rule also includes provisions at § 1321.83(c) that state service priorities as set forth in at section 373(c)(2).[282] In the rule, we consistently use the term ''family caregiver,'' and we use the term ''older relative caregiver'' only when this level of specificity is needed. For these reasons, we decline to modify the eligibility and priority provisions set forth in this rule.

Comment: One commenter expressed concern for an increased threshold that limits assistance to a caregiver providing support to someone with at least two limitations in activities of daily living instead of at least two limitations in activities of daily living or independent activities of daily living.

Response: This provision does not represent a change from what is required by section 373(c)(1)(B) of the Act.[283]

Comment: One commenter expressed support for the inclusive definition of family caregiver to unmarried partners, friends, or neighbors, but expressed that the use of ''family'' may deter eligible caregivers because they do not consider themselves family. The commenter recommended consideration of terms such as ''informal caregiver,'' ''natural support caregiver,'' or ''trusted personal caregiver.''

Response: We appreciate this comment and encourage State agencies, AAAs, and service providers to use terms that will best reach individuals in need of family caregiver support services in their outreach, marketing, and service delivery efforts.

Comment: We received comment requiring a correction to remove an extra word in § 1321.91(c).

Response: We are grateful to the commenters who noted this correction and have revised this provision to read, ''[. . .] the individual for whom they are caring must be determined to be functionally impaired[.]''

Comment: We received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding evidence-informed or evidence-based caregiver assessments that may be used.

Response: We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

§ 1321.95 Service Provider Title III and Title VI Coordination Responsibilities

Consistent with § 1321.53 (*State agency Title III and Title VI coordination responsibilities*) and § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), new § 1321.95 sets forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in sections 306(a)(11)(B),[284] 307(a)(21)(A),[285] 614(a)(11),[286] and 624(a)(3)[287] of the Act. We clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees. The section complements the language at § 1321.53 for State agencies and § 1321.69 for AAAs and includes those requirements specific to service providers.

Comment: Commenters overwhelmingly expressed support for coordination between Title III and Title VI programs. Comments expressed concern regarding the lack of coordination with Title VI grantees, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how to apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act to develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed they thought the proposed language regarding coordination was too permissive. We received a comment recommending specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance on roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

Response: To make clear the responsibilities of service providers under the Act, explicit expectations for coordination between Title III and Title VI programs are specified in this rule. The provision at § 1321.95 is complementary with the provisions for State agencies and area agencies under Title III of the Act as set forth at § 1321.53 (*State agency Title III and Title VI coordination responsibilities)* and § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), as well as for Title VI grantees under the Act as set forth at § 1322.31 (*Title VI and Title III coordination*). For clarity, we revise each provision to use consistent terminology, where appropriate. We explain the changes made in the following paragraphs.

We have reordered the opening paragraph in § 1321.95 as § 1321.95(a), and we have reordered the subsequent paragraphs accordingly. ACL also recognizes the variability of local circumstances, resources, and needs. We appreciate the comment recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have revised the language at reorganized § 1321.95(a) to read, ''For locations served by service providers under Title III of the Act where there are Title VI programs, the area agency on aging's and/or service provider's policies and procedures, developed in coordination with the relevant Title VI program director(s), as set forth in § 1322.13(a), must explain how the service provider will coordinate with Title VI programs.''

We have created a reordered paragraph § 1321.95(b), and we have revised this provision to clarify the

[281] *Id.* section 3030s–1(c)(1)(B).

[282] *Id.* section 3030s–1(c)(2).

[283] *Id.* section 3030s–1(c)(1)(B).

[284] 42 U.S.C. 3026(a)(11)(B).

[285] 42 U.S.C. 3027(a)(21)(A).

[286] 42 U.S.C. 3057e(a)(11).

[287] 42 U.S.C. 3057j(a)(3).

topics that the policies and procedures set forth in paragraph (a) ''must at a minimum address[.]'' As such, we clarify that coordination is required. We have further made edits to specify how the service provider will provide outreach and referrals to tribal elders and family caregivers regarding services for which they may be eligible under Title III; clarify communication opportunities to include meetings, email distribution lists, and presentations; add how services will be provided in trauma-informed, as well as culturally appropriate, manner; and add ''Opportunities to serve on advisory councils, workgroups, and boards.''

As expectations for this type of coordination are not explicitly incorporated in the existing regulation, we believe that the promulgation of this final rule will provide a significant opportunity to further coordination between Title III and Title VI programs, including improving ACL's monitoring programs for compliance. ACL anticipates providing technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

Subpart E—Emergency and Disaster Requirements

Based on input from interested parties and our experience, particularly during the COVID–19 PHE, we add Subpart E—Emergency and Disaster Requirements (§§ 1321.97–1321.105) to explicitly set forth expectations and clarify flexibilities that are available in a disaster situation. The previous subpart E (*Hearing Procedures for State Agencies*) is no longer necessary since we redesignate and cover the provisions in subpart E in subpart B (*State Agency Responsibilities*) of the final rule.

Although the previous regulation mentions the responsibilities of service providers in weather-related emergencies (§ 1321.65(e)), existing guidance on emergency and disaster requirements under the Act is limited and does not contemplate the evolution of what may constitute an ''emergency'' or ''disaster'' or how they may uniquely affect older adults.

If a State or Territory receives a major disaster declaration (MDD) by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act,[288] this MDD triggers certain disaster relief authority under section 310 of the Act.[289] The COVID–19 PHE for example, demonstrated the devastating impact of an emergency or disaster on the target population who receive services under the Act. During the COVID–19 PHE, all States and Territories received a MDD, and we provided guidance on flexibilities available under the Act while a MDD is in effect to meet the needs of older adults, such as those related to meal delivery systems, methods for conducting well-being checks, delivery of pharmacy, grocery, and other supplies, and other vital services.

Throughout the COVID–19 PHE, we received inquiries and feedback that demonstrated a need for clarity on available flexibilities in an emergency. RFI and NPRM respondents also provided substantial feedback regarding limitations and the need for additional guidance and options for serving older adults during emergencies and disasters. Multiple RFI respondents noted that older adults and their service providers may be impacted by a wide range of emergencies and disasters—including natural, human-caused, climate-related, and viral disasters—and that prior regulatory guidance did not provide State agencies, area agencies, and service providers the flexibility necessary to adequately plan for emergency situations, as contemplated by the Act. Accordingly, they sought an expansion of the definition of ''emergency'' that better reflected their realities regarding service delivery. RFI and NPRM respondents also sought guidance on numerous aspects of program and service delivery during an emergency, such as maintaining flexibilities in meal and other service delivery introduced in response to COVID–19 PHE, increased flexibility in transferring funds, allowable spending on disaster mitigation supplies, and providing mental health services to older adults who experience disaster-related trauma. RFI respondents also asked for regulatory language describing what is expected of State agencies, area agencies, and service providers in an emergency to allow for the development of better emergency and disaster preparedness plans at State and local levels.

We considered various approaches in developing this new section. Certain flexibilities, such as allowing the use of Title III, part C–2 funds which are allocated to home-delivered meals for shelf-stable, pick-up, carry-out, drive-through, or similar meals, constitute innovative ways to deliver services that could be allowable on a regular basis within the parameters of Title III, part C–2 and without any special authorization by ACL during an emergency. Those flexibilities have been incorporated where applicable in the revised regulation for clarification purposes, for example in § 1321.87(a)(2), which addresses carry-out and other alternatives to traditional home-delivered meals. We are limited by the Act in the extent to which other flexibilities may be allowed. For example, a MDD is required for a State agency to be permitted, pursuant to section 310(c) of the Act, to use Title III funds to provide disaster relief services, which must consist of allowable services under the Act, for areas of the State where the specific MDD is authorized and where older adults and family caregivers are affected.[290]

We also recognize that during an event which results in a MDD, such as the COVID–19 PHE, statewide procurement or other direct expenditures by the State agency may be critical to meeting the mission of the Act. Based on our experience in responding to the COVID–19 PHE, we discuss certain options to be available to State agencies to expedite expenditures of Title III funds while a MDD is in effect, such as allowing a State agency to procure items on a statewide level, subject to certain terms and conditions.

We have administrative oversight responsibility with respect to the expenditures of Federal funds pursuant to the Act. Accordingly, in addition to the flexibilities we allow in this section, we are compelled to list requirements with respect to these flexibilities, such as the submission of State plan amendments by State agencies when they intend to exercise any of these flexibilities, as well as reporting requirements.

Comment: Commenters overwhelmingly expressed support for emergency and disaster preparedness and response plans, as well as clearly defined expectations and requirements before, during, and after any natural disaster.

We received other suggestions, program management recommendations, and implementation questions regarding this provision, including allowable provision of goods and services in disaster situations, establishing registries of at-risk individuals, ensuring accessible and effective communications during emergencies and disasters, and connecting with public health departments, emergency response organizations, and other long-term services and supports programs and providers.

Response: We appreciate these comments. Other than the changes specified in the subsequent paragraphs,

[288] Public Law 100–707; 42 U.S.C. 5121–5207.

[289] 42 U.S.C. 3030.

[290] *Id.* section 3030(c).

we decline to make further changes to the provisions under subpart E and intend to address other suggestions, program management recommendations, implementation questions, and requests for clarification through technical assistance.

§ 1321.97 Coordination With State, Tribal and Local Emergency Management

New § 1321.97 states that State agencies and AAAs must establish emergency plans, per sections 307(a)(28) [291] and 306(a)(17) of the Act,[292] respectively, and this section specifies requirements under the Act that these plans must meet. While the Act requires emergency planning by State agencies and AAAs, the Act provides limited guidance regarding emergency planning. We also include in this section additional guidance in connection with the development of sound emergency plans (such as requirements for continuity of operations planning, taking an all-hazards approach to planning, and coordination with Tribal emergency management and other agencies that have responsibility for disaster relief delivery).

Comment: We received comments in support of this provision, including specifying coordination with Tribal emergency management and having policies and procedures in place at all levels of the aging network to ensure minimal disruptions to services. We received comment requesting that emergencies include climate-related and human-caused disasters. Another commenter recommended the definition of ''all-hazards'' be deferred to the State and that this be specified.

Response: ACL appreciates these comments of support and notes that the regulation specifies an ''all-hazards'' approach. ACL intends that includes climate-related, weather-specific, and other natural and human-caused disasters, specific to the determination of likely ''all-hazards'' by the State agency and AAAs.

Comment: One commenter recommended that service providers under the Act be included among those with whom State agencies and AAAs coordinate.

Response: We appreciate this recommendation and have made revisions at § 1321.97(a)(1)(ii), (a)(3), and (b)(2) to incorporate service providers under the Act.

[291] 42 U.S.C. 3027(a)(28).

[292] 42 U.S.C. 3026(a)(17).

§ 1321.99 Setting Aside Funds To Address Disasters

New § 1321.99 describes the parameters under which State agencies may set aside and use funds during a MDD, per section 310 of the Act.[293]

This section also clarifies that State agencies may specify that they are setting aside Title III funds for disaster relief in their IFF or funds distribution plan. It provides direction as to the process a State agency must follow in order to award such funds for use within all or part of a PSA covered by a specific MDD where Title III services are impacted, as well as requirements with respect to the awarding of such funds.

Comment: We received comments supporting the proposed options for State agencies to address disasters as set forth. We received comments expressing concern regarding timeframes that apply, recommending limitations to proposals to allow State agencies to set aside funds, or opposing this proposed provision. Other commenters recommended that State agencies be required to consult with AAAs prior to exercising this option. Another commenter offered an alternate approach of requiring a mandatory input period or having a provision for a AAA network appeal of the State agency's plan. One commenter asked for this option to be available for State-declared disasters or for additional flexibility for State agencies to select the best method for setting aside funds.

Response: ACL agrees that the ideal service delivery mechanism, as set forth by the Act, is for regular service provision through AAAs, using an approved IFF, or for single PSA States to use their approved funds distribution plan. However, we recognize that based on our experience during the COVID–19 PHE and in certain other disaster situations, circumstances may not allow for the timely and needed delivery of services to older adults and family caregivers. For example, during the COVID–19 PHE supply chain issues occurred relatively quickly and smaller local programs and providers were at a disadvantage in procuring food, personal protective equipment, and other supplies in comparison to a larger State agency's procurement options. It is also possible that a natural disaster might result in one or more AAAs or service providers being unable to function. Requiring a mandatory input period may not allow for action to be taken in the timeframe an emergency may necessitate. We recognize that during an event which results in a MDD, statewide procurement or other direct expenditures by the State agency may be critical to meeting the mission of the Act. Therefore, we propose certain options to be available to State agencies to expedite expenditures of Title III funds only in exceptional circumstances during a MDD incident period, as set forth in paragraph (a) of this provision. ACL sought to balance maintenance of the AAAs' role with the need for expedited action in extreme circumstances.

To make clear the requirements that apply in exercising this flexibility, we have specified that up to five percent of the total Title III allocation may be used if specified in the State agency's approved IFF, funds distribution plan, or with prior approval from the Assistant Secretary for Aging. We have removed the redundant language regarding submitting a State plan amendment at § 1321.99(b)(1) and have revised the remaining items under (b) accordingly. We have also revised newly ordered § 1321.99(b)(1) to read that the set aside funds that are awarded under this provision must comply with the requirements under § 1321.101. The provision at reordered § 1321.101(b)(3)(iii)(B) requires consultation with AAAs prior to exercising this flexibility. Further, the provision at § 1321.101(b)(3)(iii)(C) requires use of set aside funding for services provided through AAAs and other aging network partners to the extent reasonably practicable.

To provide appropriate checks on this flexibility, ACL set forth the following limitations in § 1321.99 and § 1321.101: (1) this flexibility may only be exercised under a MDD, (2) up to five percent of the State agency's total Title III allocation or with prior approval of the Assistant Secretary for Aging may be set aside, (3) a State agency must submit a State plan amendment not requiring prior approval detailing various information regarding their use of such a flexibility, (4) the State agency must use such funding for services provided through AAAs and other aging network partners to the extent reasonably practicable in the judgement of the State agency, (5) the State agency must report on the clients and units served, and services provided with such funds, and (6) if funds are set aside for this purpose, the State agency must have policies and procedures in place to award the funds through the IFF or funds distribution plan if the funds are not awarded within 30 days of the end of the fiscal year in which the funds were received, as set forth at § 1321.99(b)(2).

[293] 42 U.S.C. 3030.

As set forth in § 1321.31(b) and this provision, the State plan amendment required when using funds set aside to address disasters does not require prior approval by the Assistant Secretary for Aging. ACL intends this requirement to facilitate transparency and communication in times of emergency and disaster and does not intend for response times to be hindered. When a State agency obligates funding under this provision, they should submit a State plan amendment to include the specific entities receiving such funds; the amount, source, and intended use for such funds; and other justification of the use of these funds. ACL does not find this expectation to be overly burdensome.

As a note, funds awarded within 30 days of the end of the fiscal year in which the funds were received may have a project period that extends to the length of the State agency's award, subject to the State agency's policies and procedures. For example, if FY 2024 funds set aside were not used under this provision, they would need to be awarded through the IFF or funds distribution plan by August 31, 2024. They could have a project period ending up to September 30, 2025, subject to the State agency's policies and procedures. As funds provided under Title III of the Act typically have a project period of two years, ACL believes this provides sufficient time for AAAs and service providers to use the funds. ACL encourages the State agency, AAAs, and service providers to be in communication regarding the status of and expectations for use of these funds. We have added the cross-references for the IFF provision (§ 1321.49) and funds distribution plan (§ 1321.51(b)) to § 1321.99(b)(2) for clarity.

Additionally, use of the flexibility set forth at § 1321.99 is not required, and some State agencies may elect not to pursue this option given limited availability of funds or for other reasons. Other State agencies may provide for emergency and disaster preparedness or response through funds awarded through their existing IFFs or funds distribution plans. This provision offers an opportunity for State agencies to consult with AAAs, service providers, and the general public prior to setting aside funds to address disasters. We believe that as set forth, these provisions provide the appropriate balance of flexibility to State agencies during disaster-related emergencies, and decline to make further changes at § 1321.99.

§ 1321.101 Flexibilities Under a Major Disaster Declaration

New § 1321.101 describes disaster relief flexibilities available pursuant to Title III under a MDD to provide disaster relief services for affected older adults and family caregivers. Recognizing that there is no required period of advance notice of the end of a MDD incident period, the final rule allows State agencies up to 90 calendar days after the end of a MDD incident period to obligate funds for disaster relief services or additional time with prior approval from the Assistant Secretary for Aging. We also recognize that during an event which results in a MDD, such as the COVID–19 PHE, Statewide procurement or other direct expenditures by the State agency may be critical to meeting the mission of the Act. Based on our experience in responding to the COVID–19 PHE, we set forth additional options to be available to State agencies to expedite expenditures of Title III funds while under a MDD, including allowing a State agency to procure items on a statewide level and allowing a State agency to allocate a portion of its State plan administration funds (not to exceed five percent of the total Title III grant award) to a PSA covered under a MDD to be used for direct service provision without having to allocate the funds through the IFF or funds distribution plan. We selected a cap of five percent as State agencies are allowed under section 308(b)(2) [294] of the Act to apply the greater of $750,000 or five percent of the total Title III grant award to State plan administration. For example, at the beginning of the COVID–19 PHE, we provided flexibilities where State agencies were able to provide some direct services, like food boxes, to areas in the State that were not able to access needed food for older adults and their caregivers. This flexibility allowed State agencies to quickly provide needed access to food for vulnerable populations where access was severely limited at a local level. The terms and conditions that will apply to these flexibilities also are set forth in this section, such as requirements to submit State plan amendments when a State agency intends to exercise such flexibilities (such amendments are to include the specific entities receiving the funds, the amount, the source, the intended use for the funds, and other justification for the use of the funds) and reporting requirements.

We received many comments in response to the RFI and NPRM asking that various flexibilities allowed during the COVID–19 PHE remain in place permanently. We are limited by the Act in the extent to which flexibilities may be allowed. For example, a MDD is required in order for a State agency to be permitted, pursuant to section 310(c) [295] of the Act, to use Title III funds to provide disaster relief services (which must consist of allowable services under the Act) for areas of the State where the specific MDD is authorized and where older adults and family caregivers are affected, and the Act contains limitations on the transfer of Title III funds among the various parts of Title III. Flexibility was provided for 100 percent of transfer of Title III nutrition services funds through separate legislation, the CARES Act, which is limited to the period of the declared Public Health Emergency for COVID–19.

Comment: Many commenters expressed support for allowing flexibility in the use of funds as outlined in this provision. Some commenters agreed with the timeframe proposed in § 1321.101(g). Other commenters expressed concern about the feasibility of fully obligating funds under the proposed timeline. We received one comment requesting that funds provided for the Ombudsman program under part 1324, subpart A, be exempt from use under these flexibilities. One commentor asked for clarification regarding the five percent amount of State plan administration that the State agency may use and the five percent amount for direct expenditures and/or acting to procure items on a statewide level that the State agency may use. Other commenters expressed confusion regarding the intended use of these provisions.

Response: We appreciate these comments and have made edits to improve the clarity of this provision. We have created new paragraphs (b) and (c) and have redesignated the subsequent provisions. In paragraph (b) we have specified the flexibilities a State agency may exercise under a MDD.

Through § 1321.101(b), ACL intends to provide three distinct flexibilities that a State agency may exercise pursuant to a MDD. Section 1321.101(b)(1) allows any portion of open grant awards funds to be used for disaster relief services. For example, during the MDD for the COVID–19 PHE, this allowed AAAs and service providers to use funds originally provided for congregate meals under Title III, part C–1 of the Act to be used for home-delivered meals and other purposes that, at the time, would

[294] 42 U.S.C. 3028(b)(2).

[295] 42 U.S.C. 3030(c).

otherwise have been unallowable absent a MDD.

Secondly, § 1321.101(b)(2) permits the State agency to redirect and use its State plan administration funding for direct service provision. For clarity, we have revised this provision to state, ''Awarding portions of State plan administration, up to a maximum of five percent of the Title III grant award or to a maximum of the amounts set forth at § 1321.9(c)(2)(iv), for use in a planning and service area[.]''

Thirdly, § 1321.101(b)(3) allows for the State agency's awarding of funds set aside to address disasters, as set forth in § 1321.99, pursuant to a major disaster declaration incident period. This provision is in addition to and separate from the provision at § 1321.101(b)(2). For clarity, we further specify how the State agency may use the set aside funds. Section 1321.101(b)(3)(i) provides for awarding of funds to an area agency serving a PSA covered in whole or in part under a MDD without allocation through the IFF; § 1321.101(b)(3)(ii) provides for awarding of funds to a service provider, in single PSA States, without allocation through the funds distribution plan; and § 1321.101(b)(3)(iii) provides for the State agency to use funds for direct service provision, direct expenditures, and/or procurement of items on a statewide level, subject to requirements as specified in § 1321.101(b)(3)(iii)(A) through (D).

ACL recognizes the importance of the Ombudsman program in responding to residents of long-term care facilities in times of disasters and other emergencies. ACL also recognizes that there may be times when the Ombudsman program is not able to fully use its funding during an emergency. The flexibilities described in this provision may allow a State agency to meet urgent, time sensitive needs of older adults and family caregivers, including residents of long-term care facilities. However, in recognition of the importance of proper coordination and communication between the State agency and the Ombudsman program, we have revised § 1321.101(b)(3)(iii)(B) and (f) to better incorporate the Ombudsman program.

We added a new paragraph (c) to specify the State plan amendment requirements that apply. The subsequent provisions are reordered. Section 1321.101(c) requires the State agency to submit a State plan amendment as set forth in § 1321.31(b) to justify its use of funds and to provide transparency about the use of funding flexibilities. State plan amendments required under § 1321.31(b) do not require prior approval by the Assistant Secretary for Aging. In light of commenter concerns about the timeliness of awarding funds and submitting the State plan amendment, we have revised § 1321.31(b) to clarify timeline for submission of such State plan amendments whenever necessary and within 30 calendar days of the action(s) listed in the provision.

The flexibilities under this provision enable State agencies and AAAs to provide immediate response in a disaster situation. Extending this timeframe would not be aligned with the urgent response time expected during disaster response. However, we recognize that additional time to obligate funds may be appropriate under certain circumstances with prior approval from the Assistant Secretary for Aging, as included in the proposed rule.

§ 1321.103 Title III and Title VI Coordination for Emergency and Disaster Preparedness

Section 1321.53 (*State agency Title III and Title VI coordination responsibilities),* § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), set forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in the Act sections 306(a)(11)(B),[296] 307(a)(21)(A),[297] 614(a)(11),[298] and 624(a)(3).[299] New § 1321.103 clarifies that Title III and Title VI coordination should extend to emergency and disaster preparedness planning, response, and recovery.

Comment: We received comment in support of this provision. We also received recommendation that any entities involved in provision of services under Title III of the Act to develop their procedures for outreach and coordination with the relevant Title VI program director.

Response: We appreciate these comments, including recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have revised the language at § 1321.103 to read, ''[. . .] policies and procedures, developed in communication with the relevant Title VI program director(s) as set forth in § 1322.13(c), in place[.]''

[296] 42 U.S.C. 3026(a)(11)(B).

[297] 42 U.S.C. 3027(a)(21)(A).

[298] 42 U.S.C. 3057e(a)(11).

[299] 42 U.S.C. 3057j(a)(3).

Comment: We received comment requesting that emergencies include climate-related and human-caused disasters in Tribal communities.

Response: ACL appreciates this comment and notes that the regulation specifies an ''all-hazards'' approach. ACL intends for ''all-hazards'' to include climate-related, weather-specific, and other natural and human-caused disasters, specific to the determination of likely ''all-hazards'' by the State agency, AAAs, and Title VI programs.

§ 1321.105 Modification During Major Disaster Declaration or Public Health Emergency

New § 1321.105 states that the Assistant Secretary for Aging retains the right to modify emergency and disaster-related requirements set forth in the regulation under a Major Disaster declared by the U.S. President under The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub. L. 100–707; 42 U.S.C. 5121–5207), or public health emergency (PHE) as declared by the U.S. Secretary for Health and Human Services.

C. Deleted Provisions

We remove the following provisions since they are no longer necessary and/or applicable, and to avoid potential confusion or conflicts due to statutory and/or regulatory changes.

§ 1321.5 Applicability of Other Regulations

We remove § 1321.5, which lists other applicable regulations, because the provision is unnecessary and may create confusion or become outdated due to statutory or regulatory changes.

§ 1321.75 Licenses and Safety

We remove § 1321.75, which describes State agency and AAA responsibilities to ensure that facilities who are awarded funds for multipurpose senior center activities obtain appropriate licensing and follow required safety procedures, and that proposed alterations or renovations of multipurpose senior centers comply with applicable ordinances, laws, or building codes. The provision is no longer necessary since these responsibilities are addressed by other policies and procedures at the State and local levels.

Part 1322—Grants to Indian Tribes for Support and Nutrition Services

Title VI General Comments

Comment: Many commenters supported the updating and modernizing of the regulations. In

particular, ACL received overwhelmingly positive comments supporting the provision of services for Tribal and Hawaiian Native elders and family caregivers. Commenters shared the harsh realities for and significant needs of Tribal and Hawaiian Native elders and family caregivers and requested additional funding for Tribal organizations and Hawaiian Native grantees to provide services under the Act.

Response: ACL appreciates these comments of support. ACL anticipates continuing to provide technical assistance to grantees under Title VI of the Act in support of Tribal and Hawaiian Native elders and family caregivers. We acknowledge comments about funding constraints, but funding is outside the scope of this rule.

Comment: ACL received comments of appreciation for the proposed changes to clarify Title VI and other provisions of the Act to better allow grantees to serve Native elders and family caregivers. One commenter noted that consolidating the sections referencing Title VI services to Indian Tribes and Native Hawaiian grantees creates more clarity in the regulations, which will permit grantees to better serve Native American, Alaskan Native, and Native Hawaiian elders and family caregivers.

Response: ACL appreciates these comments of support.

Comment: One commenter recommended updating all references from ''Native Americans'' to ''Indian Tribes.'' Another commenter requested use of ''Native Americans'' instead of ''Indians.'' Other commenters expressed various beliefs and preferences regarding the appropriate terms to use regarding service to American Indian and/or Native American elders and family caregivers.

Response: In this rule, ACL took great care to ensure that the terms used are respectful and have appropriate meaning for practical, consistent application. We also recognize there is variation in the terms used and preferred by different individuals and organizations. In this rule, we used the terms as specified in § 1322.3 (*Definitions*). We referred to organizations in terms of ''Eligible organization,'' ''Hawaiian Native grantee,'' ''Indian tribe,'' [300] and ''Tribal organization.'' [301] References to ''Hawaiian Native or Native Hawaiian,'' [302] ''Native Americans,'' [303] and ''Older Indians'' are specific to the individual rather than the entity, except in the case of referencing a Hawaiian Native grantee. Where existing, we used the same definitions as established in the OAA and other statutes.

A. Provisions Revised To Reflect Statutory Changes and/or for Clarity

Subpart A—Introduction

§ 1322.1 Basis and Purpose of This Part

Revised § 1322.1 explains the requirements of Title VI of the Act to provide grants to Indian Tribes and Native Hawaiian grantees. We consolidate 45 CFR part 1322 and 45 CFR part 1323 into 45 CFR part 1322 and subsequently retitle this part as ''Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services.'' We revise language to affirm the sovereign government to government relationship with a Tribal organization, and similar considerations, as appropriate for Hawaiian Native grantees representing elders and family caregivers, and to ensure consistency with statutory terminology and requirements, such as adding reference to caregiver services and specifying family caregivers as a service population, as set forth in Title VI of the Act. We add language to incorporate Native Hawaiians and Native Hawaiian grantees. We also clarify that terms not otherwise defined will have meanings ascribed to them in the Act.

Comment: We received multiple comments expressing support for the rights of Native Americans and funding to support Native Americans as they age.

Response: We appreciate these comments.

Comment: One commenter recommended that ACL consider changes to § 1322.1(a), specifically the statement ''[. . .] American Indian elders on Indian reservations [. . .]'' to instead reference American Indians elders and family caregivers from a Federally or State recognized Tribe, as not all Tribal elders reside on a reservation.

Response: ACL acknowledges the population of American Indian elders and family caregivers residing outside a reservation. Other Federally recognized Tribes do not maintain Tribal reservations. The relevant service area for provision of services under Title VI of the Act is specified in the definition of ''service area'' in § 1322.3 and § 1322.5(b). For clarity, we have revised this provision to read, ''This program is established to meet the unique needs and circumstances of American Indian and Alaskan Native elders and family caregivers and of older Native Hawaiians and family caregivers, on Indian reservations and/or in service areas as approved in § 1322.7.''

§ 1322.3 Definitions

Our final rule updates the definitions of significant terms in § 1322.3 to reflect current statutory terminology and operating practice and to provide clarity. We add several definitions and revise several existing definitions. The additions and revisions are intended to reflect changes to the statute, important practices in the administration of programs under the Act, and feedback we have received from a range of interested parties. We add definitions of the following terms: ''Access to services,'' ''Act,'' ''Area agency on aging,'' ''Domestically produced foods,'' ''Eligible organization,'' ''Family caregiver,'' ''Hawaiian Native or Native Hawaiian,'' Hawaiian Native grantee,'' ''In-home supportive services,'' ''Major disaster declaration,'' ''Multipurpose senior center,'' ''Native American,'' ''Nutrition Services Incentive Program,'' ''Older Native Hawaiian,'' ''Older relative caregiver,'' ''Program income,'' ''Reservation,'' ''State agency,'' ''Title VI director,'' and ''Voluntary contributions.''

We retain and make minor revisions to the terms: ''Acquiring,'' ''Altering or renovating,'' ''Constructing,'' ''Department,'' ''Means test,'' ''Service area,'' ''Service provider,'' and ''Tribal organization.'' We retain with no revisions the terms: ''Budgeting period,'' ''Indian reservation,'' ''Indian Tribe,'' ''Older Indians,'' and ''Project period.''

Comment: We received comment expressing support for the added definitions to clarify and provide consistency with the intersection of Title III and Title VI funding. Other commenters suggested other terms for potential definition in this rule.

Response: ACL appreciates these comments. We have made additional edits to definitions for consistency with Title III, where appropriate. In lieu of additional definition in this rule, grantees under Title VI of the Act may establish their own definitions, as long as they are not in conflict with applicable Federal requirements. ACL also intends to provide technical assistance to aid in the implementation of this rule.

[300] Section 102(27) of the OAA, 42 U.S.C. 3002(27); sec. 612(c) of the OAA, 42 U.S.C. 3057c(c).

[301] Section 102(56) of the OAA, 42 U.S.C. 3002(56); sec. 612(c) of the OAA, 42 U.S.C. 3057c(c).

[302] Section 102(37)(B) of the OAA, 42 U.S.C. 3002(37)(B); sec. 625 of the OAA, 42 U.S.C. 3057k.

[303] Section 102(37) of the OAA, 42 U.S.C. 3002(37).

Comment: One commenter recommended changing all references in part 1322 from ''Tribal Organizations'' to ''Tribal Grantees,'' due to the definition of ''Tribal Organization'' set forth in the Indian Self-Determination and Education Assistance Act (ISDEAA).[304] The commenter stated that the proposed change would reduce the potential of confusing a chartered Tribal organization as representing the governing body of the Tribe. Another commenter requested that State-recognized Tribes be included in the definition of ''eligible organization.''

Response: Section 612(c) of the Act [305] expressly provides that, for purposes of Title VI, tribal has the same meaning as in section 4 of the ISDEAA.[306] Section 612 of the Act [307] also sets forth the criteria for an eligible organization to receive a grant, using the criteria in section 4 of the ISDEAA.[308] Accordingly, ACL uses the statutory definitions in this regulation.

Comment: Commenters requested expansion of the definition of in-home supportive services and that the definition be consistent with the definition in § 1321.3, to allow for collaboration with other programs. Commenters also asked for consistency in the example of ''minor modification of homes'' in part 1321.

Response: We have revised the definition of in-home supportive services in response to the comments. We similarly have amended this definition in part 1321 for consistency.

Comment: We received many comments supporting an inclusive definition of family caregiver, as well as suggestions for expanded wording of the definition. One commenter recommended ACL consider alternatives to the term ''informal'' within the ''family caregiver'' definition to avoid minimizing their invaluable role and avoid inaccuracy due to some receiving financial compensation.

Response: ACL appreciates these comments and concurs that the definition includes non-traditional families and families of choice. We believe that the definition is sufficiently broad to account for the concerns raised by commenters. To address family caregivers who may receive limited financial compensation, we have revised the definition to add, ''For purposes of this part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.'' We have made a similar edit to the definition in part 1321.

Comment: We received comments questioning the use of the term ''multi-purpose senior centers'' to reference a service. We also received comments disagreeing with definition, including with the inclusion of virtual facilities. Other commenters expressed appreciation for the inclusion of virtual facilities to reflect a growing number of programs and services offered online after the pandemic, noting this may make programs more accessible and equitable.

Response: We appreciate these comments and have revised § 1322.3 to indicate ''[. . .] as used in § 1322.25, facilitation of services in such a facility.'' We also agree with commenters that allowing virtual facilities ''as practicable'' provides options for various service modalities to reflect local circumstances, while remaining true to the definition of multipurpose senior center as set forth in the Act.

Comment: One commenter expressed concern about the definition of service area and how to serve Tribal elders residing in urban areas outside of the reservation.

Response: Service areas are required by section 614(c)(4) of the OAA and are approved through the funding application process.[309] Grantees under Title VI of the Act may facilitate service to elders and family caregivers living outside the service area through appropriate coordination with Title III and other programs.

Comment: We received comments and suggestions regarding clarification to the definition of ''voluntary contributions.''

Response: We appreciate these comments and suggestions. We have revised the definition of ''voluntary contributions'' to read, ''[. . .] means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.'' We have made a similar change to the definition in part 1321 for consistency. We also intend to address other suggestions and requests for clarification through technical assistance.

Subpart B—Application

§ 1322.5 Application Requirements

We redesignated § 1322.19 of the existing regulation (*Application requirements*) as § 1322.5 and revised the provisions to reflect updates to the Act. We specify that application submissions must include program objectives; a map and/or description of the geographic boundaries of the proposed service area; documentation of supportive and nutrition services capability; certain assurances; a tribal resolution; and signature by a principal official.

Comment: Many commentors expressed concern with § 1322.5(d)(1) which requires eligible organizations to represent at least 50 individuals age 60 and older in order to apply for funding. Several asked that the age of an elder as established by the eligible organization be used in qualifying to apply for funds under Title VI of the Act and that no minimum number of elders be required to apply for funds.

Other commenters expressed need to amend the current funding formula for allocation of services to include the population under age 60 as it results in unfunded eligibility. One commenter noted that after COVID–19, life expectancy for American Indians decreased by 6.6 years. An additional commenter noted that many communities, including some Alaskan Tribes, have a great number of elders in need over the Tribal elder age of 50 but may not have at least 50 elders who are age 60. They therefore are not eligible to apply for funding.

Response: ACL acknowledges the decreased life expectancy and many needs of Native American elders and family caregivers. However, we are unable to make changes in this provision, as this would require statutory changes to section 612(a).[310] We emphasize that smaller Tribes may be eligible to apply for Title VI funding as a consortium. ACL is available to provide technical assistance regarding how Tribes with a smaller number of elders who are at least 60 years of age may apply for funding under Title VI of the Act.

Comment: Commenters expressed issues with inadequate funding based on current funding formula/distribution procedures. They noted that Tribal nations only receive 2% of the OAA budget and that Title VI funding should be increased and provided directly to Tribal nations through ISDEAA Title I contracts and Title V compacts to fulfill trust and treaty obligations.

Response: The amount of OAA funding is determined by Congress and beyond the scope of this regulation. The Act sets out the requirements for making funding awards to Tribal organizations with approved funding applications.

[304] Public Law 93–638, 88 Stat. 2203 (1975); 25 U.S.C. 5301 *et seq.*

[305] 42 U.S.C. 3057(c).

[306] 25 U.S.C. 5304.

[307] 42 U.S.C. 3057c.

[308] 25 U.S.C. 5304.

[309] 42 U.S.C. 3057e(c)(4).

[310] 25 U.S.C. 5304(a).

Comment: One commenter recommended including Indian Health Service maps to identify service areas as an acceptable submission under § 1322.5(b).

Response: Indian Health Service maps may be used to describe the geographic service area proposed. Section 614(c)(4) of the Act allows an applicant to provide an appropriate narrative description of the geographic area to be served and an assurance that procedures will be adopted to ensure against duplicate services.[311]

Comment: One commenter expressed concern that new applicants might not be able to meet the requirement § 1322.5(c) of their ability to provide supportive and nutrition services effectively or that they have provided such services for the past three years. Another commenter stated that Title VI programs may lack funding and capacity to develop and submit a Title VI application. They suggest adequate training, financial resources, and updated guidance document be provided to ensure programs fully understand what is expected.

Response: The application requirements in § 1322.5 are consistent with those in effect in the most recent cycle of Title VI funding and as set forth in the Act. Documentation of supportive and nutrition services capacity is an important application component. The rule provides the options of attesting to this capacity either with documentation of such services provided within the last three years or with documentation of the ability to do so.

ACL provides significant training and guidance documents on the Older Indians website, available at *https://olderindians.acl.gov.* We will continue to provide technical assistance and guidance to grantees and prospective grantees.

§ 1322.7 Application Approval

Section 1322.21 of the existing regulation (*Application approval*) is redesignated here as § 1322.7. We make minor revisions to align the provision with updates to the Act and to clarify that no less than annual performance and fiscal reporting is required.

Comment: We received numerous comments on the inadequacy of funding for Title VI programs.

Response: The amount of funding for OAA programs is determined by Congress and thus is outside the scope of this regulation.

§ 1322.9 Hearing Procedures

Section 1322.23 of the existing regulation (*Hearing procedures*) is redesignated here as § 1322.9. Section 614(d)(3) of the Act provides opportunity for a hearing when an organization's application under section 614 is denied.[312] As under Title III, hearings will be conducted by the HHS Departmental Appeals Board (DAB).

We received no comments on § 1322.9. However, we have made technical corrections to remove unnecessary words and to align the section with 45 CFR part 16.

Subpart C—Service Requirements

§ 1322.13 Policies and Procedures

We combined §§ 1322.9 (*Contributions*), 1322.11 (*Prohibition against supplantation*), and 1322.17 (*Access to information*) of the existing regulation and redesignated them as § 1322.13 (*Policies and procedures*). We also combined into § 1322.13 the areas for which a Tribal organization or Hawaiian Native grantee must have established policies and procedures.

Section 1322.13 specifies programmatic and fiscal requirements for which a Tribal organization or Hawaiian Native grantee should have established policies and procedures. These include identifying an individual to serve as the Title VI director; collecting and submission of data and other reports to ACL; ensuring that the direct provision of services meet requirements of the Act; client eligibility; coordination with area agencies on aging and other Title III and VII-funded programs; specifying a listing and definitions of services that may be provided by the Tribal organization or Hawaiian Native grantee; detailing any limitations on the frequency, amount, or type of service provided; and the grievance process for older Native Americans and family caregivers who are dissatisfied with or denied services under the Act.

We have previously provided technical assistance to Tribal organizations or Hawaiian Native grantees that were unaware of certain fiscal requirements and/or did not understand their obligations under these requirements. We add § 1322.13(c)(2) to provide clarity regarding policies and procedures for fiscal requirements such as voluntary contributions; buildings and equipment; and supplantation. In particular, § 1322.13(c)(2)(ii) addresses the need to ensure that the funding is used for allowable costs that support allowable activities; to ensure consistency in the guidance provided by ACL; and to affirm that altering and renovating activities are allowable for facilities providing services under this section.

Comment: Commenters expressed concern that the number of policies and procedures being asked of Title VI programs could be burdensome, that they would need additional staff to support the changes, and that they lack sufficient funds to meet the requirements of § 1322.13.

Response: Section 1322.13 responds to requests for technical assistance and feedback from listening sessions by clarifying the policies and procedures that grantees under Title VI of the Act must have. The provisions reflect current expectations for grantees under Title VI of the Act. ACL is committed to supporting all grantees with technical assistance so that they may comply with the requirements.

Comment: One commenter noted grievance processes are usually in place at the Tribal level, but they can be difficult to navigate.

Response: Section 1322.13(c)(1)(iv) requires there to be a grievance process for elders and family caregivers who are dissatisfied with or denied services under the Act. In deference to Tribal sovereignty, the grantee under Title VI of the Act is to specify the process to be used. ACL will provide technical assistance regarding how grievance processes can be designed for appropriate navigation by elders and family caregivers.

§ 1322.15 Confidentiality and Disclosure of Information

Section 1322.7 of the existing regulation (*Confidentiality and disclosure of information*) is redesignated here as § 1322.15. We make minor revisions to align the provision with updates to definitions and consolidation of part 1323 regarding applicability to a Hawaiian Native grantee. We also specify that a provider of legal assistance shall not be required to reveal any information that is protected by attorney client privilege; policies and procedures are in place to maintain confidentiality of records; and information may be shared with other organizations, as appropriate, in order to provide services. The Tribal organization or Hawaiian Native grantee may also require the application of other laws and guidance for the collection, use, and exchange of both PII and personal health information.

Comment: A commenter expressed the need for respecting data sovereignty regarding Tribal laws and that Tribal

[311] 42 U.S.C. 3057e(c)(4).

[312] 42 U.S.C. 3057e.

laws should supersede reporting requirements.

Response: ACL respects issues relating to sensitivity of data ownership and use with respect to Title VI programs. As such, the data addressed in § 1322.13(b) is used for program management, fiscal accountability, and budget justification purposes. ACL is committed to following appropriate data collection requirements, including meeting Paperwork Reduction Act requirements. The current data collection requirements for performance reporting are approved under OMB Control No. 0985–0007.

Comment: We received comments that expressed strong support for ACL's proposal to clarify the obligation of Tribal organizations and Hawaiian Native grantees and other providers to protect the confidentiality of OAA participants and to specify that policies and procedures must comply with all applicable Federal laws, codes, rules, and regulations. However, another commenter felt that as sovereign nations, Native communities should not be required to enforce the National Institutes for Standards Cybersecurity and Privacy Frameworks as well as other applicable Federal laws. Instead, they stated that Tribal entities should be allowed to determine what works best for their respective community.

Response: ACL appreciates these comments and has removed the National Institutes for Standards Cybersecurity and Privacy Frameworks requirement from the final rule.

§ 1322.25 Supportive Services

Section 1322.13 of the existing regulation (*Supportive services*) is redesignated here as § 1322.25. Revised § 1322.25 clarifies the supportive services available under Title VI, parts A and B of the Act are intended to be comparable to such services set forth in Title III of the Act. Supportive services under Title III of the Act include in-home supportive services, access services, and legal services. We clarify allowable use of funds, including for acquiring, altering or renovating, and constructing multipurpose senior centers.

We also clarify that inappropriate duplication of services be avoided for participants receiving service under both part A or B and part C and include minor language revisions for clarity and consistency with updated definitions.

Comment: ACL received comment supporting the proposal to clarify the allowable use of funds and that Title VI-funded supportive services include in-home supportive, access, and legal services.

Response: ACL appreciates this comment.

§ 1322.27 Nutrition Services

Section 1322.15 of the existing regulation (*Nutrition services*) is redesignated here as § 1322.27. Revised § 1322.27 clarifies that nutrition services available under Title VI, parts A and B of the Act are intended to be comparable to services available under Title III of the Act. Section 614(a)(8) of the Act requires nutrition services to be substantially in compliance with the provisions of part C of Title III, which includes congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.[313] Based on experiences during the COVID–19 PHE and numerous requests for flexibility in provision of meals, we clarify that home-delivered meals may be provided via home delivery, pick-up, carry-out, drive-through, or as determined by the Tribal organization or Hawaiian Native grantee; that eligibility for home-delivered meals is determined by the Tribal organization or Hawaiian Native grantee and not limited to those who may be identified as ''homebound;'' that eligibility criteria may consider multiple factors; and that meal participants may also be encouraged to attend congregate meals and other activities, as feasible, based on a person-centered approach and local service availability.

We specify that the Tribal organization or Hawaiian Native grantee must provide congregate and home-delivered meals, and nutrition education, nutrition counseling, and other nutrition services may be provided, with funds under Title VI part A or B of the Act. We also include minor clarifications for consistency.

Finally, this provision sets forth requirements for NSIP allocations. NSIP allocations are based on the number of meals reported by the Tribal organization or Hawaiian Native grantee which meet certain requirements, as specified. A Tribal organization or Hawaiian Native grantee may choose to receive their allocation grants as cash, commodities, or a combination thereof. NSIP funds may only be used to purchase domestically produced foods used in a meal, as set forth under the Act. We intend for this provision to answer many questions we have received regarding the proper use of NSIP funds.

Comment: We received a comment asking to allow Title VI programs to use NSIP funds to purchase food directly from Tribes and Tribal organizations and for traditional foods.

Response: Purchase of food from Tribes and Tribal organizations in the United States is considered to be domestically produced food and consistent with § 1322.27. ACL encourages the purchase of traditional foods and other foods from Tribes and Tribal organizations in the United States and intends that the promulgation of this rule makes this clear.

Comment: Commenters supported ACL's proposals to clarify the provision of nutrition services. One commenter recommended additional flexibility for nutrition services requirements that limit service options in remote Tribal areas. Another commenter expressed concern about the proposed expansion of home-delivered meals to older adults who are not homebound due to concerns surrounding funding and staff capacity. One commenter noted that aligning services to the requirements of Title III may create more barriers to funding flexibility. We also received comments regarding reporting and other program implementation matters.

Response: ACL appreciates these comments. The OAA states that nutrition services available under Title VI, parts A and B of the Act are intended to be comparable to such services set forth in Title III of the Act. Based on comments received, we have revised § 1322.27(a)(4) to remove reference to the Nutrition Care Process, consistent with changes in part 1321. We have also made other edits for consistency with these similar provisions in part 1321.

The provisions of § 1322.13, regarding policies and procedures to implement Title VI services, offer existing flexibilities to address remote areas, as well as to set priorities for how and to whom services will be provided given limited funds. We will provide technical assistance to address reporting concerns and other program implementation matters.

B. New Provisions Added To Clarify Responsibilities and Requirements Under Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services

The final rule includes the following new provisions to provide guidance in response to inquiries and feedback received from grantees and other interested parties and changes in the provision of services, and to clarify requirements under the Act.

[313] 42 U.S.C. 3057e(a)(8).

Subpart C—Service Requirements

§ 1322.11 Purpose of Services Allotments Under Title VI

New § 1322.11 specifies that services provided under Title VI consist of supportive, nutrition, and family caregiver support program services, and that funds are to assist a Tribal organization or Hawaiian Native grantee to develop or enhance comprehensive and coordinated community-based systems for older Native Americans and family caregivers. We received no comments on this section.

§ 1322.17 Purpose of Services—Person- and Family-Centered, Trauma-Informed

New § 1322.17 clarifies that services under the Act should be provided in a manner that is person-centered and trauma-informed. Recipients of services are entitled to an equal opportunity to the full and free enjoyment of the best possible physical and mental health, which includes access to person-centered and trauma-informed services.

Comment: We received many comments expressing support for culturally sensitive, person- and family-centered, and trauma-informed approaches and practices in working with Native American elders and family caregivers. Other comments requested guidance in implementing these provisions. We also received comment that the term ''holistic traditional care'' would be a more appropriate term, as it implies the entire person within a setting which includes familial, cultural, and historical components.

Response: We appreciate these comments and have revised § 1322.17 to include culturally appropriate holistic traditional care.

Comment: One commenter expressed concern that the section is not clear if this provision is required for all services that are provided, given use of the terms ''as appropriate'' and ''if applicable.''

Response: ACL acknowledges the comment and uses the terms ''as appropriate'' and ''if applicable'' to reflect the variety of services that may be provided and to maintain the inherent flexibility of the OAA to respond to the needs of the local Tribal communities. For example, not all services use a person-centered plan; a person-centered plan would not be appropriate for a public education service. Grantees under Title VI of the Act can implement these provisions to best meet their circumstances, as long as implementation is consistent with all applicable Federal requirements. We intend to address further questions and requests for clarification through technical assistance.

§ 1322.19 Responsibilities of Service Providers

New § 1322.19 specifies the responsibilities of service providers to include providing service participants with an opportunity to contribute to the cost of the service; providing self-directed services to the extent feasible; acknowledging service provider responsibility to comply with local APS requirements, as appropriate; arranging for weather-related and other emergencies; assisting participants to benefit from other programs; and coordinating with other appropriate services.

Comment: We received comment expressing support for specifying the responsibilities of service providers and suggesting two responsibilities be added: cultural competence training and inclusion of nondiscrimination language.

Response: ACL appreciates this comment. Nondiscrimination policies are among the Federal requirements that apply to all service providers under the Act. ACL recognizes that cultural competence training is best offered locally to honor distinct Tribal and Hawaiian Native differences and local availability. As such we have revised the text to include, ''Receive training to provide services in a culturally competent manner and consistent with §§ 1322.13 through 1322.17.''

§ 1322.21 Client Eligibility for Participation

To be eligible for services under the Act, participants must have attained the minimum age determined by the Tribal organization or Hawaiian Native grantee, except in the case of limited services, such as nutrition and family caregiver support services. We received inquiries, requests for technical assistance, and comments demonstrating misunderstandings among Tribal organizations and Native Hawaiian grantees, as well as from others in the aging network, about eligibility requirements for Title VI services. For example, we received feedback expressing confusion as to whether younger caregivers of adults of any age are eligible to receive Title VI part C program services, which is not allowable under the Act, as well as the circumstances under which non-Native Americans who live within a Tribal organization's or Hawaiian Native grantee's approved service area and are considered members of the community by the Tribal organization may be eligible to receive services under this part.

New § 1322.21 clarifies eligibility requirements under the Act and explains that a Tribal organization or Hawaiian Native grantee may adopt additional eligibility requirements, if they do not conflict with the Act, the implementing regulation, or guidance issued by the Assistant Secretary for Aging.

Comment: One commenter supported ACL clarifying that a Tribal organization or Native Hawaiian grantee may adopt eligibility requirements beyond those included in the OAA, as long as they don't conflict with the OAA or guidance from the Assistant Secretary for Aging. Another commenter stressed the importance of upholding Tribal sovereignty and favorably cited this provision as honoring sovereignty. We received additional comments encouraging ACL to widen the scope of service to eligible individuals based on their membership status within Federally or State recognized Tribes regardless of having a residence on Federally recognized reservations.

Response: These regulations do not require elders receiving services to live on a reservation of a Federally recognized Tribe. In fact, there are Federally recognized Tribes that do not have reservation lands. ACL respects Tribal sovereignty, and has included the following at § 1322.21(b), ''A Tribal organization or Hawaiian Native grantee may develop further eligibility requirements for implementation of services for older Native Americans and family caregivers, consistent with the Act and other applicable Federal requirements.'' Among these is ''geographic boundaries'' in § 1322.21(b)(2). As we believe this offers maximum flexibility to Tribes, Tribal organizations, and Hawaiian Native grantees under the Act, we make no further edits to this section.

§ 1322.23 Client and Service Priority

We previously received numerous inquiries about how a Tribal organization or Hawaiian Native grantee should prioritize providing services to various groups. Questions included whether there was an obligation to serve everyone who sought services and whether services were to be provided on a first-come, first-served basis. Questions about prioritization were particularly prevalent in response to demand for services created in the wake of the COVID–19 Public Health Emergency (PHE). Entities sought clarification on whether they are permitted to set priorities, who is permitted to set priorities, and the

degree to which entities have discretion to set their own priority parameters.

New § 1322.23 clarifies that entities may prioritize services and that they have flexibility to set their own policies based on their assessment of local needs and resources. For clarity and convenience, we list the priorities for serving family caregivers as set forth in section 631(b) of the Act.[314]

Comment: Commenters supported the flexibility given to Tribal organizations and Native Hawaiian grantees to prioritize services and set their own policies based on their assessment of local need and resources. One commenter requested that language be added to include assessments based on greatest social or economic needs. Another commenter recommended that ACL consider the adoption of explicit language referring to LGBTQI+ Indian and Native Hawaiian older adults, Two-Spirit older adults, and Indian and Native Hawaiian older adults with HIV and including such language in all non-discrimination provisions and in cultural competency training requirements.

Response: ACL appreciates these comments and encourages prioritization of services to assist elders with the greatest social and the greatest economic needs, including the populations referenced in the comments. Section 1322.23 directs grantees to conduct their own assessment of local needs and resources, as well as to identify criteria for prioritizing the delivery of services. In order to maintain flexibility of Tribal organizations and Hawaiian Native grantees, ACL declines to further specify how this is done in this rule. However, ACL will provide technical assistance in implementing these provisions.

§ 1322.29 Family Caregiver Support Services

New § 1322.29 implements section 631 of the Act related to family caregiver support services.[315] It clarifies the services available; eligibility requirements for respite care and supplemental services; and allowable use of funds.

Comment: Commenters supported the breadth of § 1322.29. One commenter noted that while they support flexible definitions of family caregiving, they are concerned that as more people will be eligible for services, this would require additional funds.

Response: ACL appreciates these comments and notes that funding decisions are outside the scope of this rule.

[314] 42 U.S.C. 3057k–11(b).

[315] 42 U.S.C. 3057k–11.

§ 1322.31 Title VI and Title III Coordination

Consistent with § 1321.53 (*State agency Title III and Title VI coordination responsibilities),* § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), new § 1322.31 outlines expectations for coordinating activities and delivery of services under Title VI and Title III, as articulated in sections 306(a)(11)(B),[316] 307(a)(21)(A),[317] 614(a)(11),[318] and 624(a)(3) of the Act.[319] We clarify that coordination is required under the Act and that all entities are responsible for coordination, including Tribal organizations and a Hawaiian Native grantee, State agencies, AAAs, and service providers.

Comment: Commenters overwhelmingly expressed support for coordination between Title VI and Title III programs. They expressed concern about the lack of coordination between Title VI grantees and State agencies, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how to apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed that the proposed language regarding coordination was too permissive. A commenter recommended specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance for State agencies on their roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

Response: ACL expects coordination between Title VI and Title III programs. As stated above, § 1322.31 sets forth the same requirements for Title VI programs as are set forth in § 1321.53 for State agencies, in § 1321.69 for AAAs, and in § 1321.95 for service providers under Title III of the Act. Based on the comments received, we revised each provision to use consistent language, where appropriate. We explain the changes made in the following paragraphs.

[316] 42 U.S.C. 3026(a)(11)(B).

[317] 42 U.S.C. 3027(a)(21)(A).

[318] 42 U.S.C. 3057e(a)(11).

[319] 42 U.S.C. 3057j(a)(3).

We have reordered the opening paragraph in § 1322.31 as § 1322.31(a) and have reordered the subsequent paragraphs accordingly. We have further revised the language in reorganized § 1322.31(a) to read, ''A Tribal organization or Hawaiian Native grantee under Title VI of the Act must have policies and procedures, developed in coordination with the relevant State agency, area agency or agencies, and service provider(s) that explain how the Title VI program will coordinate with Title III and/or VII funded services [. . .] A Tribal organization or Hawaiian Native grantee may meet these requirements by participating in tribal consultation with the State agency regarding Title VI programs.''

We have created a reordered paragraph § 1322.53(b) and have made revisions to clarify topics that the policies and procedures set forth in paragraph (a) ''[. . .] must at a minimum address[.]'' By using these words, ACL makes clear that coordination is required. We have further made edits to include how outreach and referrals will be provided to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII; remove duplicate language which was incorporated into revised paragraph (a); revise ''[. . .] such as [. . .]'' to ''[. . .] to include [. . .]'' in reference to meetings, email distribution lists, and presentations regarding communication opportunities; add ''How services will be provided in a culturally appropriate and trauma-informed manner;'' and make other grammatical edits for consistency.

We have also added new § 1322.31(c) to state, ''The Title VI program director, as set forth in § 1322.13(a), shall participate in the development of policies and procedures as set forth in §§ 1321.53, 1321.69, and 1321.95.''

There are multiple successful examples of such coordination that ACL is committed to sharing and expanding. We believe that the promulgation of these regulations will provide a significant opportunity to further coordination between Title VI and Title III programs, including improving ACL's monitoring programs for compliance. ACL anticipates providing technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

Regarding provision of Title III funding to Tribes, the amount of available Title III funding is limited to what is appropriated for such purposes. State agencies are required to distribute such funding to AAAs via an IFF in

States with multiple PSAs, as required by the Act and as set forth at § 1321.49. In some States, Tribes have been designated as AAAs and receive Title III funds. Single PSA State agencies are required to distribute funds in accordance with a funds distribution plan as set forth at § 1321.51(b), and Title VI programs may receive funds under a contract or grant with a State agency in such States. State agencies and AAAs are required to establish and follow procurement policies in awarding Title III funds under the Act, which may allow for awarding of funds to Title VI grantees, Tribes, and other Tribal organizations.

ACL emphasizes that this new provision is included based on feedback by Tribes and Title VI-funded programs to specify that coordination is a requirement. While coordination is a requirement, there are various ways for grantees under Title VI and Title III of the Act to coordinate. ACL encourages Tribes and Tribal organizations to apply to provide Title III-funded services. However, the statute does not allow for a requirement that Title III funds be provided to Title VI grantees outside of the procurement policies in place for awarding of Title III funds under the Act.

Subpart D—Emergency & Disaster Requirements

The COVID–19 PHE highlighted the importance of the efforts of Tribal organizations and the Hawaiian Native grantee to maintain the health and wellness of older Native Americans and family caregivers. Existing guidance on emergency and disaster requirements under the Act is limited and does not contemplate the evolution of what may constitute an ''emergency'' or ''disaster'' or how emergencies and disasters may uniquely affect older Native Americans and family caregivers.

If a State or Indian Tribe (whether directly, or through association with the State) receives a MDD by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207, section 310 of the Act applies, and provides flexibility related to disaster relief.[320] The COVID–19 PHE for example, demonstrated the devastating impact on the target population of services under the Act. During the pandemic, all States and some Indian Tribes received a MDD, and we provided guidance on flexibilities available under the Act while under a MDD to meet the needs of older Native Americans and caregivers, such as those related to meal delivery systems, methods for conducting well-being checks, delivery of pharmacy, grocery, and other supplies, and other vital services.

Throughout the COVID–19 PHE we received inquiries and feedback that demonstrated a need for clarity on available flexibilities in an emergency. RFI and NPRM respondents also provided substantial feedback regarding limitations and the need for additional guidance and options for serving older adults during emergencies. Multiple RFI respondents noted that services under the Act may be impacted by a wide range of emergencies and disasters—including natural, human-caused, climate-related, and viral disasters—and that previous regulatory guidance did not provide service providers under the Act the flexibility necessary to adequately plan for emergency situations. Accordingly, the aging network sought an expansion of the definition of ''emergency'' that better reflected their realities regarding service delivery. RFI and NPRM respondents also sought guidance on numerous aspects of program and service delivery during an emergency, such as maintaining flexibilities in meal and other service delivery introduced in response to the COVID–19 PHE, allowable spending on disaster mitigation supplies, and providing mental health services to older adults who experience disaster-related trauma. RFI respondents also asked for regulatory language outlining what is expected of a grantee under the Act in an emergency to allow for the development of better emergency and disaster preparedness plans at all levels.

Based on input from interested parties and our experience, particularly during the COVID–19 PHE, we add Subpart D—Emergency and Disaster Requirements (§§ 1322.33–1322.39) to explicitly outline expectations and clarify flexibilities that are available in a disaster situation. We considered various approaches in developing this section. Certain flexibilities, such as allowing for carry-out or drive through meals, constitute innovative ways to deliver services that could be allowable on a regular basis within the parameters of Title VI part A or B and without any special authorization by ACL during an emergency. Those flexibilities have been incorporated where applicable in the revised regulation for clarification purposes (see § 1322.27, which addresses carry-out and other alternatives to traditional home-delivered meals). We are limited by the Act in the extent to which other flexibilities may be allowed. For example, a MDD is required in order for a Tribal organization or Hawaiian Native grantee to be permitted, pursuant to section 310(c) of the Act,[321] to use Title VI funds to provide disaster relief services (which must consist of allowable services under the Act) for areas of the service area where the specific major disaster declaration is authorized and where older Native Americans and family caregivers are affected.

Comment: We received comment expressing general support for inclusion of this subpart and flexibility to innovatively address disasters and emergencies.

Response: ACL appreciates this comment.

§ 1322.33 Coordination With Tribal, State, and Local Emergency Management

New § 1322.33 states that Tribal organizations and Hawaiian Native grantees must establish emergency plans, and this section outlines requirements that these plans must meet. While the Act requires emergency planning by State agencies and area agencies on aging, the Act provides limited guidance regarding emergency planning specific to Title VI grantees. We also include in this section additional guidance in connection with the development of sound emergency plans (such as requirements for continuity of operations planning, taking an all-hazards approach to planning, and coordination among Tribal, State, and local emergency management and other agencies that have responsibility for disaster relief delivery).

Comment: We received comments supporting ACL's proposal to require Tribal organizations and Hawaiian Native grantees to establish emergency plans, to specify the requirements those plans must meet, and to provide guidance regarding development of emergency plans. We received comment recommending any regulations directing the State agency or AAAs to develop procedures for outreach and coordination with Tribes be developed in consultation with that community's Title VI program directors. Another commenter noted there are existing Tribal emergency plans that could be used to comply with the section and that in incidences where there is an opportunity to coordinate, it could be captured with a memorandum of understanding.

Response: ACL appreciates these comments. The provisions in part 1322 are specific to the expectations for

[320] 42 U.S.C. 3030.

[321] 42 U.S.C. 3030(c).

grantees under Title VI of the Act. Expectations for grantees under Title III of the Act are in part 1321. In response to the recommendation to consult with the appropriate Title VI program directors, we have made this change at § 1321.103. ACL agrees that existing Tribal emergency plans that address coordination with the services funded under Title VI of the Act, in accordance with these provisions, would meet these expectations. Establishing a memorandum of understanding is also a reasonable method to meet the expectations as set forth. ACL appreciates the comments identifying how implementation of these provisions can be accomplished.

§ 1322.35 Flexibilities Under a Major Disaster Declaration

New § 1322.35 outlines disaster relief flexibilities available under a MDD to provide disaster relief services for affected older Native Americans and family caregivers. Recognizing that there is no required period of advance notice of the end of a MDD incident period, the final rule allows a Tribal organization or Hawaiian Native grantee up to 90 days after the expiration of a MDD to obligate funds for disaster relief services.

We received many comments in response to the RFI and NPRM asking that various flexibilities allowed during the COVID–19 PHE remain in place following the end of the PHE. We are limited by the Act in the extent to which flexibilities may be allowed. For example, a MDD is required in order for a Title VI grantee to be permitted, pursuant to section 310(c) of the Act,[322] to use Title VI funds to provide disaster relief services (which must consist of allowable services under the Act) for areas of the service area where the specific MDD is authorized and where older Native Americans and family caregivers are affected.

Comment: We received comments in support of these changes that will better enable OAA-funded programs to serve Native elders in instances of disasters or emergencies. We also received comments with questions if a Tribal declaration needs to be recognized by the non-Tribal entities that are referenced.

Response: ACL appreciates these comments and intends to provide technical assistance regarding various declarations that may apply in emergency and disaster situations. We have also made edits to § 1322.35(b) for consistency with the language used in this similar provision in part 1321 and have reordered items accordingly.

[322] 42 U.S.C. 3030(c).

§ 1322.37 Title VI and Title III Coordination for Emergency and Disaster Preparedness

Section 1321.53 (*State agency Title III and Title VI coordination responsibilities*), § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), outline expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in the Act sections 306(a)(11)(B),[323] 307(a)(21)(A),[324] 614(a)(11),[325] and 624(a)(3).[326] New § 1322.37 clarifies that Title VI and Title III coordination should extend to emergency and disaster preparedness planning and response.

Comment: We received comments supporting the clarification that Title VI and Title III coordination should extend to emergency and disaster preparedness and response. We also received comment noting geographic, historical, and cultural considerations that are part of the preparedness plans developed by the Tribal aging programs that are uniquely Tribal.

Response: ACL appreciates these comments and confirms that specific to emergency and disaster coordination, § 1321.97 requires coordination by grantees under Title III of the Act with State, Tribal, and local emergency management, while § 1321.103 requires that State and area agencies coordinate with Title VI programs. These provisions complement this provision at § 1322.37.

§ 1322.39 Modification During Major Disaster Declaration or Public Health Emergency

New § 1322.39 states that the Assistant Secretary for Aging retains the right to modify emergency and disaster-related requirements set forth in the regulation under a MDD or PHE.

C. Deleted Provisions

§ 1322.5 Applicability of Other Regulations

The final rule removes § 1322.5, which lists other applicable regulations, because the provision is unnecessary and may create confusion or become outdated due to statutory or regulatory changes.

[323] 42 U.S.C. 3026(a)(11)(B).

[324] 42 U.S.C. 3027(a)(21)(A).

[325] 42 U.S.C. 3057e(a)(11).

[326] 42 U.S.C. 3057j(a)(3).

Part 1323—Grants for Supportive and Nutritional Services to Older Hawaiian Natives

A. Deleted Provisions

The final rule removes part 1323, which is specific to Title VI, part B, which applies to one Hawaiian Native grantee. We include requirements specific to Title VI, part B in the revised part 1322. By so doing we anticipate reducing confusion and improving appropriate consistency in service provision to both older Indians and Native Hawaiians and family caregivers thereof.

Comment: ACL received comments of appreciation for the proposed changes to clarify Title VI and other provisions of the Act to better allow grantees to serve Native elders and family caregivers. One commenter noted that consolidating the sections referencing Title VI services to Indian Tribes and Native Hawaiian grantees creates more clarity in the regulations, which will permit grantees to better serve Native American, Alaskan Native, and Native Hawaiian elders and family caregivers.

Response: ACL appreciates these comments.

Part 1324—Allotments for Vulnerable Elder Rights Protection Activities

A. Provisions Revised To Reflect Statutory Changes and/or for Clarity

Subpart A—State Long-Term Care Ombudsman Program

The regulation for the State Long-Term Care Ombudsman Program (Ombudsman program) was first issued in 2015. In the eight years since, ACL has provided technical assistance to State Long-Term Care Ombudsmen, State agencies, and designated local Ombudsman entities as they work to implement the regulation. The 2016 reauthorization of the Act also made changes specific to the Ombudsman program. Changes to the regulation are needed to ensure consistency with updates to the Act. Additionally, based on requests for technical assistance and comments to the NPRM, ACL has determined to clarify certain sections of part 1324, including the responsibilities and the authority of the State Long-Term Care Ombudsman (Ombudsman); duties owed to residents regarding confidentiality; and COI requirements.

Comment: Many commenters stated support in general for the updating of the regulations to be consistent with Title VII of the Act.

Response: ACL appreciates these comments of support. ACL anticipates continuing to provide technical assistance to grantees under Title VII of

the Act in support of the individuals served by Title VII programs.

Comment: A commenter noted a need for increased funding for Ombudsman programs and legal services for older adults, adding that increased funding would help programs rely less on volunteers. Other organizations commented on the utilization of volunteers in the Ombudsman program and recommended that we establish multiple levels of certification to account for volunteers who desire fewer responsibilities, noting that training could be adjusted as well.

Response: Although program funding is beyond the scope of the rule, we acknowledge the decline in volunteers over multiple years and understand the impact on program resources. The Act calls for the Ombudsman to designate representatives of the Office of the State Long-Term Care Ombudsman (the Office), without distinguishing between paid and volunteer representatives. The rule defines ''representatives of the Office'' as the ''[. . .] employees or volunteers designated by the Ombudsmanto fulfill the duties set forth in § 1324.19(a)[.]'' Fulfillment of Ombudsman program duties is the purpose for the Ombudsman's designation of a representative of the Office. Therefore, it would be inconsistent with this definition for an individual who does not work to resolve complaints and perform the other Ombudsman program functions to be designated by the Ombudsman as a representative of the Office.

Further, the Act requires ACL to develop training standards for representatives; in doing so as sub-regulatory guidance, we sought input from Ombudsman programs across the country to establish a minimum level of training, but several states adjusted their training to provide additional hours and content for representatives who are assigned more complex responsibilities. We have determined that Ombudsman programs have flexibility to assign volunteer duties to meet the needs of the program if they are performing duties described in the rule.

Comment: One commenter challenged the accuracy of Frequently Asked Questions that ACL published as sub-regulatory guidance, noting that they contradict the rule.

Response: While we respectfully disagree with the concern about the guidance in relation to the prior version of the Ombudsman rule, we intend to review previous sub-regulatory guidance and adjust where necessary to align with this final rule.

§ 1324.1 Definitions

We add a new definition for ''Official duties'' to § 1324.1 for consistency with part 1321 of the regulation, which also contains this defined term. In both parts 1321 and 1324, this term is used to define the duties of representatives of the Office. As currently defined at § 1324.1, representatives of the Office are the employees or volunteers designated by the Ombudsman to conduct the work of the Ombudsman program. The definition of ''Official duties'' is included to clarify the role of representatives of the Office. We made clarifications to address misunderstandings of the role expressed by third parties who deal with the Ombudsman program. We also made minor changes to the definition of ''*Resident representative.*''

Comment: Most commenters agreed with the added and clarified definitions in § 1324.1. Some commenters recommended we add language to clarify that representatives of the Office may be carrying out the duties ''[. . .] by direct delegation from, the State Long-Term Care Ombudsman'' in addition to carrying out duties ''[. . .] under the auspices and general direction of, [. . .] the State Long-Term Care Ombudsman.''

Response: We appreciate the comments. We recognize that Ombudsman programs operate in a variety of organizational structures and that direct delegation is one way that programs are managed. We have modified the definition of ''Official duties'' as recommended. The same change was made in part 1321.

Comment: One commenter recommended that we add a definition of ''resolved'' to support accuracy of data.

Response: We appreciate the commenter's interest in accuracy. Specifying data collection requirements is outside the scope of this rule. The National Ombudsman Reporting System includes definitions for accurate data collection and is accompanied by training and a series of frequently asked questions. We will work with the National Ombudsman Resource Center to continue to refine guidance regarding data collection requirements.

Comment: Commenters identified incongruent sentence structure in the proposed modification to the definition of resident representative.

Response: We agree with the commenters' notes about wording and have made technical corrections to that definition.

Comment: One commenter underscored the importance of the Ombudsman program being resident-directed and recommended the addition of a definition of ''informed consent.'' The commenter noted that some long-term care facilities, guardians, and others have attempted to limit the ability of the Ombudsman program to advocate on behalf of residents and that multiple understandings of the term lead to inconsistent application. They suggested including that, when seeking consent, representatives of the Ombudsman program give residents a full explanation of the facts, options, and possible outcomes.

Response: We agree that consent is a key to successful advocacy for residents. We will provide technical assistance for obtaining informed consent.

§ 1324.11 Establishment of the Office of the State Long-Term Care Ombudsman

Section 1324.11 sets forth requirements related to the establishment of the Office of the State Long-Term Care Ombudsman (Office). We make minor changes to § 1324.11(a) and to the introductory clause of (b), as well as to (e) introductory text, (e)(1)(i) and (v); (e)(4)(i) through (iii); (e)(5) and (6); and (e)(8)(ii), to clarify the purpose of the section. Other changes to this section are discussed in more detail, below.

In fulfilling their responsibilities, representatives of the Office may need access to the medical, social and/or other records of a resident, and section 712(b) of the Act requires State agencies to ensure that representatives of the Office will have such access, as appropriate, including in the circumstance where a resident is unable to communicate consent to the review and has no legal representative.[327] Previously, § 1324.11 did not require policies and procedures to address access to a resident's records in this circumstance by the Ombudsman and the representatives of the Office, and we receive many requests for technical assistance as to how to address this situation. Accordingly, we add language in § 1324.11(e)(2) to require policies and procedures to provide direction for the Ombudsman and representatives of the Office as to how to address a situation where a resident is unable to communicate consent to the review of their records and they have no legal representative who can communicate consent for them. We add the requirement for policies and procedures as § 1324.11(e)(2)(iv)(C) and renumber

[327] 42 U.S.C. 3058g(b).

subsequent subsections within § 1324.11(e)(2)(iv).

A major tenet of the Ombudsman program is that it is resident-directed. This concept extends to if and how information about a resident's complaints is disclosed, and section 712(d) of the Act requires State agencies to prohibit the disclosure of the identity of a resident without their consent.[328] We have received many requests for technical assistance as to how to address a situation when the resident is unable to provide consent to disclose; there is no resident representative authorized to act on behalf of the resident; or the resident representative refuses consent and there is reasonable cause to believe the resident's representative has taken an action, failed to act, or otherwise made a decision that may adversely affect the resident. We add language to § 1324.11(e)(3)(iv) to require State agencies to have policies and procedures in place to provide direction for representatives of the Office as to how to address these situations.

States may have laws that require mandatory reporting of abuse, neglect, and exploitation. We have received questions as to the applicability of these requirements to the Ombudsman program, despite the prohibitions in section 712(b) of the Act against disclosure of resident records and identifying information without resident consent.[329] To clarify existing requirements, we add language to § 1324.11(e)(3)(v) to require State agencies to have policies and procedures in place to make clear that mandatory reporting of abuse, neglect, and exploitation by the Ombudsman program is prohibited. Subsequent subsections within § 1324.11(e)(3) have been re-numbered to reflect the new language.

Section 712 of the Act requires the Ombudsman program to represent the interests of residents before government agencies and to seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents.[330] Section 712 also provides that the Ombudsman, personally or through representatives of the Office, is to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State; recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents.[331] To be a strong advocate, the Ombudsman must be able to make determinations and to establish positions of the Office independently and without interference and must not be constrained by determinations or positions of the agency in which the Office is organizationally located.

In response to information ACL received about State government agencies engaging in interference prohibited under section 712 of the Act[332] (*e.g.,* by requiring prior approval of positions of the Office regarding governmental laws, regulations, or policies), we add language to the introductory portion of § 1324.11(e)(8) to clarify this prohibition. Specifically, we replace the existing phrase ''[. . .] without necessarily representing the determinations or positions of the State agency or other agency in which the Office is organizationally located'' with ''[. . .] without interference and shall not be constrained by or necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.''

Comment: One commenter recommended the addition of language to clarify that any work for non-ombudsman services or programs must not utilize funding designated for the Ombudsman program and must not interfere with the duties and functions of the Ombudsman program.

Response: Section 1324.13(f) directs the Ombudsman to determine the use of fiscal resources appropriated for or otherwise available for the operation of the Office, including determining that program budgets and expenditures of local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program. Further, § 1324.11(e)(1)(vi) provides that procedures that clarify fiscal responsibilities of local Ombudsman entities include clarifications about access to programmatic fiscal information by appropriate representatives of the Office. Therefore, we believe the recommendation of the commenter would be most appropriately handled through Ombudsman policies and procedures, and we have elected not to make a change to the rule.

Comment: Commenters recommended additional requirements for qualification to serve as the State Long-Term Care Ombudsman. Recommendations included educational requirements, minimum years of experience in the current role or in the field, expertise in the legal system and legislative process as well as organizational management and program administration, and gaps in employment with a long-term care facility.

Response: The rule includes several areas of expertise required of an Ombudsman as well as a one-year cooling off period after employment by a long-term care facility, as required by section 712(f)(1)(C)(iii) of the Act.[333] Given the statutory requirement, we have retained this provision as proposed.

Comment: Many commenters recommended ACL clarify in part 1324 the authority of the Ombudsman to develop policies and procedures, noting that such authority is critical to their responsibility for program operation, monitoring, and service delivery. One commenter suggested the regulations grant the Ombudsman full legal authority to establish policies and procedures.

Response: We have modified § 1324.11(e) to clarify that the agency shall establish Ombudsman program policies and procedures as recommended by the Ombudsman. The edit is designed to ensure that the Ombudsman leads development of policies and procedures. We decline to require that the Ombudsman have full legal authority to establish policy and procedures to allow for coordination and cooperation and where State law does not provide such authority.

Comment: One commenter recommended that ACL add a requirement for policies and procedures for emergency and disaster preparedness and response that would incorporate continuity of operations planning, all-hazards planning, and coordination with emergency management agencies.

Response: The COVID–19 PHE provided new opportunities for Ombudsman programs to forge relationships with emergency management agencies and public health agencies, and we agree that some programs were more equipped than others to create and implement continuity of operations plans. We appreciate the comment and have added

[328] *Id.* section 3058g(d).

[329] *Id.* section 3058g(b).

[330] *Id.* section 3058g.

[331] *Id.*

[332] *Id.*

[333] 42 U.S.C. 3058g(f)(1)(C)(iii).

a requirement in § 1324.11(e) that policies and procedures related to emergency planning include continuity of operations procedures. Additionally, we will provide technical assistance to Ombudsman programs to implement the new requirement.

Comment: One commenter recommended that ACL establish a requirement for the Ombudsman to collaborate with area agencies on aging to create a uniform system for monitoring local Ombudsman entities to assure that designated programs are performing duties as required. Another commenter noted that varied processes lead to extra requests for information that take up limited program resources. Several commenters recommended a standard frequency of monitoring, such as every one to four years or every two to three years.

Response: Section 1324.11(e) requires that when local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities and with representatives of the Office. However, the rule does not clearly require consultation with area agencies on aging when the area agency on aging is not the host agency for the local Ombudsman program. Therefore, we have amended § 1324.11(e) to add such consultation.

Further, we use this rule to make § 1324.11(e) consistent with § 1324.13(c), which requires the Ombudsman to monitor local Ombudsman entities ''on a regular basis.'' Specifically, we modify § 1324.11(e)(1)(iii) to require monitoring ''on a regular basis'' defer to the Ombudsman to define ''regular'' in terms of the frequency of monitoring, in consultation with area agencies on aging based on the revision to § 1324.11(e) described above. Because resources vary and there are other factors that would determine an appropriate monitoring frequency, we are not prescribing a timeframe.

Comment: Several commenters recommended edits to § 1324.11(e)(1)(v) to clarify the standards the Ombudsman must establish regarding response times to complaints.

Response: We appreciate the comments and agree that clarification of the rule will assist Ombudsman programs to establish timeframes for response to complaints made by or on behalf of residents. Therefore, we have revised the section to clarify the standards the Ombudsman must establish based on the needs and resources of the program.

Comment: A few organizations commented on § 1324.11(e)(1)(vi), recommending language to ensure that the Ombudsman program manager at local Ombudsman entities is involved in the budget and expenditure process and receives regular reports of fund balances and expenditures.

Response: Section § 1324.11(e)(1)(vi) addresses procedures regarding fiscal responsibilities of the local Ombudsman entity such as access to programmatic fiscal information by appropriate representatives of the Office. This subsection provides general guidance while allowing State agencies and Ombudsman to devise the policies and procedures that fit their specific program structures and resources. We are not changing the language but will provide targeted technical assistance in the future.

Comment: Commenters recommended an addition to procedural requirements to establish time frames and methods of destruction of Ombudsman program records. One commenter also suggested a statement that Ombudsman program records are not subject to public records or freedom of information requests.

Response: ACL has received questions from Ombudsman programs about record retention requirements and appreciates the comment raising the issue in the context of the rule. We agree that requiring Ombudsman programs to have policies and procedures regarding timeframes would help with consistent response to requests for records. Therefore, we have added a requirement at § 1324.11(e)(1)(vii) for Ombudsman programs to have procedures regarding record retention. We believe that existing provisions in section 712 of the Older Americans Act [334] and at § 1324.11(e)(3) support confidentiality of records. ACL intends to provide additional sub-regulatory guidance for implementation of existing requirements.

Comment: Some commenters recommended that § 1324.11(e)(2), which addresses procedures for access to facilities, residents, and records, be amended to require access to long-term care facilities at any time to ensure residents have unrestricted access to representatives of the Office. Other recommendations include that ACL specify that long-term care facilities must provide the Ombudsman and/or representatives of the Office with resident names, contact information, and room numbers so that representatives can quickly and easily locate residents; and to set specific maximum timeframes to produce the roster and other requested information. One commenter also recommended that ACL clarify that failure to comply would constitute willful interference.

Response: ACL does not have authority to establish requirements for long-term care facilities. We have determined that existing requirements for policies and procedures coupled with State agency requirements about interference at § 1324.15(i) provide sufficient guidance for Ombudsmen and State agencies to collaborate on how to ensure that representatives of the Office can perform their duties effectively. We appreciate the suggestions, and ACL intends to offer technical assistance and make best practices available to support Ombudsmen and representatives of the Office to fulfill their duties.

Comment: Many commenters expressed support for the new requirement at § 1324.11(e)(3)(iv), that policies and procedures about disclosure of files, records, and other information maintained by the Ombudsman program must include standard criteria for making determinations about disclosure of resident information when the resident is unable to provide consent and there is no resident representative or the resident representative refuses consent in certain circumstances as set forth.

Response: ACL appreciates the support of this provision. We note the related clarification to § 1324.11(e)(2)(iv)(C). When a resident is unable to grant or decline consent and there is no legal representative, the representative of the Office must seek approval of the Ombudsman. The clarification makes § 1324.11(e)(2)(iv)(C) consistent with § 1324.11(e)(2)(iv)(D).

Comment: One commenter requested that we clarify the requirement in § 1324.11(e)(3)(iv) regarding policies and procedures for obtaining consent to include non-verbal consent as an acceptable method.

Response: The existing rule provides for consent to be provided orally, visually, or through the use of auxiliary aids and services. ACL intends that visual or assisted communication includes non-verbal forms of communication and will retain the existing language.

Comment: Many commenters expressed support for the proposed clarification of § 1324.11(e)(3)(v). One commenter noted that despite long-standing requirements about disclosure and consent, mandatory reporting requirements have continued to be an issue in States where the Ombudsman program is not exempt from reporting in State rules, laws, and professional licensing requirements. One commenter

[334] 42 U.S.C. 3058g.

recommended that we use ''mandated'' as that is the most common term for such provisions.

Response: We appreciate the comment and have made the requested modification in the final rule. In reviewing the NPRM we identified a technical error; the new provision at § 1324.11(e)(3)(v) should have replaced the language in § 1324.11(e)(3)(vi). Paragraphs have been merged and renumbered in the final rule.

Comment: Many commenters expressed support for the change to § 1324.11(e)(6)(i), which removed ''adequately'' in regard to removing or remedying COI, as it allows for less ambiguity.

Response: We appreciate the support of the modification.

Comment: One organization recommended adding that the policies and procedures regarding grievances in § 1324.11(e)(7); personnel management in § 1324.17; and COI in § 1324.21 be ''fair'' if an Ombudsman takes adverse action on designation of a local Ombudsman entity, noting that removal of designation and certification could be arbitrary actions. They additionally recommended a requirement to provide the grievance process in writing to covered entities and individuals in advance.

Response: ACL believes that the regulatory language is sufficient to address the concern, and will provide technical assistance and additional guidance, if necessary, in consultation with interested parties.

Comment: Many commenters raised concerns that the subject of determinations identified in § 1324.11(e)(8)(i) through (iii) is too narrow and does not include other areas of Ombudsman program operations about which the Ombudsman makes determinations (*e.g.,* complaint processing, contents of the annual report). Commenters suggested that changing ''regarding'' to ''including'' would clarify that the areas listed are not all-inclusive but are examples and suggested adding the annual report as required in § 1324.13(g). They cited instances of host agencies editing determinations. One commenter recommended seeking input from representatives of the Office when making determinations regarding systems advocacy.

Response: We appreciate the explanation and information about Ombudsman program experiences and note that the examples in the existing rule are also included in § 1324.13 (*Functions and responsibilities of the State Long-Term Care Ombudsman*). Therefore, we have amended § 1324.11(e)(8) to refer to the functions and responsibilities of the Ombudsman. We will provide technical assistance on practices for seeking input, including regular review of Ombudsman records, data analysis, or direct consultation with representatives of the Office.

§ 1324.13 Functions and Responsibilities of the State Long-Term Care Ombudsman

Section 712 of the Act sets forth the functions and roles of the Ombudsman and provides that the Ombudsman has the authority to make independent determinations in connection with these various functions.[335] Through technical assistance inquiries, monitoring activities, and RFI comments, we have been made aware of instances where a State agency does not understand the authority and independence of the Ombudsman, such as with respect to commenting on governmental policy. We clarify § 1324.13 to provide that the Ombudsman has the authority to lead and manage the Office. Specifically, we change the phrase in the first sentence ''[. . .] responsibility for the leadership [. . .]'' to ''[. . .] responsibility and authority for the leadership [. . .]'' to emphasize the authority of the Ombudsman to carry out the statutory functions.

Section 201(d) of the Act provides for oversight of the Ombudsman program by a Director of the Office of Long-Term Care Ombudsman Programs.[336] We update § 1324.13(c)(2) to take into account previous sub-regulatory guidance and require training for certification and continuing education procedures to be based on and consistent with the standards established by ACL's Director of the Office of Long-Term Care Ombudsman Programs, as well as with any standards set forth by the Assistant Secretary for Aging.

Section 712 of the Act contains detailed requirements with which representatives of the Office must comply, such as requirements as to confidentiality of resident records, as well as limitations on disclosure of such records and on the disclosure of the identity of residents.[337] Section 712 also requires that representatives receive adequate training with respect to program requirements.[338] We have been made aware of instances where staff of the Ombudsman program have had access to resident records without training or certification as a representative of the Office. Pursuant to the statutory requirements, and to address instances of noncompliance, § 1324.13(c)(2)(iii) and (d) require that all staff and volunteers of the Ombudsman program who will have access to resident records, as well as other files, records, and information subject to disclosure requirements, be trained and certified as designated representatives of the Office, so that individuals with access to confidential information will be accountable to the Ombudsman for their actions. The subsequent subsection in § 1324.13(c)(2) is re-numbered accordingly.

The Act affords the Ombudsman discretion in determining whether to disclose the files, records, or other information of the Office. ACL often receives requests for technical assistance regarding criteria for such determinations. In response, we add to § 1324.13(e)(2) the following criteria to assist the Ombudsman in making this determination: whether the disclosure has the potential to cause retaliation, to undermine the working relationships between the Ombudsman program and other entities, or to undermine other official duties of the Ombudsman program.

We are aware of an apparent conflict between provisions of the Developmental Disabilities Act, which affords protection and advocacy programs access to resident records, and provisions of the OAA which prohibit the Ombudsman from disclosing resident-identifying information and afford the Ombudsman discretion in determining whether to disclose the files, records, or other information of the Office.[339] Consistent with our authority to interpret these two statutes, we have worked with protection and advocacy and Long-Term Care Ombudsman programs to collect additional information on the experiences and circumstances of grantees related to this issue. As a result of these efforts, ACL has offered technical assistance to individual States as issues arise to assist protection and advocacy and Ombudsman programs to come to an agreement on how to handle these questions. ACL technical assistance centers have co-branded a toolkit on collaboration between Ombudsman programs and protection and advocacy agencies.[340] We encourage such collaboration.

[335] *Id.* section 3058g.

[336] 42 U.S.C. 3011(d).

[337] 42 U.S.C. 3058g.

[338] *Id.*

[339] 42 U.S.C. 15043.

[340] *Long-Term Care Ombudsman Programs and Protection & Advocacy Agencies Collaboration Toolkit,* The Nat'l Consumer Voice for Long Term Care, *https://ltcombudsman.org/omb_support/pm/collaboration/ltcop-protection-and-advocacy-*

Continued

Section 712(h) of the Act provides that the State agency must require the Ombudsman program to submit an annual report that, among other things, describes the activities carried out by the Office, evaluates problems experienced by residents, analyzes the success of the Ombudsman program, and makes recommendations to improve the quality of life of residents.[341] This information is separate from and in addition to the data reported annually to ACL through the national data reporting system known as the National Ombudsman Reporting System (NORS). We have found that some Ombudsman programs do not understand that the annual report required by section 712 differs from the annual NORS reporting. We add language to § 1324.13(g) to clarify the distinction between reports required by section 712 and NORS.

The Ombudsman program's effectiveness in advocacy relies on relationships with other entities that can assist residents. Section 712 of the Act also requires that the Ombudsman program will coordinate services with legal assistance providers and others, as appropriate, and enter into a memorandum of understanding with legal assistance providers.[342] We revise § 1324.13(h)(1)(i) to require the adoption of memoranda of understanding with legal assistance programs provided under section 306(a)(2)(C) of the Act [343] that address, at a minimum, referral processes and strategies to be used when the Ombudsman and a legal assistance programs are both providing services to a resident.

Further, the final rule requires memoranda of understanding with facility and long-term care provider licensing and certification programs to address communication protocols and procedures to share information, including procedures for access to copies of licensing and certification records maintained by the State. Federal nursing home regulations require interaction between Ombudsman programs and licensing and certification programs. The goal of this requirement is to foster consistency in the relationships among Ombudsman programs and regulators across the country and support communication about all types of long-term care providers regulated by the State. Language regarding this requirement is set forth in § 1324.13(h)(1)(ii).

We also clarify that memoranda of understanding are recommended with other organizations, programs and systems as set forth in § 1324.13(h)(2). Elements of § 1324.13(h) have been re-numbered in connection with these changes. We also make minor changes to § 1324.13(a)(7)(vii) and (h) for clarity.

Comment: A few commenters expressed support for clarification of the Ombudsman's authority to lead and manage the Office, noting that the update would increase program effectiveness by limiting barriers in program implementation.

Response: We appreciate the support and have finalized the rule as proposed.

Comment: Commenters expressed support for existing language requiring Ombudsman review and approval of plans and contracts governing local Ombudsman entities, noting appreciation for oversight by the Ombudsman as well as support for the updated language about training.

Response: ACL appreciates the support.

Comment: Commenters expressed support for the language at § 1324.13(c)(2)(iii) that removes ambiguity and ensures that staff and volunteers who have access to records are trained and designated. One commenter asked whether ACL requires the Office to use the training curriculum developed by the National Ombudsman Resource Center. One commenter recommended that ACL require supervision during training only when the trainee is working directly with residents and facility staff and not during documentation or administrative duties.

Response: The rule at § 1324.13(c)(2)(iii) has been finalized as proposed. ACL does not require Ombudsman programs to use the model training that was developed to assist programs and inform a State-specific curriculum if the training curriculum used complies with the minimum standards developed and issued as sub-regulatory guidance. We defer to the Ombudsman to determine implementation of the supervision requirement that meets the needs of the program. ACL will provide technical assistance as needed.

Comment: Commenters proposed language requiring the Ombudsman to work with designated program coordinators at local Ombudsman entities to create and revise local program budgets and to work with host agencies to ensure programs have regular access to reports on income and expenditures. One commenter recommended that ACL require certification from the Ombudsman program manager at local Ombudsman entities that they have consulted on and approved the expenditures of the local Ombudsman entity.

Response: Section 1324.11(e)(1) requires that procedures clarify access to programmatic fiscal information by appropriate representatives of the Office, and §§ 1324.11(e)(1)(iii), 1324.13(c)(1)(iii) require monitoring of local Ombudsman entities on a regular basis. ACL will provide technical assistance to programs as needed to ensure compliance.

Comment: Many commenters expressed support for the proposed clarification of the annual reporting requirement in addition to the data report submitted to ACL. Commenters additionally recommended the addition of ''dissemination'' of the report and reference to the requirement for independent development.

Response: We appreciate the suggested edit and have added dissemination to § 1324.13(g).

Comment: Many commenters provided feedback on the proposed new requirement at § 1324.13(h) to establish a memorandum of understanding with the State entity responsible for licensing and certification of long-term care facilities (State survey agencies). Some responses supported the proposal without modification. There was also a suggestion to include State mental health departments and others with a role in providing access to LTC facilities or community-based services. Others recommended modification to require State survey agencies to provide Ombudsman programs with unredacted records and all records. Additionally, some commenters objected to the provision for communication protocols and sharing of information to be included in the memorandum of understanding.

Response: We agree with the suggestion to include mental health authorities as an optional entity with which to execute a memorandum of understanding and have added this at § 1324.13(h)(2)(x). Ombudsman programs have reported an increase in residents of LTC facilities who have mental illness and substance use disorders.

ACL does not have authority to require State survey agencies to release information to Ombudsman programs. The memorandum of understanding, however, will help clarify the information that can be shared and how it will be shared, and will support formalized protocols for communication to create consistency and to eliminate the gaps that Ombudsman programs report. Therefore, we have finalized the

agencies-collaboration-toolkit (last visited Oct. 13, 2023).

[341] 42 U.S.C. 3058g(h).

[342] *Id.* section 3058g.

[343] 42 U.S.C. 3026(a)(2)(C).

rule as proposed and will provide technical assistance to address the concerns raised by commenters.

Comment: One commenter asked for clarification of the difference between the memorandum of understanding requirement with legal assistance providers and the suggested agreement with the legal assistance developer. They raised concerns about the need to have a separate agreement with each legal assistance provider in a State that does not have a centralized legal assistance program.

Response: Due to the variety of structures of both Ombudsman programs and legal assistance programs, we defer to the Ombudsman to determine how to implement the requirement within the State-specific structure and community resources. We refer commenters to the existing toolkit for collaboration between Ombudsman programs and legal services. ACL will continue to provide technical assistance through our legal assistance and ombudsman resource centers.

Comment: Commenters expressed concern that § 1324.13(i), which defines activities to be performed by the Ombudsman to include activities determined by the Assistant Secretary to be appropriate, could lead to ''mission drift.'' They recommended qualifying language that such other activities must not conflict with the duties and responsibilities of the Ombudsman program and must be relevant to the program and residents.

Response: We accept the comment and have revised this provision accordingly.

§ 1324.15 State Agency Responsibilities Related to the Ombudsman Program

Section 712 of the Act sets forth State agency responsibilities for the Ombudsman program.[344] Section 712(g) of the Act requires the State agency to ensure that adequate legal counsel is available with respect to the program, and § 1324.15(j) explains those requirements.[345] We include minor changes to this section for clarity. For example, the requirements and detail about the scope of responsibility of legal counsel are reorganized to clarify that legal counsel is to be available for consultation on program matters, as well as consultation to the program on the legal needs of residents. The regulations modify the provision for attorney-client privilege to specify that the privilege applies to communications between the Ombudsman and their legal counsel, not between the Ombudsman and counsel for the resident.

We receive many requests for technical assistance with respect to the requirement in section 712 of the Act that the Ombudsman be responsible for fiscal management of the Office.[346] Revised § 1324.15(k) addresses specific components of fiscal management and codifies best practices. Specifically, the State agency must notify the Ombudsman of all sources of funds for the program and requirements for those funds and must ensure that the Ombudsman has full authority to determine the use of fiscal resources for the Office and to approve allocation to designated local Ombudsman entities before distribution of funds. In addition, the revised section requires the Ombudsman to determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program. ACL anticipates providing training and technical assistance for the implementation of these requirements. The section immediately following new § 1324.15(k) is re-numbered accordingly.

We also replace the word ''of'' with ''for'' in the last sentence of § 1324.15(e) to correct a typographical error relating to reasonable requests ''for'' reports by the State agency as it conducts its monitoring responsibilities.

Comment: Many commenters recommended modification to § 1324.15(b) to ensure that State agencies implement requirements of part 1324 in the establishment and operation of the Ombudsman program with the necessary authority to perform its functions. The recommended amendment would add a requirement for State agencies to ensure that the Office acts independent of the State agency, or other agency in which the Office is organizationally located, in the performance of the Ombudsman program's functions, responsibilities, and duties.

Another commenter recommended that State agency monitoring include a review and documentation of the Ombudsman program's systems advocacy activities through a request for examples.

Response: The rule requires the State agency to ensure that the Ombudsman program has sufficient authority and access to fully perform all the functions, responsibilities, and duties of the Office. As stated earlier § 1324.11 requires establishment of the Office of the State Long-Term Care Ombudsman as a distinct, separately identifiable entity that authorizes the Ombudsman, as head of the Office, to make independent determinations and establish positions that do not necessarily represent the determinations or positions of the agency in which it is located. We reiterate that we have accepted comments to clarify that § 1324.11(e)(8) applies to all determinations. Further, § 1324.15(e) requires the State agency to assess as part of its monitoring whether the Ombudsman program is performing all the functions, responsibilities, and duties set forth in §§ 1324.13 and 1324.19. Therefore, ACL believes that the rule provides both clear requirements for functional autonomy and for assurance of implementation. ACL intends to provide technical assistance on implementation of monitoring responsibilities.

Comment: Many commenters expressed support for § 1324.15(j) regarding legal counsel and the State agency's role in ensuring that effective legal representation and consultation is available. Commenters also stated that local representatives of the Office need to have an attorney present when participating in legal proceedings such as depositions and hearings.

Response: We appreciate support for § 1324.15(j). ACL will defer to the Ombudsman and the attorneys it chooses to work with on specific matters related to representation.

Comment: Many commenters expressed strong support for clarifying language at § 1324.15(k) that defines the expectations for the State agency to provide critical information for the Ombudsman to manage the fiscal components of the Ombudsman program efficiently and effectively. One commenter noted that the revision will help eliminate confusion and disparities around the country. Another recommended adding a requirement for the Ombudsman program manager of the local Ombudsman entity to approve initial budgets, expenditures, and changes and to certify that the manager has been involved in and approved expenditures as well as being provided with access to fiscal information throughout the year.

Response: We believe that the recommendation regarding § 1324.15(k) is addressed in § 1324.11(e)(1)(vi) and in § 1324.13(f), which discuss policies and procedures and fiscal responsibility. We decline to make the change.

§ 1324.17 Responsibilities of Agencies Hosting Local Ombudsman Entities

We did not propose any changes to § 1324.17, which sets forth the responsibilities of agencies hosting local

[344] 42 U.S.C. 3058g.

[345] *Id.* section 3058g(g).

[346] *Id.* section 3058g(a)(2).

Ombudsman entities for the personnel management policies and procedures. This section prohibits host agencies from establishing policies and procedures that prohibit the representative of the Office from performing their duties as authorized by law.

Comment: A few commenters expressed concern that some local host agencies do not support representatives of the Office performing systems advocacy and recommended explicit language to ensure that local representatives of the Office are insulated from interference.

Response: As noted above, § 1324.17 prohibits policies and procedures that would interfere with the representative of the Office's performance of their duties. Section 1324.11(e)(5) discusses the duty to engage in systems advocacy. Further, § 1324.19(a)(7) requires representatives of the Office to carry out other activities that the Ombudsman determines to be appropriate. Taken together with §§ 1324.11 and 1324.13, which authorize the Ombudsman to make determinations and establish positions of the Office, these sections support engaging in systems advocacy related to the determinations and positions established by the Ombudsman. The ACL Office of Long-Term Care Ombudsman Programs learns about these types of program barriers through technical assistance and review of State Ombudsman annual reports. As needed, these issues are addressed through additional technical assistance, training, and requests for corrective action.

§ 1324.19 Duties of the Representatives of the Office

This section addresses the duties of the representatives of the Office and provides detailed instructions as to the processing of complaints by representatives of the Office. Minor revisions are made to § 1324.19(b)(2)(ii) and (b)(5) for clarity.

Comment: One commenter recommended editing § 1324.19(a)(7) to ensure that representatives of the Office are not required to perform activities that are inconsistent with the program requirements.

Response: We have accepted the comment.

Comment: One commenter requested that we clarify that providing consent to complaint processing includes non-verbal consent.

Response: The rule allows consent to be provided orally, visually, or using auxiliary aids and services. ACL intends that visual or assisted communication includes non-verbal forms of communication, and we have finalized the rule as written.

Comment: One commenter identified various mechanisms that authorize an individual to serve as a representative for a resident and suggested the Ombudsman be required to provide guidance to representatives of the Office about these mechanisms.

Response: We thank the commenter for the suggestion. ACL training standards already require training about the role of resident representatives, resident decision-making supports and options, State laws on third-party decision makers, communication with resident representatives, and ascertaining the extent of the resident representative's authority.

§ 1324.21 Conflicts of Interest

Section 712(f) of the Act sets forth requirements related to individual and organizational COI, and § 1324.21 implements the statutory provision. COI provisions promote credibility and effectiveness of the Ombudsman program.[347]

Section 1324.21(a) sets out as organizational conflicts the placement of an Ombudsman program in specified organizations. These include an organization that is responsible for licensing, surveying, or certifying long-term care services, including facilities; that provides long-term services and supports under a Medicaid waiver or a Medicaid State plan; that conducts preadmission screening for long-term care facility admissions; that provides long-term care coordination or case management services in settings that include long-term care facilities; that sets reimbursement rates for long-term care services; or that is responsible for eligibility determinations for the Medicaid program carried out under title XIX of the Social Security Act.[348]

We make minor clarifying changes to § 1324.21(b)(3). We remove the last sentence of § 1324.21(b)(5), which repeats language included in § 1324.21(b)(3).

We clarify in § 1324.21(c) situations that create an individual COI, consistent with section 712(f)(1)(C) of the Act.[349]

Comment: Most commenters expressed support for aligning the regulations regarding COI with the underlying statutory provisions. One expressed concern about separating Ombudsman program staff from agency staff serving people with greatest economic or social need, noting that such separation increases the difficulty of all staff to understand and benefit from the valuable role of the Ombudsman program. Another commented that it is acceptable for Ombudsman programs and APS to be in the same agency with appropriate firewalls. One commenter recommended adding a definition of long-term care services and noted that the expanded list could narrow the list of entities willing to house the program in a decentralized model.

Response: As stated, § 1324.21 is consistent with the COI provisions in section 712 of the Act.[350] We will update our sub-regulatory guidance as State agencies and Ombudsman programs work to implement the requirements. We refer commenters to section 102 of the Older Americans Act and § 1324.1 for definitions.[351]

B. New Provisions Added To Clarify Responsibilities and Requirements Under Allotments for Vulnerable Elder Rights Protection Activities

Subpart B—Programs for Prevention of Elder Abuse, Neglect, and Exploitation

§ 1324.201 State Agency Responsibilities for the Prevention of Elder Abuse, Neglect, and Exploitation

Title VII, chapter 3 of the Act sets forth requirements that State agencies must meet with respect to the development and enhancement of programs to address elder abuse, neglect, and exploitation.[352] New § 1324.201 clarifies that as a condition of receiving Federal funds under this chapter State agencies must comply with all applicable provisions of the Act, including those of section 721(c), (d), (e), as well as with all other applicable Federal requirements.[353]

Comment: ACL received comments on this section supportive of the addition. They also recommended that ACL consider the prevalence of elder abuse within LGBTQI+ and HIV positive communities, including residents of long-term care facilities. One commenter recommended that State agencies partner with and support State and Tribal elder justice coalitions to ensure coordination and guidance from interested parties in development of the elder justice system, dissemination of information and educational resources, and to provide policy consultation and research.

Response: ACL appreciates the support. Section 721 of the Act requires

[347] *Id.* section 3058g(f).

[348] 42 U.S.C. 1396–1396v.

[349] 42 U.S.C. 3058g(f)(1)(C).

[350] 42 U.S.C. 3058g.

[351] 42 U.S.C. 3002.

[352] 42 U.S.C. 3058i.

[353] *Id.* section 3058i(c), (d), (e).

coordination, and ACL has elected not to repeat statutory language.[354]

Subpart C—State Legal Assistance Development

§ 1324.301 Definitions

New § 1324.301 states definitions set forth in § 1321.3 apply to subpart C, and terms used in subpart C but not otherwise defined will have the meanings ascribed to them in the Act.

§ 1324.303 Legal Assistance Developer

We add a new regulation under Title VII, § 1324.303 to implement section 731 of the Act regarding the position of Legal Assistance Developer (LAD).[355] The State agency designates the LAD and describes the office and its duties as well as activities in the State plan. The regulation sets forth the duties of the LAD, including training and technical assistance to legal assistance providers and coordination with the Ombudsman program. The final rule includes COI prohibitions, including a prohibition against undertaking responsibilities that might compromise the performance of duties as LAD. COI may arise if the LAD serves as the director of the APS program, legal counsel to the Ombudsman program, or counsel or a party to administrative appeals related to long-term care settings. COI may also arise, for example, if the LAD serves as the administrator of a public guardianship program; hearing officer in Medicaid appeals related to LTSS delivered under Medicaid authorities including waiver programs and Medicaid State plan, and/or nursing home eligibility; or serves as the Ombudsman.

The LAD oversees advice, training, and technical assistance support for the provision of legal assistance provided by the State agency; coordinates with all legal assistance and representation for all priority areas described in the Act; and coordinates with the legal assistance resource center established pursuant to section 420 of the Act.[356]

Comment: Section 1324.303 sets forth the requirements for the LAD, pursuant to section 731 of the OAA.[357] Several commenters were appreciative of the clarification regarding the roles and responsibilities of the LAD. Most, however, discussed challenges facing the position, including a lack of adequate funding and its designation as a part-time position. Some described the LAD as wearing many hats and noted that many LADs are not lawyers, potentially hindering their ability to support the needs of the legal assistance program, including support for legal assistance and elder rights education, and coordination with the Ombudsman program and APS. One commenter stated that it is a misnomer to designate subpart C of the regulations as a State Legal Assistance Development Program, since the Act refers only to the designation of a person as LAD, and to the optional activities a State agency may choose to have the LAD undertake. Additionally, most LAD positions are not full-time, and section 731 of the Act only refers to an individual working as the LAD. Commenters requested that the regulations require the LAD to be a full-time position staffed by an attorney.

Response: ACL appreciates the comments. It is our intent to set out expectations for the duties of the LAD, including coordination of the provision of legal assistance, consistent with the provisions of the Act. However, it is outside the scope of the regulations to address funding issues. We also cannot mandate that the LAD be a full-time position and/or staffed by an attorney. Nevertheless, we remind State agencies that § 1324.303(b) requires them to ensure that the LAD has the knowledge, resources, and capacity to carry out the functions of the position. The Act does not require professional qualifications for the individual a State agency designates as the LAD, nor does the Act require, as it does for other statutorily designated positions, such as the Ombudsman, that the LAD be a full-time position. Accordingly, these matters are beyond the scope of our regulatory authority.

We have made one change to the regulatory text in response to the comments. Given that section 731 of the OAA [358] requires the State agency to provide the assistance of an individual, rather than a program, we have modified the title of subpart C of these regulations to State Legal Assistance Development. The title mirrors the title of section 731 of the OAA.

Comment: Commenters appreciated that § 1324.303(a)(4)(ii) requires LADs to promote alternatives to guardianship. One commenter noted that supported decision making can be used both formally through contractual agreement and informally. The commenter recommended that the section refer to supported decision making, rather than supported decision making agreements as the proposed regulatory text reads.

Response: ACL accepts the comment. ACL agrees that decision supports are available through a range of tools and approaches and each adult has the right to determine which tool or approach suits their needs, or to determine that they do not want to adopt such a tool. We refer to all such tools and approaches as decision supports.

Comment: Proposed § 1324.303(d) defines standards to address COI. One commenter objected to these provisions related to the legal assistance developer, which ''stringently prohibit 'dual hatting' of the LAD positions with other responsibilities,'' as being unduly burdensome, given the lack of dedicated funding authorized in the Act for the position. The same commenter was concerned that the lack of dedicated funding made it cost-prohibitive for the LAD to carry out the roles and responsibilities set forth in the regulation.

Response: We do not prohibit LADs from assuming additional functions, as long as these functions do not pose actual or perceived COI. For the reasons stated earlier, we believe that the COI provisions are necessary to protect the interests of older people and the integrity of the LAD position. We expect State agencies to include their conflict mitigation strategies for this position in their policies and procedures. State agencies may also review and prioritize the roles and responsibilities of the LAD position to meet the needs of the State, provided that their priorities are clearly described in the State plan.

III. Required Regulatory Analyses

Comment: ACL received several comments indicating concerns with implementation costs and administrative burden in implementing the final rule, as well as concerns regarding ongoing costs to monitor compliance with the final rule. Some State agencies commented that they anticipate that consultants and/or additional staff will need to be hired and/or that changes will need to be made to information technology systems. Some State agencies asserted that ACL has greatly underestimated both the cost, and the amount of time needed, to come into compliance with the rule; some have included cost estimates in their comments of hundreds of thousands dollars or more (in some cases these are expressed as annual costs and not so in others).

Response: For the reasons discussed below, we maintain the Regulatory Impact Analysis (RIA) as proposed, except that we have updated the analysis with more recent data.

As noted in the RIA, the most recent reauthorization of the OAA was enacted during Federal Fiscal Year 2020, and the baseline for the analysis was Federal

[354] *Id.* section 3058i.
[355] 42 U.S.C. 3058j.
[356] 42 U.S.C. 3032i.
[357] 42 U.S.C. 3058j.
[358] *Id.*

Fiscal Year 2019. Most of the changes to 45 CFR parts 1321, 1322, and 1324 modernize the OAA regulations to bring them into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and to provide clarity of administration for ACL and its grantees with respect to aspects of the OAA that were enacted under previous reauthorizations. A limited number of substantive changes were made by the 2020 reauthorization to the implementation of programs by State agencies and area agencies, and as more particularly discussed in the RIA, we anticipate that any costs to a State agency associated with these changes will be de minimis. We also note that public comments that provided State-specific cost estimates to implement and administer the final rule did not clearly differentiate between costs attributable to the statute and the incremental costs of implementing the final rule, which makes it difficult to incorporate this information in the final RIA.

In addition to areas where we better align regulation with statute, as also described in more detail in the RIA below, the final rule benefits State agencies by modernizing the regulatory text to provide greater flexibility to State agencies and area agencies and to reflect ongoing feedback from interested parties and responses to our RFI in areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve.

While State agencies and AAAs should review their practices, policies, and procedures to ensure they comply with the final rule, we note again that a majority of this rule updates prior regulations to conform to longstanding statutory requirements. State agencies and AAAs also already should be engaging in monitoring activities for compliance with the Act. In addition, the final rule grants significant discretion to the State or area agency (as applicable) in how to implement many provisions. Similarly, a majority of the provisions of this final rule that apply to Title VI grantees and to service providers bring the prior regulation into conformity with what is already required by the Act.

However, in consideration of comments related to the time required for implementation of the rule, we have decided to delay the compliance date of this rule until October 1, 2025. This should give all regulated entities sufficient time to come into compliance with these regulations. It will also allow time for State and area plans on aging that will be effective as of October 1, 2025, to incorporate the requirements of this final rule into new or amended plans. As noted previously, State agencies that need additional time to comply with one or more provisions of the rule may submit a request to proceed under a corrective action plan. A request should include the reason the State needs additional time, the steps the State will take to reach full compliance, and how much additional time the State anticipates needing. The corrective action plan process is intended to be highly collaborative and flexible. Under a corrective action plan, States agencies and ACL will jointly identify progress milestones and a feasible timeline for the State agency to come into compliance with the provision(s) of the rule incorporated into the corrective action plan. State agencies must make a good faith effort at compliance to continue operating under a corrective action plan. Requests for corrective action plans will be reviewed after April 1, 2024, and ACL will provide guidance on this process after this rule takes effect.

Comment: One commenter proposed allowing State agencies to request waivers from having to meet the requirements set forth in the final rule if they could otherwise meet the intent of the Act.

Response: ACL has determined not to make any changes to the regulatory text in response to this comment. Most of the changes to 45 CFR part 1321 modernize the OAA regulations to bring them into conformity with the requirements of the OAA. Accordingly, we decline to allow State agencies to request waivers from meeting provisions in the final rule (unless otherwise explicitly allowed).

Comment: ACL received a comment expressing concern that the rule may have Federalism implications.

Response: Pursuant to Executive Order 13132, ACL has considered the impact of the final rule on State and local governments. Our analysis of the potential federalism implications of the final rule is set forth in Section III.C below.

Regulatory Impact Analysis

1. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 14094 entitled ''Modernizing Regulatory Review'' (April 6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act (42 U.S.C. 1302(b)), section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA; March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (CRA; 5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Executive Order 14094 entitled ''Modernizing Regulatory Review'' (hereinafter, the Modernizing E.O.) amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review). The amended section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $200 million or more in any 1 year (adjusted every 3 years by the Administrator of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A RIA must be prepared for significant rules. Based on our estimates, OIRA has determined that this rulemaking is ''significant'' per section 3(f) of Executive Order 12866. Therefore, OMB has reviewed these proposed regulations, and the Departments have provided the following assessment of their impact. Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C 801 *et seq.*) OIRA has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

1. Summary of Costs and Transfers

This analysis describes costs and transfers under this final rule and quantifies several categories of costs to grantees (State agencies under Title III and Title VII and Tribal organizations and Hawaiian Native grantees under Title VI) and subrecipients (area agencies and service providers under Title III and where applicable, Title VII). Specifically, we quantify costs associated with grantees and subrecipients revising policies and procedures, conducting staff training, and revising State plan documentation accessibility practices. As discussed in greater detail in this analysis, we estimate that the final rule will result in one-time costs of approximately $17.43 million, including costs associated with covered entities revising policies and procedures, and costs associated with training.

The analysis also includes a discussion of costs we do not quantify, and a discussion of the potential benefits under the rule that we similarly do not quantify.

Baseline Conditions and Changes Due to Reauthorization

The most recent reauthorization of the OAA was enacted during Federal Fiscal Year (FFY) 2020; therefore, the baseline used for the analysis is FFY 2019. A main impact of the 2020 reauthorization of the OAA was to increase the authorized appropriations available to be distributed to the State agencies for the implementation of programs and services under Titles III, VI, and VII. A limited number of substantive changes were made by the 2020 reauthorization to the implementation of programs by State agencies and area agencies, including: requiring outreach efforts to Asian-Pacific American, Native American, Hispanic, and African-American older individuals, and older sexual and gender minority populations and the collection of data with respect thereto; requiring State agencies to simplify the process for transferring funds for nutrition services to reduce administrative barriers and direct resources to where the greatest need is for such services; broadening allowable services under Title III, part B, such as screening for traumatic brain injury and the negative effects of social isolation; clarifying that a purpose of the Title III, part C program is to reduce malnutrition; clarifying the allowability of reimbursing volunteer Ombudsman representatives under Title VII for costs incurred; and expanding the examples of allowable elder justice activities under section 721 [359] to include community outreach and education as well as the support and implementation of innovative practices, programs, and materials in communities to develop partnerships for the prevention, investigation, and prosecution of abuse, neglect, and exploitation.

The OAA initially was passed in 1965. The prior regulations for programs authorized under the OAA are from 1988 and have not been substantially altered since that time (other than portions of 45 CFR part 1321 and 45 CFR part 1324 regarding the State Long-Term Care Ombudsman Program, which were promulgated in 2015). Following its initial passage, the OAA has been reauthorized and amended sixteen times prior to the 2020 reauthorization, including five times since the regulations were promulgated in 1988.

Many changes have been made in the implementation of the OAA since 1988 as a result of these reauthorizations. State agencies, area agencies, and Title VI grantees should already be aware of programmatic and fiscal requirements in the reauthorizations and should have established policies and procedures to implement them. Accordingly, substantially all of the changes to 45 CFR parts 1321, 1322, and 1324 modernize the OAA regulations to bring them into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and provide clarity of administration for ACL and its grantees with respect to aspects of the OAA that were enacted under previous reauthorizations.

In addition to areas where we better align regulation with statute, we make modifications to regulatory text that modernize our rule to provide greater flexibility to State agencies and area agencies and to reflect ongoing feedback from interested parties and responses to our RFI in areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve. For example, we modernize our nutrition regulations to better support grantees' efforts to meet the needs of older adults. Our previous sub-regulatory guidance has indicated that meals are either consumed on-site at a congregate meal setting or delivered to a participant's home. This previous guidance does not take into account those who may leave their homes to pick up a meal but are not able to consume the meal in the congregate setting for various reasons, including safety concerns such as those experienced during the COVID–19 PHE. The COVID–19 PHE brought to light limitations in our prior nutrition regulations, which we have addressed in § 1321.87 to allow for shelf-stable, pick-up, carry-out, drive-through, or similar meals where a participant will be able to collect their meal from a congregate site and return to the community off-site to enjoy it. Our final rule is a direct response to feedback from interested parties, including as gathered from the RFI and NPRM comment period, and appropriately reflects the evolving needs of both grantees and OAA participants.

Another example of a modification to regulatory text that modernizes our rule is the new definition of ''greatest economic need.'' Focusing OAA services toward individuals who have the greatest economic need is one of the basic tenets of the OAA. The definition of ''greatest economic need'' in the OAA incorporates income and poverty status. However, the definition in the OAA is not intended to preclude State agencies from taking into consideration populations that experience economic need due to other causes. A variety of local conditions and individual situations, other than income, could factor into an individual's level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition will allow State agencies and AAAs to make these determinations.

A detailed discussion of costs and transfers associated with the rule follows.

i. 2020 Reauthorization

a. New Requirements for State Agencies and Area Agencies

The 2020 reauthorization imposed the following new requirements on grantees: required outreach efforts to Asian-Pacific American, Native American, Hispanic, and African-American older individuals, and older lesbian, gay, bisexual, and transgender (LGBT) populations and the collection of data with respect thereto; required State agencies to simplify the process for transferring funds for nutrition services to reduce administrative barriers and direct resources to where the greatest need is for such services; and clarified that reducing malnutrition is a purpose of the OAA Title III, part C program.

We do not associate any additional costs for the agencies with respect to these requirements. The agencies were

[359] 42 U.S.C. 3058i.

required to conduct outreach to minority populations prior to the 2020 reauthorization, and State agencies already have been reaching out to the LGBTQI+ population.[360] For those agencies that have not been reaching out to LGBTQI+ communities, we believe any additional cost to conduct outreach to this population will be de minimis, as they already have processes in place to reach out to underserved populations. The data collection cost likewise will be minimal as agencies already have data collection systems and practices in place.

The cost to State agencies to comply with the requirement that they simplify the process for transferring funds for nutrition services to reduce administrative barriers and direct resources to where the greatest need is for such services is not quantifiable. Each State agency must comply with its State-level procurement requirements, and it is not possible for us to determine what any State agency may be able to change in this regard or at what cost. It is in each State agency's interest to improve this process for transferring nutrition services funds, and we believe that State agencies engage in ongoing efforts to improve their fiscal management processes generally, within allowable parameters. Accordingly, we anticipate that any costs to a State agency associated with this requirement will be de minimis.

We do not associate any costs to State agencies, AAAs, or Title VI grantees with respect to the clarification that a purpose of the Title III, part C program is to reduce malnutrition. Grantees already were screening for older adults who are at high nutrition risk and have been offering nutrition counseling and nutrition education, as appropriate, and this clarification is not expected to impose additional costs on OAA grantees or subrecipients.

ii. Final Rule

a. Revising Policies and Procedures

This analysis anticipates that the final rule will result in one-time costs to State agencies, AAAs, service providers, and Title VI grantees to revise policies and procedures. The obligations of State agencies and AAAs under the OAA are more extensive than are those of Title VI grantees under the OAA. Accordingly, the Title III rule is considerably more extensive than is the Title VI rule, and we address State agencies and AAAs separately from Title VI grantees. We also address service providers separately, as we anticipate that the scope of the review needed for service providers will be narrower than that needed for State agencies and AAAs.

In addition to changes to the existing regulations, we add several new provisions to the regulations in the following areas: 45 CFR part 1321 (Title III): State Agency Responsibilities, Area Agency Responsibilities, Service Requirements, Emergency and Disaster Requirements; 45 CFR part 1322 (Title VI): Service Requirements, Emergency and Disaster Requirements; and 45 CFR part 1324 (Title VII): Programs for Prevention of Elder Abuse, Neglect, and Exploitation and State Legal Assistance Development. However, substantially all of these new provisions update the OAA regulations to bring them into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and provide clarity of administration for ACL and its grantees with respect to aspects of the OAA that were enacted under previous reauthorizations. We associate one-time costs to State agencies, AAAs, service providers, and Title VI grantees to update their policies and procedures and to train employees on the updated policies and procedures, as discussed below. State agencies, AAAs, service providers, and Title VI grantees already should be aware of these requirements and already should have established policies and procedures in place. Accordingly, we otherwise associate no cost to them as a result of these new provisions.

State Agencies and AAAs

In clarifying requirements for State agency and AAA policies and procedures under the OAA, ACL anticipates that all 56 State agencies and 615 AAAs (671 aggregate State agencies and AAAs) will revise their policies and procedures under the final rule, with half of these State agencies or AAAs requiring fewer revisions. We estimate that State agencies or AAAs with more extensive revisions will spend forty-five (45) total hours on revisions per agency. Of these, forty (40) hours in the aggregate will be spent by one or more mid-level manager(s) equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011),[361] at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs,[362] while an average of five (5) hours will be spent by executive staff equivalent to a general and operations manager (BLS Occupation code 11–1021),[363] at a cost of $94.32 per hour after adjusting for non-wage benefits and indirect costs.[364] For State agencies or AAAs with less extensive revisions, we assume that twenty-five (25) total hours will be spent on revisions per agency. Of these, twenty (20) hours will be spent by one or more mid-level manager(s), and five (5) hours will be spent by executive staff.

We monetize the time that will be spent by State agencies and AAAs on revising policies and procedures by estimating a total cost per entity as follows:

336 State agencies/AAAs—more extensive revisions:	
First-Line Supervisor: 40 hours @ $59.02/hr:	$2,360.80
General and Operations Manager: 5 hours @ $94.32/hr:	$471.60
	$2,832.40 per agency.

[360] For example, in its plan on aging that was effective October 1, 2018, the California State agency noted a focus on developing strategies to better serve LGBTQI+ populations; the Ohio State agency sought input regarding the needs of LGBTQI+ populations in connection with the preparation of its State plan on aging for FFY 2019–2022; and the New York State agency's plan on aging for FFY 2019–2023 references ongoing efforts to work with area agencies on aging to conduct outreach to the LGBTQI+ community.

[361] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), *https://www.bls.gov/oes/current/oes431011.htm.*

[362] This hourly cost was determined by multiplying the median wage of $29.51 by 2.

[363] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11–1021 General and Operations Managers (May 2022), *https://www.bls.gov/oes/current/oes111021.htm.*

[364] This hourly cost was determined by multiplying the median wage of $47.16 by 2.

335 State agencies/AAAs—less extensive revisions:	
First-Line Supervisor: 20 hours @ $59.02/hr:	$1,180.40
General and Operations Manager: 5 hours @ $94.32/hr:	$471.60
	$1,652.00 per agency.

For the approximately 336 State agencies or AAAs with more extensive revisions, we estimate a cost of approximately $951,686.40. For the 335 State agencies or AAAs with less extensive revisions, we estimate a cost of approximately $553,420.00. We estimate the total cost associated with revisions with respect to the final rule for State agencies and AAAs of $1,505,106.40.

Service Providers

According to data submitted to ACL by the State agencies, there were 17,438 service providers during FFY 2021, and we use that figure for this analysis. We anticipate that all 17,438 service providers will review their existing policies and procedures to confirm that they comply the rule and will update their policies and procedures, as needed, in order to bring them into compliance. We estimate that the scope of the review needed for service providers will be narrower than that needed for State agencies and AAAs and will be limited to areas related to their provision of direct services, such as person-centered and trauma-informed services, eligibility for services, client prioritization, and client contributions. Like State agencies, AAAs and Title VI grantees, service providers already should be aware of the fiscal and programmatic changes that have been made to the OAA since 1988, and to the extent required, they already should have established policies and procedures with respect to the OAA requirements that apply to them.

We estimate that service providers will spend seven (7) total hours on revisions per agency. Of these, five (5) hours in the aggregate will be spent by one or more mid-level manager(s) equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011),[365] at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs,[366] while an average of two (2) hours would be spent by executive staff equivalent to a general and operations manager (BLS Occupation code 11–1021),[367] at a cost of $94.32 per hour after adjusting for non-wage benefits and indirect costs.[368]

We monetize the time spent by service providers on revising policies and procedures by estimating a total cost per entity as follows:

First-Line Supervisor: 5 hours @ $59.02/hr:	$295.10
General and Operations Manager: 2 hours @ $94.32/hr:	188.64
	$483.74 per agency.

We estimate the total cost associated with revisions with respect to the final rule for 17,438 service providers of $8,435,458.12.

Title VI Grantees

This analysis anticipates that the final rule also will result in one-time costs to Title VI grantees to revise policies and procedures. In clarifying requirements for Title VI grantee policies and procedures under the OAA, ACL anticipates that all 290 Title VI grantees will revise their policies and procedures under the final rule, with approximately one-third of these Title VI grantees requiring fewer revisions. We estimate that Title VI grantees with more extensive revisions will spend thirty (30) total hours on revisions per agency. All of these 30 hours will be spent by a mid-level manager equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011),[369] at a cost of $59.02 per hour after adjusting for non-wage benefits and the indirect costs. For Title VI grantees with less extensive revisions, we assume fifteen (15) total hours spent on revisions per agency. All of these hours will be spent by a mid-level manager equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011),[370] at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs.[371]

We monetize the time spent by Title VI grantees on revising policies and procedures as follows:

196 Title VI grantees—more extensive revisions:.	
First-Line Supervisor: 30 hours @ $59.02/hr:	$1,770.60 per grantee.
94 Title VI grantees—less extensive revisions:	
First-Line Supervisor: 15 hours @ $59.02/hr:	$885.30 per grantee.

For the approximately 196 Title VI grantees with more extensive revisions, we estimate a cost of approximately $347,037.60. For the 94 Title VI grantees with less extensive revisions, we estimate a cost of approximately $83,218.20. We estimate the total cost associated with revisions of policies and procedures for Title VI grantees with respect to the final rule of $430,255.80.

The above estimates of time and number of State agencies, AAAs and Title VI grantees that will revise their policies under the regulation are approximate estimates based on ACL's

[365] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), *https://www.bls.gov/oes/current/oes431011.htm.*

[366] This hourly cost was determined by multiplying the median wage of $29.51 by 2.

[367] U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11–1021 General and Operations Managers (May 2022), *https://www.bls.gov/oes/current/oes111021.htm.*

[368] This hourly cost was determined by multiplying the median wage of $47.16 by 2.

[369] U.S. Dep't of Labor, Bureau of Labor Statistics. Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), *https://www.bls.gov/oes/current/oes431011.htm.*

[370] *Id.*

[371] These hourly costs were determined by multiplying the median wage of $29.51 by 2.

extensive experience working with the agencies (including providing technical assistance), feedback and inquiries that we have received from State agencies, AAAs, and Title VI grantees, as well as ACL staff's prior experience working with OAA programs at State agencies and AAAs. Due to variation in the types and sizes of State agencies, AAAs, and Title VI grantees, the above estimates of time and number of entities that will revise their policies under the regulation is difficult to calculate precisely.

b. Training

ACL estimates that State agencies, AAAs, service providers and Title VI grantees will incur one-time costs with respect to training or re-training employees under the final revised rule. For reasons similar to the discussion above with respect to revisions to policies and procedures, we address State agencies and AAAs separately from Title VI grantees. We also address service providers separately, as we anticipate that the training needed for service providers will be less extensive than that needed for State agencies and AAAs.

State Agencies and AAAs

Costs To Prepare and Conduct Trainings of Their Own Staff

Consistent with our estimates relating to the number of agencies that will require extensive revision of their policies, we estimate that 50 percent of the State agencies and AAAs program management staff will require more extensive staff training regarding the rule. Based on our experience working with State agencies and AAAs, we estimate that, for State agencies and AAAs that need more extensive trainings, one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011)[372] will spend three (3) total hours to prepare the training, and five (5) hours to provide the training, at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs, and that for those needing less extensive trainings, one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011)[373] will spend two (2) total hours to prepare the training, and two (2) hours to provide the training, at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs.[374]

We monetize the time spent by State agencies and AAAs to prepare and conduct trainings for their own employees as follows:

336 State agencies/AAAs—more extensive trainings: First-Line Supervisor: 8 hours @$59.02/hr:	$472.16 per agency.
335 State agencies/AAAs—less extensive trainings: First-Line Supervisor: 4 hours @$59.02/hr:	$236.08 per agency

For the approximately 336 State agencies or AAAs with more extensive needed training, we estimate a cost of approximately $158,645.76. For the 335 State agencies or AAAs with less extensive training needs, we estimate a cost of approximately $79,086.80. We estimate the total cost associated with the preparation and conduct of trainings with respect to the final rule for State agencies and AAAs of $237,732.56.

Costs To Receive Trainings by Their Own Staff

As noted above, we estimate that 50 percent of the State agencies and AAAs program management staff will require more extensive staff training regarding the rule. Based on our experience working with State agencies and AAAs, we estimate that State agencies and AAAs with more extensive trainings will spend five (5) total hours on trainings per agency, and that those with less extensive trainings will spend two (2) hours on trainings per agency. We estimate that five (5) employees per agency, equivalent to social and community service managers (BLS Occupation code 11–9151),[375] will receive training at a cost of $71.38 per hour per employee after adjusting for non-wage benefits and indirect costs,[376] and that one (1) employee per agency, equivalent to a business operations specialist (BLS Occupation code 13–1199),[377] will receive training at a cost of $73.06 per hour after adjusting for non-wage benefits and indirect costs.[378]

We monetize the time spent in the receipt of trainings as follows:

336 State agencies/AAAs—more extensive trainings:	
Social & Community Service Manager: 5 staff × 5 hours @$71.38/hr:	$1,784.50
Business Operations Specialist: 1 staff × 5 hours @$73.06/hr:	365.30
	$2,149.80/ agency.
335 State agencies/AAAs—less extensive trainings:	
Social & Community Service Manager: 5 staff × 2 hours @$71.38/hr:	$713.80
Business Operations Specialist: 1 staff × 2 hours @$73.06/hr:	146.12.
	$859.92/ agency.

For the approximately 336 State agencies or AAAs with more extensive trainings, we estimate a cost of approximately $722,332.80. For the 335 State agencies or AAAs with less extensive trainings, we estimate a cost of approximately $288,073.20. We estimate the total cost associated with receipt of training by employees with respect to revisions to policies and procedures under the final rule of $1,010,406.00.

[372] U.S. Dep't of Labor, Bureau of Labor Statistics. Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), *https://www.bls.gov/oes/current/oes431011.htm.*.

[373] *Id.*

[374] These hourly costs were determined by multiplying the median wage of $29.51 by 2.

[375] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11–9151 Social and Community Service Managers (May 2022), *https://www.bls.gov/oes/current/oes119151.htm.*

[376] This hourly cost was determined by multiplying the median wage of $35.69 by 2.

[377] U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 13–1199 Business Operations Sepcialists, All Other (May 2022), *https://www.bls.gov/oes/current/oes131199.htm.*

[378] This hourly cost was determined by multiplying the median wage of $36.53 by 2.

Costs To Conduct Trainings of AAAs by State Agencies

We estimate that each of the forty-seven (47) State agencies that have AAAs will conduct one (1) training for their AAAs. We estimate that two (2) State agency employees per agency, each equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011),[379] will spend three (3) total hours to conduct the training, at a cost per employee of $59.02 per hour after adjusting for non-wage benefits and indirect costs.[380] As the State agencies already will have created trainings for their own employees, we do not associate any costs with the creation of trainings for the AAAs. We monetize the time spent by the 47 State agencies to train AAAs by estimating a cost per agency of $354.12 (2 staff × 3 hours × $59.02/hr). We estimate the total cost to the State agencies to train AAAs to be $16,643.64.

We estimate that each of the 615 AAAs will arrange for two (2) AAA employees, each equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011),[381] to attend the three (3) hour trainings conducted by the State agency, at a cost per employee of $59.02 per hour after adjusting for non-wage benefits and indirect costs.[382] We monetize the time spent by the 615 AAAs to attend the State agency trainings by estimating a cost per agency of $354.12 (2 staff × 3 hours × $59.02/hr). We estimate the total cost associated to the AAAs to receive training from the State agencies to be $217,783.80. We estimate the total costs associated with the training by State agencies of AAAs to be $234,427.44.

Service Providers

Cost To Conduct Trainings

We estimate that the 615 AAAs, as well as the 9 State agencies in single PSA States that do not have AAAs, will provide training to their service providers with respect to revisions to policies and procedures under the final rule. We estimate that two (2) AAA or State agency employees per agency, as applicable, each equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011),[383] will spend two (2) total hours to conduct one (1) training, at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs.[384] As the State agencies and AAAs already will have created trainings for their own employees, we do not associate any costs with the creation of trainings for the service providers. We monetize the time spent by the 615 AAAs and the 9 State agencies to train service providers by estimating a cost per agency of $236.08 (2 staff × 2 hours × $59.02/hr). We estimate the total cost associated with the conduct of trainings of service providers to be $147,313.92.

Cost To Receive Training

We estimate that all 17,438 service providers will receive training regarding revised policies and procedures in connection with the final rule. We estimate that two (2) employees per agency, equivalent to social and community service managers (BLS Occupation code 11–9151),[385] will receive two (2) hours of training at a cost per employee of $71.38 per hour after adjusting for non-wage benefits and indirect costs.[386]

We monetize the time spent by service providers to receive training with respect to revised policies and procedures by estimating a total cost per entity of $285.52 (2 staff × 2 hours × $71.38/hr). We estimate the total cost associated with receipt of training with respect to the final rule for 17,438 service providers of $4,978,897.76.

Title VI Grantees

Costs To Prepare and Conduct Trainings of Their Own Staff

Consistent with our estimates relating to the number of Title VI grantees that will require extensive revision of their policies, we estimate that two thirds of the Title VI grantees' program management staff will require more extensive staff training regarding the rule. Based on our experience working with Title VI grantees, we estimate that, for Title VI grantees that need more extensive trainings, one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011) [387] will spend three (3) total hours to prepare the training, and five (5) hours to provide the training, at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs, and that for those needing less extensive trainings one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011) [388] will spend two (2) total hours to prepare the training, and two (2) hours to provide the training, at a cost of $59.02 per hour after adjusting for non-wage benefits and indirect costs.[389]

We monetize the time spent by Title VI grantees to prepare and conduct trainings for their own employees by estimating a total cost per entity of $472.16 (1 staff × 8 hours × $59.02/hr) or $251.92 (1 staff × 4 hours × $59.02/hr), depending on the extent of the training needed. For the approximately 196 Title VI grantees with more extensive needed training, we estimate a cost of approximately $92,543.36. For the 94 Title VI grantees with less extensive training needs, we estimate a cost of approximately $22,191.52. We estimate the total cost associated with the preparation and conduct of trainings with respect to the final rule for Title VI grantees of $114,734.88.

Cost To Receive Trainings by Their Own Staff

As noted above, we estimate that two thirds of the Title VI grantees' program management staff will require more extensive staff training regarding the rule. Based on our experience working with Title VI grantees, we estimate that those grantees with more extensive trainings will spend five (5) total hours on the receipt of training per agency, and that those with less extensive trainings will spend two (2) hours on the receipt of trainings per agency. We estimate that three (3) employees per agency, equivalent to social and community service managers (BLS Occupation code 11–9151),[390] will

[379] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), *https://www.bls.gov/oes/current/oes431011.htm.*

[380] This hourly cost was determined by multiplying the median wage of $29.51 by 2.

[381] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), *https://www.bls.gov/oes/current/oes431011.htm..*

[382] This hourly cost was determined by multiplying the median wage of $29.51 by 2.

[383] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), *https://www.bls.gov/oes/current/oes431011.htm.*

[384] This hourly cost was determined by multiplying the median wage of 29.51 by 2.

[385] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11–9151 Social and Community Service Managers (May, 2022), *https://www.bls.gov/oes/current/oes119151.htm.*

[386] This hourly cost was determined by multiplying the median wage of $36.59 by 2.

[387] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43–1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), *https://www.bls.gov/oes/current/oes431011.htm.*

[388] *Id.*

[389] These hourly costs were determined by multiplying the median wage of $29.51 by 2.

[390] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11–9151 Social and Community Service Managers (May, 2022), *https://www.bls.gov/oes/current/oes119151.htm.*

receive training at a cost per employee of $71.38 per hour after adjusting for non-wage benefits and indirect costs,[391] and that one (1) employee per agency, equivalent to a business operations specialist (BLS Occupation code 13–1199),[392] will receive training at a cost of $73.06 per hour after adjusting for non-wage benefits and indirect costs.[393]

We monetize the time spent on receipt of training as follows:

196 Title VI Grantees—more extensive trainings:	
Social & Community Service Manager: 3 staff × 5 hours @ $71.38/hr:	$1,070.70
Business Operations Specialist: 1 staff × 5 hours @ $73.06/hr:	365.30
	$1,436.00/grantee
94 Title VI Grantees—less extensive trainings:	
Social & Community Service Manager: 3 staff × 2 hours @ $71.38/hr:	$428.28
Business Operations Specialist: 1 staff × 2 hours @ $73.06/hr:	146.12
	$574.40/grantee

For the approximately 196 Title VI grantees with more extensive trainings, we estimate a cost of approximately $281,456.00. For the 94 Title VI grantees with less extensive trainings, we estimate a cost of approximately $53,993.60. We estimate the total cost associated with receipt of training of employees with respect to revisions to policies and procedures under the final rule of $335,449.60.

The above estimates of the time needed by State agencies, AAAs, and Title VI grantees for training of employees with respect to the final rule, as well as the number of employees to be trained, are approximate estimates based on ACL's extensive experience working with the agencies, including providing technical assistance as well as ACL staff's prior experience working with OAA programs at State agencies and AAAs. Due to variation in the types and sizes of State agencies, AAAs, and Title VI grantees, the above estimates of time needed for training and the number of employees to be trained with respect to the final rule is difficult to calculate precisely.

c. Making State Plan Documentation Available

Section 305(a)(2) of the OAA,[394] together with existing 45 CFR 1321.27, require State agencies, in the development and administration of the State plan, to obtain and consider the input of older adults, the public, and recipients of services under the OAA. Section 1321.29 of the final regulation requires State agencies to ensure that documents which are to be available for public review in connection with State plans and State plan amendments, as well as final State plans and State plan amendments, be available in a public location, as well as available in print by request.

Based on ACL's extensive experience working with State agencies in their development of State plans and State plan amendments, we estimate that most State agencies already comply with the requirements to make such documentation accessible in a public place. It is common practice for State agencies to post the documents on their public websites.[395] For those that do not already post the documents on their websites, we estimate that it will take less than one hour of time spent by a computer and information system employee to post the documents on their websites. Accordingly, we believe this cost will be minimal and do not quantify it.

Occasionally, a member of the public may request a print copy of a State plan. State plan documents can vary widely in length; based on our experience, we estimate that on average each State plan contains 75 pages, including exhibits. At an estimated cost of $.50 per page for copies, each paper copy will cost approximately $37.50. Today, documents typically are shared electronically, rather than via print copies, and we estimate that each State agency will receive few requests for print copies of their State plans. In addition, all States have established laws that allow access to public records.[396] Therefore, we also believe this cost will be minimal and do not quantify it.

d. State Plan Amendments and Disaster Flexibilities

Based on input from interested parties and our experience, particularly during the COVID–19 PHE, we add Subpart E—Emergency and Disaster Requirements (§§ 1321.97–1321.105) to set forth expectations and clarify flexibilities that are available in certain disaster situations. Similarly, § 1322.35 will provide for flexibilities to be available to Title VI grantees during certain emergencies and will require Title VI grantees to report separately on expenditures of funds when exercising such flexibilities. ACL estimates that some State agencies, AAAs, and Title VI grantees will incur costs to comply with the new provision. For reasons similar to the discussion above with respect to revisions to policies and procedures, we address State agencies and area agencies separately from Title VI grantees.

State Agencies and AAAs

ACL has administrative oversight responsibility with respect to the expenditures of Federal funds pursuant to the OAA, and these flexibilities involve exceptions to certain programmatic and fiscal requirements under the OAA. Accordingly, in addition to the flexibilities we allow in this section, we are compelled to set forth that State agencies be required to submit State plan amendments when they intend to exercise any of these flexibilities, as well to comply with reporting requirements. We believe the cost to a State agency to prepare and submit a State plan amendment will be quite minimal, in particular in comparison to the benefits to older adults in emergency situations as a result of these flexibilities. We, therefore, do not quantify the cost to a State agency to prepare and submit such a State plan amendment. We likewise do not quantify the cost to a State

[391] This hourly cost was determined by multiplying the median wage of $35.69 by 2.

[392] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 13–1199 Business Operations Specialists, All Other (May, 2022), *https://www.bls.gov/oes/current/oes131199.htm.*

[393] This hourly cost was determined by multiplying the median wage of $36.53 by 2.

[394] 42 U.S.C. 3025(a)(2).

[395] For example, the State agencies from Alabama, Arizona, California, Florida, Georgia, Illinois, Massachusetts, Montana, North Dakota, New York, and Ohio, in addition to others, post their plans on aging on their websites.

[396] *Public Records,* Natl. Assn. of Attorneys General, *https://www.naag.org/issues/civil-law/public-records/* (last visited Oct. 24, 2023); *State Public Records Laws,* FOIAdvocates, *http://www.foiadvocates.com/records.html* (last visited Oct. 24, 2023). States may charge fees in order to provide copies of public records; *e.g.,* New Jersey's Open Public Records Law, N.J.S.A. 47:1A–1 *et seq.*

agency to comply with reporting requirements, as sound fiscal and data tracking policies and principles, outside of the OAA, should be in place for all State agency expenditures of Federal funds, regardless of the source.

Title VI Grantees

Similarly, § 1322.35 will provide for flexibilities to be available to Title VI grantees during certain emergencies and will require Title VI grantees to report separately on expenditures of funds when exercising such flexibilities. Again, we do not quantify the cost to a Title VI grantee to comply with reporting requirements, as sound fiscal and data tracking policies and principles, outside of the OAA, should be in place for all Title VI grantee expenditures of Federal funds, regardless of the source.

iii. Total Quantified Costs of the Final Rule

The table below sets forth the total estimated cost of the final rule: [397]

Item of cost	State agencies and AAAs ($)	Service providers ($)	Title VI Grantees ($)
2020 OAA Reauthorization	0.00	0.00	0.00
Revise Policies and Procedures	1,505,106.40	8,435,458.12	430,255.80
Prepare/Conduct Training for Own Staff	237,732.56	N/A	114,734.88
Receipt of Training for Own Staff	1,010,406.00	4,978,897.76	335,449.60
SUA Training of AAAs	234,427.44	N/A	N/A
SUA/AAA Training of Service Providers	147,313.92	N/A	N/A
Available Documentation			
State Plan Amendments for Disaster Flexibilities			
Total	3,134,986.32	13,414,355.88	880,440.28

As the table above indicates, the costs attributable to the final rule, in the aggregate amount, are estimated at $17,429,782.50. ACL estimates quantified costs attributable to the final rule of $3.13 million for State agencies and AAAs (at an average cost of $4,484 per State agency in States that have AAAs, $4,488 per State agency in States with no AAAs, and $4,694 per area agency), $13.4 million for service providers (at an average cost of $769 per service provider), and $0.88 million for Title VI grantees (at an average cost of $3,036 per Title VI grantee). These costs would consist of staff time to revise policies and procedures and to create, provide and receive trainings. Assuming annual productive time per full time employee (FTE) of 1,650 hours (based on average weekly hours worked of 33 hours per week [398] and 50 weeks worked per annum), these estimated costs would equate to approximately four percent of one (1) FTE's annual time for each State agency and area agency, three percent of one (1) FTE's annual time for each Title VI grantee, and .7 percent of one (1) FTE's annual time for each service provider.

2. Discussion of Benefits

The benefits from this final rule are difficult to quantify. We anticipate that the rule will provide clarity of administration for State agencies, AAAs, and Title VI grantees with respect to aspects of the OAA that were enacted under previous reauthorizations. This clarity likely will reduce time spent by grantees in implementing and managing OAA programs and services and result in improved program and fiscal management.

Additional benefits are anticipated from our modifications to regulatory text that modernize our rule to provide greater flexibility to State agencies and AAAs, as well as to reflect ongoing feedback from interested parties and responses to our RFI and NPRM in areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve. The rule's allowance for shelf-stable, pick-up, carry-out, drive-through, or similar meals, where a participant will be able to collect their meal from a congregate site and return to the community off-site to enjoy it, is a direct response to feedback from interested parties, including as gathered from the RFI, and appropriately reflects the evolving needs of both grantees and OAA participants. We anticipate increased participation in the Title III nutrition programs, which in turn will lead to better nutritional health for a new group of older adults that does not currently participate in the program.

Another example of a modification to regulatory text that will modernize our rule is the new definition of ''greatest economic need,'' which will allow State agencies and AAAs to take into consideration populations that experience economic need due to a variety of local conditions and individual situations, other than income, that could factor into an individual's level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition will allow State agencies and AAAs to make these determinations.

The flexibilities to be afforded to State agencies and Title VI grantees in certain emergency and disaster situations will allow funding to be directed more efficiently where it is needed most to better assist older adults in need.

We have determined that the many anticipated benefits of the final rule are not quantifiable, given the variation in the types and sizes of State agencies, AAAs, and Title VI grantees, as well as the variation in conditions and situations at the State and local level throughout the U.S.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 601 *et seq.*), agencies must consider the impact of regulations on small entities and analyze regulatory options that would minimize a rule's impacts on these entities. Alternatively, the agency head may certify that the final rule will not have a significant economic impact on a substantial number of small entities.

[397] For information regarding the calculations of the amounts set forth in this table, please see the RIA discussion above.

[398] Average weekly hours worked information per U.S. Dep't. of Labor, Bureau of Labor and Statistics, Labor Productivity and Cost Measures—Major Sectors nonfarm business, business, nonfinancial corporate, and manufacturing (Feb. 2, 2023), *https://www.bls.gov/productivity/tables/home.htm.*

ACL estimates the costs that would result from the final rule to be $4,879 per State agency in States that have area agencies, $4,883 per State agency in States with no area agencies, $5,104 per area agency, $856 per service provider, and $3,247 per Title VI grantee. These costs would consist of staff time to revise policies and procedures and to create, provide and receive trainings. Assuming annual productive time per full time employee (FTE) of 1,650 hours (based on average weekly hours worked of 33 hours per week [399] and 50 weeks worked per annum), these estimated costs would equate to approximately four percent of one (1) FTE's annual time for each State agency and area agency, three percent of one (1) FTE's annual time for each Title VI grantee, and .7 percent of one (1) FTE's annual time for each service provider. HHS certifies that this final rule will not have a significant economic impact on a substantial number of small businesses and other small entities.

C. Executive Order 13132 (Federalism)

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement describing the agency's considerations.

Consultations With State and Local Officials

Executive Order 13132 requires meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. As discussed in the preamble, the proposed regulations were developed with input from interested parties, including State and local officials.

We issued a Request for Information (RFI) on May 6, 2022, seeking input from the aging network, Indian Tribes, States, and Territories on challenges they face administering services, as well as feedback from individuals and other interested parties on experiences with services, providers, and programs under the Act. ACL received comments from over 90 entities in response to the RFI.

In addition, ACL conducted a listening session on April 18, 2022, at the national conference for Tribal organization grantees under Title VI of the OAA. We also promoted the RFI and the NPRM with Title VI grantees and Indian Tribes, and a Tribal consultation meeting took place at the National Title VI Conference April 12, 2023.

On June 16, 2023, the **Federal Register** published a notice of proposed rulemaking (NPRM) regarding OAA Titles III, VI, and VII (88 FR 39568). Through the NPRM, ACL sought feedback regarding ACL's proposal to modernize the implementing regulations of the OAA, which have not been substantially altered since their promulgation in 1988. ACL received 780 public comments on the NPRM.

The goal of the processes outlined above was to hear from all interested entities, including State and local officials, the public, and professional fields about their experience with OAA services and about the proposed regulations. Interested parties were provided with opportunities to give input as to areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve, as well as input into the content of the final rule. We carefully reviewed comments received in response to the RFI and the NPRM from State and local officials, considered concerns raised in developing the final rule, and made changes to several of the final rule's provisions based on public comments. Our final rule is a direct response to feedback from interested parties and reflects the evolving needs of both grantees and OAA program participants.

Nature of Concerns and the Need To Issue This Proposed Rule

The final rule modifies existing OAA regulations 45 CFR parts 1321, 1322, and 1324 and removes 45 CFR part 1323. Most of these changes modernize the OAA regulations to bring them into conformity with the reauthorized OAA and to provide clarity of administration for ACL and its grantees. In addition to areas where we better align regulation with current statute, we make modifications to regulatory text that modernize our rule to provide greater flexibility to State agencies.

Commenters overwhelmingly supported most provisions in the proposed rule. Many commenters expressed general support for our updates to modernize the regulations. Some commenters appreciated the flexibilities in the rule, while others appreciated the additional clarity offered by the rule.

Some commenters asked that ACL be more prescriptive in the final rule and that the final rule be revised to allow less discretion to State agencies in implementing the Act. The preamble notes several instances where ACL declined such requests, in order to provide flexibility to State agencies in implementing the final rule.

We received comments that the final rule would be challenging to implement absent additional funding. We seriously considered these views in developing the final rule. We also completed a regulatory impact analysis to fully assess costs and benefits of the new requirements. We recognize that some of the new proposed regulatory provisions may create administrative and monetary burden in updating policies and procedures, as well as a potential need for changes to some States' laws or regulations. However, this burden should be a one-time expense, some policies are at the States' option to adopt, and States will have significant discretion to implement the proposed provisions in the manner best suited to State needs. Much of this final rule codifies the policies and procedures that State agencies already have, or should have, in place to administer programs and deliver services under the OAA, and we believe that many State agencies already are in substantial compliance with the final rule.

Extent to Which We Meet Those Concerns

The 2020 OAA reauthorization increased the amount of OAA funding that State agencies [400] may use to administer the Act from the greater of (i) 5% of Title III B, C, D, and E funding and (ii) $500,000 to the greater of (i) 5% of Title III B, C, D, and E funding and (ii) $750,000.[401] In addition, we believe that many States already are in substantial compliance with the final rule, most of which brings the regulations into conformity with the OAA. We also believe the benefits of the final rule will be significant: the rule provides considerable latitude to State agencies to determine how best to implement the OAA in order to respond to local needs and circumstances, and it increases the flexibility available to States in administering the OAA.

D. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

ACL will fulfill its responsibilities under Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to establish procedures for meaningful consultation and coordination with

[399] *Id.*

[400] This excludes Guam, American Samoa, the United States Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands, which have lower administrative caps.

[401] 42 U.S.C. 3028(b).

Tribal officials in the development of Federal policies that have Tribal implications. ACL conducted a listening session at the National Title VI Conference on April 18, 2022. We also promoted the RFI and NPRM with Title VI grantees and Indian Tribes. A Tribal consultation meeting took place at the National Title VI Conference April 12, 2023. ACL continued to solicit input from affected Federally recognized Indian Tribes as we developed these updated regulations. ACL conducted a Tribal consultation meeting on Thursday June 22, 2023, from 2:00 p.m. to 4:00 p.m. eastern time. Additional details were made available at *https://olderindians.acl.gov/events/.*

Comment: Commenters expressed concern that proposed service policies and procedures were not added through consultation and do not honor Tribal sovereignty. Another commenter noted the numerous acts of Congress that require Federal agencies to consider the administrative burden and infrastructure inequities faced by Tribes. A commenter noted that there should be additional Tribal consultation with Alaskan and Hawaiian programs given the volume and special circumstances that they could speak to on the impact of the proposed regulations.

Response: ACL honors Tribal sovereignty and offered formal Tribal consultation and other engagements with Tribal grantee input prior to issuing the NPRM. ACL conducted a listening session at the National Title VI Conference on April 18, 2022. We also promoted the RFI with Title VI grantees and Indian Tribes until it closed on June 6, 2022. A Tribal consultation meeting took place at the National Title VI Conference April 12, 2023. ACL also conducted a Tribal briefing on June 22, 2023. These activities were conducted in addition to the weekly announcements made by ACL's Office of American Indian, Alaskan Native, and Native Hawaiian Programs once the NPRM was released on June 16, 2023, and the formal Tribal consultation requested and received on the NPRM on August 9, 2023, following a ''Dear Tribal Leader'' sent from ACL.

ACL is committed to honoring Tribal sovereignty while offering opportunities to directly engage with program contacts and leaders regularly.

ACL works to maintain a strong government to government relationship with opportunities to provide meaningful and timely input on areas that have a direct impact to their programs. ACL used comments received from Tribal grantees and other commentators through the RFI process to ensure that cultural and traditional practices were incorporated into the proposed regulations. ACL sent a Tribal Leader Letter to Tribal leaders on July 14, 2023, sharing a direct link to make comments and hosted a Tribal consultation regarding the proposed regulations on August 9, 2023. ACL notes that much of what is in the final rule is codifying what is in the Act.

E. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. In 2023, that threshold is approximately $177 million. If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. We have determined that this rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $177 million in any one year. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small governments.

F. Plain Language in Government Writing

Pursuant to Executive Order 13563 of January 18, 2011, and Executive Order 12866 of September 30, 1993, Executive Departments and Agencies are directed to use plain language in all proposed and final rules. ACL believes it has used plain language in drafting of the proposed and final rule.

G. Paperwork Reduction Act (PRA)

The final rule contains an information collection in the form of State plans on aging under Title III and Title VII of the Act and applications for funding by eligible organizations to serve older Native Americans and family caregivers under Title VI of the Act. ACL intends to update guidance regarding State plans on aging and applications for funding under Title VI of the Act when the final rule is published.

The requirement for each State agency to submit a multi-year State plan on aging, for a two, three, or four-year period, is a core function of State agencies and a long-standing requirement to receive funding under the Act. State agencies use funds provided under the Act to prepare State plans on aging. In preparing and submitting State plans on aging, State agencies compile information and obtain public input. They coordinate with State, Tribal, AAA, service providers, local government, and other interested parties.

ACL will submit a PRA request to the Office of Management and Budget (OMB) for the development of the State plans on aging. Respondents include 55 State agencies located in each of the 50 States as well as the District of Columbia, Guam, Puerto Rico, American Samoa, and the Mariana Islands. ACL estimates 40 burden hours per response. Due to the multi-year nature of the plans, ACL estimates a total of 683 hours in the aggregate to meet State plan requirements by State agencies each year. Based on our years of experience, we anticipate for each State agency 171 hours of executive staff time equivalent to a general and operations manager (Occupation code 11–1021), at a cost of $55.41 per hour unadjusted hourly wage, $110.82 adjusted for non-wage benefits and indirect costs, and 512 hours of first-line supervisor time (Occupation code 43–1011), at a cost of $30.47 per hour unadjusted hourly wage, $60.94 adjusting for non-wage benefits and indirect costs. We monetize the cost of meeting State plan requirements at $50,151.50 per year.

This final rule contains an information collection under OMB control number 0985–0064 Application for Older Americans Act, Title VI parts A/B and C Grants with an expiration date of November 30, 2025. The OAA requires the Department to promote the delivery of supportive services and nutrition services to Native Americans. ACL is responsible for administering the Title VI part A/B (Nutrition and Supportive Service) and part C (Caregiver) grants. This information collection (0985–0064) gathers information on the ability of Federally recognized American Indian, Alaskan Native and Native Hawaiian organizations to provide nutrition, supportive, and caregiver services to elders within their service area. Title VI grant applications are required once every three (3) years, with 545 respondents taking 4.25 hours per response. ACL estimates the burden

associated with this collection of information as 395.4 annual burden hours.

Following publication of this rule, ACL will update guidance regarding State plans on aging and applications for funding under Title VI of the Act. In accordance with the regulations implementing the PRA, sections § 1320.11 and § 1320.12, ACL will submit any material or substantive revisions under 0985–0064 and 0985–New to the Office of Management and Budget for review, comment, and approval.

List of Subjects in 45 CFR Parts 1321, 1322, 1323, and 1324

Administrative practice and procedure, Aged, Area agencies on aging, Elder rights, Family caregivers, Grant programs—social programs, Indians, Native Hawaiian programs, Tribal organizations and a Native Hawaiian grantee.

For the reasons discussed in the preamble, ACL amends 45 CFR chapter XIII as follows:

■ 1. Revise part 1321 to read as follows:

PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

Sec.

Authority: 42 U.S.C. 3001 *et seq.*

Subpart A—Introduction

§ 1321.1 Basis and purpose of this part.

(a) The purpose of this part is to implement Title III of the Older Americans Act, as amended (the Act) (42 U.S.C. 3001 *et seq.*). This part prescribes requirements State agencies shall meet to receive grants to develop comprehensive and coordinated systems for the delivery of the following services: supportive, nutrition, evidence-based disease prevention and health promotion, caregiver, legal, and, where appropriate, other services. These services are provided via State agencies, area agencies on aging, and local service providers under the Act. These requirements include:

(1) Responsibilities of State agencies;

(2) Responsibilities of area agencies on aging;

(3) Service requirements; and

(4) Emergency and disaster requirements.

(b) The requirements of this part are based on Title III of the Act. Title III provides for formula grants to State agencies on aging, under approved State plans described in § 1321.27, to develop or enhance comprehensive and coordinated community-based systems resulting in a continuum of person-centered services to older persons and family caregivers, with special emphasis on older individuals with the greatest economic need and greatest social need, with particular attention to low-income minority older individuals. A responsive community-based system of services shall include collaboration in planning, resource allocation, and delivery of a comprehensive array of services and opportunities for all older adults in the community. Title III funds are intended to be used as a catalyst to bring together public and private resources in the community to assure the provision of a full range of efficient, well-coordinated, and accessible person-centered services for older persons and family caregivers.

(c) Each State designates one State agency to:

(1) Develop and submit a State plan on aging, as set forth in § 1321.33;

(2) Administer Title III and VII funds under the State plan and the Act;

(3) Be responsible for planning, policy development, administration, coordination, priority setting, monitoring, and evaluation of all State activities related to the Act;

(4) Serve as an advocate for older individuals and family caregivers;

(5) Designate planning and service areas;

(6) Designate an area agency on aging to serve each planning and service area,

except in single planning and service area States; and

(7) Provide funds as set forth in the Act to either:

(i) Area agencies on aging under approved area plans on aging, in States with multiple planning and service areas, for their use in fulfilling requirements under the Act and distribution to service providers to provide direct services,

(ii) Service providers, in single planning and service area States, to provide direct services, or

(iii) The Ombudsman program, as set forth in part 1324 of this chapter.

(d) Terms used, but not otherwise defined, in this part will have the meanings ascribed to them in the Act.

§ 1321.3 Definitions.

Access to services or access services, as used in this part and sections 306 and 307 of the Act (42 U.S.C. 3026 and 3027), means services which may facilitate connection to or receipt of other direct services, including transportation, outreach, information and assistance, options counseling, and case management services.

Acquiring, as used in the Act, means obtaining ownership of an existing facility.

Act, means the Older Americans Act of 1965, as amended.

Altering or renovating, as used in this part, means making modifications to or in connection with an existing facility which are necessary for its effective use. Such modifications may include alterations, improvements, replacements, rearrangements, installations, renovations, repairs, expansions, upgrades, or additions, which are not in excess of double the square footage of the original facility and all physical improvements.

Area agency on aging, as used in this part, means a single agency designated by the State agency to perform the functions specified in the Act for a planning and service area.

Area plan administration, as used in this part, means funds used to carry out activities as set forth in section 306 of the Act (42 U.S.C. 3026) and other activities to fulfill the mission of the area agency as set forth in § 1321.55, including development of private pay programs or other contracts and commercial relationships.

Best available data, as used in section 305(a)(2)(C) of the Act (42 U.S.C. 3025(a)(2)(C)), with respect to the development of the intrastate funding formula, means the most current reliable data or population estimates available from the U.S. Decennial Census, American Community Survey, or other high-quality, representative data available to the State agency.

Constructing, as used in this part, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

Conflicts of interest, as used in this part, means:

(1) One or more conflicts between the private interests and the official responsibilities of a person in a position of trust;

(2) One or more conflicts between competing duties of an individual, or between the competing duties, services, or programs of an organization, and/or portion of an organization; and

(3) Other conflicts of interest identified in guidance issued by the Assistant Secretary for Aging and/or by State agency policies.

Cost sharing, as used in section 315(a) of the Act (42 U.S.C. 3030c–2(a)), means requesting payment using a sliding scale, based only on an individual's income and the cost of delivering the service, in a manner consistent with the exceptions, prohibitions, and other conditions laid out in the Act.

Department, means the U.S. Department of Health and Human Services.

Direct services, as used in this part, means any activity performed to provide services directly to an older person or family caregiver, groups of older persons or family caregivers, or to the general public by the staff or volunteers of a service provider, an area agency on aging, or a State agency whether provided in-person or virtually. Direct services exclude State or area plan administration and program development and coordination activities.

Domestically produced foods, as used in this part, means Agricultural foods, beverages and other food ingredients which are a product of the United States, its Territories or possessions, the Commonwealth of Puerto Rico, or the Trust Territories of the Pacific Islands (hereinafter referred to as ''the United States''), except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to minor ingredients. Ingredients from nondomestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

Family caregiver, as used in this part, means an adult family member, or another individual, who is an informal provider of in-home and community care to an older individual; an adult family member, or another individual, who is an informal provider of in-home and community care to an individual of any age with Alzheimer's disease or a related disorder with neurological and organic brain dysfunction; or an older relative caregiver. For purposes of this part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.

Fiscal year, as used in this part, means the Federal fiscal year.

Governor, as used in this part, means the chief elected officer of each State and the mayor of the District of Columbia.

Greatest economic need, as used in this part, means the need resulting from an income level at or below the Federal poverty level and as further defined by State and area plans based on local and individual factors, including geography and expenses.

Greatest social need, as used in this part, means the need caused by noneconomic factors, which include:

(1) Physical and mental disabilities;

(2) Language barriers;

(3) Cultural, social, or geographical isolation, including due to:

(i) Racial or ethnic status;

(ii) Native American identity;

(iii) Religious affiliation;

(iv) Sexual orientation, gender identity, or sex characteristics;

(v) HIV status;

(vi) Chronic conditions;

(vii) Housing instability, food insecurity, lack of access to reliable and clean water supply, lack of transportation, or utility assistance needs;

(viii) Interpersonal safety concerns;

(ix) Rural location; or

(x) Any other status that:

(A) Restricts the ability of an individual to perform normal or routine daily tasks; or

(B) Threatens the capacity of the individual to live independently; or

(4) Other needs as further defined by State and area plans based on local and individual factors.

Immediate family, as used in this part pertaining to conflicts of interest, means a member of the household or a relative with whom there is a close personal or significant financial relationship.

In-home supportive services, as used in this part, references those supportive

services provided in the home as set forth in the Act, to include:

(1) Homemaker, personal care, home care, home health, and other aides;

(2) Visiting and telephone or virtual reassurance;

(3) Chore maintenance;

(4) Respite care for families, including adult day care; and

(5) Minor modification of homes that is necessary to facilitate the independence and health of older individuals and that is not readily available under another program.

Local sources, as used in the Act and *local public sources,* as used in section 309(b)(1) of the Act (42 U.S.C. 3029(b)(1)), means tax-levy money or any other non-Federal resource, such as State or local public funding, funds from fundraising activities, reserve funds, bequests, or cash or third-party in-kind contributions from non-client community members or organizations.

Major disaster declaration, as used in this part and section 310 of the Act (42 U.S.C. 3030), means a Presidentially declared disaster under the Robert T. Stafford Relief and Emergency Assistance Act (42 U.S.C. 5121–5207).

Means test, as used in the Act, means the use of the income, assets, or other resources of an older person, family caregiver, or the households thereof to deny or limit that person's eligibility to receive services under this part.

Multipurpose senior center, as used in the Act, means a community facility for the organization and provision of a broad spectrum of services, which shall include provision of health (including mental and behavioral health), social, nutritional, and educational services and the provision of facilities for recreational activities for older individuals, as practicable, including as provided via virtual facilities; as used in § 1321.85, facilitation of services in such a facility.

Native American, as used in the Act, means a person who is a member of any Indian Tribe, band, nation, or other organized group or community of Indians (including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) who:

(1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(2) Is located on, or in proximity to, a Federal or State reservation or rancheria; or is a person who is a Native Hawaiian, who is any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778.

Nutrition Services Incentive Program, as used in the Act, means grant funding to State agencies, eligible Tribal organizations, and Native Hawaiian grantees to support congregate and home-delivered nutrition programs by providing an incentive to serve more meals.

Official duties, as used in section 712 of the Act (42 U.S.C. 3058g) with respect to representatives of the Long-Term Care Ombudsman Program, means work pursuant to the Long-Term Care Ombudsman Program authorized by the Act, 45 CFR part 1324, subpart A, and/or State law and carried out under the auspices and general direction of, or by direct delegation from, the State Long-Term Care Ombudsman.

Older relative caregiver, as used in section 372(a)(4) of the Act (42 U.S.C. 3030s(a)(4)), means a caregiver who is age 55 or older and lives with, is the informal provider of in-home and community care to, and is the primary caregiver for, a child or an individual with a disability;

(1) In the case of a caregiver for a child is:

(i) The grandparent, step-grandparent, or other relative (other than the parent) by blood, marriage, or adoption, of the child;

(ii) Is the primary caregiver of the child because the biological or adoptive parents are unable or unwilling to serve as the primary caregivers of the child; and

(iii) Has a legal relationship to the child, such as legal custody, adoption, or guardianship, or is raising the child informally; and

(2) In the case of a caregiver for an individual with a disability, is the parent, grandparent, step-grandparent, or other relative by blood, marriage, or adoption of the individual with a disability.

Periodic, as used in this part to refer to the frequency of client assessment and data collection, means, at a minimum, once each fiscal year, and as used in section 307(a)(4) of the Act (42 U.S.C. 3027(a)(4)) to refer to the frequency of evaluations of, and public hearings on, activities and projects carried out under State and area plans, means, at a minimum once each State or area plan cycle.

Planning and service area, as used in section 305 of the Act (42 U.S.C. 3025), means an area designated by a State agency under section 305(a)(1)(E) (42 U.S.C. 3025(a)(1)(E)), for the purposes of local planning and coordination and awarding of funds under Title III of the Act, including a single planning and service area.

Private pay programs, as used in section 306(g) of the Act (42 U.S.C. 3026(g)), are a type of contract or commercial relationship and are programs, separate and apart from programs funded under the Act, for which the individual consumer agrees to pay to receive services under the programs.

Program development and coordination activities, as used in this part, means those actions to plan, develop, provide training, and coordinate at a systemic level those programs and activities which primarily benefit and target older adult and family caregiver populations who have the greatest social needs and greatest economic needs, including development of contracts, commercial relationships, or private pay programs.

Program income, means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance except as otherwise provided under Federal grantmaking authorities. Program income includes but is not limited to income from fees for services performed, the use or rental of real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. *See also* 35 U.S.C. 200–212 (which applies to inventions made under Federal awards).

Reservation, as used in section 305(b)(2) of the Act (42 U.S.C. 3025(b)(2)) with respect to the designation of planning and service areas, means any Federally or State recognized American Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), and Indian allotments.

Service provider, means an entity that is awarded funds, including via a grant, subgrant, contract, or subcontract, to provide direct services under the State or area plan.

Severe disability, as used to carry out the provisions of the Act, means a severe, chronic disability attributable to mental or physical impairment, or a

combination of mental and physical impairments, that:

(1) Is likely to continue indefinitely; and

(2) Results in substantial functional limitation in three or more of the following major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, economic self-sufficiency, cognitive functioning, and emotional adjustment.

Single planning and service area State, means a State which was approved on or before October 1, 1980, as such and continues to operate as a single planning and service area.

State, as used in this part, means one or more of the 50 States, the District of Columbia, and the Territories of Guam, Puerto Rico, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, unless otherwise specified.

State agency, as used in this part, means the designated State unit on aging for each of the 50 States, the District of Columbia, and the Territories of Guam, Puerto Rico, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, unless otherwise specified.

State plan administration, as used in this part, means funds used to carry out activities as set forth in section 307 of the Act (42 U.S.C. 3027) and other activities to fulfill the mission of the State agency as set forth in § 1321.5.

Supplemental foods, as used in this part, means foods that assist with maintaining health, but do not alone constitute a meal. Supplemental foods include liquid nutrition supplements or enhancements to a meal, such as additional beverage or food items, and may be specified by State agency policies and procedures. Supplemental foods may be provided with a meal, or separately, to older adults who participate in either congregate or home-delivered meal services.

Voluntary contributions, as used in section 315(b) of the Act (42 U.S.C. 3030c–2(b)), means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.

Subpart B—State Agency Responsibilities

§ 1321.5 Mission of the State agency.

(a) The Act intends that the State agency shall be a leader on all aging issues on behalf of all older individuals and family caregivers in the State. The State agency shall proactively carry out a wide range of functions, including advocacy, planning, coordination, inter-agency collaboration, information sharing, training, monitoring, and evaluation. The State agency shall lead the development or enhancement of comprehensive and coordinated community-based systems in, or serving, communities throughout the State. These systems shall be designed to assist older individuals and family caregivers in leading independent, meaningful, and dignified lives in their own homes and communities.

(b) In States with multiple planning and service areas, the State agency shall designate area agencies on aging to assist in carrying out the mission described above for the State agency at the sub-State level. The State agency shall designate as area agencies on aging only those non-State agencies having the capacity and making the commitment to fully carry out the mission described for area agencies in § 1321.55.

(c) The State agency shall assure that the resources made available to area agencies on aging under the Act are used to carry out the mission described for area agencies in § 1321.55.

§ 1321.7 Organization and staffing of the State agency.

(a) The State shall designate a sole State agency to develop and administer the State plan required under this part and part 1324 of this chapter and to serve as the effective and visible advocate for older adults within the State.

(b) The State agency shall have an adequate number of qualified staff to fulfill the functions prescribed in this part.

(c) The State agency shall establish, contract, or otherwise arrange with another agency or organization as permitted by section 307(a)(9)(A) of the Act (42 U.S.C. 3027(a)(9)(A)), an Office of the State Long-Term Care Ombudsman. Such Office must be headed by a full-time Ombudsman and consist of other staff as appropriate to fulfill responsibilities as set forth in part 1324, subpart A, of this chapter.

(d) If a State statute establishes an Ombudsman program which will perform the functions of section 307(a)(9)(A) of the Act (42 U.S.C. 3027(a)(9)(A)), the State agency continues to be responsible for assuring that the requirements of this program under the Act and as set forth in part 1324, subpart A, of this chapter, are met, notwithstanding any additional requirements or funding related to State law. In such cases where State law may conflict with the Act, the Governor shall confirm understanding of the State agency's continuing obligations under the Act through an assurance in the State plan.

(e) The State agency shall have as set forth in section 307(a)(13) (42 U.S.C. 3027(a)(13)) and section 731 of the Act (42 U.S.C. 3058j) and 45 CFR part 1324, subpart C, a Legal Assistance Developer, and such other personnel as appropriate to provide State leadership in developing legal assistance programs for older individuals throughout the State.

§ 1321.9 State agency policies and procedures.

(a) The State agency on aging shall develop policies and procedures governing all aspects of programs operated as set forth in this part and part 1324 of this chapter. These policies and procedures shall be developed in consultation with area agencies on aging, program participants, and other appropriate parties in the State. Except for the Ombudsman program as set forth in 45 CFR part 1324, subpart A and where otherwise indicated, the State agency policies may allow for such policies and procedures to be developed at the area agency on aging level. The State agency is responsible for implementing, monitoring, and enforcing policies and procedures, where:

(1) The policies and procedures developed by the State agency shall address how the State agency will monitor the programmatic and fiscal performance of all programs and activities initiated under this part for compliance with all requirements, and for quality and effectiveness. As set forth in sections 305(a)(2)(A) and 306(a) of the Act (42 U.S.C. 3025(a)(2)(A) and 3026(a)), and consistent with section 305(a)(1)(C) (42 U.S.C. 3025(a)(1)(C)), the State agency shall be responsible for monitoring the program and financial activities of subrecipients and subgrantees to ensure that grant awards are used for the authorized purposes and in compliance with Federal statutes, regulations, and the terms and conditions of the grant award, including:

(i) Evaluating each subrecipient's risk of noncompliance to ensure proper accountability and compliance with program requirements and achievement of performance goals;

(ii) Reviewing subrecipient policies and procedures; and

(iii) Ensuring that all subrecipients and subgrantees complete audits as required in 2 CFR part 200, subpart F and 45 CFR part 75, subpart F.

(2) The State agency may not delegate to another agency the authority to award or administer funds under this part.

(3) The State Long-Term Care Ombudsman shall be responsible for monitoring the files, records, and other information maintained by the Ombudsman program, as set forth in part 1324, subpart A. Such monitoring may be conducted by a designee of the Ombudsman. Neither the Ombudsman nor a designee shall disclose identifying information of any complainant or long-term care facility resident to individuals outside of the Ombudsman program, except as otherwise specifically provided in § 1324.11(e)(3) of this chapter.

(b) The State agency shall ensure policies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by the Assistant Secretary for Aging.

(c) Policies and procedures developed and implemented by the State agency shall address:

(1) Direct service provision for services as set forth in §§ 1321.85, 1321.87, 1321.89, 1321.9, and 1321.93, including:

(i) Requirements for client eligibility, periodic assessment, and person-centered planning, where appropriate;

(ii) A listing and definitions of services that may be provided in the State with funds received under the Act;

(iii) Limitations on the frequency, amount, or type of service provided;

(iv) Definition of those within the State in greatest social need and greatest economic need;

(v) Specific actions the State agency will use or require the area agency to use to target services to meet the needs of those in greatest social need and greatest economic need;

(vi) How area agencies on aging may request to provide direct services under provisions of § 1321.65(b)(7), where appropriate;

(vii) Actions to be taken by area agencies and direct service providers to implement requirements as set forth in paragraphs (c)(2)(x) through (xi) of this section; and

(viii) The grievance process for older individuals and family caregivers who are dissatisfied with or denied services under the Act.

(2) Fiscal requirements including:

(i) *Intrastate funding formula (IFF).* Distribution of Title III funds via the intrastate funding formula or funds distribution plan and of Nutrition Services Incentive Program funds as set forth in § 1321.49 or § 1321.51 shall be maintained by the State agency where funds must be promptly disbursed.

(ii) *Non-Federal share (match).* As set forth in sections 301(d)(1) (42 U.S.C. 3021(d)(1)), 304(c) (42 U.S.C. 3024(c)), 304(d)(1)(A) (42 U.S.C. 3024(d)(1)(A)), 304(d)(1)(D) (42 U.S.C. 3024(d)(1)(D)), 304(d)(2) (42 U.S.C. 3024(d)(2)), 309(b) (42 U.S.C. 3029(b)), 316(b)(5) (42 U.S.C. 3030c–3(b)(5)), and 373(h)(2) (42 U.S.C. 3030s–2(h)(2)) of the Act, the State agency shall maintain statewide match requirements, where:

(A) The match may be made by State and/or local public sources except as set forth in paragraph (c)(2)(ii)(C) of this section.

(B) Non-Federal shared costs or match funds and all contributions, including cash and third-party in-kind contributions must be accepted if the funds meet the specified criteria for match. A State agency may not require only cash as a match requirement.

(C) State or local public resources used to fund a program which uses a means test shall not be used to meet the match.

(D) Proceeds from fundraising activities may be used to meet the match as long as no Federal funds were used in the fundraising activity. Fundraising activities are unallowable costs without prior written approval, as set forth in 2 CFR 200.442.

(E) A State agency may use State and local funds expended for a non-Title III funded program to meet the match requirement for Title III expenditures when the non-Title III funded program:

(*1*) Is directly administered by the State or area agency;

(*2*) Does not conflict with requirements of the Act;

(*3*) Is used to match only the Title III program and not any other Federal program; and

(*4*) Includes procedures to track and account expenditures used as match for a Title III program or service.

(F) Match requirements for area agencies are determined by the State agency.

(G) Match requirements for direct service providers are determined by the State and/or area agency.

(H) A State or area agency may determine a match in excess of required amounts.

(I) Other Federal funds may not be used to meet required match unless there is specific statutory authority.

(J) The required statewide match for grants awarded under Title III of the Act is as follows:

(*1*) *Administration.* Federal funding for State, Territory, and area plan administration may not account for more than 75 percent of the total funding expended and requires a 25 percent match. As set forth in 2 CFR 200.306(c), prior written approval is hereby granted for unrecovered indirect costs to be used as match.

(*2*) *Supportive services and nutrition services.* (*i*) Federal funding for services funded under supportive services as set forth in § 1321.85, less the portion of funds used for the Ombudsman program, may not account for more than 85 percent of the total funding expended, and requires a 15 percent match;

(*ii*) Federal funding for services funded under nutrition services as set forth in § 1321.87, less funds provided under the Nutrition Services Incentive Program, may not account for more than 85 percent of the total funding expended, and requires a 15 percent match;

(*iii*) One-third (⅓) of the 15 percent match must be met from State resources, and the remaining two-thirds (⅔) match may be met by State or local resources;

(*iv*) The match for supportive services and nutrition services may be pooled.

(*3*) *Family caregiver support services.* The Federal funding for services funded under family caregiver support services as set forth in § 1321.91 may not account for more than 75 percent of the total dollars expended and requires a 25 percent match.

(*4*) *Services not requiring match.* Services for which no match is required include:

(*i*) Evidence-based disease prevention and health promotion services as set forth in § 1321.89;

(*ii*) The Nutrition Services Incentive Program; and

(*iii*) The portion of funds from supportive services used for the Ombudsman program.

(iii) *Transfers.* Transfer of service allotments elected by the State agency which must meet the following requirements:

(A) A State agency must provide notification of the transfer amounts elected pursuant to guidance as set forth by the Assistant Secretary for Aging;

(B) A State agency shall not delegate to an area agency on aging or any other entity the authority to make a transfer;

(C) A State agency may only elect to transfer between the Title III, part B Supportive Services and Senior Centers, part C–1 Congregate Nutrition Services, and part C–2 Home-Delivered Nutrition Services grant awards;

(*1*) The State agency may elect to transfer up to 40 percent between the Title III, part C–1 and part C–2 grant awards, per section 308(b)(4)(A) of the Act (42 U.S.C. 3028(b)(4)(A));

(*i*) The State agency must request and receive approval of a waiver from the Assistant Secretary for Aging to exceed the 40 percent transfer limit.

(*ii*) The State agency may request a waiver up to an additional 10 percent between the Title III part C–1 and part C–2 grant awards, per section 308(b)(4)(B) of the Act (42 U.S.C. 3028(b)(4)(B)).

(*2*) The State agency may elect to transfer up to 30 percent between Title III, parts B and C, per section 308(b)(5)(A) of the Act (42 U.S.C. 3028(b)(5)(A)); and

(*i*) The State agency must request and receive approval of a waiver from the Assistant Secretary for Aging to exceed the 30 percent limitation between parts B and C, per section 316(b)(4) of the Act (42 U.S.C. 3030c–3(b)(4));

(D) Percentages subject to transfer are calculated based on the total original Title III award allotted;

(E) Transfer limitations apply to the State agency in aggregate;

(F) State agencies, in consultation with area agencies, shall:

(*1*) Ensure the process used by the State agencies in transferring funds under this section (including requirements relating to the authority and timing of such transfers) is simplified and clarified to reduce administrative barriers; and

(*2*) With respect to transfers between parts C–1 and C–2, direct limited resources to the greatest nutrition service needs at the community level; and

(G) State agencies do not have to apply equal limitations on transfers to each area agency on aging.

(iv) *State, Territory, and area plan administration.* State and Territory plan administration maximum allocation requirements must align with the approved intrastate funding formula or funds allocation plan as set forth in § 1321.49 or § 1321.51, as applicable. In addition:

(A) *State and Territory plan administration maximum allocation amounts.* State and Territory plan administration maximum allocation amounts may be taken from any part of the overall allotment to a State agency under Title III of the Act. Maximum allocation amounts are determined by the State agency's status as set forth in this paragraph (c)(2)(iv)(A) and paragraph (c)(2)(iv)(B) of this section:

(*1*) A State agency which serves a State with multiple planning and service areas may use the greater of $750,000, per section 308(b)(2)(A) of the Act (42 U.S.C. 3028(b)(2)(A)), or five percent of the total Title III Award.

(*2*) A State agency which serves a single planning and service area State and is not listed in (*3*) below may elect to be subject to paragraph (c)(2)(iv)(A)(*1*) of this section or to the area plan administration limit of ten percent of the overall allotment to a State agency under Title III, as specified in section 308(a)(3) (42 U.S.C. 3028(a)(3)) of the Act.

(*3*) Guam, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands shall have available the greater of $100,000 or five percent of the total final Title III Award, as set forth in section 308(b)(2)(B) (42 U.S.C. 3028(b)(2)(B)) of the Act.

(B) *Area plan administration maximum allocation amounts.* Area plan administration maximum allocation amounts may be allocated to any part of the overall allotment to the State agency under Title III, with the exception of part D, for use by area agencies on aging for activities as set forth in sections 304(d)(1)(A) and 308 of the Act (42 U.S.C. 3024(d)(1)(A) and 3028) and in § 1321.57(b). Single planning and service area States may elect amounts for either State plan administration or area plan administration, as set forth in the Act and paragraph (c)(2)(iv)(A)(*2*) of this section.

(*1*) The State agency will determine the maximum amount of funding available for area plan administration from the total Title III allocation after deducting the amount of funding allocated for State plan administration and calculating a maximum of ten percent of this amount;

(*2*) The State agency may make no more than the amount calculated in paragraph (c)(2)(iv)(B)(*1*) of this section available to area agencies on aging for distribution in accordance with the intrastate funding formula as set forth in § 1321.49; and

(*3*) Any amounts available to the State agency for State plan administration which the State agency determines are not needed for that purpose may be used to supplement the amount available for area plan administration (42 U.S.C. 3028(a)(2)).

(v) *Minimum adequate proportion.* The State agency will meet expectations for the minimum adequate proportion of funds expended by each area agency on aging and State agency to provide the categories of services of access services, in-home supportive services, and legal assistance, as identified in the approved State plan as set forth in § 1321.27(i).

(vi) *Maintenance of effort.* The State agency will meet expectations regarding maintenance of effort, where:

(A) The State agency must expend for both services and administration at least the average amount of State funds reported and certified as expended under the State plan for these activities for the three previous fiscal years for Title III;

(B) The amount certified must at least meet minimum match requirements from State resources;

(C) Any amount of State resources included in the Title III maintenance of effort certification that exceeds the minimum amount mandated becomes part of the permanent maintenance of effort; and

(D) Excess State match reported on the Federal financial report does not become part of the maintenance of effort unless the State agency certifies the excess.

(vii) *The State Long-Term Care Ombudsman Program.* The State agency shall maintain State Long-Term Care Ombudsman Program funding requirements, where:

(A) *Minimum Certification of Expenditures.* The State agency must expend annually under Title III and Title VII of the Act, respectively, for the Ombudsman program no less than the minimum amounts that are required to be expended by section 307(a)(9) of the Act (42 U.S.C. 3027(a)(9));

(B) *Expenditure Information.* The State agency must provide the Ombudsman with verifiable expenditure information for the annual certification of minimum expenditures and for completion of annual reports; and

(C) *Fiscal management and determination of resources.* Fiscal management and determination of resources appropriated or otherwise available for the operation of the Office are in compliance as set forth at § 1324.13(f) of this chapter.

(viii) *Rural minimum expenditures.* The State agency shall maintain minimum expenditures for services for older individuals residing in rural areas, where:

(A) The State agency shall establish a process and control for determining the definition of ''rural areas'' within their State;

(B) For each fiscal year, the State agency must spend on services for older individuals residing in rural areas the minimum annual amount that is not less than the amount expended for such services, as required by the Act; and

(C) The State agency must project the cost of providing such services for each fiscal year (including the cost of providing access to such services) and must specify a plan for meeting the

needs for such services for each fiscal year.

(ix) *Reallotment.* The State agency shall maintain requirements for reallotment of funds, where:

(A) The State agency must annually review and notify the Assistant Secretary for Aging prior to the end of the fiscal year in which grant funds were awarded if there is funding that will not be expended within the grant period for Title III or VII that the State agency will release to the Assistant Secretary for Aging.

(B) The State agency must annually review and notify the Assistant Secretary for Aging of the amount of any released Title III or VII funding from other State agencies that the State agency requests to receive and expend within the grant period from the Assistant Secretary for Aging.

(C) The State agency must use its intrastate funding formula or funds distribution plan, as set forth in § 1321.49 or § 1321.51, to distribute any Title III funds that the Assistant Secretary for Aging reallots pursuant to the State agency's notification under paragraph (c)(2)(ix)(B) of this section.

(x) *Voluntary contributions.* Voluntary contributions shall be allowed and may be solicited for all services for which funds are received under this Act, consistent with section 315(b) (42 U.S.C. 3030c–2(b)). Policies and procedures related to voluntary contributions shall address these requirements:

(A) Suggested contribution levels. The suggested contribution levels shall be based on the actual cost of services;

(B) Individuals encouraged to contribute. Voluntary contributions shall be encouraged for individuals whose self-declared income is at or above 185 percent of the Federal poverty level. Assets, savings, or other property owned by an older individual or family caregiver may not be considered when seeking voluntary contributions from any older individual or family caregiver;

(C) Solicitation. The method of solicitation must be noncoercive, and the solicitation:

(*1*) Must meet all the requirements of this provision; and

(*2*) Be conducted in such a manner so as not to cause a service recipient to feel intimidated, or otherwise feel pressured into making a contribution.

(D) Provisions to all service recipients. All recipients of services shall be provided:

(*1*) An opportunity to voluntarily contribute to the cost of the service;

(*2*) Clear information, including information in alternative formats and in languages other than English in compliance with Federal civil rights laws, explaining there is no obligation to contribute, and the contribution is voluntary;

(*3*) Protection of privacy and confidentiality of each recipient with respect to the recipient's income and contribution or lack of contribution.

(E) Prohibition on means testing. Means testing, as defined in § 1321.3, is prohibited;

(F) Prohibition on denial of services. Services shall not be denied because the older individual or family caregiver will not or cannot make a voluntary contribution;

(G) Procedures to be established. Appropriate procedures to safeguard and account for all contributions are established; and

(H) Collection of program income. Amounts collected are considered program income and are subject to the requirements in 2 CFR 200.307 and in § 1321.9(c)(2)(xii).

(xi) *Cost sharing.* A State agency is permitted under section 315(a) of the Act (42 U.S.C. 3030c–2(a)), to implement cost sharing for services funded by the Act by recipients of the services, except as provided for in paragraph (c)(2)(xi)(D) of this section. If the State agency allows for cost sharing, the State agency shall address these requirements:

(A) *Policies and procedures.* The State agency shall develop policies and procedures to be implemented statewide, including how an area agency on aging may request and receive a waiver of cost sharing policies, if the area agency on aging adequately demonstrates:

(*1*) A significant proportion of persons receiving services under the Act have incomes below the threshold established in State agency policies and procedures; or

(*2*) That cost sharing would be an unreasonable administrative or financial burden upon the area agency on aging.

(B) *Sliding contribution scale.* The State agency shall establish a sliding contribution scale and a description of the criteria to participate in cost sharing to be implemented statewide, which shall:

(*1*) Meet all the requirements of this provision;

(*2*) Be based solely on individual income and the cost of delivering services;

(*3*) Be communicated including in written materials and in alternative formats upon request;

(*4*) Explain there is no obligation to contribute, and the contribution is voluntary;

(*5*) Be conducted in such a manner so as not to cause a service recipient to feel intimidated, or otherwise feel pressured into making a contribution;

(*6*) Protect the privacy and confidentiality of each recipient with respect to the recipient's income and contribution or lack of contribution.

(C) Individuals eligible to cost share. Individuals shall be determined eligible to cost share based solely on a confidential declaration of income and with no requirement for verification;

(D) Prohibitions on cost sharing. Cost sharing is prohibited as follows:

(*1*) By a low-income older individual if the income of such individual is at or below the Federal poverty level;

(*2*) If State agency policies and procedures specify other low-income individuals within the State excluded from cost sharing;

(*3*) For the following services:

(*i*) Information and assistance, outreach, benefits counseling, or case management services;

(*ii*) Ombudsman, elder abuse prevention, legal assistance, or other consumer protection services;

(*iii*) Congregate and home-delivered meals; and

(*iv*) Any services delivered through Tribal organizations.

(E) Prohibition on means testing. Means testing, as defined in § 1321.3, is prohibited;

(F) Prohibition on denial of services. Services shall not be denied because the older individual or family caregiver will not or cannot make a cost sharing contribution;

(G) Procedures to be established. Appropriate procedures to safeguard and account for all cost sharing contributions are established; and

(H) Collection of program income. All cost sharing contributions collected are considered program income and are subject to the requirements of 2 CFR 200.307, 45 CFR 75.307, and in § 1321.9(c)(2)(xii).

(xii) *Use of program income.* Program income is subject to the requirements in 2 CFR 200.307 and 45 CFR 75.307 and as follows:

(A) Voluntary contributions and cost sharing payments are considered program income;

(B) Program income collected must be used to expand a service funded under the Title III grant award pursuant to which the income was originally collected;

(C) The State agency must use the addition alternative as set forth in 2 CFR 200.307(e)(2) and 45 CFR 75.307(e)(2) when reporting program income, and prior approval of the addition alternative from the Assistant Secretary for Aging is not required;

(D) Program income must be expended or disbursed prior to requesting additional Federal funds; and

(E) Program income may not be used to match grant awards funded by the Act without prior approval.

(xiii) *Private pay programs.* The State agency shall maintain requirements for private pay programs, where:

(A) State agencies, area agencies on aging, and service providers may provide private pay programs, subject to State and/or area agency policies and procedures;

(B) The State agency requires area agencies and service providers under the Act that establish private pay programs to develop policies and procedures to:

(*1*) Promote equity, fairness, inclusion, and adherence to the requirements of the Act, including:

(*i*) Meeting conflict of interest requirements;

(*ii*) Meeting financial accountability requirements;

(*iii*) Prohibiting use of funds for direct services under Title III to support provision of service via private pay programs, except as a part of routine information and assistance or case management referrals; and

(*2*) Require that persons who receive information about private pay programs and who are eligible for services provided with Title III funds in the planning and service area be made aware of Title III-funded and any similar voluntary contributions-based service options, even if there is a waiting list for those services, on an initial and periodic basis to allow individuals to determine whether they will select voluntary contributions-based services or private pay programs.

(xiv) *Contracts and commercial relationships.* The State agency shall maintain requirements for contracts and commercial relationships, where:

(A) State agencies, area agencies on aging, and service providers may enter into contracts and commercial relationships, subject to State and/or area agency policies and procedures and guidance as set forth by the Assistant Secretary for Aging, including through:

(*1*) Contracts with health care payers;

(*2*) Private pay programs; or

(*3*) Other arrangements with entities or individuals that increase the availability of home-and community-based services and supports.

(B) The State agency shall require area agencies and service providers under the Act that establish contracts and commercial relationships to develop policies and procedures to:

(*1*) Promote fairness, inclusion, and adherence to the requirements of the Act, including:

(*i*) Meeting conflict of interest requirements; and

(*ii*) Meeting financial accountability requirements.

(*2*) With the approval of the State and/or area agency, allow use of funds for direct services under Title III to support provision of service via contracts and commercial relationships when:

(*i*) All requirements for direct services provision are maintained, as set forth in this part and the Act, or

(*ii*) In compliance with the requirements of the Act, as set forth in section 212 (42 U.S.C. 3020c), and all other applicable Federal requirements.

(C) The State agency shall, through the area plan or other process, develop policies and procedures for area agencies on aging and service providers to receive approval to establish contracts and commercial relationships and participate in activities related to contracts and commercial relationships.

(xv) *Buildings, alterations or renovations, maintenance, and equipment.* Buildings and equipment, where costs incurred for altering or renovating, utilities, insurance, security, necessary maintenance, janitorial services, repair, and upkeep (including Federal property unless otherwise provided for) to keep buildings and equipment in an efficient operating condition, including acquisition and replacement of equipment, may be an allowable use of funds, and the following apply:

(A) Costs are only allowable to the extent not payable by third parties through rental or other agreements;

(B) Costs must be allocated proportionally to the benefiting grant program;

(C) Construction and acquisition activities are only allowable for multipurpose senior centers. In addition to complying with the requirements of the Act, as set forth in section 312 (42 U.S.C. 3030b), as well as with all other applicable Federal laws, the grantee or subrecipient as applicable must file a Notice of Federal Interest in the appropriate official records of the jurisdiction where the property is located at the time of acquisition or prior to commencement of construction, as applicable. The Notice of Federal Interest must indicate that the acquisition or construction, as applicable, has been funded with an award under Title III of the Act, that the requirements set forth in section 312 of the Act (42 U.S.C. 3030b) apply to the property, and that inquiries regarding the Federal Government's interest in the property should be directed in writing to the Assistant Secretary for Aging;

(D) Altering and renovating activities are allowable for facilities providing direct services with funds provided as set forth in §§ 1321.85, 1321.87, 1321.89, and 1321.91 subject to Federal grant requirements under 2 CFR part 200 and 45 CFR part 75;

(E) Altering and renovating activities are allowable for facilities used to conduct area plan administration activities with funds provided as set forth in paragraph (c)(2)(iv)(B) of this section, subject to Federal grant requirements under 2 CFR part 200 and 45 CFR part 75; and

(F) Prior approval by the Assistant Secretary for Aging does not apply.

(xvi) *Supplement, not supplant.* Funds awarded under the Act for services provided under sections 306(a)(9)(B) (42 U.S.C. 3026(a)(9)(B)), 315(b)(4)(E) (42 U.S.C. 3030c–2(b)(4)(E)), 321(d) (42 U.S.C. 3030d(d)), 374 (42 U.S.C. 3030s–2), and 705(a)(4) (42 U.S.C. 3058d(a)(4)), must be used to supplement, not supplant existing Federal, State, and local funds expended to support those activities.

(xvii) *Monitoring of State plan assurances.* Monitoring for compliance for assurances identified in the approved State plan as set forth in § 1321.27.

(xviii) *Advance funding.* If the State agency permits the advance of funding to meet immediate cash needs of area agencies on aging and service providers, the State agency shall have policies and procedures which comply with all applicable Federal requirements, including timeframes and amount limitations that may apply.

(xix) *Fixed amount subawards.* Fixed amount subawards up to the simplified acquisition threshold are allowed.

(3) The State plan process, including compliance with requirements as set forth in §§ 1321.27 and 1321.29.

(4) In States with multiple planning and service areas, the area plan process, including compliance with requirements as set forth in § 1321.65.

§ 1321.11 Advocacy responsibilities.

(a) The State agency shall:

(1) Review, monitor, evaluate, and comment on Federal, State, and local plans, budgets, regulations, programs, laws, levies, hearings, policies, and actions which affect or may affect older individuals or family caregivers, and recommend any changes in these which the State agency considers to be aligned with the interests identified in the Act;

(2) Provide technical assistance and training to agencies, organizations, associations, or individuals representing older individuals and family caregivers; and

(3) Review and comment on applications to State and Federal agencies for assistance relating to meeting the needs of older individuals and family caregivers.

(b) No requirement in this section shall be deemed to supersede a prohibition contained in a Federal appropriation on the use of Federal funds to lobby.

§ 1321.13 Designation of and designation changes to planning and service areas.

(a) The State agency is responsible for designating distinct planning and service areas within the State.

(b) No State agency may designate the entire State as a single planning and service area, except for States designated as such on or before October 1, 1980.

(c) State agencies must have policies and procedures regarding designation of and changes to planning and service areas in accordance with the Act. Such policies and procedures should provide due process to affected parties, accountability, and transparency. Such policies and procedures must address the following:

(1) The application process to change a planning and service area, if initiated outside of the State agency;

(2) How notice to interested parties will be provided;

(3) How need for the action will be documented;

(4) Provisions for conducting a public hearing;

(5) Provisions for involving area agencies on aging, service providers, and older individuals in the action or proceeding, such as offering other opportunities for feedback from interested parties;

(6) The appeals process for affected parties; and

(7) Timeframes that apply to each of the items under this paragraph (c).

(d) State agencies that seek to change one or more planning and service area designations must consider the following:

(1) The geographical distribution of older individuals in the State;

(2) The incidence of the need for services under the Act;

(3) The distribution of older individuals who have greatest economic need and greatest social need (with particular attention to low-income older individuals, including low-income minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas) residing in such areas;

(4) The distribution of older individuals who are Native Americans residing in such areas;

(5) The distribution of resources available to provide such services under the Act;

(6) The boundaries of existing areas within the State which were drawn for the planning or administration of services under the Act;

(7) The location of units of general purpose local government, as defined in section 302(4) of the Act (2 U.S.C. 3022(4)), within the State; and

(8) Any other relevant factors.

(e) When the State agency issues a decision to change planning and service areas, it shall provide an explanation of its consideration of the factors in paragraph (d) of this section. Such explanations must be included in the State plan amendment submitted as set forth in § 1321.31(b) or State plan submitted as set forth in § 1321.33.

§ 1321.15 Interstate planning and service area.

(a) An interstate planning and service area is an agreement between the State agencies that have responsibility for administering the programs within the interstate area, in which the agreement increases the allotment of the State agency or agencies with lead responsibility and decreases the allotment of the State agency or agencies without the lead responsibility. The Governor of any State in which a planning and service area crosses State boundaries, or in which an interstate Indian reservation is located, may apply to the Assistant Secretary for Aging to request redesignation as an interstate planning and service area comprising the entire metropolitan area or Indian reservation. If the Assistant Secretary for Aging approves such an application, the Assistant Secretary for Aging shall adjust the State agency allotments of the areas within the planning and service area in which the interstate planning and service area is established to reflect the number of older individuals within the area who will be served by an interstate planning and service area not within the State.

(b) Before requesting permission of the Assistant Secretary for Aging to designate an interstate planning and service area, the Governor of each State shall execute a written agreement that specifies the State agency proposed to have lead responsibility for administering the programs within the interstate planning and service area and lists the conditions, agreed upon by each State agency, governing the administration of the interstate planning and service area.

(c) The lead State agency shall request permission of the Assistant Secretary for Aging to designate an interstate planning and service area by submitting the request, together with a copy of the agreement as part of its State plan or as an amendment to its State plan.

(d) Prior to the Assistant Secretary for Aging's approval for State agencies to designate an interstate planning and service area, the Assistant Secretary for Aging shall determine that all applicable requirements and procedures in §§ 1321.27 and 1321.29 are met.

(e) If the request is approved, the Assistant Secretary for Aging, based on the agreement between the State agencies, will increase the allocation(s) of the State agency or agencies with lead responsibility for administering the programs within the interstate area and will reduce the allocation(s) of the State agency or agencies without lead responsibility by one of these methods:

(1) Reallocation of funds in proportion to the number of individuals age 60 and over for funding provided under Title III, parts B, C, and D and in proportion to the number of individuals age 70 and over for funding provided under Title III, part E for that portion of the interstate planning and service area located in the State without lead responsibility; or

(2) Reallocation of funds based on the intrastate funding formula of the State agency or agencies without lead responsibility.

(f) Each State agency that is a party to an interstate planning and service area agreement shall review and confirm their agreement as a part of their State plan on aging as set forth in § 1321.27.

§ 1321.17 Appeal to the Departmental Appeals Board on planning and service area designation.

(a) This section sets forth the procedures for providing hearings to applicants for designation as a planning and service area under § 1321.13, whose application is denied by the State agency or § 1321.15, whose application is denied by the Assistant Secretary for Aging.

(b) Any applicant for designation as a planning and service area whose application is denied, and who has been provided a hearing and a written decision by the State agency, may appeal the denial to the Departmental Appeals Board (DAB) in writing following receipt of the State agency's written decision, in accordance with the procedures set forth in 45 CFR part 16. The applicant must, at the time of filing an appeal with the DAB, mail a copy of the appeal to the State agency, if appealing subject to § 1321.13, or the Assistant Secretary for Aging, if appealing subject to § 1321.15, and include a certificate of service with its

initial filing. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision.

§ 1321.19 Designation of and designation changes to area agencies.

(a) The State agency is responsible for designating an area agency on aging to serve each planning and service area. Only one area agency on aging shall be designated to serve each planning and service area. An area agency on aging may serve more than one planning and service area. An area agency that serves more than one planning and service area must maintain separate funding, planning, and advocacy responsibilities for each planning and service area. State agencies shall have policies and procedures regarding designation of area agencies on aging and changes to an agency's designation as an area agency on aging in accordance with the Act. Such policies and procedures should provide due process to affected parties, accountability, and transparency and must address the following:

(1) Provisions for designating an area agency on aging, including:

(i) The application process;

(ii) How notice to interested parties will be provided;

(iii) How views offered by the unit(s) of general purpose local government in such area will be obtained and considered;

(iv) How the State agency will provide the right of first refusal to a unit of general purpose local government if:

(A) Such unit demonstrates ability to meet the requirements as set forth by the State agency, in accordance with the Act; and

(B) The boundaries of such a unit and the boundaries of the area are reasonably contiguous.

(v) How the State agency shall then give preference to an established office on aging if the unit of general purpose local government chooses not to exercise the right of first refusal;

(vi) How the State agency will assume area agency on aging responsibilities in the event there are no successful applicants in the State agency's application process; and

(vii) The appeals process for affected parties.

(2) Provisions for an area agency on aging that voluntarily relinquishes their area agency on aging designation, including that the State agency's written acceptance of the voluntary relinquishment of area agency on aging designation will be considered as the State agency's withdrawal of area agency on aging designation, and requirements under § 1321.21(b) will apply;

(3) Provisions for when the State agency takes action to withdraw an area agency on aging's designation, in accordance with § 1321.21;

(4) Provisions for when the State agency administers area agency on aging programs as provided for in section 306(f) (42 U.S.C. 3026(f)), where the Assistant Secretary for Aging may extend the 90-day period if the State agency requests an extension and demonstrates to the satisfaction of the Assistant Secretary for Aging a need for the extension; and

(5) If a State agency previously designated the entire State as a single planning and service area, provisions for when the State agency designates one or more additional planning and service areas.

(b) For any of the actions listed in paragraph (a) of this section, the State agency must submit a State plan amendment as set forth in § 1321.31(b) or State plan as set forth in § 1321.33;

(c) An area agency may be any of the following types of agencies:

(1) An established office on aging which is operating within a planning and service area;

(2) Any office or agency of a unit of general purpose local government, which is designated to function for the purpose of serving as an area agency on aging by the chief elected official of such unit;

(3) Any office or agency designated by the appropriate chief elected officials of any combination of units of general purpose local government to act on behalf of such combination for such purpose; or

(4) Any non-State, local public, or nonprofit private agency in a planning and service area, or any separate organizational unit within such agency, which is under the supervision or direction for this purpose of the designated State agency, and which demonstrates the ability and willingness to engage in the planning or provision of a broad range of services under the Act within such planning and service area.

(d) A State agency may not designate any regional or local office of the State as an area agency.

§ 1321.21 Withdrawal of area agency designation.

(a) In carrying out section 305 of the Act (42 U.S.C. 3025), the State agency shall withdraw the area agency designation whenever it, after reasonable notice and opportunity for a hearing, finds that:

(1) An area agency does not meet the requirements of this part;

(2) An area plan or plan amendment is not approved;

(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of the Act, regulations and other guidance as set forth by the Assistant Secretary for Aging, terms and conditions of Federal grant awards under the Act, or policies and procedures established and published by the State agency on aging;

(4) Activities of the area agency are inconsistent with the statutory mission prescribed in the Act;

(5) The State agency changes one or more planning and service area designations; or

(6) The area agency voluntarily requests the State agency withdraw its designation.

(b) If a State agency withdraws an area agency's designation under this section it shall:

(1) Provide a plan for the continuity of area agency functions and services in the affected planning and service area;

(2) Submit a State plan amendment as set forth in § 1321.31(b) or State plan as set forth in § 1321.33; and

(3) Designate a new area agency in the planning and service area in a timely manner.

(c) If necessary to ensure continuity of services in a planning and service area, the State agency may, for a period of up to 180 days after its final decision to withdraw designation of an area agency:

(1) Perform the responsibilities of the area agency; or

(2) Assign the responsibilities of the area agency to another agency in the planning and service area.

(d) The Assistant Secretary for Aging may extend the 180-day period if a State agency:

(1) Notifies the Assistant Secretary for Aging in writing of its action under this section;

(2) Requests an extension; and

(3) Demonstrates to the satisfaction of the Assistant Secretary for Aging a need for the extension. Need for the extension may include the State agency's reasonable but unsuccessful attempts to procure an applicant to serve as the area agency.

§ 1321.23 Appeal to the Departmental Appeals Board on area agency on aging withdrawal of designation.

(a) This section sets forth hearing procedures afforded to affected parties if the State agency initiates an action or proceeding to withdraw designation of an area agency on aging.

(b) Any area agency on aging that has appealed a State agency's decision to withdraw area agency on aging designation, and that has been provided a hearing and a written decision, may

appeal the decision to the Departmental Appeals Board in writing following receipt of the State agency's written decision, in accordance with the procedures set forth in 45 CFR part 16. The applicant must, at the time of filing an appeal with the DAB, mail a copy of the appeal to the State agency and include a certificate of service with its initial filing. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision.

§ 1321.25 Duration, format, and effective date of the State plan.

(a) A State agency will follow the guidance issued by the Assistant Secretary for Aging regarding duration and formatting of the State plan. Unless otherwise indicated, a State agency may determine the format, how to collect information for the plan, and whether the plan will remain in effect for two, three, or four years.

(b) An approved State plan or amendment identified in § 1321.31(a) becomes effective on the date designated by the Assistant Secretary for Aging.

(c) A State agency may not make expenditures under a new plan or amendment requiring approval, as identified in § 1321.27 or § 1321.31(a), until it is approved.

§ 1321.27 Content of State plan.

To receive a grant under this part, a State agency shall have an approved State plan as prescribed in section 307 of the Act (42 U.S.C. 3027). In addition to meeting the requirements of section 307, a State plan shall include:

(a) Identification of the sole State agency that the State has designated to develop and administer the plan.

(b) Statewide program objectives to implement the requirements under Title III and Title VII of the Act and any objectives established by the Assistant Secretary for Aging.

(c) Evidence that the State plan is informed by and based on area plans, except for single planning and service area States.

(d) A description of how greatest economic need and greatest social need are determined and addressed by specifying:

(1) How the State agency defines greatest economic need and greatest social need, which shall include the populations as set forth in the § 1321.3 definitions of greatest economic need and greatest social need; and

(2) The methods the State agency will use to target services to the populations identified in paragraph (d)(1) of this section, including how funds under the Act may be distributed to serve prioritized populations in accordance with requirements as set forth in § 1321.49 or § 1321.51, as appropriate.

(e) An intrastate funding formula or funds distribution plan indicating the proposed use of all Title III funds administered by a State agency, and the distribution of Title III funds to each planning and service area, in accordance with § 1321.49 or § 1321.51, as appropriate.

(f) Identification of the geographic boundaries of each planning and service area and of area agencies on aging designated for each planning and service area, if applicable.

(g) Demonstration that the determination of greatest economic need and greatest social need specific to Native American persons is identified pursuant to communication among the State agency and Tribes, Tribal organizations, and Native communities, and that the services provided under this part will be coordinated, where applicable, with the services provided under Title VI of the Act and that the State agency shall require area agencies to provide outreach where there are older Native Americans in any planning and service area, including those living outside of reservations and other Tribal lands.

(h) Certification that any program development and coordination activities shall meet the following requirements:

(1) The State agency shall not fund program development and coordination activities as a cost of supportive services under area plans until it has first spent 10 percent of the total of its combined allotments under Title III on the administration of area plans;

(2) Program development and coordination activities must only be expended as a cost of State plan administration, area plan administration, and/or Title III, part B supportive services;

(3) State agencies and area agencies on aging shall, consistent with the area plan and budgeting cycles, submit the details of proposals to pay for program development and coordination as a cost of Title III, part B supportive services to the general public for review and comment; and

(4) Expenditure by the State agency and area agency on program development and coordination activities are intended to have a direct and positive impact on the enhancement of services for older individuals and family caregivers in the planning and service area.

(i) Specification of the minimum proportion of funds that will be expended by each area agency on aging and the State agency to provide each of the following categories of services:

(1) Access to services;

(2) In-home supportive services; and

(3) Legal assistance, as set forth in § 1321.93.

(j) If the State agency allows for Title III, part C–1 funds to be used as set forth in § 1321.87(a)(1)(i):

(1) Evidence, using participation projections based on existing data, that provision of such meals will enhance and not diminish the congregate meals program, and a commitment to monitor the impact on congregate meals program participation;

(2) Description of how provision of such meals will be targeted to reach those populations identified as in greatest economic need and greatest social need;

(3) Description of the eligibility criteria for service provision;

(4) Evidence of consultation with area agencies on aging, nutrition and other direct services providers, other interested parties, and the general public regarding the provision of such meals; and

(5) Description of how provision of such meals will be coordinated with area agencies on aging, nutrition and other direct services providers, and other interested parties.

(k) How the State agency will use funds for prevention of elder abuse, neglect, and exploitation as set forth in 45 CFR part 1324, subpart B.

(l) How the State agency will meet responsibilities for the Legal Assistance Developer, as set forth in 45 CFR part 1324, subpart C.

(m) Description of how the State agency will conduct monitoring that the assurances to which they attest are being met.

§ 1321.29 Public participation.

The State agency shall:

(a) Have mechanisms and varied methods to obtain the views of older individuals, family caregivers, service providers, and the public on a periodic basis, with a focus on those in greatest economic need and greatest social need;

(b) Consider those views in developing and administering the State plan and policies and procedures regarding services provided under the plan;

(c) Establish and comply with a reasonable minimum time period (at least 30 calendar days) for public review and comment on new State plans as set forth in § 1321.27 and State plan amendments requiring approval of the Assistant Secretary for Aging as set forth in § 1321.31(a). State agencies may request a waiver of the minimum time

period from the Assistant Secretary for Aging during an emergency or when a time sensitive action is otherwise necessary;

(d) Ensure the documents noted in paragraph (c) of this section and final State plans and amendments are available to the public for review, as well as available in alternative formats and other languages if requested.

§ 1321.31 Amendments to the State plan.

(a) Subject to prior approval by the Assistant Secretary for Aging, a State agency shall amend the State plan whenever necessary to reflect:

(1) New or revised statutes or regulations as determined by the Assistant Secretary for Aging;

(2) An addition, deletion, or change to a State agency's goal, assurance, or information requirement statement;

(3) A change in the State agency's intrastate funding formula or funds distribution plan for Title III funds, as set forth in § 1321.49 or § 1321.51;

(4) A request to waive State plan requirements as set forth in section 316 of the Act (42 U.S.C. 3030c–3), or as required by guidance as set forth by the Assistant Secretary for Aging; or

(5) Other changes as required by guidance as set forth by the Assistant Secretary for Aging.

(b) A State agency shall amend the State plan and notify the Assistant Secretary for Aging of an amendment not requiring prior approval whenever necessary and within 30 days of the action(s) listed in paragraphs (b)(1) through (6) of this section:

(1) A significant change in a State law, organization, policy, or State agency operation;

(2) A change in the name or organizational placement of the State agency;

(3) Distribution of State plan administration funds for demonstration projects;

(4) A change in planning and service area designation, as set forth in § 1321.13;

(5) A change in area agency on aging designation, as set forth in § 1321.19; or

(6) Exercising of major disaster declaration flexibilities, as set forth in § 1321.101.

(c) Information required by this section shall be submitted according to guidelines prescribed by the Assistant Secretary for Aging.

§ 1321.33 Submission of the State plan or plan amendment to the Assistant Secretary for Aging for approval.

(a) Each State plan, or plan amendment which requires approval of the Assistant Secretary for Aging as set forth at § 1321.31(a), shall be signed by the Governor, or the Governor's designee, and submitted to the Assistant Secretary for Aging to be considered for approval at least 90 calendar days before the proposed effective date of the plan or plan amendment according to guidance as set forth by the Assistant Secretary for Aging, except in the case of a waiver provided by the Assistant Secretary for Aging. Each State plan amendment which does not require the prior approval of the Assistant Secretary for Aging shall be submitted as set forth at § 1321.31(b).

(b) In advance of the submission to the Assistant Secretary for Aging to be considered for approval, the State agency shall submit a draft of the plan or amendment to the appropriate ACL Regional Office at least 120 calendar days before the proposed effective date of the plan or plan amendment, except in the case of a waiver request or as otherwise provided in guidance as set forth by the Assistant Secretary for Aging. The State agency shall work with the ACL Regional Office in reviewing the plan or plan amendment for compliance.

§ 1321.35 Notification of State plan or State plan amendment approval or disapproval for changes requiring Assistant Secretary for Aging approval.

(a) The Assistant Secretary for Aging shall approve a State plan or State plan amendment by notifying the Governor or the Governor's designee in writing.

(b) When the Assistant Secretary for Aging proposes to disapprove a State plan or amendment, the Assistant Secretary for Aging shall notify the Governor in writing, giving the reasons for the proposed disapproval, and inform the State agency that it may request a hearing on the proposed disapproval following the procedures described in guidance issued by the Assistant Secretary for Aging.

§ 1321.37 Notification of State plan amendment receipt for changes not requiring Assistant Secretary for Aging approval.

The State agency shall submit an amendment not requiring Assistant Secretary for Aging approval as set forth at § 1321.31(b) to the appropriate ACL Regional Office. The ACL Regional Office shall review the amendment to confirm the contents do not require approval of the Assistant Secretary for Aging and will acknowledge receipt of the State plan amendment by notifying the head of the State agency in writing.

§ 1321.39 Appeal to the Departmental Appeals Board regarding State plan on aging.

If the Assistant Secretary for Aging intends to disapprove a State plan or State plan amendment, the Assistant Secretary for Aging shall first afford the State agency notice and an opportunity for a hearing. Administrative reviews of State plan disapprovals, as provided for in sections 307(c) and 307(d) of the Act (42 U.S.C. 3027(c)–(d)) are performed by the Department Appeals Board in accordance with the procedures set forth in 45 CFR part 16. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision.

§ 1321.41 When a disapproval decision is effective.

(a) The Assistant Secretary for Aging shall specify the effective date for reduction and withholding of the State agency's grant upon a disapproval decision from the Departmental Appeals Board. This effective date may not be earlier than the date of the Departmental Appeals Board's decision or later than the first day of the next calendar quarter.

(b) A disapproval decision issued by the DAB represents the final determination of the Assistant Secretary for Aging and shall remain in effect unless reversed or stayed on judicial appeal, or until the agency or the plan is changed to meet all Federal requirements, except that the Assistant Secretary for Aging may modify or set aside the decision before the record of the proceedings under this subpart is filed in court.

§ 1321.43 How the State agency may appeal the Departmental Appeals Board's decision.

A State agency may appeal the final decision of the Departmental Appeals Board disapproving the State plan or plan amendment, finding of noncompliance, or finding that a State agency does not meet the requirements of this part to the U.S. Court of Appeals for the circuit in which the State is located. The State agency shall file the appeal within 30 days of the Departmental Appeals Board's final decision.

§ 1321.45 How the Assistant Secretary for Aging may reallot the State agency's withheld payments.

The Assistant Secretary for Aging may disburse funds withheld from the State agency directly to any public or nonprofit private organization or agency, or political subdivision of the State that has the authority and capacity to carry out the functions of the State

agency and submits a State plan which meets the requirements of this part, and which contains an agreement to meet the non-Federal share requirements.

§ 1321.47 Conflicts of interest policies and procedures for State agencies.

(a) State agencies must have policies and procedures regarding conflicts of interest, in accordance with the Act and all other applicable Federal requirements. These policies and procedures must safeguard against conflicts of interest on the part of the State agency, employees, and agents of the State who have responsibilities relating to Title III programs, including area agencies on aging, governing boards, advisory councils, staff, and volunteers. Conflicts of interest policies and procedures must establish mechanisms to identify, avoid, remove, and remedy conflicts of interest in a Title III program at organizational and individual levels, including:

(1) Ensuring that State agency employees and agents administering Title III programs do not have a financial interest in a Title III program;

(2) Removing and remedying actual, perceived, or potential conflicts that arise due to an employee or agent's financial interest in a Title III program;

(3) Establishing robust monitoring and oversight, including periodic reviews, to identify conflicts of interest in a Title III program;

(4) Ensuring that no individual, or member of the immediate family of an individual, involved in administration or provision of a Title III program has a conflict of interest;

(5) Requiring that other agencies that operate a Title III program have policies in place to prohibit the employment or appointment of Title III program decision-makers, staff, or volunteers with a conflict that cannot be adequately removed or remedied;

(6) Requiring that a Title III program takes reasonable steps to suspend or remove Title III program responsibilities of an individual who has a conflict of interest, or who has an immediate family member with a conflict of interest, which cannot be adequately removed or remedied;

(7) Ensuring that no organization which provides a Title III service is subject to a conflict of interest;

(8) Prohibiting the officers, employees, or agents of the Title III program from soliciting or accepting gratuities, favors, or anything of monetary value from grantees, contractors, and/or subrecipients, except where policies and procedures allow for situations where the financial interest is not substantial, or the gift is an unsolicited item of nominal value;

(9) Establishing the actions the State agency will require a Title III program to take in order to remedy or remove such conflicts, as well as disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Title III program; and

(10) Documenting conflict of interest mitigation strategies, as necessary and appropriate, when a State agency or Title III program operates an Adult Protective Services or guardianship program.

(b) Individual conflicts include:

(1) An employee, or immediate member of an employee's family, maintaining ownership, employment, consultancy, or fiduciary interest in a Title III program organization or awardee when that employee or immediate family member is in a position to derive personal benefit from actions or decisions made in their official capacity;

(2) One or more conflicts between the private interests and the official responsibilities of a person in a position of trust;

(3) One or more conflicts between competing duties; and

(4) Other conflicts of interest identified in guidance issued by the Assistant Secretary for Aging and/or by State agency policies.

(c) Organizational conflicts include:

(1) One or more conflicts between competing duties, programs, and/or services; and

(2) Other conflicts of interest identified in guidance issued by the Assistant Secretary for Aging and/or by State agency policies.

§ 1321.49 Intrastate funding formula.

(a) The State agency of a State with multiple planning and service areas, as part of its State plan, in accordance with guidelines issued by the Assistant Secretary for Aging, using the best available data, and after consultation with all area agencies on aging in the State, shall develop and publish for review and comment by older individuals, family caregivers, other appropriate agencies and organizations, and the general public, an intrastate funding formula for the allocation of funds specific to each planning and service area to area agencies on aging under Title III for supportive, nutrition, evidence-based disease prevention and health promotion, and family caregiver services prior to taking the steps as set forth in § 1321.33. The intrastate funding formula shall be made available for public review and comment for a reasonable minimum time period (at least 30 calendar days, unless a waiver is provided by the Assistant Secretary for Aging during an emergency or when a time sensitive action is otherwise necessary). The formula shall reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic need and greatest social need with particular attention to low-income minority older individuals. A separate formula may be provided for the evidence-based disease prevention and health promotion allocation to target areas that are medically underserved and in which there are large numbers of older individuals who have the greatest economic need and greatest social need for such services. The State agency shall review, update, and submit for approval to the Assistant Secretary for Aging its formula as needed.

(b) The publication for review and comment required by the preceding paragraph shall include:

(1) A descriptive statement of the formula's assumptions and goals, and the application of the definitions of greatest economic need and greatest social need, including addressing the populations identified pursuant to § 1321.27(d)(1), which includes the following components:

(i) A statement that discloses if and how, prior to distribution under the intrastate funding formula to the area agencies on aging, funds are deducted from Title III funds for State plan administration, disaster set-aside funds as set forth in § 1321.99, and/or Long-Term Care Ombudsman Program allocations;

(ii) A statement that describes if a separate formula will be used for evidence-based disease prevention and health promotion allocation; and

(iii) A statement of how the State agency's Nutrition Services Incentive Program award will be distributed.

(2) A numerical mathematical statement of the actual funding formula to be used for all supportive, nutrition, evidence-based disease prevention and health promotion, and family caregiver allocations of Title III funds, including the separate numerical mathematical statement that may be provided for the evidence-based disease prevention and health promotion allocation, which includes:

(i) A descriptive statement of each factor and the weight or percentage used for each factor; and

(ii) Definitions of the terms used in the numerical mathematical statement.

(3) A listing of the population, economic, and social data to be used for each planning and service area in the State;

(4) A demonstration of the allocation of funds, pursuant to the funding formula, to each planning and service area in the State by part of Title III; and

(5) The source of the best available data used to allocate funding through the intrastate funding formula, which may include:

(i) The most current U.S. Decennial Census results;

(ii) The most current and reliable American Community Survey results; and/or

(iii) Other high-quality data available to the State agency.

(c) In meeting the requirement in paragraph (a) of this section, the intrastate funding formula may not allow for:

(1) The State agency to hold funds at the State level except as outlined in paragraph (b)(1)(i) of this section;

(2) Exceeding the State plan and area plan administration caps set in the Act, as set forth at § 1321.9(c)(2)(iv);

(3) Use of Title III, part D funds for area plan administration;

(4) A State agency to directly provide Title III funds to any entity other than a designated area agency on aging, with the exception of State plan administration funds, Title III, part B Ombudsman program funds, and disaster set-aside funds as described in § 1321.99; or

(5) Any other use in conflict with the Act.

(d) In meeting the requirement in paragraph (b)(1)(iii) of this section, the following apply:

(1) Cash must be promptly and equitably disbursed to recipients of grants or contracts for nutrition projects under the Act;

(2) The statement of distribution of grant funds and procedures for determining any commodities election amount must be followed;

(3) State agencies have the option to receive grant as cash and/or agricultural commodities; and

(4) State agencies may consult with the area agencies on aging to determine the amount of the commodities election.

(e) In meeting the requirements in this section, the following apply:

(1) Title VII funds are not required to be subject to the intrastate funding formula;

(2) Any funds allocated for the Long-Term Care Ombudsman Program under Title III, part B are not required to be subject to the intrastate funding formula;

(3) The intrastate funding formula may provide for a separate allocation of funds received under Title III, part D for preventive health services. In the award of such funds to selected planning and service areas, the State agency shall give priority to areas of the State:

(i) Which are medically underserved; and

(ii) In which there are large numbers of individuals who have the greatest economic need and greatest social need for such services, including the populations the State agency identifies pursuant to § 1321.27(d)(1).

(4) The State agency may determine the amount of funds available for area plan administration prior to deducting Title III, part B Ombudsman program funds and disaster set-aside funds as described in § 1321.99;

(5) After deducting any State plan administration funds, Title III, part B Ombudsman program funds, and disaster set-aside funds as described in § 1321.99, the State agency must allocate all other Title III funding to area agencies on aging designated to serve each planning and service area;

(6) State agencies may reallocate funding within the State when an area agency on aging voluntarily or otherwise returns funds, subject to the State agency's policies and procedures which must include the following:

(i) If an area agency voluntarily returns funds, the area agency on aging must provide evidence that its governing board or chief elected official approves the return of funds;

(ii) Funds must be made available to all area agencies on aging who request funds available for reallocation;

(iii) The intrastate funding formula shall be proportionally adjusted based on area agencies on aging that request redistributed allocations; and

(iv) Title III funds subject to reallocation may only be reallocated to area agencies on aging via the proportionally adjusted intrastate funding formula described in paragraph (a) of this section.

(f) The State agency shall submit its proposed intrastate funding formula to the Assistant Secretary for Aging for prior approval as part of a State plan or State plan amendment as set forth in § 1321.33.

§ 1321.51 Single planning and service area States.

(a) Unless otherwise specified, the State agency in single planning and service area States must meet the requirements in the Act and subpart C of this part, including maintaining an advisory council as set forth in § 1321.63.

(b) As part of their State plan submission, single planning and service area States must provide a funds distribution plan which includes:

(1) A descriptive statement as to how the State agency determines the geographical distribution of the Title III and Nutrition Services Incentive Program funding;

(2) How the State agency targets the funding to reach individuals with greatest economic need and greatest social need, with particular attention to low-income minority older individuals;

(3) At the option of the State agency, a numerical/mathematical statement as a part of their funds distribution plan; and

(4) Justification if the State agency determines it meets requirements to provide services directly where:

(i) As set forth in section 307(a)(8)(A) of the Act (42 U.S.C. 3027(a)(8)(A)), no supportive services, except as set forth in paragraph (b)(4)(i)(B) of this section, nutrition services, disease prevention and health promotion, or family caregiver services will be directly provided by the State agency, unless, in the judgment of the State agency:

(A) Provision of such services by the State agency is necessary to assure an adequate supply of such services;

(B) Such services are directly related to such State agency's administrative functions; or

(C) Such services may be provided more economically, and with comparable quality, by such State agency.

(ii) The State agency may directly provide case management, information and assistance services, and outreach.

(iii) Approval of the State agency to provide direct services may only be granted for a maximum of the State plan period. For each time that approval is granted to a State agency to provide direct services, the State agency must demonstrate the State agency's efforts to identify service providers prior to being granted a subsequent approval.

(c) Single planning and service area States must adhere to use of the funds distribution plan for Title III and Nutrition Services Incentive Program funds within the State. If a single planning and service area State agency revises their Title III funds distribution plan, they may do so by:

(1) Following their policies and procedures to publish the updated funds distribution plan for public review and comment for a reasonable minimum time period (30 calendar days or greater, unless a waiver is provided by the Assistant Secretary for Aging during an emergency or when a time sensitive action is otherwise necessary); and

(2) Submitting the revised funds distribution plan for Assistant Secretary for Aging approval prior to implementing the changes as noted at § 1321.33.

§ 1321.53 State agency Title III and Title VI coordination responsibilities.

(a) For States where there are Title VI programs, the State agency's policies and procedures, developed in coordination with the relevant Title VI program director(s), as set forth in § 1322.13(a), must explain how the State's aging network, including area agencies and service providers, will coordinate with Title VI programs to ensure compliance with sections 306(a)(11)(B) and 307(a)(21)(A) of the Act (42 U.S.C. 3026(a)(11)(B) and 3027(a)(21)(A)). State agencies may meet these requirements through a Tribal consultation policy that includes Title VI programs.

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:

(1) How the State's aging network, including area agencies on aging and service providers, will provide outreach to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII;

(2) The communication opportunities the State agency will make available to Title VI programs, to include Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities, meetings, email distribution lists, presentations, and public hearings;

(3) The methods for collaboration on and sharing of program information and changes, including coordinating with area agencies and service providers where applicable;

(4) How Title VI programs may refer individuals who are eligible for Title III and/or VII services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Opportunities to serve on advisory councils, workgroups, and boards, including area agency advisory councils, as set forth in § 1321.63.

Subpart C—Area Agency Responsibilities

§ 1321.55 Mission of the area agency.

(a) The Act intends that the area agency on aging shall be the lead on all aging issues on behalf of all older individuals and family caregivers in the planning and service area. The area agency shall proactively carry out, under the leadership and direction of the State agency, a wide range of functions including advocacy, planning, coordination, inter-agency collaboration, information sharing, monitoring, and evaluation. The area agency shall lead the development or enhancement of comprehensive and coordinated community-based systems in, or serving, each community in the planning and service area. These systems shall be designed to assist older individuals and family caregivers in leading independent, meaningful, healthy, and dignified lives in their own homes and communities.

(b) A comprehensive and coordinated community-based system described in of this section shall:

(1) Have a point of contact where anyone may go or contact for help, information, and/or referral on any aging issue;

(2) Provide information on a range of available public and private long-term care services and support options;

(3) Assure that these options are readily accessible to all older individuals and family caregivers, no matter what their income;

(4) Include a commitment of public, private, voluntary, and personal resources committed to supporting the system;

(5) Involve collaborative decision-making among public, private, voluntary, faith-based, civic, and fraternal organizations, including trusted leaders of communities in greatest economic need and greatest social need, and older individuals and family caregivers in the community;

(6) Offer special help or targeted resources for the most vulnerable older individuals, family caregivers, and those in danger of losing their independence;

(7) Provide effective referral from agency to agency to assure that information and/or assistance is provided, no matter how or where contact is made in the community;

(8) Evidence sufficient flexibility to respond with appropriate individualized assistance, especially for vulnerable older individuals or family caregivers;

(9) Be tailored to the specific nature of the community and the needs of older adults in the community; and

(10) Have a board of directors comprised of leaders in the community, including leaders from groups identified as in greatest economic need and greatest social need, who have the respect, capacity, and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change, and plan community responses for the present and for the future.

(c) The resources made available to the area agency on aging under the Act shall be used consistent with the definition of area plan administration as set forth in § 1321.3 to finance those activities necessary to achieve elements of a community-based system set forth in paragraph (b) of this section and consistent with the requirements for provision of direct services as set forth in §§ 1321.85 through 1321.93.

(d) The area agency may not engage in any activity which is inconsistent with its statutory mission prescribed in the Act or policies prescribed by the State agency under § 1321.9.

§ 1321.57 Organization and staffing of the area agency.

(a) An area agency may be either:

(1) An agency whose single purpose is to administer programs for older individuals and family caregivers; or

(2) A separate organizational unit within a multipurpose agency which functions as the area agency on aging. Where the State agency designates a separate organizational unit of a multipurpose agency that has previously been serving as an area agency, the State agency action shall not be subject to section 305(b)(5)(B) of the Act (42 U.S.C. 3025(b)(5)(B)).

(b) The area agency, once designated, is responsible for providing for adequate and qualified staff to facilitate the performance of the functions as set forth in this part. Such functions, except for provision of direct services, are considered to be area plan administration functions.

(c) The designated area agency shall continue to function in that capacity until either:

(1) The State agency withdraws the designation of the area agency as provided in § 1321.21(a)(1) through (5); or

(2) The area agency informs the State agency that it no longer wishes to carry out the responsibilities of an area agency as provided in § 1321.21(a)(6).

§ 1321.59 Area agency policies and procedures.

(a) The area agency on aging shall develop policies and procedures in compliance with State agency policies and procedures, including those required under § 1321.9, governing all aspects of programs operated under this part, including those related to conflict of interest, and be in alignment with the Act and all other applicable Federal requirements. These policies and procedures shall be developed in consultation with other appropriate parties in the planning and service area.

(b) The policies and procedures developed by the area agency shall address the manner in which the area agency will monitor the programmatic and fiscal performance of all programs, direct service providers, and activities initiated under this part for quality and

effectiveness. Quality monitoring and measurement results are encouraged to be publicly available in a format that may be understood by older individuals, family caregivers, and their families.

(c) The area agency is responsible for enforcement of these policies and procedures.

(d) The area agency may not delegate to another agency the authority to award or administer funds under this part.

§ 1321.61 Advocacy responsibilities of the area agency.

(a) The area agency shall serve as the public advocate for the development or enhancement of comprehensive and coordinated community-based systems of services in each community throughout and specific to each planning and service area.

(b) In carrying out this responsibility, the area agency shall:

(1) Monitor, evaluate, and comment on policies, programs, hearings, levies, and community actions which affect older individuals and family caregivers which the area agency considers to be aligned with the interests identified in the Act;

(2) Solicit comments from the public on the needs of older individuals and family caregivers;

(3) Represent the interests of older individuals and family caregivers to local level and executive branch officials, public and private agencies, or organizations;

(4) Consult with and support the State's Long-Term Care Ombudsman Program; and

(5) Coordinate with public and private organizations, including units of general purpose local government to promote new or expanded benefits and opportunities for older individuals and family caregivers.

(c) Each area agency on aging shall undertake a leadership role in assisting communities throughout the planning and service area to target resources from all appropriate sources to meet the needs of older individuals and family caregivers with greatest economic need and greatest social need, with particular attention to low-income minority individuals. Such activities may include location of services and specialization in the types of services most needed by these groups to meet this requirement. However, the area agency shall not permit a grantee or contractor under this part to employ a means test for services funded under this part.

(d) No requirement in this section shall be deemed to supersede a prohibition contained in the Federal appropriation on the use of Federal funds to lobby the Congress; or the lobbying provision applicable to private nonprofit agencies and organizations contained in OMB Circular A–122.

§ 1321.63 Area agency advisory council.

(a) *Functions of council.* The area agency shall establish an advisory council. The council shall carry out advisory functions which further the area agency's mission of developing and coordinating community-based systems of services for all older individuals and family and older relative caregivers specific to each planning and service area. The council shall advise the agency relative to:

(1) Developing and administering the area plan;

(2) Ensuring the plan is available to older individuals, family caregivers, service providers, and the general public;

(3) Conducting public hearings;

(4) Representing the interests of older individuals and family caregivers; and

(5) Reviewing and commenting on community policies, programs and actions which affect older individuals and family caregivers with the intent of assuring maximum coordination and responsiveness to older individuals and family caregivers.

(b) *Composition of council.* The council shall include individuals and representatives of community organizations from or serving the planning and service area who will help to enhance the leadership role of the area agency in developing community-based systems of services targeting those in greatest economic need and greatest social need. The advisory council shall be made up of:

(1) More than 50 percent older individuals, including minority individuals who are participants or who are eligible to participate in programs under this part, with efforts to include individuals identified as in greatest economic need and individuals identified as in greatest social need in § 1321.65(b)(2);

(2) Representatives of older individuals;

(3) Family caregivers, which may include older relative caregivers;

(4) Representatives of health care provider organizations, including providers of veterans' health care (if appropriate);

(5) Representatives of service providers, which may include legal assistance, nutrition, evidence-based disease prevention and health promotion, caregiver, long-term care ombudsman, and other service providers;

(6) Persons with leadership experience in the private and voluntary sectors;

(7) Local elected officials;

(8) The general public; and

(9) As available:

(i) Representatives from Indian Tribes, Pueblos, or Tribal aging programs; and

(ii) Older relative caregivers, including kin and grandparent caregivers of children or adults age 18 to 59 with a disability.

(c) *Review by advisory council.* The area agency shall submit the area plan and amendments for review and comment to the advisory council before it is transmitted to the State agency for approval.

(d) *Conflicts of interest.* The advisory council shall not operate as a board of directors for the area agency. Individuals may not serve on both the advisory council and the board of directors for the same entity.

§ 1321.65 Submission of an area plan and plan amendments to the State agency for approval.

(a) The area agency shall submit the area plan on aging and amendments specific to each planning and service area to the State agency for approval following procedures specified by the State agency in the State agency policies prescribed by § 1321.9.

(b) State agency policies and procedures regarding area plan requirements will at a minimum address the following:

(1) Content, duration, and format;

(2) That the area agency shall identify populations within the planning and service area at greatest economic need and greatest social need, which shall include the populations as set forth in the § 1321.3 definitions of greatest economic need and greatest social need.

(3) Assessment and evaluation of unmet need, such that each area agency shall submit objectively collected, and where possible, statistically valid, data with evaluative conclusions concerning the unmet need for supportive services, nutrition services, evidence-based disease prevention and health promotion services, family caregiver support services, and multipurpose senior centers. The evaluations for each area agency shall consider all services in these categories regardless of the source of funding for the services;

(4) Public participation specifying mechanisms to obtain the periodic views of older individuals, family caregivers, service providers, and the public with a focus on those in greatest economic need and greatest social need, including:

(i) A reasonable minimum time period (at least 30 calendar days, unless a waiver is provided by the State agency during an emergency or when a time

sensitive action is otherwise necessary) for public review and comment on area plans and area plan amendments; and

(ii) Ensuring the documents noted in (b)(4)(i) of this section and final area plans and amendments are accessible in a public location, as well as available in print by request.

(5) The services, including a definition of each type of service; the number of individuals to be served; the type and number of units to be provided; and corresponding expenditures proposed to be provided with funds under the Act and related local public sources under the area plan;

(6) Plans for how direct services funds under the Act will be distributed within the planning and service area, in order to address populations identified as in greatest social need and greatest economic need, as identified in § 1321.27(d)(1);

(7) Process for determining whether the area agency meets requirements to provide services directly where:

(i) As set forth in section 307(a)(8)(A) of the Act (42 U.S.C. 3027(a)(8)(A)), no supportive services, nutrition services, evidence-based disease prevention and health promotion services, or family caregiver support services will be directly provided by an area agency on aging in the State, unless, in the judgment of the State agency:

(A) Provision of such services by the area agency on aging is necessary to assure an adequate supply of such services;

(B) Such services are directly related to such area agency on aging's administrative functions; or

(C) Such services may be provided more economically, and with comparable quality, by such area agency on aging.

(ii) At its discretion, the State agency may waive the conditions set forth in paragraph (b)(7)(i) of this section and allow area agencies on aging to directly provide the supportive services of case management, information and assistance services, and outreach without additional restriction.

(iii) Approval of the area agency to provide direct services shall only be granted for a maximum of the area plan period. For each time approval is granted to an area agency to provide direct services, the area agency must demonstrate the area agency's efforts to identify service providers prior to being granted a subsequent approval.

(8) Minimum adequate proportion requirements, as identified in the approved State plan as set forth in § 1321.27;

(9) Requirements for program development and coordination activities as set forth in § 1321.27(h), if allowed by the State agency;

(10) If the area agency requests to allow Title III, part C–1 funds to be used as set forth in § 1321.87(a)(1)(i) through (iii), it must provide the following information to the State agency:

(i) Evidence, using participation projections based on existing data, that provision of such meals will enhance and not diminish the congregate meals program, and a commitment to monitor impact on congregate meals program participation;

(ii) Description of how provision of such meals will be targeted to reach those populations identified as in greatest economic need and greatest social need;

(iii) Description of the eligibility criteria for service provision;

(iv) Evidence of consultation with nutrition and other direct services providers, other interested parties, and the general public regarding the need for and provision of such meals; and

(v) Description of how provision of such meals will be coordinated with nutrition and other direct services providers and other interested parties.

(11) Initial submission and amendments;

(12) Approval by the State agency; and

(13) Appeals regarding area plans on aging.

(c) Area plans shall incorporate services which address the incidence of hunger, food insecurity and malnutrition; social isolation; and physical and mental health conditions.

(d) Pursuant to section 306(a)(16) of the Act (42 U.S.C. 3026(a)(16)), area plans shall provide, to the extent feasible, for the furnishing of services under this Act, through self-direction.

(e) Area plans on aging shall develop objectives that coordinate with and reflect the State plan goals for services under the Act.

§ 1321.67 Conflicts of interest policies and procedures for area agencies on aging.

(a) The area agency must have policies and procedures regarding conflicts of interest in accordance with the Act, guidance as set forth by the Assistant Secretary for Aging, and State agency policies and procedures as set forth at § 1321.47. These policies and procedures must safeguard against conflicts of interest on the part of the area agency, area agency employees, governing board and advisory council members, and awardees who have responsibilities relating to the area agency's grants and contracts. Conflicts of interest policies and procedures must establish mechanisms to avoid both actual and perceived conflicts of interest and to identify, remove, and remedy any existing or potential conflicts of interest at organizational and individual levels, including:

(1) Reviewing service utilization and financial incentives to ensure agency employees, governing board and advisory council members, grantees, contractors, and other awardees who serve multiple roles, such as assessment and service delivery, are appropriately stewarding Federal resources while fostering services to enhance access to community living;

(2) Ensuring that the area agency on aging employees and agents administering Title III programs do not have a financial interest in Title III programs;

(3) Complying with § 1324.21 of this chapter regarding the Ombudsman program, as appropriate;

(4) Removing and remedying any actual, perceived, or potential conflict between the area agency on aging and the area agency on aging employee or contractor's financial interest in a Title III program;

(5) Establishing robust monitoring and oversight, including periodic reviews, to identify conflicts of interest in the Title III program;

(6) Ensuring that no individual, or member of the immediate family of an individual, involved in Title III programs has a conflict of interest;

(7) Requiring that agencies to which the area agency provides Title III funds have policies in place to prohibit the employment or appointment of Title III program decision makers, staff, or volunteers with conflicts that cannot be adequately removed or remedied;

(8) Requiring that Title III programs take reasonable steps to refuse, suspend or remove Title III program responsibilities of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, that cannot be adequately removed or remedied;

(9) Complying with the State agency's periodic review and identification of conflicts of the Title III program;

(10) Prohibiting the officers, employees, or agents of the Title III program from soliciting or accepting gratuities, favors, or anything of monetary value from grantees, contractors, and/or subrecipients, except where policies and procedures allow for situations where the financial interest is not substantial, or the gift is an unsolicited item of nominal value;

(11) Establishing the actions the area agency will require Title III programs to take in order to remedy or remove such conflicts, as well as disciplinary actions

to be applied for violations of such standards by officers, employees, or agents of the Title III program; and

(12) Documentation of conflict of interest mitigation strategies, as necessary and appropriate, when operating an Adult Protective Services or guardianship program.

(b) [Reserved]

§ 1321.69 Area agency on aging Title III and Title VI coordination responsibilities.

(a) For planning and service areas where there are Title VI programs, the area agency's policies and procedures, developed in coordination with the relevant Title VI program director(s), as set forth in § 1322.13(a), must explain how the area agency's aging network, including service providers, will coordinate with Title VI programs to ensure compliance with section 306(a)(11)(B) of the Act (42 U.S.C. 3026(a)(11)(B)).

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:

(1) How the area agency's aging network, including service providers, will provide outreach to Tribal elders and family caregivers regarding services for which they may be eligible under Title III;

(2) The communication opportunities the area agency will make available to Title VI programs, to include Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities, meetings, email distribution lists, presentations, and public hearings;

(3) The methods for collaboration on and sharing of program information and changes, including coordinating with service providers where applicable;

(4) How Title VI programs may refer individuals who are eligible for Title III services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Opportunities to serve on advisory councils, workgroups, and boards, including area agency advisory councils as set forth in § 1321.63.

Subpart D—Service Requirements

§ 1321.71 Purpose of services allotments under Title III.

(a) Title III of the Act authorizes the distribution of Federal funds to the State agency on aging for the following services:

(1) Supportive services;

(2) Nutrition services;

(3) Evidence-based disease prevention and health promotion services; and

(4) Family caregiver support services.

(b) Funds authorized are for the purpose of assisting the State agency and its area agencies to develop, provide, or enhance for older individuals and family caregivers comprehensive and coordinated community-based direct services and systems.

(c) Except for ombudsman services, State plan administration, disaster assistance as noted at §§ 1321.99 through 1321.101, or as otherwise allowed in the Act, State agencies in States with multiple planning and service areas will award the funds made available under this section to designated area agencies on aging according to the approved intrastate funding formula as set forth in § 1321.49.

(d) Except for ombudsman services, State plan administration, disaster assistance as noted at §§ 1321.99 through 1321.101, or as otherwise allowed in the Act, State agencies in States with single planning and service areas shall award funds by grant or contract to community services provider agencies and organizations for direct services to older individuals and family caregivers in, or serving, communities throughout the planning and service area, except as set forth in § 1321.51(b)(4).

(e) Except where the State agency approves the area agency to provide direct services, as set forth in § 1321.65(b)(7), after subtracting funds for area plan administration as set forth in § 1321.9(c)(2)(iv)(B) and program development and coordination activities, if allowed by the State agency, as set forth in § 1321.27(h), area agencies shall award these funds by grant or contract to community services provider agencies and organizations for direct services to older individuals and family caregivers in, or serving, communities throughout the planning and service area.

§ 1321.73 Policies and procedures.

(a) The area agency on aging and/or service provider shall ensure the development and implementation of policies and procedures in accordance with State agency policies and procedures, including those required as set forth in § 1321.9. The State agency may allow for policies and procedures to be developed by the subrecipient(s), except as set forth at §§ 1321.9(a) and 1321.9(c)(2)(xi) and where otherwise specified.

(b) The area agency on aging and/or service provider will provide the State agency in a timely manner with statistical and other information which the State agency requires to meet its planning, coordination, evaluation, and reporting requirements established by the State agency under § 1321.9.

(c) The State agency and/or area agencies on aging must develop an independent qualitative and quantitative monitoring process ensuring the quality and effectiveness of services regarding meeting participant needs and preferences, the goals described within the State and/or area plan, and State and local requirements, as well as conflicts of interest policies and procedures. Quality monitoring and measurement results are encouraged to be made available to the public in plain language format designed to support and provide information and choice among persons and families receiving services.

§ 1321.75 Confidentiality and disclosure of information.

(a) State agencies and area agencies on aging shall have procedures to protect the confidentiality of information about older individuals and family caregivers collected in the conduct of their responsibilities. The procedures shall ensure that no information about an older person or family caregiver, or obtained from an older person or family caregiver by a service provider or the State or area agencies, is disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of their legal representative, unless the disclosure is required by law or court order, or for program monitoring and evaluation by authorized Federal, State, or local monitoring agencies.

(b) A State agency, area agency on aging or other contracting or granting or auditing agency may not require a provider of long-term care ombudsman services under this part to reveal any information that is protected by disclosure provisions in 45 CFR part 1324, subpart A. State agencies must comply with confidentiality and disclosure of information provisions as directed in 45 CFR part 1324, as appropriate.

(c) A State or area agency on aging shall not require a provider of legal assistance under this part to reveal any information that is protected by attorney client privilege.

(d) State agencies must have policies and procedures that ensure that entities providing services under this title promote the rights of each older individual who receives such services. Such rights include the right to confidentiality of records relating to such individual.

(e) State agencies' policies and procedures must explain that individual information and records may be shared with other State and local agencies, community-based organizations, and health care providers and payers in order to provide services.

(f) State agencies' policies and procedures must comply with all applicable Federal laws as well as guidance as the State determines, for the collection, use, and exchange of both Personal Identifiable Information (PII) and personal health information in the provision of Title III services under the Act. State agencies are encouraged to consult with Tribes regarding any Tribal data sovereignty expectations that may apply.

§ 1321.77 Purpose of services—person- and family-centered, trauma-informed.

(a) Services must be provided to older adults and family caregivers in a manner that is person-centered, trauma-informed, and culturally sensitive. Services should be responsive to their interests, physical and mental health, social and cultural needs, available supports, and desire to live where and with whom they choose. Person-centered services may include community-centered and family-centered approaches consistent with the traditions, practices, beliefs, and cultural norms and expectations of older adults and family caregivers.

(b) Services should, as appropriate, provide older adults and family caregivers with the opportunity to develop a person-centered plan that is led by the individual or, if applicable, by the individual and the individual's authorized representative. Services should be incorporated into existing person-centered plans, as appropriate.

(c) State and area agencies and service providers should provide training to staff and volunteers on person-centered and trauma-informed service provision.

§ 1321.79 Responsibilities of service providers under State and area plans.

As a condition for receipt of funds under this part, each State agency and/or area agency on aging shall assure that service providers shall:

(a) Specify how the service provider intends to satisfy the service needs of those identified as in greatest economic need and greatest social need, with a focus on low-income minority individuals in the area served, including attempting to provide services to low-income minority individuals at least in proportion to the number of low-income minority older individuals and family caregivers in the population serviced by the provider;

(b) Provide recipients with an opportunity to contribute to the cost of the service as provided in § 1321.9(c)(2)(x) or (xi);

(c) Pursuant to section 306(a)(16) of the Act (42 U.S.C. 3026(a)(16)), provide, to the extent feasible, for the furnishing of services under this Act through self-direction;

(d) Bring conditions or circumstances which place an older person, or the household of an older person, in imminent danger to the attention of adult protective services or other appropriate officials for follow-up, provided that:

(1) The older person or their legal representative consents; or

(2) Such action is in accordance with local adult protective services requirements, except as set forth at § 1321.93 and part 1324, subpart A, of this chapter;

(e) Where feasible and appropriate, make arrangements for the availability of services to older individuals and family caregivers in weather-related and other emergencies;

(f) Assist participants in taking advantage of benefits under other programs; and

(g) Assure that all services funded under this part are coordinated with other appropriate services in the community, and that these services do not constitute an unnecessary duplication of services provided by other sources.

§ 1321.81 Client eligibility for participation.

(a) An individual must be age 60 or older at the time of service to be eligible to participate in services under the Act, unless the Act otherwise provides an explicit exception. Exceptions are limited to the following specific services:

(1) Nutrition services:

(i) Services shall be available to spouses of any age of older individuals;

(ii) Services may be available to:

(A) A person with a disability who lives with an adult age 60 or older or who resides in a housing facility that is primarily occupied by older adults at which congregate meals are served; and

(B) A volunteer during meal hours.

(2) Family caregiver support services for:

(i) Adults caring for older adults and adults caring for individuals of any age with Alzheimer's or a related disorder;

(ii) Older relative caregivers who are caring for children and are not the biological or adoptive parent of the child, where older relative caregivers shall no longer be eligible for services under this part when the child reaches 18 years of age; or

(iii) Older relative caregivers who are caring for individuals age 18 to 59 with disabilities and who may be of any relationship, including the biological or adoptive parent.

(3) Services such as information and assistance and public education, where recipients of information may not be age 60 or older, but the information is targeted to those who are age 60 or older and/or benefits those who are age 60 or older.

(4) Ombudsman program services, as provided in 45 CFR part 1324.

(b) State agencies, area agencies on aging, and local service providers may develop further eligibility requirements for implementation of services for older adults and family caregivers, as long as they do not conflict with the Act, this part, or guidance as set forth by the Assistant Secretary for Aging. Such requirements may include:

(1) Assessment of greatest social need;

(2) Assessment of greatest economic need;

(3) Assessment of functional and support need;

(4) Geographic boundaries;

(5) Limitations on number of persons that may be served;

(6) Limitations on number of units of service that may be provided;

(7) Limitations due to availability of staff/volunteers;

(8) Limitations to avoid duplication of services; and

(9) Specification of settings where services shall or may be provided.

§ 1321.83 Client and service priority.

(a) The State agency and/or area agency shall ensure service to those identified as members of priority groups through assessment of local needs and resources.

(b) The State agency and/or area agency shall establish criteria to prioritize the delivery of services under Title III, parts B (except for Ombudsman program services which are subject to provisions in 45 CFR part 1324), C, and D, in accordance with the Act.

(c) The State agency and/or area agency shall establish criteria to prioritize the delivery of services under Title III, part E, in accordance with the Act, to include:

(1) Caregivers who are older individuals with greatest social need, and older individuals with greatest economic need (with particular attention to low-income older individuals);

(2) Caregivers who provide care for individuals with Alzheimer's disease and related disorders with neurological and organic brain dysfunction; and

(3) If serving older relative caregivers, older relative caregivers of children or adults with severe disabilities.

§ 1321.85 Supportive services.

(a) Supportive services are community-based interventions set forth in the Act under Title III, part B, section 321 (42 U.S.C. 3030d) which meet standards established by the Assistant Secretary for Aging. They include in-home supportive services, access services, which may include multipurpose senior centers, and legal services.

(b) State agencies may allow use of Title III, part B funds for acquiring, altering or renovating, or constructing facilities to serve as multipurpose senior centers, in accordance with guidance as set forth by the Assistant Secretary for Aging.

(c) For those Title III, part B services intended to benefit family caregivers, such as those provided under sections 321(a)(6)(C), 321(a)(19), and 321(a)(21) of the Act (42 U.S.C. 3030d(a)(6)(C), 3030d(a)(19), and 3030d(a)(21)), State and area agencies shall ensure that there is coordination and no inappropriate duplication of such services available under Title III, part E.

(d) All funds provided under Title III, part B of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

§ 1321.87 Nutrition services.

(a) Nutrition services are community-based interventions as set forth in Title III, part C of the Act, and as further defined by the Assistant Secretary for Aging. Nutrition services include congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.

(1) Congregate meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g–21) provided under Title III, part C–1 by a qualified nutrition service provider to eligible individuals and consumed while congregating virtually or in-person, except where:

(i) If included as part of an approved State plan as set forth in § 1321.27 or State plan amendment as set forth in § 1321.31(a) and area plan or plan amendment as set forth in § 1321.65 and to complement the congregate meals program, shelf-stable, pick-up, carry-out, drive-through, or similar meals may be provided under Title III, part C–1;

(ii) Meals provided as set forth in paragraph (a)(1)(i) of this section shall:

(A) Not exceed 25 percent of the funds expended by the State agency under Title III, part C–1, to be calculated based on the amount of Title III, part C–1 funds available after all transfers as set forth in § 1321.9(c)(2)(iii) are completed;

(B) Not exceed 25 percent of the funds expended by any area agency on aging under Title III, part C–1, to be calculated based on the amount of Title III, part C–1 funds available after all transfers as set forth in § 1321.9(c)(2)(iii) are completed.

(iii) Meals provided as set forth in paragraph (a)(1)(i) of this section may be provided to complement the congregate meal program:

(A) During disaster or emergency situations affecting the provision of nutrition services;

(B) To older individuals who have an occasional need for such meal; and/or

(C) To older individuals who have a regular need for such meal, based on an individualized assessment, when targeting services to those in greatest economic need and greatest social need.

(2) Home-delivered meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g–21) provided under Title III, part C–2 by a qualified nutrition service provider to eligible individuals and consumed at their residence or otherwise outside of a congregate setting, as organized by a service provider under the Act. Meals may be provided via home delivery, pick-up, carry-out, drive-through, or similar meals.

(i) Eligibility criteria for home-delivered meals may include consideration of an individual's ability to leave home unassisted, ability to shop for and prepare nutritious meals, degree of disability, or other relevant factors pertaining to their need for the service, including social need and economic need.

(ii) Home-delivered meals service providers may encourage meal participants to attend congregate meal sites and other health and wellness activities, as feasible, based on a person-centered approach and local service availability.

(3) Nutrition education is information provided under Title III, parts C–1 or 2 which provides individuals with the knowledge and skills to make healthy food and beverage choices. Congregate and home-delivered nutrition services shall provide nutrition education, as appropriate, based on the needs of meal participants.

(4) Nutrition counseling is a service provided under Title III, parts C–1 or 2 which must align with the Academy of Nutrition and Dietetics. Congregate and home-delivered nutrition services shall provide nutrition counseling, as appropriate, based on the needs of meal participants, the availability of resources, and the expertise of a Registered Dietitian Nutritionist.

(5) Other nutrition services include additional services provided under Title III, parts C–1 or 2 that may be provided to meet nutritional needs or preferences of eligible participants, such as weighted utensils, supplemental foods, oral nutrition supplements, or groceries.

(b) State agencies shall establish policies and procedures that define a nutrition project and include how a nutrition project will provide meals and nutrition services five or more days per week in accordance with the Act. The definition of nutrition project established by the State agency must consider the availability of resources and the community's need for nutrition services as described in the State and area plans.

(c) All funds provided under Title III, part C of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

(d) Nutrition Services Incentive Program allocations are available to States and Territories that provide nutrition services where:

(1) Nutrition Services Incentive Program allocation amounts are based on the number of meals reported by the State agency which meet the following requirements:

(i) The meal is served to an individual who is eligible to receive services under the Act;

(ii) The meal is served to an individual who has not been means-tested to receive the meal;

(iii) The meal is served to an individual who has been provided the opportunity to provide a voluntary contribution to the cost of service;

(iv) The meal meets the other requirements of the Act, including that the meal meets the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g–21); and

(v) The meal is served by an agency that has a grant or contract with a State agency or area agency.

(2) The State agency may choose to receive their Nutrition Services Incentive Program grant as cash, commodities, or a combination of cash and commodities.

(3) Nutrition Services Incentive Program funds may only be used to purchase domestically produced foods used in a meal as set forth under the Act.

(4) Nutrition Services Incentive Program funds are distributed within a State pursuant to § 1321.49(b)(1)(iii) and (d) or § 1321.51(b)(1).

§ 1321.89 Evidence-based disease prevention and health promotion services.

(a) Evidence-based disease prevention and health promotion services programs are community-based interventions as set forth in Title III, part D of the Act, that have been proven to improve health and well-being and/or reduce risk of injury, disease, or disability among older adults. All programs provided using these funds must be evidence-based and must meet the Act's requirements and guidance as set forth by the Assistant Secretary for Aging.

(b) All funds provided under Title III, part D of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

§ 1321.91 Family caregiver support services.

(a) Family caregiver support services are community-based interventions set forth in Title III, part E of the Act, which meet standards set forth by the Assistant Secretary for Aging and which may be informed through the use of an evidence-informed or evidence-based caregiver assessment, including:

(1) Information to family caregivers about available services via public education;

(2) Assistance to family caregivers in gaining access to the services through:

(i) Individual information and assistance; or

(ii) Case management or care coordination.

(3) Individual counseling, organization of support groups, and caregiver training to assist family caregivers in those areas in which they provide support, including health, nutrition, complex medical care, and financial literacy, and in making decisions and solving problems relating to their caregiving roles;

(4) Respite care to enable family caregivers to be temporarily relieved from their caregiving responsibilities; and

(5) Supplemental services, on a limited basis, to complement the care provided by family caregivers. State agencies and AAAs shall define ''limited basis'' for supplemental services and may consider limiting units, episodes or expenditure amounts when making this determination.

(b) State agencies shall ensure that there is a plan to provide each of the services authorized under this part in each planning and service area, or statewide in accordance with a funds distribution plan for single planning and service area States, subject to availability of funds under the Act.

(c) To provide services listed in paragraphs (a)(4) and (5) of this section to family caregivers of adults aged 60 and older or of individuals of any age with Alzheimer's disease or a related disorder, the individual for whom they are caring must be determined to be functionally impaired because the individual:

(1) Is unable to perform at least two activities of daily living without substantial assistance, including verbal reminding, physical cueing, or supervision;

(2) At the option of the State agency, is unable to perform at least three such activities without such assistance; or

(3) Due to a cognitive or other mental impairment, requires substantial supervision because the individual poses a serious health or safety hazard to themself or others.

(d) All funds provided under Title III, part E of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

§ 1321.93 Legal assistance.

(a) *General—definition.* (1) The provisions and restrictions in this section apply to legal assistance funded by and provided pursuant to the Act.

(2) Legal assistance means legal advice and/or representation provided by an attorney to older individuals with economic or social needs, per section 102(33) of the Act (42 U.S.C. 3002(33)). Legal assistance may include, to the extent feasible, counseling, or other appropriate assistance by a paralegal or law student under the direct supervision of an attorney, and counseling or representation by a non-lawyer as permitted by law.

(b) *State agency on aging requirements.* (1) Under section 307(a)(11) of the Act (42 U.S.C. 3027(a)(11)), the roles and responsibilities of the State agency shall include assurances for the provision of legal assistance in the State plan as follows:

(i) Legal assistance, to the extent practicable, supplements and does not duplicate or supplant legal services provided with funding from other sources, including grants made by the Legal Services Corporation;

(ii) Legal assistance supplements existing sources of legal services through focusing legal assistance delivery and provider capacity in the specific areas of law affecting older adults with greatest economic need or greatest social need;

(iii) Reasonable efforts will be made to maintain existing levels of legal assistance for older individuals;

(iv) Advice, training, and technical assistance support for the provision of legal assistance for older adults will be made available to legal assistance providers, as provided in § 1324.303 and section 420(a)(1) of the Act (42 U.S.C. 3032i(a)(1));

(v) The State agency in single planning and service area States or area agencies on aging in States with multiple planning and service areas shall award, through contract funds, only to legal assistance providers that meet the standards and requirements as set forth in this section and section (c); and

(vi) Attorneys and personnel under the supervision of attorneys providing legal assistance shall adhere to the applicable Rules of Professional Conduct including the obligation to preserve the attorney-client privilege.

(2) As set forth in section 307(a)(2)(C) of the Act (42 U.S.C. 3027(a)(2)(C)) and § 1321.27(i)(3), the State agency shall designate the minimum proportion of Title III, part B funds and require the expenditure of at least that sum for each planning and service area for the purpose of procuring contract(s) for legal assistance.

(3) The State agency in States with a single planning and service area shall meet the requirements for area agencies on aging as set forth in paragraph (c) of this section.

(c) *Area Agency on Aging requirements*—(1) *Adequate proportion funding.* The area agency on aging shall award at a minimum the required adequate proportion of Title III, part B funds designated by the State agency to procure legal assistance for older residents of the planning and service area as set forth in §§ 1321.27 and 1321.65.

(2) *Standards for selection of legal assistance providers.* Area agencies on aging shall adhere to the following standards in selecting legal assistance providers:

(i) The area agency on aging must select and procure through contract the legal assistance provider or providers best able to provide legal assistance as provided in this paragraph (c)(2) and paragraphs (d) through (f) of this section; and

(ii) The area agency on aging must select the legal assistance provider(s) that best demonstrate the capacity to conduct legal assistance, which means having the requisite expertise and staff to fulfill the requirements of the Act and all applicable Federal requirements for provision of legal assistance.

(d) *Standards for legal assistance provider selection.* Selected legal assistance providers shall exhibit the capacity to:

(1) Retain staff with expertise in specific areas of law affecting older

individuals with economic or social need, including the priority areas identified in the Act;

(2) Demonstrate expertise in specific areas of law that are given priority in the Act, including income and public entitlement benefits, health care, long-term care, nutrition, consumer law, housing, utilities, protective services, abuse, neglect, age discrimination, and defense of guardianship, prioritizing focus from among the areas of law based on the needs of the community served;

(i) Defense of guardianship means advice to and representation of older individuals at risk of guardianship and older individuals subject to guardianship to divert them from guardianship to less restrictive, more person-directed forms of decisional support whenever possible, to oppose appointment of a guardian in favor of such less restrictive decisional supports, to seek limitation of guardianship and to seek revocation of guardianship;

(ii) Defense of guardianship includes:

(A) Representation to maintain the rights of individuals at risk of guardianship, and to advocate for limited guardianship if a court orders guardianship to be imposed; assistance removing or limiting an existing guardianship; or assistance to preserve or restore an individual's rights or autonomy;

(B) Representation to advocate for and assert use of least-restrictive alternatives to guardianship to preserve or restore an individual's rights and or autonomy to support decision-making, or to limit the scope of guardianship orders when such orders have or will be entered by a court; and

(C) A legal assistance provider shall not represent a petitioner for imposition of guardianship except in limited circumstances involving guardianship proceedings of older individuals who seek to become guardians only if other adequate representation is unavailable in the proceedings, and the provider has exhausted, and documents efforts made to explore less restrictive alternatives to guardianship.

(3) Provide effective administrative and judicial advocacy in the areas of law affecting older individuals with greatest economic need or greatest social need;

(4) Support other advocacy efforts, for example, the Long-Term Care Ombudsman Program, including requiring a memorandum of agreement between the State Long-Term Care Ombudsman and the legal assistance provider(s) as required by section 712(h)(8) of the Act (42 U.S.C. 3058g(h)(8)); and

(5) Effectively provide legal assistance to older individuals residing in congregate residential long-term settings as defined in the Act in section 102(35) (42 U.S.C. 3002(35)), or who are isolated as defined in the Act in section 102(24)(c) (42 U.S.C. 3002(24)(c)), or who are restricted to the home due to cognitive or physical limitations.

(e) *Standards for contracting between Area Agencies on Aging and legal assistance providers.* (1) The area agency shall enter into a contract(s) with the selected legal assistance provider(s) that demonstrate(s) the capacity to deliver legal assistance.

(2) The contract shall specify that legal assistance provider(s) shall demonstrate capacity to:

(i) Maintain expertise in specific areas of law that are to be given priority, as defined in paragraphs (d)(1) and (2) of this section.

(ii) Prioritize representation and advice that focus on the specific areas of law that give rise to problems that are disparately experienced by older adults with economic or social need.

(iii) Maintain staff with the expertise, knowledge, and skills to deliver legal assistance as described in this section.

(iv) Engage in reasonable efforts to involve the private bar in legal assistance activities authorized under the Act, including groups within the private bar furnishing services to older individuals on a pro bono and reduced fee basis.

(v) Ensure that attorneys and personnel under the supervision of attorneys providing legal assistance will adhere to the applicable Rules of Professional Conduct including, but not limited to, the obligation to preserve the attorney-client privilege.

(3) The contract shall include provisions:

(i) Describing the duty of the area agency to refer older adults to the legal assistance provider(s) with whom the area agency contracts. In fulfilling this duty, the area agency is precluded from requiring a pre-screening of older individuals seeking legal assistance or from acting as the sole and exclusive referral pathway to legal assistance.

(ii) Requiring the contracted legal assistance provider(s) to maintain capacity to provide legal assistance in the preferred language used by older individuals seeking and/or receiving legal assistance who are limited English proficient (LEP), including in oral and written communication, and to ensure effective communication for individuals with disabilities, including by providing appropriate auxiliary aids and services where necessary.

(A) This includes requiring legal assistance providers take reasonable steps to ensure meaningful access to legal assistance by older individuals with limited-English proficiency, including an individualized assessment of an individual's need to understand and participate in the legal process (as determined by each individual).

(B) This includes stating the responsibility of the legal assistance provider to provide access to interpretation and translation services to meet clients' needs.

(C) This includes taking appropriate steps to ensure communications with persons with disabilities are as effective as communication with others, including by providing appropriate auxiliary aids and services where necessary to afford qualified persons with disabilities an equal opportunity to participate in, and enjoy the benefits of, legal assistance.

(iii) Providing that the area agency will provide outreach activities that will include information about the availability of legal assistance to address problems experienced by older adults that may have legal solutions, such as those referenced in sections 306(a)(4)(B) and 306(a)(19) of the Act (42 U.S.C. 3026(a)(4)(B) and 3026(a)(19)). This includes outreach to:

(A) Older adults with greatest economic need due to low income and to those with greatest social need, including minority older individuals; and

(B) Older adults of underserved communities, including:

(*1*) Older adults with limited-English proficiency and/or whose primary language is not English;

(*2*) Older adults with severe disabilities;

(*3*) Older adults living in rural areas;

(*4*) Older adults at risk for institutional placement; and

(*5*) Older adults with Alzheimer's disease and related disorders with neurological and organic brain dysfunction and their caregivers.

(iv) Providing that legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys must adhere to the applicable State Rules of Professional Conduct.

(v) Requiring that if the legal assistance provider(s) contracted by the area agency is located within a Legal Services Corporation grantee entity, that the legal assistance provider(s) shall adhere to the specific restrictions on activities and client representation in the Legal Services Corporation Act (42 U.S.C. 2996 *et seq.*). Exempted from this requirement are:

(A) Restrictions governing eligibility for legal assistance under such Act;

(B) Restrictions for membership of governing boards; and

(C) Any additional provisions as determined appropriate by the Assistant Secretary for Aging.

(f) *Legal assistance provider requirements.* (1) The provisions and restrictions in this section apply to legal assistance provider(s) when they are providing legal assistance under section 307(a)(11) of the Act (42 U.S.C. 3027(a)(11)).

(2) Legal assistance providers under contract with the State agency in States with single planning and service areas or area agency in States with multiple planning and service areas shall adhere to the following requirements:

(i) Provide legal assistance to meet complex and evolving legal needs that may arise involving a range of private, public, and governmental entities, programs, and activities that may impact an older adult's independence, choice, or financial security; and

(ii) Maintain the capacity for and provision of effective administrative and judicial representation.

(A) *Effective administrative and judicial representation* means the expertise and ability to provide the range of services necessary to adequately address the needs of older adults through legal assistance in administrative and judicial forums, as required under the Act. This includes providing the full range of legal services, from brief service and advice through representation in administrative and judicial proceedings.

(B) [Reserved]

(iii) Conduct administrative and judicial advocacy as is necessary to meet the legal needs of older adults with economic or social need, focusing on such individuals with the greatest economic need or greatest social need:

(A) *Economic need* means the need for legal assistance resulting from income at or below the Federal poverty level, as defined in section 102(44) of the Act (42 U.S.C. 3002(44)), that is insufficient to meet the legal needs of an older individual or that causes barriers to attaining legal assistance to assert the rights of older individuals as articulated in the Act and in the laws, regulations, and Constitution.

(B) *Social need* means the need for legal assistance resulting from social factors, as defined by in section 102(24) of the Act (42 U.S.C. 3002(24)), that cause barriers to attaining legal assistance to assert the rights of older individuals.

(iv) Maintain the expertise required to capably handle matters related to the priority case type areas specified under the Act, including income and public entitlement benefits, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age discrimination and defense of guardianship (as defined in paragraph (d)(2)(i) of this section).

(v) Maintain the expertise required to deliver any matters in addition to those specified in paragraph (f)(2)(iv) of this section that are related to preserving, maintaining, and restoring an older adult's independence, choice, or financial security.

(vi) Maintain the expertise and capacity to deliver a full range of legal assistance, from brief service and advice through representation in hearings, trials, and other administrative and judicial proceedings in the areas of law affecting such older individuals with economic or social need.

(vii) Maintain the capacity to provide effective legal assistance and legal support to other advocacy efforts, including, but not limited to, the Long-Term Care Ombudsman Program serving the planning and service area, as required by section 712(h)(8) of the Act (42 U.S.C. 3058g(h)(8)), and maintain the capacity to form, develop and maintain partnerships that support older adults' independence, choice, or financial security.

(viii) Maintain and exercise the capacity to effectively provide legal assistance to older adults regardless of whether they reside in community or congregate settings, and to provide legal assistance to older individuals who are confined to their home, and older adults whose access to legal assistance may be limited by geography or isolation.

(ix) Maintain the capacity to provide legal assistance in the preferred language used by older individuals seeking and/or receiving legal assistance who are limited-English proficient (LEP), including in oral and written communication.

(A) Legal assistance provider(s) shall take reasonable steps to ensure meaningful access to legal assistance by older individuals with limited English-speaking proficiency and other communication needs;

(B) Such reasonable steps require an individualized assessment of the needs of individuals who are seeking legal assistance and legal assistance clients to understand and participate in the legal process (as determined by each individual); and

(C) Legal assistance provider(s) are responsible for providing access to interpretation, translation, and auxiliary aids and services to meet older individuals' legal assistance needs.

(x) Maintain staff with knowledge of the unique experiences of older adults with economic or social need and expertise in areas of law affecting such older adults.

(xi) Meet the following legal assistance provider requirements:

(A) A legal assistance provider may not require an older person to disclose information about income or resources as a condition for providing legal assistance under this part.

(B) A legal assistance provider may ask about the person's financial circumstances as a part of the process of providing legal advice, counseling, and representation, or for the purpose of identifying additional resources and benefits for which an older person may be eligible.

(C) A legal assistance provider and its attorneys may engage in other legal activities to the extent that there is no conflict of interest nor other interference with their professional responsibilities under this Act.

(D) Legal assistance providers that are not housed within Legal Services Corporation grantee entities shall coordinate their services with existing Legal Services Corporation projects to concentrate funds under this Act in providing legal assistance to older adults with the greatest economic need or greatest social need.

(E) Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client.

(F) Legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys must adhere to the applicable Rules of Professional Conduct.

(3) Restrictions on legal assistance.

(i) No legal assistance provider(s) shall use funds received under the Act to provide legal assistance in a fee generating case unless other adequate representation is unavailable or there is an emergency requiring immediate legal action. All providers shall establish procedures for the referral of fee generating cases.

(A) ''Fee generating case'' means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party.

(B) [Reserved]

(ii) Other adequate representation is deemed to be unavailable when:

(A) Recovery of damages is not the principal object of the client; or

(B) A court appoints a provider or an employee of a provider pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction; or

(C) An eligible client is seeking benefits under Title II of the Social Security Act (42 U.S.C. 401 *et seq.*), Federal Old Age, Survivors, and Disability Insurance Benefits; or Title XVI of the Social Security Act (42 U.S.C. 1381 *et seq.*), Supplemental Security Income for Aged, Blind, and Disabled.

(iii) A provider may seek and accept a fee awarded or approved by a court or administrative body or included in a settlement.

(iv) When a case or matter accepted in accordance with this section results in a recovery of damages, other than statutory benefits, a provider may accept reimbursement for out-of-pocket costs and expenses incurred in connection with the case or matter.

(4) Legal assistance provider prohibited activities.

(i) A provider, employee of the provider, or staff attorney shall not engage in the following prohibited political activities:

(A) No provider or its employees shall contribute or make available funds, personnel, or equipment provided under the Act to any political party or association or to the campaign of any candidate for public or party office; or for use in advocating or opposing any ballot measure, initiative, or referendum;

(B) No provider or its employees shall intentionally identify the Title III program or provider with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office; or

(C) While engaged in legal assistance activities supported under the Act, no attorney shall engage in any political activity.

(ii) No funds made available under the Act shall be used for lobbying activities including, but not limited to, any activities intended to influence any decision or activity by a nonjudicial Federal, State, or local individual or body.

(A) Nothing in this section is intended to prohibit an employee from:

(*1*) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies;

(*2*) Informing a client about a new or proposed statute, executive order, or administrative regulation relevant to the client's legal matter;

(*3*) Responding to an individual client's request for advice only with respect to the client's own communications to officials unless otherwise prohibited by the Act, Title III regulations or other applicable law. This provision does not authorize publication or training of clients on lobbying techniques or the composition of a communication for the client's use;

(*4*) Making direct contact with the area agency for any purpose; or

(*5*) Testifying before a government agency, legislative body, or committee at the request of the government agency, legislative body, or committee.

(B) [Reserved]

(iii) A provider may use funds provided by private sources to:

(A) Engage in lobbying activities if a government agency, elected official, legislative body, committee, or member thereof is considering a measure directly affecting activities of the provider under the Act;

(B) [Reserved]

(iv) While carrying out legal assistance activities and while using resources provided under the Act, by private entities or by a recipient, directly or through a subrecipient, no provider or its employees shall:

(A) Participate in any public demonstration, picketing, boycott, or strike, whether in person or online, except as permitted by law in connection with the employee's own employment situation;

(B) Encourage, direct, or coerce others to engage in such activities; or

(C) At any time engage in or encourage others to engage in:

(*1*) Rioting or civil disturbance;

(*2*) Activity determined by a court to be in violation of an outstanding injunction of any court of competent jurisdiction;

(*3*) Any illegal activity;

(*4*) Any intentional identification of programs funded under the Act or recipient with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office; or

(v) None of the funds made available under the Act may be used to pay dues exceeding a reasonable amount per legal assistance provider per annum to any organization (other than a bar association), a purpose or function of which is to engage in activities prohibited under these regulations. Such dues may not be used to engage in activities for which Older Americans Act funds cannot be directly used.

§ 1321.95 Service provider Title III and Title VI coordination responsibilities.

(a) For locations served by service providers under Title III of the Act where there are Title VI programs, the area agency on aging's and/or service provider's policies and procedures, developed in coordination with the relevant Title VI program director(s), as set forth in § 1322.13(a), must explain how the service provider will coordinate with Title VI programs.

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:

(1) How the service provider will provide outreach to Tribal elders and family caregivers regarding services for which they may be eligible under Title III;

(2) The communication opportunities the service provider will make available to Title VI programs, to include meetings email distribution lists, and presentations;

(3) The methods for collaboration on and sharing of program information and changes;

(4) How Title VI programs may refer individuals who are eligible for Title III services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Opportunities to serve on advisory councils, workgroups, and boards.

Subpart E—Emergency and Disaster Requirements

§ 1321.97 Coordination with State, Tribal, and local emergency management.

(a) *State agencies.* (1) State agencies shall establish emergency plans, as set forth in section 307(a)(28) of the Act (42 U.S.C. 3027(a)(28)). Such plans must include, at a minimum:

(i) The State agency's continuity of operations plan and an all-hazards emergency response plan based on completed risk assessments for all hazards and updated annually;

(ii) A plan to coordinate activities with area agencies on aging, service providers, local emergency response agencies, relief organizations, local governments, State agencies responsible for emergency and disaster preparedness, and any other institutions that have responsibility for disaster relief service delivery;

(iii) Processes for developing and updating long-range emergency and disaster preparedness plans; and

(iv) Other relevant information as determined by the State agency.

(2) The plan shall include information describing the involvement of the head of the State agency in the development, revision, and implementation of emergency and disaster preparedness plans, including the State Public Health Emergency Preparedness and Response Plan.

(3) The plan shall discuss coordination with area agencies on aging and service providers and Tribal and local emergency management.

(b) *Area agencies on aging.* (1) Area agencies on aging shall establish emergency plans. Such plans must include:

(i) The area agency's continuity of operations plan and an all-hazards emergency response plan based on completed risk assessments for all hazards and updated annually;

(ii) A description of coordination activities for both development and implementation of long-range emergency and disaster preparedness plans; and

(iii) Other information as deemed appropriate by the area agency on aging.

(2) The area agency on aging shall coordinate with Federal, local, and State emergency response agencies, service providers, relief organizations, local and State governments, and any other entities that have responsibility for disaster relief service delivery, as well as with Tribal emergency management, as appropriate.

§ 1321.99 Setting aside funds to address disasters.

(a) Section 310 of the Act (42 U.S.C. 3030) authorizes the use of funds during Presidentially declared major disaster declarations under the Stafford Act (42 U.S.C. 5121–5207) without regard to distribution through the State agency's intrastate funding formula or funds distribution plan when the following apply:

(1) Title III services are impacted; and

(2) Flexibility is needed as determined by the State agency.

(b) When implementing this authority, State agencies may set aside funds, up to five percent of their total Title III allocations, if specified as being allowed to be withheld for the purpose in their approved intrastate funding formula or funds distribution plan, or with prior approval from the Assistant Secretary for Aging. The following apply for use of set aside funds:

(1) Set aside funds that are awarded under this provision must comply with the requirements at § 1321.101; and

(2) The State agency must have policies and procedures in place to award funds set aside through the intrastate funding formula, as set forth in § 1321.49, or funds distribution plan, as set forth in § 1321.51(b), if there are no funds awarded subject to this provision within 30 days of the end of the fiscal year in which the funds were received.

§ 1321.101 Flexibilities under a major disaster declaration.

(a) If a State or Indian Tribe requests and receives a major disaster declaration under the Stafford Act (42 U.S.C. 5121–5207), the State agency may use disaster relief flexibilities under Title III as set forth in this section to provide disaster relief services for areas of the State where the specific major disaster declaration is authorized and where older adults and family caregivers are affected.

(b) Flexibilities a State agency may exercise under a major disaster declaration include:

(1) Allowing use of any portion of the funds of any open grant awards under Title III of the Act for disaster relief services for older individuals and family caregivers.

(2) Awarding portions of State plan administration, up to a maximum of five percent of the Title III grant award or to a maximum of the amounts set forth at § 1321.9(c)(2)(iv), for use in a planning and service area covered in whole or part under a major disaster declaration without the requirement of allocation through the intrastate funding formula or funds distribution plan to be used for direct service provision.

(3) Awarding of funds set aside to address disasters, as set forth in § 1321.99, or as determined by the Assistant Secretary for Aging, in the following ways:

(i) to an area agency serving a planning and service area covered in whole or part under a major disaster declaration without the requirement of allocation through the intrastate funding formula;

(ii) for single planning and service area States, to a service provider without the requirement of allocation through a funds distribution plan; or

(iii) to be used for direct service provision, direct expenditures, and/or procurement of items on a statewide level, if the State agency adheres to the following:

(A) The State agency judges that provision of services or procurement of supplies by the State agency is necessary to ensure an adequate supply of such services and/or that such services can be provided/supplies procured more economically, and with comparable quality, by the State agency;

(B) The State agency consults with area agencies on aging prior to exercising the flexibility, and includes the Ombudsman as set forth in part 1324, subpart A if funding for the Ombudsman program is affected;

(C) The State agency uses such set aside funding, as provided at § 1321.99, for services provided through area agencies on aging and other aging network partners to the extent reasonably practicable, in the judgment of the State agency; and

(D) The State agency ensures reporting of any clients, units, and services provided through such expenditures.

(c) A State agency must submit a State plan amendment as set forth in § 1321.31(b) if the State agency exercises any of the flexibilities as set forth in paragraph (b) of this section. The State plan amendment must at a minimum include the specific entities receiving funds; the amount, source, and intended use for funds; and other such justification of the use of funds.

(d) Disaster relief services may include any allowable services under the Act to eligible older individuals or family caregivers during the period covered by the major disaster declaration.

(e) Expenditures of funds under disaster relief flexibilities must be reported separately from the grant where funding was expended. State agencies may expend funds from any source within open grant awards under Title III and Title VII of the Act but must track the source of all expenditures.

(f) State agencies must have policies and procedures outlining communication with area agencies on aging and/or local service providers regarding State agency expectations for eligibility, use, and reporting of services and funds provided under these flexibilities, and include the Ombudsman as set forth in part 1324, subpart A if funding for the Ombudsman program is affected.

(g) A State agency may only make obligations exercising this flexibility during the major disaster declaration incident period or 90 days thereafter or with prior approval from the Assistant Secretary for Aging.

§ 1321.103 Title III and Title VI coordination for emergency and disaster preparedness.

State agencies, area agencies, and Title VI programs should coordinate in emergency and disaster preparedness planning, response, and recovery. State agencies and area agencies that have Title VI programs in operation within their jurisdictions must have policies and procedures, developed in communication with the relevant Title VI program director(s) as set forth in § 1322.13(c), in place for how they will communicate and coordinate with Title VI programs regarding emergency and disaster preparedness planning, response, and recovery.

§ 1321.105 Modification during major disaster declaration or public health emergency.

The Assistant Secretary for Aging retains the right to modify the requirements described in these regulations pursuant to a major disaster declaration or public health emergency.

■ 2. Revise part 1322 to read as follows:

PART 1322—GRANTS TO INDIAN TRIBES AND NATIVE HAWAIIAN GRANTEES FOR SUPPORTIVE, NUTRITION, AND CAREGIVER SERVICES

Sec.

Authority: 42 U.S.C. 3001 *et seq.*

Subpart A—Introduction

§ 1322.1 Basis and purpose of this part.

(a) This program is established to meet the unique needs and circumstances of American Indian and Alaskan Native elders and family caregivers and of older Native Hawaiians and family caregivers, on Indian reservations and/or in service areas as approved in § 1322.7. This program honors the sovereign government to government relationship with a Tribal organization serving elders and family caregivers through direct grants to serve the eligible participants and similar considerations, as appropriate, for Hawaiian Native grantees representing elders and family caregivers. This part implements Title VI (parts A, B, and C) of the Older Americans Act, as amended (the Act), by establishing the requirements that an Indian Tribal organization or Hawaiian Native grantee shall meet in order to receive a grant to promote the delivery of services for older Indians, Alaskan Native, Native Hawaiians, and Native American family caregivers that are comparable to services provided under Title III. This part also prescribes application and hearing requirements and procedures for these grants.

(b) Terms used, but not otherwise defined, in this part will have the meanings ascribed to them in the Act.

§ 1322.3 Definitions.

Access to services or access services, as used in this part, means services which may facilitate connection to or receipt of other direct services, including transportation, outreach, information and assistance, options counseling, and case management services.

Acquiring, as used in this part, means obtaining ownership of an existing facility.

Act, means the Older Americans Act of 1965 as amended.

Altering or renovating, as used in this part, means making modifications to or in connection with an existing facility which are necessary for its effective use. Such modifications may include alterations, improvements, replacements, rearrangements, installations, renovations, repairs, expansions, upgrades, or additions, which are not in excess of double the square footage of the original facility and all physical improvements.

Area agency on aging, as used in this part, means a single agency designated by the State agency to perform the functions specified in the Act for a planning and service area.

Budgeting period, as used in § 1322.19, means the intervals of time into which a period of assistance (project period) is divided for budgetary and funding purposes.

Constructing, as used in this part, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

Department, means the U.S. Department of Health and Human Services.

Domestically produced foods, as used in this part, means agricultural foods, beverages and other food ingredients which are a product of the United States, its Territories or possessions, the Commonwealth of Puerto Rico, or the Trust Territories of the Pacific Islands (hereinafter referred to as ''the United States''), except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to minor ingredients. Ingredients from nondomestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

Eligible organization, means either a Tribal organization or a public or nonprofit private organization having the capacity to provide services under this part for older Hawaiian Natives.

Family caregiver, as used in this part, means an adult family member, or another individual, who is an informal provider of in-home and community care to an older Native American; an adult family member, or another individual, who is an informal provider of in-home and community care to an individual of any age with Alzheimer's disease or a related disorder with neurological and organic brain dysfunction; or an older relative caregiver. For purposes of this part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.

Hawaiian Native or *Native Hawaiian,* as used in this part, means any individual, any of whose ancestors were native of the area which consists of the Hawaiian Islands prior to 1778.

Hawaiian Native grantee, as used in this part, means an eligible organization that has received funds under Title VI of the Act to provide services to older Hawaiians.

Indian reservation, means the reservation of any Federally recognized Indian Tribe, including any band, nation, pueblo, or rancheria, any former reservation in Oklahoma, any community on non-trust land under the jurisdiction of an Indian Tribe, including a band, nation, pueblo, or rancheria, with allotted lands, or lands subject to a restriction against alienation imposed by the United States, and Alaska Native regions established, pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

Indian Tribe, means any Indian Tribe, band, nation, or organized group or community, including any Alaska Native village, regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b).

In-home supportive services, as used in this part, references those supportive services provided in the home as set forth in the Act, to include:

(1) Homemaker, personal care, home care, home health, and other aides;

(2) Visiting and telephone or virtual reassurance;

(3) Chore maintenance;

(4) Respite care for families, including adult day care as a respite service for families; and

(5) Minor modification of homes that is necessary to facilitate the independence and health of older Native Americans and that is not readily available under another program.

Major disaster declaration, as used in this part and section 310 of the Act (42 U.S.C. 3030), means a Presidentially declared disaster under the Robert T. Stafford Relief and Emergency Assistance Act (42 U.S.C. 5121–5207).

Means test, as used in this part in the provision of services, means the use of the income, assets, or other resources of an older Native American, family caregiver, or the households thereof to deny or limit that person's eligibility to receive services under this part.

Multipurpose senior center, as used in the Act, means a community facility for the organization and provision of a broad spectrum of services, which shall include provision of health (including mental and behavioral health), social, nutritional, and educational services and the provision of facilities for recreational activities for older Native Americans, as practicable, including as provided via virtual facilities; as used in § 1322.25, facilitation of services in such a facility.

Native American, as used in the Act, means a person who is a member of any Indian Tribe, band, nation, or other organized group or community of Indians (including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) who:

(1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(2) Is located on, or in proximity to, a Federal or State reservation or rancheria; or is a person who is a Native Hawaiian, who is any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778.

Nutrition Services Incentive Program, as used in the Act, means grant funding to State agencies, eligible Tribal organizations, and Native Hawaiian grantees to support congregate and home-delivered nutrition programs by providing an incentive to serve more meals.

Older Indians, means those individuals who have attained the minimum age determined by the Indian Tribe for services.

Older Native Hawaiian, means any individual, age 60 or over, who is a Hawaiian Native.

Older relative caregiver, as used in section 631 of the Act (42 U.S.C. 3057k–11), means a caregiver who is age 55 or older and lives with, is the informal provider of in-home and community care to, and is the primary caregiver for, a child or an individual with a disability;

(1) In the case of a caregiver for a child is:

(i) The grandparent, step-grandparent, or other relative (other than the parent) by blood, marriage, or adoption, of the child;

(ii) Is the primary caregiver of the child because the biological or adoptive parents are unable or unwilling to serve as the primary caregivers of the child; and

(iii) Has a legal relationship to the child, such as legal custody, adoption, or guardianship, or is raising the child informally; and

(2) In the case of a caregiver for an individual with a disability, is the parent, grandparent, step-grandparent, or other relative by blood, marriage, or adoption of the individual with a disability.

Program income, as defined in 2 CFR part 200.1 means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance except as provided in 2 CFR 200.307(f). Program income includes but is not limited to income from fees for services performed, the use or rental of real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. See also 2 CFR 200.307, 200.407 and 35 U.S.C. 200–212 (which applies to inventions made under Federal awards).

Project period, as used in § 1322.19, means the total time for which a project is approved including any extensions.

Reservation, as used in section 305(b)(2) of the Act (42 U.S.C. 3025(b)(2)) with respect to the designation of planning and service areas, means any Federally or State recognized American Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

Service area, as used in § 1322.5(b) and elsewhere in this part, means that geographic area approved by the Assistant Secretary for Aging in which the Tribal organization or Hawaiian Native grantee provides supportive, nutrition, and/or family caregiver support services to older Indians or Native Hawaiians residing there. Service areas are approved through the funding application process, which may include Bureau of Indian Affairs service area maps. A service area may include all or part of the reservation or any portion of a county or counties which has a common boundary with the reservation. A service area may also include a non-contiguous area if the designation of such an area will further the purpose of the Act and will provide for more effective administration of the program by the Tribal organization.

Service provider, means an entity that is awarded funds, including via a grant, subgrant, contract, or subcontract, from a Tribal organization or Native Hawaiian grantee to provide direct services under this part.

State agency, as used in this part, means the designated State unit on aging for each of the 50 States, the District of Columbia, and the Territories of Guam, Puerto Rico, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, unless otherwise specified.

Title VI director, as used in this part, means a single individual who is the key personnel responsible for day-to-day management of the Title VI program and who serves as a contact point for communications regarding the Title VI program.

Tribal organization, as used in this part, means the recognized governing body of any Indian Tribe, or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities. Provided that in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian Tribe, the approval of each Indian Tribe shall be a prerequisite to the letting or making of the contract or grant (25 U.S.C. 450b).

Voluntary contributions, as used in section 315(b) of the Act (42 U.S.C. 3030c–2(b)), means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.

Subpart B—Application

§ 1322.5 Application requirements.

An eligible organization shall submit an application. The application shall be submitted as prescribed in section 614 of the Act (42 U.S.C. 3057e) and in accordance with the Assistant Secretary for Aging's instructions for the specified project and budget periods. In addition to the requirements set out in section 614 of the Act (42 U.S.C. 3057e), the application shall provide for:

(a) Program objectives, as set forth in section 614(a)(5) of the Act (42 U.S.C. 3057e(a)(5)), and any objectives established by the Assistant Secretary for Aging;

(b) A map and/or description of the geographic boundaries of the service area proposed by the eligible organization, which may include Bureau of Indian Affairs service area maps;

(c) Documentation of the ability of the eligible organization to deliver supportive and nutrition services to older Native Americans, or documentation that the eligible organization has effectively administered supportive and nutrition services within the last 3 years;

(d) Assurances as prescribed by the Assistant Secretary for Aging that:

(1) The eligible organization represents at least 50 individuals who have attained 60 years of age or older and reside in the service area;

(2) The eligible organization shall comply with all applicable State and local license and safety requirements, if any, for the provision of those services;

(3) If a substantial number of the older Native Americans residing in the service area are limited English proficient, the Tribal organization shall utilize the services of workers who are fluent in the language used by a predominant number of older Native Americans;

(4) Procedures to ensure that all services under this part are provided without use of any means tests;

(5) The eligible organization shall comply with all requirements set forth in §§ 1322.7 through 1322.17;

(6) The services provided under this part shall be coordinated, where applicable, with services provided under Title III of the Act as set forth in 45 CFR part 1321 and Title VII of the Act as set forth in 45 CFR part 1324, and the eligible organization shall establish and follow policies and procedures as set forth in § 1322.13;

(7) The eligible organization shall have a completed needs assessment within the project period immediately prior to the application identifying the need for nutrition and supportive services for older Native Americans and, if applying for funds under Title VI part C, for family caregivers;

(8) The eligible organization shall ensure policies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by the Assistant Secretary for Aging; and

(9) The eligible organization shall complete a program evaluation using data as set forth by the Assistant Secretary for Aging and shall use findings of such program evaluation to establish and update program goals and objectives.

(e) A Tribal resolution(s) authorizing the Tribal organization to apply for a grant under this part; and

(f) Signature by the principal official of the Indian Tribe or eligible organization.

§ 1322.7 Application approval.

(a) Approval of any application under section 614(e) of the Act (42 U.S.C. 3057e(e)), shall not commit the Assistant Secretary for Aging in any way to make additional, supplemental, continuation, or other awards with respect to any approved application.

(b) The Assistant Secretary for Aging may give first priority in awarding grants to grantees that have effectively administered such grants in the prior year.

(c) Upon approval of an application and acceptance of the funding award, the Tribal organization or Hawaiian Native grantee is required to submit all performance and fiscal reporting as set forth by the Assistant Secretary for Aging on a no less than an annual basis.

(d) If the Assistant Secretary for Aging disapproves of an application, the Assistant Secretary for Aging must follow procedures outlined in section 614(d) of the Act (42 U.S.C. 3057e(d)).

§ 1322.9 Hearing procedures.

In meeting the requirements of section 614(d)(3) of the Act (42 U.S.C. 3057e(d)(3)), if the Assistant Secretary for Aging disapproves an application from an eligible organization, the eligible organization may file a written request for a hearing with the Departmental Appeals Board (DAB) in accordance with 45 CFR part 16.

(a) The request shall be postmarked or delivered in person within 30 days of the date of the disapproval notice. If it requests a hearing, the eligible organization shall submit to the DAB, as part of the request, a full written response to each objection specified in the notice of disapproval, including the pertinent facts and reasons in support of its response, and all documentation to support its position as well as any documentation requested by the DAB.

(b) Upon receipt of appeal for reconsideration of a rejected application or activities proposed by an applicant, the DAB will notify the applicant by certified mail that the appeal has been received.

(c) The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision. After consideration of the record, the DAB will issue a written decision, based on the record, that sets forth the reasons for the decision and the evidence on which it was based. A disapproval decision issued by the DAB represents the final determination of the Assistant Secretary for Aging and remains in effect unless reversed or stayed on judicial appeal, except that the Assistant Secretary for Aging may modify or set aside the decision before the record of the proceedings under this subpart is filed in court.

(d) Either the eligible organization or the staff of the Administration on Aging may request for good cause an extension of any of the time limits specified in this section.

Subpart C—Service Requirements

§ 1322.11 Purpose of services allotments under Title VI.

(a) Title VI of the Act authorizes the distribution of Federal funds to Tribal organizations and a Hawaiian Native grantee for the following categories of services:

(1) Supportive services;
(2) Nutrition services; and
(3) Family caregiver support program services.

(b) Funds authorized under these categories are for the purpose of assisting a Tribal organization or Hawaiian Native grantee to develop or enhance comprehensive and coordinated community-based systems for older Native Americans and family caregivers.

§ 1322.13 Policies and procedures.

The Tribal organization and Hawaiian Native grantee shall ensure the development and implementation of policies and procedures, including those required as set forth in this part.

(a) Upon approval of a program application and acceptance of funding, the Tribal organization or Hawaiian Native grantee must appoint a Title VI Director and provide appropriate contact information for the Title VI Director consistent with guidance from the Assistant Secretary for Aging.

(b) The Tribal organization or Hawaiian Native grantee shall provide the Assistant Secretary for Aging with statistical and other information in order to meet planning, coordination, evaluation and reporting requirements in a timely manner and shall ensure policies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by the Assistant Secretary for Aging.

(c) A Tribal organization or Hawaiian Native grantee must maintain program policies and procedures. Policies and procedures shall address:

(1) Direct service provision, including:

(i) Requirements for client eligibility, periodic assessment, and person-centered planning, where appropriate;

(ii) Access to information and assistance to minimally address:

(A) Establishing or having a list of all services that are available to older Native Americans in the service area;

(B) Maintaining a list of services needed or requested by older Native Americans;

(C) Providing assistance to older Native Americans to help them take advantage of available services;

(D) Working with agencies, such as area agencies on aging and other programs funded by Title III and Title VII as set forth in §§ 1321.53 and 1321.69 of this chapter, to facilitate participation of older Native Americans; and

(E) A listing and definitions of services that may be provided by the Tribal organization or Native Hawaiian grantee with funds received under the Act.

(iii) Limitations on the frequency, amount, or type of service provided; and

(iv) The grievance process for older individuals and family caregivers who are dissatisfied with or denied services under the Act.

(2) Fiscal requirements including:

(i) *Voluntary contributions.* Voluntary contributions, where:

(A) Each Tribal organization or Hawaiian Native grantee shall:

(*1*) Provide each older Native American with a voluntary opportunity to contribute to the cost of the service;

(*2*) Protect the privacy of each older Native American with respect to their contribution;

(*3*) Establish appropriate procedures to safeguard and account for all contributions;

(*4*) Use all voluntary contributions to expand comprehensive and coordinated services systems supported under this part, while using voluntary contributions provided for nutrition services only to expand nutrition services, consistent with § 1322.27.

(B) Each Tribal organization or Native Hawaiian grantee may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the Tribal organization or Native Hawaiian grantee shall consider the income ranges of older Native Americans in the service area and the Tribal organization's or Hawaiian Native grantee's other sources of income. However, means tests may not be used.

(C) A Tribal organization or Hawaiian Native grantee that receives funds under this part may not deny any older Native American a service because the older Native American will not or cannot contribute to the cost of the service.

(ii) *Buildings and equipment.* Buildings and equipment, where costs incurred for altering or renovating, utilities, insurance, security, necessary maintenance, janitorial services, repair, and upkeep (including Federal property unless otherwise provided for) to keep buildings and equipment in an efficient operating condition, may be an allowable use of funds if:

(A) Costs are not payable by third parties through rental or other agreements;

(B) Costs support an allowed activity under Title VI part A, B, or C of the Act and are allocated proportionally to the benefiting grant program;

(C) Constructing and acquiring activities are only allowable for multipurpose senior centers;

(D) In addition to complying with 2 CFR part 200, the Tribal organization or Native Hawaiian grantee (and all other necessary parties) must file a Notice of Federal Interest in the appropriate official records of the jurisdiction where the property is located at the time of acquisition or prior to commencement of construction, as applicable. The Notice of Federal Interest must indicate that the acquisition or construction has been funded with an award under Title VI of the Act and that inquiries regarding the Federal Government's interest in the property should be directed in writing to the Assistant Secretary for Aging;

(E) Altering and renovating activities are allowable for facilities providing services with funds provided as set forth in this part and as subject to 2 CFR part 200.

(iii) *Supplement, not supplant.* Funds awarded under this part must be used to supplement, not supplant existing Federal, State, and local funds expended to support activities.

(d) The Tribal organization or Hawaiian Native grantee must develop a monitoring process ensuring the quality and effectiveness of services regarding meeting participant needs, the goals outlined within the approved application, and Tribal organization requirements.

§ 1322.15 Confidentiality and disclosure of information.

A Tribal organization or Hawaiian Native grantee shall develop and maintain confidentiality and disclosure procedures as follows:

(a) A Tribal organization or Hawaiian Native grantee shall have procedures to ensure that no information about an older Native American or obtained from an older Native American by any provider of services is disclosed by the provider of such services in a form that identifies the person without the informed consent of the person or their legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal or Tribal monitoring agencies.

(b) A Tribal organization or Hawaiian Native grantee is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act (5 U.S.C. 552).

(c) A Tribal organization or Hawaiian Native grantee shall not require a provider of legal assistance under this

part to reveal any information that is protected by attorney client privilege.

(d) The Tribal organization or Hawaiian Native grantee must have policies and procedures that ensure that entities providing services under this title promote the rights of each older Native American who receives such services. Such rights include the right to confidentiality of records relating to such Native American.

(e) A Tribal organization's or Hawaiian Native grantee's policies and procedures may explain that individual information and records may be shared with other State and local agencies, community-based organizations, and health care providers and payers, as appropriate, in order to provide services.

(f) A Tribal organization's or Hawaiian Native grantee's policies and procedures must comply with all applicable Federal laws, codes, rules, and regulations, including the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. 1301 *et seq.*), as well as guidance as the Tribal organization or Hawaiian Native grantee determines, for the collection, use, and exchange of both Personal Identifiable Information (PII) and personal health information in the provision of Title VI services under the Act.

§ 1322.17 Purpose of services—person- and family-centered, trauma-informed.

(a) Services must be provided to older Native Americans and family caregivers in a manner that is person-centered, trauma-informed, and culturally sensitive. Services should be consistent with culturally appropriate holistic traditional care and responsive to their interests, physical and mental health, social and cultural needs, available supports, and desire to live where and with whom they choose. Person-centered services may include community-centered and family-centered approaches consistent with the traditions, practices, beliefs, and cultural norms and expectations of the Tribal organization or Hawaiian Native grantee.

(b) Services should, as appropriate, be consistent with culturally appropriate holistic traditional care and provide older Native Americans and family caregivers with the opportunity to develop a person-centered plan that is led by the individual or, if applicable, by the individual and the individual's authorized representative. Services should be incorporated into existing person-centered plans, as appropriate.

(c) Tribal organizations and Hawaiian Native grantees should provide training to staff and volunteers on culturally appropriate holistic traditional care and person-centered and trauma-informed service provision.

§ 1322.19 Responsibilities of service providers.

As a condition for receipt of funds under this part, each Tribal organization and Hawaiian Native grantee shall assure that providers of services shall:

(a) Provide service participants with an opportunity to contribute to the cost of the service as provided in § 1322.13(c)(2)(i);

(b) Provide, to the extent feasible, for the furnishing of services under this Act, through self-direction;

(c) With the consent of the older Native American, or their legal representative if there is one, or in accordance with local adult protective services requirements, bring to the attention of adult protective services or other appropriate officials for follow-up, conditions or circumstances which place the older Native American, or the household of the older Native American, in imminent danger;

(d) Where feasible and appropriate, make arrangements for the availability of services to older Native Americans and family caregivers in weather-related and other emergencies;

(e) Assist participants in taking advantage of benefits under other programs;

(f) Assure that all services funded under this part are coordinated with other appropriate services in the community, and that these services do not constitute an unnecessary duplication of services provided by other sources; and

(g) Receive training to provide services in a culturally competent manner and consistent with §§ 1322.13 through 1322.17.

§ 1322.21 Client eligibility for participation.

(a) An individual must have attained the minimum age determined by the Tribal organization or Hawaiian Native grantee as specified in their approved application, to be eligible to participate in services under the Act, unless the Act otherwise provides an explicit exception. Exceptions are limited to the following specific services:

(1) Nutrition services:

(i) Services shall be available to spouses of any age of older Native Americans;

(ii) Services may be available to:

(A) A person with a disability who lives with an adult, age 60 or older, or who resides in a housing facility that is primarily occupied by older adults at which congregate meals are served; and

(B) A volunteer during meal hours.

(2) Family caregiver support services for:

(i) Adults caring for older Native Americans or individuals of any age with Alzheimer's or related disorder;

(ii) Older relative caregivers who are caring for children and are not the biological or adoptive parent of the child, where older relative caregivers shall no longer be eligible for services under this part when the child reaches 18 years of age; or

(iii) Older relative caregivers who are caring for individuals age 18 to 59 with disabilities, and who may be of any relationship, including the biological or adoptive parent.

(3) Services such as information and assistance and public education, where recipients of information may not be older Native Americans, but the information is targeted to those who are older Native Americans and/or benefits those who are older Native Americans.

(b) A Tribal organization or Hawaiian Native grantee may develop further eligibility requirements for implementation of services for older Native Americans and family caregivers, consistent with the Act and all applicable Federal requirements. Such requirements may include:

(1) Assessment of functional and support needs;

(2) Geographic boundaries;

(3) Limitations on number of persons that may be served;

(4) Limitations on number of units of service that may be provided;

(5) Limitations due to availability of staff/volunteers;

(6) Limitations to avoid duplication of services;

(7) Specification of settings where services shall or may be provided;

(8) Whether to serve Native Americans who have Tribal or Native Hawaiian membership other than those who are specified in the Tribal organization's or Hawaiian Native grantee's approved application; and

(9) Whether to serve older individuals or family caregivers who are non-Native Americans but live within the approved service area and are considered members of the community by the Tribal organization.

§ 1322.23 Client and service priority.

(a) The Tribal organization or Hawaiian Native grantee shall ensure service to those identified as members of priority groups through their assessment of local needs and resources.

(b) The Tribal organization or Hawaiian Native grantee shall identify criteria for being given priority in the delivery of services under Title VI, parts

A or B, consistent with the Act and all applicable Federal requirements.

(c) The Tribal organization or Hawaiian Native grantee shall identify criteria for being given priority in the delivery of services under Title VI, part C, consistent with the Act and all applicable Federal requirements:

(1) Caregivers who are older Native Americans with greatest social need, and older Native Americans with greatest economic need (with particular attention to low-income older individuals);

(2) Caregivers who provide care for individuals with Alzheimer's disease and related disorders with neurological and organic brain dysfunction; and

(3) When serving older relative caregivers, older relative caregivers of children or adults with severe disabilities shall be given priority.

§ 1322.25 Supportive services.

(a) Supportive services are community-based interventions as set forth in Title VI of the Act, are intended to be comparable to such services set forth under Title III, and meet standards established by the Assistant Secretary for Aging. They include in-home supportive services, access services, which may include multipurpose senior centers, and legal services.

(b) A Tribal organization or Hawaiian Native grantee may provide any of the supportive services mentioned under Title III of the Act, and any other supportive services that are necessary for the general welfare of older Native Americans and older Hawaiian Natives.

(c) A Tribal organization or Hawaiian Native grantee may allow use of Title VI, part A and B funds, respectively, for acquiring, altering or renovating, or constructing facilities to serve as multipurpose senior centers, in accordance with guidance as set forth by the Assistant Secretary for Aging.

(d) For those Title VI, parts A and B services intended to benefit family caregivers, a Tribal organization or Hawaiian Native grantee, respectively, shall ensure that there is coordination and no duplication of such services available under Title VI, part C or Title III.

(e) If a Tribal organization or Hawaiian Native grantee elects to provide legal services, it shall comply with the requirements in § 1321.93 of this chapter and legal services providers shall comply fully with the requirements in § 1321.93(f) of this chapter.

§ 1322.27 Nutrition services.

(a) Nutrition services are community-based interventions as set forth in Title VI, parts A and B of the Act, and as further defined by the Assistant Secretary for Aging. Nutrition services include congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.

(1) Congregate meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g–21) provided by a qualified nutrition service provider to eligible individuals and consumed while congregating virtually, in-person, or in community off-site.

(2) Home-delivered meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g–21) provided by a qualified nutrition service provider to eligible individuals and consumed at their residence or otherwise outside of a congregate setting, as organized by a service provider under the Act. Meals may be provided via home delivery, pick-up, carry-out or drive-through, or through other service as determined by the Tribal organization or Hawaiian Native grantee.

(i) Eligibility criteria for home-delivered meals, as determined by the Tribal organization or Hawaiian Native grantee, may include consideration of an individual's ability to leave home unassisted, ability to shop for and prepare nutritious meals, degree of disability, or other relevant factors pertaining to their need for the service.

(ii) Home-delivered meals providers may encourage meal participants to attend congregate meal sites and other health and wellness activities, as feasible, based on a person-centered approach and local service availability.

(3) Nutrition education is information provided which provides individuals with the knowledge and skills to make healthy food and beverage choices. Congregate and home-delivered nutrition services may provide nutrition education, as appropriate, based on the needs of meal participants.

(4) Nutrition counseling is a standardized service provided which must align with the Academy of Nutrition and Dietetics. Congregate and home-delivered nutrition services may provide nutrition counseling, as appropriate, based on the needs of meal participants.

(5) Other nutrition services include additional services that may be provided to meet nutritional needs or preferences, such as weighted utensils, supplemental foods, or food items, based on the needs of eligible participants.

(b) The Tribal organization or Hawaiian Native grantee shall provide congregate meals and home-delivered meals to eligible participants and may provide nutrition education, nutrition counseling, and other nutrition services, as available. As set forth in section 614(a)(8) of the Act (42 U.S.C. 3057e(a)(8)), if the need for nutrition services is met from other sources, the Tribal organization or Hawaiian Native grantee may use the available funding under the Act for supportive services.

(c) Nutrition Services Incentive Program allocations are available to a Tribal organization or Hawaiian Native grantee that provides nutrition services where:

(1) Nutrition Services Incentive Program allocation amounts are based on the number of meals reported by the Tribal organization or Hawaiian Native grantee which meet the following requirements:

(i) The meal is served to an individual who is eligible to receive services under the Act;

(ii) The meal is served to an individual who has not been means-tested to receive the meal;

(iii) The meal is served to an individual who has been provided the opportunity to provide a voluntary contribution to the cost of service;

(iv) The meal meets the other requirements of the Act, including that the meal meets the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g–21); and

(v) The meal is served by an agency that is, or has a grant or contract with, a Tribal organization or Hawaiian Native grantee.

(2) The Tribal organization or Hawaiian Native grantee may choose to receive their Nutrition Services Incentive Program grant as cash, commodities, or a combination of cash and commodities.

(3) Nutrition Services Incentive Program funds may only be used to purchase domestically produced foods used in a meal as set forth under the Act.

(d) Where applicable, the Tribal organization or Hawaiian Native grantee shall work with agencies responsible for administering nutrition and other programs to facilitate participation of older Native Americans.

§ 1322.29 Family caregiver support services.

(a) Family caregiver support services are community-based interventions set forth in Title VI, part C of the Act, which meet standards set forth by the Assistant Secretary for Aging and which

may be informed through the use of an evidence-informed or evidence-based caregiver assessment, including:

(1) Information to caregivers about available services via public education;

(2) Assistance to caregivers in gaining access to the services through:

(i) Individual information and assistance; or

(ii) Case management or care coordination.

(3) Individual counseling, organization of support groups, and caregiver training to assist the caregivers in those areas in which they provide support, including health, nutrition, complex medical care, and financial literacy, and in making decisions and solving problems relating to their caregiving roles;

(4) Respite care to enable caregivers to be temporarily relieved from their caregiving responsibilities; and

(5) Supplemental services, on a limited basis, to complement the care provided by caregivers. A Tribal organization or Hawaiian Native grantee shall define ''limited basis'' for supplemental services and may consider limiting units, episodes or expenditure amounts when making this determination.

(b) The Title VI Native American Family Caregiver Support Program is intended to serve unpaid family caregivers and to provide services to caregivers, not to the people for whom they care. Its primary purpose is not to pay for care for an elder. However, respite care may be provided to an unpaid family caregiver.

(c) To provide services listed in paragraphs (a)(4) and (5) of this section to caregivers of older Native Americans or of individuals of any age with Alzheimer's disease or a related disorder, the individual for whom they are caring must be determined to be functionally impaired because the individual:

(1) Is unable to perform at least two activities of daily living without substantial assistance, including verbal reminding, physical cueing, or supervision;

(2) At the option of the Tribal organization or Hawaiian Native grantee, is unable to perform at least three such activities without such assistance; or

(3) Due to a cognitive or other mental impairment, requires substantial supervision because the individual behaves in a manner that poses a serious health or safety hazard to the individual or to another individual.

§ 1322.31 Title VI and Title III coordination.

(a) A Tribal organization or Hawaiian Native grantee under Title VI of the Act must have policies and procedures, developed in coordination with the relevant State agency, area agency or agencies, and service provider(s) that explain how the Title VI program will coordinate with Title III and/or VII funded services within the Tribal organization's or Hawaiian Native grantee's approved service area for which older Native Americans and family caregivers are eligible to ensure compliance with sections 614(a)(11) and 624(a)(3) of the Act (42 U.S.C. 3057e(a)(11) and 3057j(a)(3)), respectively. A Tribal organization or Hawaiian Native grantee may meet these requirements by participating in Tribal consultation with the State agency regarding Title VI programs.

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:

(1) How the Tribal organization or Hawaiian Native grantee will provide outreach to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII of the Act;

(2) The communication opportunities the Tribal organization or Hawaiian Native grantee will make available to Title III and VII programs, to include meetings, email distribution lists, and presentations;

(3) The methods for collaboration on and sharing of program information and changes;

(4) How Title VI programs may refer individuals who are eligible for Title III services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Processes the Title VI program will use for providing feedback on the State plan on aging and any area plans on aging relevant to the Tribal organization's or Hawaiian Native grantee's approved service area.

(c) The Title VI program director, as set forth in § 1322.13(a), shall participate in the development of policies and procedures as set forth in §§ 1321.53, 1321.69, and 1321.95 of this chapter.

Subpart D—Emergency and Disaster Requirements

§ 1322.33 Coordination with Tribal, State, and local emergency management.

A Tribal organization or Hawaiian Native grantee shall establish emergency plans. Such plans must include, at a minimum:

(a) A continuity of operations plan and an all-hazards emergency response plan based on completed risk assessments for all hazards and updated annually;

(b) A plan to coordinate activities with the State agency, any area agencies on aging providing Title III and VII funded services within the Tribal organization's or Hawaiian Native grantee's approved service area, local emergency response and management agencies, relief organizations, local governments, other State agencies responsible for emergency and disaster preparedness, and any other institutions that have responsibility for disaster relief service delivery;

(c) Processes for developing and updating long-range emergency and disaster preparedness plans; and

(d) Other relevant information as determined by the Tribal organization or Hawaiian Native grantee.

§ 1322.35 Flexibilities under a major disaster declaration.

(a) If a State or Indian Tribe requests and receives a major disaster declaration under the Stafford Act (42 U.S.C. 5121–5207), the Tribal organization or Hawaiian Native grantee may use disaster relief flexibilities as set forth in this section to provide disaster relief services within its approved service area for areas of the State or Indian Tribe where the specific major disaster declaration is authorized and where older Native Americans and family caregivers are affected.

(b) Flexibilities a Tribal organization or Hawaiian Native grantee may exercise under a major disaster declaration include allowing use of any portion of the funds of any open grant awards under Title VI of the Act for disaster relief services for older individuals and family caregivers.

(c) Disaster relief services may include any allowable services under the Act to eligible older Native Americans or family caregivers during the period covered by the major disaster declaration.

(d) Expenditures of funds under disaster relief flexibilities must be reported separately from the grant where funding was expended. A Tribal organization or Hawaiian Native grantee may expend funds from any source within open grant awards under Title VI of the Act but must track the source of all expenditures.

(e) A Tribal organization or Hawaiian Native grantee must have policies and procedures outlining eligibility, use, and reporting of services and funds provided under these flexibilities.

(f) A Tribal organization or Hawaiian Native grantee may only make obligations exercising this flexibility during the major disaster declaration incident period or 90 days thereafter or

with prior approval from the Assistant Secretary for Aging.

§ 1322.37 Title VI and Title III coordination for emergency and disaster preparedness.

A Tribal organization or Hawaiian Native grantee under Title VI of the Act and State and area agencies funded under Title III of the Act should coordinate in emergency and disaster preparedness planning, response, and recovery. A Tribal organization or Hawaiian Native grantee must have policies and procedures in place for how they will communicate and coordinate with State agencies and area agencies regarding emergency and disaster preparedness planning, response, and recovery.

§ 1322.39 Modification during major disaster declaration or public health emergency.

The Assistant Secretary for Aging retains the right to modify the requirements described in these regulations pursuant to a major disaster declaration or public health emergency.

PART 1323—[REMOVED]

■ 3. Under the authority of 42 U.S.C. 3001 *et seq.,* remove part 1323.

■ 4. Revise part 1324 to read as follows:

PART 1324—ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES

Sec.

Authority: 42 U.S.C. 3001 *et seq.*

Subpart A—State Long-Term Care Ombudsman Program

§ 1324.1 Definitions.

The following definitions apply to this part:

Immediate family, pertaining to conflicts of interest as used in section 712 of the Older Americans Act (the Act) (42 U.S.C. 3058g), means a member of the household or a relative with whom there is a close personal or significant financial relationship.

Office of the State Long-Term Care Ombudsman, as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the organizational unit in a State or Territory which is headed by a State Long-Term Care Ombudsman.

Official duties, as used in section 712 of the Act (42 U.S.C. 3058g) with respect to representatives of the Long-Term Care Ombudsman Program, means work pursuant to the Long-Term Care Ombudsman Program authorized by the Act, subpart A of this part, and/or State law and carried out under the auspices and general direction of, or by direct delegation from, the State Long-Term Care Ombudsman.

Representatives of the Office of the State Long-Term Care Ombudsman, as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1324.19(a), whether personnel supervision is provided by the Ombudsman or their designees or by an agency hosting a local Ombudsman entity designated by the Ombudsman pursuant to section 712(a)(5) of the Act (42 U.S.C. 3058g(a)(5)).

Resident representative means any of the following:

(1) An individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access the resident's medical, social, or other personal information; manage the resident's financial matters; or receive notifications pertaining to the resident;

(2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access the resident's medical, social or other personal information; manage the resident's financial matters; or receive notifications pertaining to the resident;

(3) Legal representative, as used in section 712 of the Act (42 U.S.C. 3058g);

(4) The court-appointed guardian or conservator of a resident;

(5) Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction.

State Long-Term Care Ombudsman, or *Ombudsman,* as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the individual who heads the Office and is responsible to personally, or through representatives of the Office, fulfill the functions, responsibilities and duties set forth in §§ 1324.13 and 1324.19.

State Long-Term Care Ombudsman program, Ombudsman program, or *program,* as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the program through which the functions and duties of the Office are carried out, consisting of the Ombudsman, the Office headed by the Ombudsman, and the representatives of the Office.

Willful interference means actions or inactions taken by an individual in an attempt to intentionally prevent, interfere with, or attempt to impede the Ombudsman from performing any of the functions or responsibilities set forth in § 1324.13, or the Ombudsman or a representative of the Office from performing any of the duties set forth in § 1324.19.

§ 1324.11 Establishment of the Office of the State Long-Term Care Ombudsman.

(a) The Office of the State Long-Term Care Ombudsman shall be an entity headed by the State Long-Term Care Ombudsman, who shall carry out all of the functions and responsibilities set forth in § 1324.13 and, directly and/or through local Ombudsman entities, the duties set forth in § 1324.19.

(b) The State agency shall establish the Office and thereby carry out the Long-Term Care Ombudsman Program in either of the following ways:

(1) The Office is a distinct entity, separately identifiable, and located within or connected to the State agency; or

(2) The State agency enters into a contract or other arrangement with any public agency or nonprofit organization which shall establish a separately identifiable, distinct entity as the Office.

(c) The State agency shall require that the Ombudsman serve on a full-time basis. In providing leadership and management of the Office, the functions, responsibilities, and duties, as set forth in §§ 1324.13 and 1324.19 are to constitute the entirety of the Ombudsman's work. The State agency or other agency carrying out the Office shall not require or request the

Ombudsman to be responsible for leading, managing or performing the work of non-ombudsman services or programs except on a time-limited, intermittent basis.

(1) This provision does not limit the authority of the Ombudsman program to provide ombudsman services to populations other than residents of long-term care facilities so long as the appropriations under the Act are utilized to serve residents of long-term care facilities, as authorized by the Act.

(2) [Reserved]

(d) The State agency, and other entity selecting the Ombudsman, if applicable, shall ensure that the Ombudsman meets minimum qualifications which shall include, but not be limited to, demonstrated expertise in:

(1) Long-term services and supports or other direct services for older individuals or individuals with disabilities;

(2) Consumer-oriented public policy advocacy;

(3) Leadership and program management skills; and

(4) Negotiation and problem resolution skills.

(e) Where the Ombudsman has the legal authority to do so, they shall establish policies and procedures, in consultation with the State agency, to carry out the Ombudsman program in accordance with the Act. Where State law does not provide the Ombudsman with legal authority to establish policies and procedures, the Ombudsman shall recommend policies and procedures to the State agency or other agency in which the Office is organizationally located, and such agency shall establish Ombudsman program policies and procedures as recommended by the Ombudsman. Where local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman and/or appropriate agency shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities, area agencies on aging, and representatives of the Office. The policies and procedures must address the following:

(1) *Program administration.* Policies and procedures regarding program administration must include, but not be limited to:

(i) A requirement that the agency in which the Office is organizationally located must not have personnel policies or practices that prohibit the Ombudsman from performing the functions and responsibilities of the Ombudsman, as set forth in § 1324.13, or from adhering to the requirements of section 712 of the Act (42 U.S.C. 3058g). Nothing in this provision shall prohibit such agency from requiring that the Ombudsman, or other employees or volunteers of the Office, adhere to the personnel policies and procedures of the entity which are otherwise lawful.

(ii) A requirement that an agency hosting a local Ombudsman entity must not have personnel policies or practices which prohibit a representative of the Office from performing the duties of the Ombudsman program or from adhering to the requirements of section 712 of the Act (42 U.S.C. 3058g). Nothing in this provision shall prohibit such agency from requiring that representatives of the Office adhere to the personnel policies and procedures of the host agency which are otherwise lawful.

(iii) A requirement that the Ombudsman shall, on a regular basis, monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

(iv) A description of the process by which the agencies hosting local Ombudsman entities will coordinate with the Ombudsman in the employment or appointment of representatives of the Office.

(v) Standards to ensure that the Office and/or local Ombudsman entities provide prompt response to complaints, with priority given to complaints regarding abuse, neglect, exploitation, and complaints that are time sensitive. At a minimum, the standards shall require consideration of the severity of the risk to the resident, the imminence of the threat of or potential harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.

(vi) Procedures that clarify appropriate fiscal responsibilities of the local Ombudsman entity, including but not limited to clarifications regarding access to programmatic fiscal information by appropriate representatives of the Office.

(vii) Procedures that establish standard retention periods for files, records, and other information maintained by the Ombudsman program and allowable methods of storage and destruction.

(2) *Procedures for access.* Policies and procedures regarding timely access to facilities, residents, and appropriate records (regardless of format and including, upon request, copies of such records) by the Ombudsman and representatives of the Office must include, but not be limited to:

(i) Access to enter all long-term care facilities at any time during a facility's regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated;

(ii) Access to all residents to perform the functions and duties set forth in §§ 1324.13 and 1324.19;

(iii) Access to the name and contact information of the resident representative, if any, where needed to perform the functions and duties set forth in §§ 1324.13 and 1324.19;

(iv) Access to review the medical, social, and other records relating to a resident, if:

(A) The resident or resident representative communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures;

(C) The resident is unable to communicate consent to the review and has no legal representative, and the representative of the Office obtains the approval of the Ombudsman; or

(D) Access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, a representative of the Office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the representative of the Office obtains the approval of the Ombudsman.

(v) Access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities;

(vi) Access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and

(vii) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule (42 U.S.C. 1301 *et seq.*), 45 CFR part 160 and 45 CFR part 164, subparts A and E, does not preclude release by covered entities of resident private health information or other resident identifying information to the Ombudsman program, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or Federal survey or inspection process.

(3) *Disclosure.* Policies and procedures regarding disclosure of files, records, and other information

maintained by the Ombudsman program must include, but not be limited to:

(i) Provision that the files, records, and information maintained by the Ombudsman program may be disclosed only at the discretion of the Ombudsman or designee of the Ombudsman for such purpose and in accordance with the criteria developed by the Ombudsman, as required by § 1324.13(e);

(ii) Prohibition of the disclosure of identifying information of any resident with respect to whom the Ombudsman program maintains files, records, or information, except as otherwise provided by § 1324.19(b)(5) through (8), unless:

(A) The resident or the resident representative communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order.

(iii) Prohibition of the disclosure of identifying information of any complainant with respect to whom the Ombudsman program maintains files, records, or information, unless:

(A) The complainant communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order.

(iv) Standard criteria for making determinations about disclosure of resident information when the resident is unable to provide consent and there is no resident representative or the resident representative refuses consent as set forth in § 1324.19(b)(5) through (8);

(v) Prohibition on requirements for mandatory reporting abuse, neglect, or exploitation to adult protective services or any other entity, long-term care facility, or other concerned person, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1324.19(b)(5) through (8); and

(vi) Adherence to the provisions of paragraph (e)(3) of this section, regardless of the source of the request for information or the source of funding for the services of the Ombudsman program, notwithstanding section 705(a)(6)(C) of the Act (42 U.S.C. 3058d(a)(6)(C)).

(4) *Conflicts of interest.* Policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in § 1324.21, including:

(i) Ensuring that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the Ombudsman has or may have a conflict of interest;

(ii) Requiring that other agencies in which the Office or local Ombudsman entities are organizationally located have policies in place to prohibit the employment or appointment of an Ombudsman or a representative of the Office who has or may have a conflict that cannot be adequately removed or remedied;

(iii) Requiring that the Ombudsman take reasonable steps to refuse, suspend, or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family who has or may have a conflict of interest, which cannot be removed or remedied;

(iv) Establishing the methods by which the Office and/or State agency will periodically review and identify conflicts of the Ombudsman and representatives of the Office; and

(v) Establishing the actions the Office and/or State agency will require the Ombudsman or representatives of the Office to take in order to remedy or remove such conflicts.

(5) *Systems advocacy.* Policies and procedures related to systems advocacy must assure that the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

(i) Such procedures must exclude the Ombudsman and representatives of the Office from any State lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the Act (42 U.S.C. 3058g).

(ii) Nothing in this part shall prohibit the Ombudsman or the State agency or other agency in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office.

(6) *Designation.* Policies and procedures related to designation must establish the criteria and process by which the Ombudsman shall designate and/or refuse, suspend, or remove designation of local Ombudsman entities and representatives of the Office.

(i) Such criteria should include, but not be limited to, the authority to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office in situations in which an identified conflict of interest cannot be removed or remedied as set forth in § 1324.21.

(ii) [Reserved]

(7) *Grievance process.* Policies and procedures related to grievances must establish a grievance process for the receipt and review of grievances regarding the determinations or actions of the Ombudsman and representatives of the Office.

(i) Such process shall include an opportunity for reconsideration of the Ombudsman decision to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office. Notwithstanding the grievance process, the Ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.

(ii) [Reserved]

(8) *Determinations of the Office.* Policies and procedures related to the determinations of the Office must ensure that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, and carry out the functions and responsibilities authorized by § 1324.13 without interference and shall not be constrained by or necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.

(9) *Emergency planning.* Policies and procedures related to emergency planning must include continuity of operations procedures using an all-hazards approach, and coordination with emergency management agencies.

§ 1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

The Ombudsman, as head of the Office, shall have responsibility and authority for the leadership and management of the Office in coordination with the State agency, and, where applicable, any other agency carrying out the Ombudsman program, as follows.

(a) *Functions.* The Ombudsman shall, personally or through representatives of the Office:

(1) Identify, investigate, and resolve complaints that:

(i) Are made by, or on behalf of, residents; and

(ii) Relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of residents (including the welfare and rights of residents with respect to the appointment and activities of resident representatives) of:

(A) Providers, or representatives of providers, of long-term care;

(B) Public agencies; or

(C) Health and social service agencies.

(2) Provide services to protect the health, safety, welfare, and rights of the residents;

(3) Inform residents about means of obtaining services provided by the Ombudsman program;

(4) Ensure that residents have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses from representatives of the Office to requests for information and complaints;

(5) Represent the interests of residents before governmental agencies, assure that individual residents have access to, and pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;

(6) Provide administrative and technical assistance to representatives of the Office and agencies hosting local Ombudsman entities;

(7)(i) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;

(ii) Recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate;

(iii) Facilitate public comment on the laws, regulations, policies, and actions;

(iv) Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office;

(v) Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns;

(vi) Such determinations and positions shall be those of the Office and shall not necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located;

(vii) In carrying out systems advocacy efforts of the Office on behalf of long-term care facility residents and pursuant to the receipt of grant funds under the Act, the provision of information, recommendations of changes of laws to legislators, and recommendations of changes to government agency regulations and policies by the Ombudsman or representatives of the Office do not constitute lobbying activities as defined by 45 CFR part 93.

(8) Coordinate with and promote the development of citizen organizations consistent with the interests of residents; and

(9) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils to protect the well-being and rights of residents.

(b) *Responsibilities.* The Ombudsman shall be the head of a unified statewide Long-Term Care Ombudsman Program and shall:

(1) Establish or recommend policies, procedures, and standards for administration of the Ombudsman program pursuant to § 1324.11(e);

(2) Require representatives of the Office to fulfill the duties set forth in § 1324.19 in accordance with Ombudsman program policies and procedures.

(c) *Designation.* The Ombudsman shall determine designation and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act (42 U.S.C. 3058g(a)(5)) and the policies and procedures set forth in § 1324.11(e)(6).

(1) If an Ombudsman chooses to designate local Ombudsman entities, the Ombudsman shall:

(i) Designate local Ombudsman entities to be organizationally located within public or non-profit private entities;

(ii) Review and approve plans or contracts governing local Ombudsman entity operations, including, where applicable, through area agency on aging plans, in coordination with the State agency; and

(iii) Monitor, on a regular basis, the Ombudsman program performance of local Ombudsman entities.

(2) The Ombudsman shall establish procedures for training for certification and continuing education of the representatives of the Office, based on and consistent with standards established by the Director of the Office of Long-Term Care Ombudsman Programs as described in section 201(d) of the Act (42 U.S.C. 3011(d)) and set forth by the Assistant Secretary for Aging, in consultation with residents, resident representatives, citizen organizations, long-term care providers, and the State agency, that:

(i) Specify a minimum number of hours of initial training;

(ii) Specify the content of the training, including training relating to Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State; investigative and resolution techniques; and such other matters as the Office determines to be appropriate;

(iii) Specify that all program staff or volunteers who have access to residents, files, records, and other information of the Ombudsman program subject to disclosure requirements shall undergo training and certification to be designated as representatives of the Office; and

(iv) Specify an annual number of hours of in-service training for all representatives of the Office.

(3) Prohibit any representative of the Office from carrying out the duties described in § 1324.19 unless the representative:

(i) Has received the training required under paragraph (c)(2) of this section or is performing such duties under supervision of the Ombudsman or a designated representative of the Office as part of certification training requirements; and

(ii) Has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office.

(4) The Ombudsman shall investigate allegations of misconduct by representatives of the Office in the performance of Ombudsman program duties and, as applicable, coordinate such investigations with the State agency in which the Office is organizationally located, agency hosting the local Ombudsman entity and/or the local Ombudsman entity.

(5) Policies, procedures, or practices which the Ombudsman determines to be in conflict with the laws, policies, or

procedures governing the Ombudsman program shall be sufficient grounds for refusal, suspension, or removal of designation of the representative of the Office and/or the local Ombudsman entity.

(d) *Ombudsman program information.* The Ombudsman shall manage the files, records, and other information of the Ombudsman program, whether in physical, electronic, or other formats, including information maintained by representatives of the Office and local Ombudsman entities pertaining to the cases and activities of the Ombudsman program. Such files, records, and other information are the property of the Office. Nothing in this provision shall prohibit a representative of the Office or a local Ombudsman entity from maintaining such information in accordance with Ombudsman program requirements. All program staff or volunteers who access the files, records, and other information of the Ombudsman program subject to disclosure requirements shall undergo training and certification to be designated as representatives of the Office.

(e) *Disclosure.* In making determinations regarding the disclosure of files, records, and other information maintained by the Ombudsman program, the Ombudsman shall:

(1) Have the sole authority to make or delegate determinations concerning the disclosure of the files, records, and other information maintained by the Ombudsman program. The Ombudsman shall comply with section 712(d) of the Act (42 U.S.C. 3058g(d)) in responding to requests for disclosure of files, records, and other information, regardless of the format of such file, record, or other information, the source of the request, and the sources of funding to the Ombudsman program;

(2) Develop and adhere to criteria to guide the Ombudsman's discretion in determining whether to disclose the files, records, or other information of the Office. Criteria for disclosure of records shall consider if the disclosure has the potential to:

(i) Cause retaliation against residents, complainants, or witnesses;

(ii) Undermine the working relationships between the Ombudsman program, facilities, and/or other agencies; or

(iii) Undermine other official duties of the program.

(3) Develop and adhere to a process for the appropriate disclosure of information maintained by the Office, including:

(i) Classification of at least the following types of files, records, and information: medical, social, and other records of residents; administrative records, policies, and documents of long-term care facilities; licensing and certification records maintained by the State with respect to long-term care facilities; and data collected in the Ombudsman program reporting system;

(ii) Identification of the appropriate individual designee or category of designee, if other than the Ombudsman, authorized to determine the disclosure of specific categories of information in accordance with the criteria described in this paragraph (e).

(f) *Fiscal management.* The Ombudsman shall determine the use of the fiscal resources appropriated or otherwise available for the operation of the Office. Where local Ombudsman entities are designated, the Ombudsman shall approve the allocations of Federal and State funds provided to such entities, subject to applicable Federal and State laws and policies. The Ombudsman shall determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program.

(g) *Annual report.* In addition to the annual submission of the National Ombudsman Reporting System report, the Ombudsman shall independently develop, provide final approval of, and disseminate an annual report as set forth in section 712(h)(1) of the Act (42 U.S.C. 3058g(h)(1)) and as otherwise required by the Assistant Secretary for Aging.

(1) Such report shall:

(i) Describe the activities carried out by the Office in the year for which the report is prepared;

(ii) Contain analysis of Ombudsman program data;

(iii) Describe evaluation of the problems experienced by, and the complaints made by or on behalf of, residents;

(iv) Contain policy, regulatory, and/or legislative recommendations for improving quality of the care and life of the residents; protecting the health, safety, welfare, and rights of the residents; and resolving resident complaints and identified problems or barriers;

(v) Contain analysis of the success of the Ombudsman program, including success in providing services to residents of assisted living, board and care facilities, and other similar adult care facilities; and

(vi) Describe barriers that prevent the optimal operation of the Ombudsman program.

(2) The Ombudsman shall make such report available to the public and submit it to the Assistant Secretary for Aging, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-term care facilities, and other appropriate governmental entities.

(h) *Memoranda of understanding.* Through adoption of memoranda of understanding or other means, the Ombudsman shall lead State-level coordination and support appropriate local Ombudsman entity coordination, between the Ombudsman program and other entities with responsibilities relevant to the health, safety, well-being, or rights of residents of long-term care facilities, including:

(1) The required adoption of memoranda of understanding between the Ombudsman program and:

(i) Legal assistance programs provided under section 306(a)(2)(C) of the Act (42 U.S.C. 3026(a)(2)(C)), addressing at a minimum referral processes and strategies to be used when the Ombudsman program and a legal assistance program are both providing program services to a resident;

(ii) Facility and long-term care provider licensure and certification programs, addressing at minimum communication protocols and procedures to share information including procedures for access to copies of licensing and certification records maintained by the State with respect to long-term care facilities.

(2) The recommended adoption of memoranda of understanding or other means between the Ombudsman program and:

(i) Area agency on aging programs;

(ii) Aging and disability resource centers;

(iii) Adult protective services programs;

(iv) Protection and advocacy systems, as designated by the State, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*);

(v) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));

(vi) Victim assistance programs;

(vii) State and local law enforcement agencies;

(viii) Courts of competent jurisdiction;

(ix) The State Legal Assistance Developer as provided under section 731 of the Act (42 U.S.C. 3058j) and as set forth in subpart C to this part; and

(x) The State mental health authority.

(i) *Other activities.* The Ombudsman shall carry out such other activities as the Assistant Secretary for Aging determines to be appropriate and are

consistent with the functions of the State Long-Term Care Ombudsman Program as authorized by the Older Americans Act.

§ 1324.15 State agency responsibilities related to the Ombudsman program.

(a) *Compliance.* In addition to the responsibilities set forth in part 1321 of this chapter, the State agency shall ensure that the Ombudsman complies with the relevant provisions of the Act and of this rule.

(b) *Authority and access.* The State agency shall ensure, through the development of policies, procedures, and other means, consistent with § 1324.11(e)(2), that the Ombudsman program has sufficient authority and access to facilities, residents, and information needed to fully perform all of the functions, responsibilities, and duties of the Office.

(c) *Training.* The State agency shall provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents. The State agency may utilize funds appropriated under Title III and/or Title VII of the Act designated for direct services in order to provide access to such training opportunities.

(d) *Personnel supervision and management.* The State agency shall provide personnel supervision and management for the Ombudsman and representatives of the Office who are employees of the State agency. Such management shall include an assessment of whether the Office is performing all of its functions under the Act.

(e) *State agency monitoring.* The State agency shall provide monitoring, as required by § 1321.9(b) of this chapter, including but not limited to fiscal monitoring, where the Office and/or local Ombudsman entity is organizationally located within an agency under contract or other arrangement with the State agency. Such monitoring shall include an assessment of whether the Ombudsman program is performing all of the functions, responsibilities and duties set forth in §§ 1324.13 and 1324.19. The State agency may make reasonable requests for reports, including aggregated data regarding Ombudsman program activities, to meet the requirements of this provision.

(f) *Disclosure limitations.* The State agency shall ensure that any review of files, records, or other information maintained by the Ombudsman program is consistent with the disclosure limitations set forth in §§ 1324.11(e)(3) and 1324.13(e).

(g) *State and area plans on aging.* The State agency shall integrate the goals and objectives of the Office into the State plan and coordinate the goals and objectives of the Office with those of other programs established under Title VII of the Act and other State elder rights, disability rights, and elder justice programs, including, but not limited to, legal assistance programs provided under section 306(a)(2)(C) of the Act (42 U.S.C. 3026(a)(2)(C)), to promote collaborative efforts and diminish duplicative efforts. Where applicable, the State agency shall require inclusion of goals and objectives of local Ombudsman entities into area plans on aging.

(h) *Elder rights leadership.* The State agency shall provide elder rights leadership. In so doing, it shall require the coordination of Ombudsman program services with the activities of other programs authorized by Title VII of the Act, as well as other State and local entities with responsibilities relevant to the health, safety, well-being, or rights of older adults, including residents of long-term care facilities as set forth in § 1324.13(h).

(i) *Interference, retaliation, and reprisals.* The State agency shall:

(1) Ensure that it has mechanisms to prohibit and investigate allegations of interference, retaliation, and reprisals:

(i) By a long-term care facility, other entity, or individual with respect to any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of the Office; or

(ii) By a long-term care facility, other entity or individual against the Ombudsman or representatives of the Office for fulfillment of the functions, responsibilities, or duties enumerated at §§ 1324.13 and 1324.19; and

(2) Provide for appropriate sanctions with respect to interference, retaliation, and reprisals.

(j) *Legal counsel.* (1) The State agency shall ensure that:

(i) Legal counsel for the Ombudsman program is adequate, available, is without conflict of interest (as defined by the State ethical standards governing the legal profession), and has competencies relevant to the legal needs of:

(A) The program, in order to provide consultation and/or representation as needed to assist the Ombudsman and representatives of the Office in the performance of their official functions, responsibilities, and duties, including complaint resolution and systems advocacy. Legal representation, arranged by or with the approval of the Ombudsman, is provided to the Ombudsman or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of official duties.

(B) Residents, in order to provide consultation and representation as needed for the Ombudsman program to protect the health, safety, welfare, and rights of residents.

(ii) The Ombudsman and representatives of the Office assist residents in seeking administrative, legal, and other appropriate remedies. In so doing, the Ombudsman shall coordinate with the Legal Assistance Developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents.

(2) Such legal counsel may be provided by one or more entities, depending on the nature of the competencies and services needed and as necessary to avoid conflicts of interest (as defined by the State ethical standards governing the legal profession). At a minimum, the Office shall have access to an attorney knowledgeable about the Federal and State laws protecting the rights of residents and governing long-term care facilities.

(3) Legal representation of the Ombudsman program by the Ombudsman or representative of the Office who is a licensed attorney shall not by itself constitute sufficiently adequate legal counsel.

(4) The communications between the Ombudsman and their legal counsel are subject to attorney-client privilege.

(k) *Fiscal management.* The State agency shall ensure that:

(1) The Ombudsman receives notification of all sources of funds received by the State agency that are allocated or appropriated to the Ombudsman program and provides information on any requirements of the funds, and the Ombudsman is supported in their determination of the use of funds;

(2) The Ombudsman has full authority to determine the use of fiscal resources appropriated or otherwise available for the operation of the Office;

(3) Where local Ombudsman entities are designated, the Ombudsman approves the allocations of Federal and State funds to such entities, prior to any distribution of such funds, subject to applicable Federal and State laws and policies; and

(4) The Ombudsman determines that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws,

policies, and procedures governing the Ombudsman program.

(l) *State agency requirements of the Office.* The State agency shall require the Office to:

(1) Develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act (42 U.S.C. 3058g(h)(1)) and § 1324.13(g) and as otherwise required by the Assistant Secretary for Aging;

(2) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3) Provide such information as the Office determines to be necessary to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of individuals residing in long-term care facilities; and recommendations related to such problems and concerns;

(4) Establish procedures for the training of the representatives of the Office, as set forth in § 1324.13(c)(2); and

(5) Coordinate Ombudsman program services with entities with responsibilities relevant to the health, safety, welfare, and rights of residents of long-term care facilities, as set forth in § 1324.13(h).

§ 1324.17 Responsibilities of agencies hosting local Ombudsman entities.

(a) The agency in which a local Ombudsman entity is organizationally located shall be responsible for the personnel management, but not the programmatic oversight, of representatives, including employee and volunteer representatives, of the Office.

(b) The agency in which a local Ombudsman entity is organizationally located shall not have personnel policies or practices which prohibit the representatives of the Office from performing the duties, or from adhering to the access, confidentiality, and disclosure requirements of section 712 of the Act (42 U.S.C. 3058g), as implemented through this rule and the policies and procedures of the Office.

(1) Policies, procedures, and practices, including personnel management practices of the host agency, which the Ombudsman determines conflict with the laws or policies governing the Ombudsman program shall be sufficient grounds for the refusal, suspension, or removal of the designation of local Ombudsman entity by the Ombudsman.

(2) Nothing in this provision shall prohibit the host agency from requiring that the representatives of the Office adhere to the personnel policies and procedures of the agency which are otherwise lawful.

§ 1324.19 Duties of the representatives of the Office.

In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity and may designate an employee or volunteer of the local Ombudsman entity as a representative of the Office. Representatives of the Office may also be designated employees or volunteers within the Office.

(a) *Duties.* An individual so designated as a representative of the Office shall, in accordance with the policies and procedures established by the Office and the State agency:

(1) Identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;

(2) Provide services to protect the health, safety, welfare, and rights of residents;

(3) Ensure that residents in the service area of the local Ombudsman entity have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses to requests for information and complaints;

(4) Represent the interests of residents before government agencies and assure that individual residents have access to, and pursue (as the representative of the Office determines necessary and consistent with resident interest) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(5)(i) Review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents;

(ii) Facilitate the ability of the public to comment on the laws, regulations, policies, and actions.

(6) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils; and

(7) Carry out other activities that the Ombudsman determines to be appropriate and are consistent with the functions of the State Long-Term Care Ombudsman Program as authorized by the Older Americans Act.

(b) *Complaint processing.* (1) With respect to identifying, investigating, and resolving complaints, and regardless of the source of the complaint (*i.e.,* complainant), the Ombudsman and the representatives of the Office serve the resident of a long-term care facility. The Ombudsman or representative of the Office shall investigate a complaint, including but not limited to a complaint related to abuse, neglect, or exploitation, for the purposes of resolving the complaint to the resident's satisfaction and of protecting the health, welfare, and rights of the resident. The Ombudsman or representative of the Office may identify, investigate, and resolve a complaint impacting multiple residents or all residents of a facility.

(2) Regardless of the source of the complaint (*i.e.,* the complainant), including when the source is the Ombudsman or representative of the Office, the Ombudsman or representative of the Office must support and maximize resident participation in the process of resolving the complaint as follows:

(i) The Ombudsman or representative of the Office shall offer privacy to the resident for the purpose of confidentially providing information and hearing, investigating, and resolving complaints.

(ii) The Ombudsman or representative of the Office shall discuss the complaint with the resident (and, if the resident is unable to communicate informed consent, the resident's representative) in order to:

(A) Determine the perspective of the resident (or resident representative, where applicable) of the complaint;

(B) Request the resident (or resident representative, where applicable) to communicate informed consent in order to investigate the complaint;

(C) Determine the wishes of the resident (or resident representative, where applicable) with respect to resolution of the complaint, including whether the allegations are to be reported and, if so, whether the Ombudsman or representative of the Office may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies. Such report and disclosure shall be consistent with paragraph (b)(3) of this section;

(D) Advise the resident (and resident representative, where applicable) of the resident's rights;

(E) Work with the resident (or resident representative, where applicable) to develop a plan of action for resolution of the complaint;

(F) Investigate the complaint to determine whether the complaint can be verified; and

(G) Determine whether the complaint is resolved to the satisfaction of the resident (or resident representative, where applicable).

(iii) Where the resident is unable to communicate informed consent, and has no resident representative, the Ombudsman or representative of the Office shall:

(A) Take appropriate steps to investigate and work to resolve the complaint in order to protect the health, safety, welfare and rights of the resident; and

(B) Determine whether the complaint was resolved to the satisfaction of the complainant.

(iv) In determining whether to rely upon a resident representative to communicate or make determinations on behalf of the resident related to complaint processing, the Ombudsman or representative of the Office shall ascertain the extent of the authority that has been granted to the resident representative under court order (in the case of a guardian or conservator), by power of attorney or other document by which the resident has granted authority to the representative, or under other applicable State or Federal law.

(3) The Ombudsman or representative of the Office may provide information regarding the complaint to another agency in order for such agency to substantiate the facts for regulatory, protective services, law enforcement, or other purposes so long as the Ombudsman or representative of the Office adheres to the disclosure requirements of section 712(d) of the Act (42 U.S.C. 3058g(d)) and the procedures set forth in § 1324.11(e)(3).

(i) Where the goals of a resident or resident representative are for regulatory, protective services or law enforcement action, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Office, the Office must assist the resident or resident representative in contacting the appropriate agency and/or disclose the information for which the resident has provided consent to the appropriate agency for such purposes.

(ii) Where the goals of a resident or resident representative can be served by disclosing information to a facility representative and/or referrals to an entity other than those referenced in paragraph (b)(3)(i) of this section, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Ombudsman program, the Ombudsman or representative of the Office may assist the resident or resident representative in contacting the appropriate facility representative or the entity, provide information on how a resident or representative may obtain contact information of such facility representatives or entities, and/or disclose the information for which the resident has provided consent to an appropriate facility representative or entity, consistent with Ombudsman program procedures.

(iii) In order to comply with the wishes of the resident, (or, in the case where the resident is unable to communicate informed consent, the wishes of the resident representative), the Ombudsman and representatives of the Office shall not report suspected abuse, neglect or exploitation of a resident when a resident or resident representative has not communicated informed consent to such report except as set forth in paragraphs (b)(5) through (7) of this section, notwithstanding State laws to the contrary.

(4) For purposes of paragraphs (b)(1) through (3) of this section, communication of informed consent may be made in writing, including through the use of auxiliary aids and services. Alternatively, communication may be made orally or visually, including through the use of auxiliary aids and services, and such consent must be documented contemporaneously by the Ombudsman or a representative of the Office, in accordance with the procedures of the Office.

(5) For purposes of paragraphs (b)(1) through (3) of this section, if a resident is unable to communicate their informed consent, or perspective on the extent to which the matter has been satisfactorily resolved, the Ombudsman or representative of the Office may rely on the communication by a resident representative of informed consent and/or perspective regarding the resolution of the complaint if the Ombudsman or representative of the Office has no reasonable cause to believe that the resident representative is not acting in the best interests of the resident.

(6) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:

(i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office;

(ii) The resident has no resident representative;

(iii) The Ombudsman or representative of the Office has reasonable cause to believe that an action, inaction, or decision may adversely affect the health, safety, welfare, or rights of the resident;

(iv) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

(v) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and

(vi) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

(7) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that, the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:

(i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office and the Ombudsman or representative of the Office has reasonable cause to believe that the resident representative has taken an action, inaction or decision that may adversely affect the health, safety, welfare, or rights of the resident;

(ii) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

(iii) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and

(iv) The representative of the Office obtains the approval of the Ombudsman.

(8) The procedures for disclosure, as required by § 1324.11(e)(3), shall provide that, if the Ombudsman or representative of the Office personally witnesses suspected abuse, gross neglect, or exploitation of a resident, the Ombudsman or representative of the Office shall seek communication of

informed consent from such resident to disclose resident-identifying information to appropriate agencies.

(i) Where such resident is able to communicate informed consent, or has a resident representative available to provide informed consent, the Ombudsman or representative of the Office shall follow the direction of the resident or resident representative as set forth in paragraphs (b)(1) through (3) of this section; and

(ii) Where the resident is unable to communicate informed consent, and has no resident representative available to provide informed consent, the Ombudsman or representative of the Office shall open a case with the Ombudsman or representative of the Office as the complainant, follow the Ombudsman program's complaint resolution procedures, and shall refer the matter and disclose identifying information of the resident to the management of the facility in which the resident resides and/or to the appropriate agency or agencies for substantiation of abuse, gross neglect or exploitation in the following circumstances:

(A) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

(B) The Ombudsman or representative of the Office has reasonable cause to believe that disclosure would be in the best interest of the resident; and

(C) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

(iii) In addition, the Ombudsman or representative of the Office, following the policies and procedures of the Office described in paragraph (b)(9) of this section, may report the suspected abuse, gross neglect, or exploitation to other appropriate agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.

(9) Prior to disclosing resident-identifying information pursuant to paragraph (b)(6) or (8) of this section, a representative of the Office must obtain approval by the Ombudsman or, alternatively, follow policies and procedures of the Office which provide for such disclosure.

(i) Where the policies and procedures require Ombudsman approval, they shall include a time frame in which the Ombudsman is required to communicate approval or disapproval in order to assure that the representative of the Office has the ability to promptly take actions to protect the health, safety, welfare or rights of residents.

(ii) Where the policies and procedures do not require Ombudsman approval prior to disclosure, they shall require that the representative of the Office promptly notify the Ombudsman of any disclosure of resident-identifying information under the circumstances set forth in paragraph (b)(6) or (8) of this section.

(iii) Disclosure of resident-identifying information under paragraph (b)(7) of this section shall require Ombudsman approval.

§ 1324.21 Conflicts of interest.

The State agency and the Ombudsman shall consider both the organizational and individual conflicts of interest that may impact the effectiveness and credibility of the work of the Office. In so doing, both the State agency and the Ombudsman shall be responsible to identify actual and potential conflicts and, where a conflict has been identified, to remove or remedy such conflict as set forth in paragraphs (b) and (d) of this section.

(a) *Identification of organizational conflicts.* In identifying conflicts of interest pursuant to section 712(f) of the Act (42 U.S.C. 3058g(f)), the State agency and the Ombudsman shall consider the organizational conflicts that may impact the effectiveness and credibility of the work of the Office. Organizational conflicts of interest include, but are not limited to, placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities, in an organization that:

(1) Is responsible for licensing, surveying, or certifying long-term care services, including facilities;

(2) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities;

(3) Has any ownership or investment interest (represented by equity, debt, or other financial relationship) in, or receives grants or donations from, a long-term care facility;

(4) Has governing board members with any ownership, investment, or employment interest in long-term care facilities;

(5) Provides long-term care to residents of long-term care facilities, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;

(6) Provides long-term care services, including programs carried out under a Medicaid waiver approved under section 1115 of the Social Security Act (42 U.S.C. 1315) or under subsection (b) or (c) of section 1915 of the Social Security Act (42 U.S.C. 1396n), or under a Medicaid State plan under section 1905(a) or subsection (i), (j), or (k) of section 1915 of the Social Security Act (42 U.S.C. 1396d(a); 42 U.S.C. 1396n(i)–(k));

(7) Provides long-term care coordination or case management, including for residents of long-term care facilities;

(8) Sets reimbursement rates for long-term care facilities;

(9) Sets reimbursement rates for long-term care services;

(10) Provides adult protective services;

(11) Is responsible for eligibility determinations for the Medicaid program carried out under title XIX of the Social Security Act (42 U.S.C. 1396–1396v);

(12) Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;

(13) Conducts preadmission screening for long-term care facility admission;

(14) Makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or

(15) Provides guardianship, conservatorship or other fiduciary or surrogate decision-making services for residents of long-term care facilities.

(b) *Removing or remedying organizational conflicts.* The State agency and the Ombudsman shall identify and take steps to remove or remedy conflicts of interest between the Office and the State agency or other agency carrying out the Ombudsman program.

(1) The Ombudsman shall identify organizational conflicts of interest in the Ombudsman program and describe steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary for Aging through the National Ombudsman Reporting System.

(2) Where the Office is located within or otherwise organizationally attached to the State agency, the State agency shall:

(i) Take reasonable steps to avoid internal conflicts of interest;

(ii) Establish a process for review and identification of internal conflicts;

(iii) Take steps to remove or remedy conflicts;

(iv) Ensure that no individual, or member of the immediate family of an individual, involved in designating, appointing, otherwise selecting, or terminating the Ombudsman is subject to a conflict of interest; and

(v) Assure that the Ombudsman has disclosed such conflicts and described steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary for Aging through the National Ombudsman Reporting System.

(3) Where a State agency is unable to adequately remove or remedy a conflict, it shall carry out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act (42 U.S.C. 3058g(a)(4)). The State agency may not enter into a contract or other arrangement to carry out the Ombudsman program if the other entity, and may not operate the Office directly if it:

(i) Is responsible for licensing, surveying, or certifying long-term care facilities;

(ii) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities; or

(iii) Has any ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility.

(4) Where the State agency carries out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act (42 U.S.C. 3058g(a)(4)), the State agency shall:

(i) Prior to contracting or making another arrangement, take reasonable steps to avoid conflicts of interest in such agency or organization which is to carry out the Ombudsman program and to avoid conflicts of interest in the State agency's oversight of the contract or arrangement;

(ii) Establish a process for periodic review and identification of conflicts;

(iii) Establish criteria for approval of steps taken by the agency or organization to remedy or remove conflicts;

(iv) Require that such agency or organization have a process in place to:

(A) Take reasonable steps to avoid conflicts of interest; and

(B) Disclose identified conflicts and steps taken to remove or remedy conflicts to the State agency for review and approval.

(5) Where an agency or organization carrying out the Ombudsman program by contract or other arrangement develops a conflict and is unable to adequately remove or remedy a conflict, the State agency shall either operate the Ombudsman program directly or by contract or other arrangement with another public agency or nonprofit private organization.

(6) Where local Ombudsman entities provide ombudsman services, the Ombudsman shall:

(i) Prior to designating or renewing designation, take reasonable steps to avoid conflicts of interest in any agency which may host a local Ombudsman entity;

(ii) Establish a process for periodic review and identification of conflicts of interest with the local Ombudsman entity in any agencies hosting a local Ombudsman entity;

(iii) Require that such agencies disclose identified conflicts of interest with the local Ombudsman entity and steps taken to remove or remedy conflicts within such agency to the Ombudsman;

(iv) Establish criteria for approval of steps taken to remedy or remove conflicts in such agencies; and

(v) Establish a process for review of and criteria for approval of plans to remove or remedy conflicts with the local Ombudsman entity in such agencies.

(7) Failure of an agency hosting a local Ombudsman entity to disclose a conflict to the Office or inability to adequately remove or remedy a conflict shall constitute grounds for refusal, suspension, or removal of designation of the local Ombudsman entity by the Ombudsman.

(c) *Identifying individual conflicts of interest.* (1) In identifying conflicts of interest pursuant to section 712(f) of the Act (42 U.S.C. 3058g(f)), the State agency and the Ombudsman shall consider individual conflicts that may impact the effectiveness and credibility of the work of the Office.

(2) Individual conflicts of interest for an Ombudsman, representatives of the Office, and members of their immediate family include, but are not limited to:

(i) Direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(ii) Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility or a long-term care service;

(iii) Employment of an individual by, or participation in the management of, a long-term care facility or a related organization, in the service area or by the owner or operator of any long-term care facility in the service area;

(iv) Receipt of, or right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;

(v) Accepting gifts or gratuities of significant value from a long-term care facility or its management, a resident, or a resident representative of a long-term care facility in which the Ombudsman or representative of the Office provides services (except where there is a personal relationship with a resident or resident representative which is separate from the individual's role as Ombudsman or representative of the Office);

(vi) Accepting money or any other consideration from anyone other than the Office, or an entity approved by the Ombudsman, for the performance of an act in the regular course of the duties of the Ombudsman or the representatives of the Office without Ombudsman approval;

(vii) Serving as guardian, conservator or in another fiduciary or surrogate decision-making capacity for a resident of a long-term care facility in which the Ombudsman or representative of the Office provides services;

(viii) Serving residents of a facility in which an immediate family member resides;

(ix) Management responsibility for, or operating under the supervision of, an individual with management responsibility for, adult protective services; and

(x) Serving as a guardian or in another fiduciary capacity for residents of long-term care facilities in an official capacity (as opposed to serving as a guardian or fiduciary for a family member, in a personal capacity).

(d) *Removing or remedying individual conflicts.* (1) The State agency or Ombudsman shall develop and implement policies and procedures, pursuant to § 1324.11(e)(4), to ensure that no Ombudsman or representatives of the Office are required or permitted to hold positions or perform duties that would constitute a conflict of interest as set forth in § 1324.21(c). This rule does not prohibit a State agency or Ombudsman from having policies or procedures that exceed these requirements.

(2) When considering the employment or appointment of an individual as the Ombudsman or as a representative of the Office, the State agency or other employing or appointing entity shall:

(i) Take reasonable steps to avoid employing or appointing an individual who has an unremedied conflict of interest or who has a member of the immediate family with an unremedied conflict of interest;

(ii) Take reasonable steps to avoid assigning an individual to perform

duties which would constitute an unremedied conflict of interest;

(iii) Establish a process for periodic review and identification of conflicts of the Ombudsman and representatives of the Office; and

(iv) Take steps to remove or remedy conflicts.

(3) In no circumstance shall the entity, which appoints or employs the Ombudsman, appoint or employ an individual as the Ombudsman who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Has been employed by or participated in the management of a long-term care facility within the previous twelve months; and

(iv) Receives, or has the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility.

(4) In no circumstance shall the State agency, other agency which carries out the Office, or an agency hosting a local Ombudsman entity appoint or employ an individual, nor shall the Ombudsman designate an individual, as a representative of the Office who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Receives, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; or

(iv) Is employed by, or participating in the management of, a long-term care facility.

(A) An agency which appoints or employs representatives of the Office shall make efforts to avoid appointing or employing an individual as a representative of the Office who has been employed by or participated in the management of a long-term care facility within the previous twelve months.

(B) Where such individual is appointed or employed, the agency shall take steps to remedy the conflict.

Subpart B—Programs for Prevention of Elder Abuse, Neglect, and Exploitation

§ 1324.201 State agency responsibilities for the prevention of elder abuse, neglect, and exploitation.

(a) In accordance with Title VII, chapter 3 of the Act, the distribution of Federal funds to the State agency on aging by formula is authorized to carry out activities to develop, strengthen, and carry out programs for the prevention, detection, assessment, and treatment of, intervention in, investigation of, and response to elder abuse, neglect, and exploitation.

(b) All programs using these funds must meet requirements as set forth in the Act, including those of section 721(c), (d), (e) (42 U.S.C. 3058i(c)–(e)) and guidance as set forth by the Assistant Secretary for Aging.

Subpart C—State Legal Assistance Development

§ 1324.301 Definitions.

(a) Definitions as set forth in § 1321.3 of this chapter apply to this part.

(b) Terms used, but not otherwise defined in this part will have the meanings ascribed to them in the Act.

§ 1324.303 Legal Assistance Developer.

(a) *State Legal Assistance Developer.* In accordance with section 731 of the Act (42 U.S.C. 3058j), the State agency shall designate an individual who shall be known as a State Legal Assistance Developer, and other personnel, sufficient to ensure:

(1) State leadership in securing and maintaining the legal rights of older individuals;

(2) State capacity for coordinating the provision of legal assistance, in accordance with section 102(23) and (24) and consistent with section 102(33) of the Act (42 U.S.C. 3002(23), (24), (33)), to include prioritizing such services provided to individuals with greatest economic need, or greatest social need;

(3) State capacity to provide technical assistance, training, and other supportive functions to area agencies on aging, legal assistance providers, Long-Term Care Ombudsman programs, adult protective services, and other service providers under the Act;

(i) The Legal Assistance Developer shall utilize the trainings, case consultations, and technical assistance provided by the support and technical assistance entity established pursuant to section 420(c) of the Act (42 U.S.C. 3032i(c)).

(ii) [Reserved]

(4) State capacity to promote financial management services to older individuals at risk of guardianship, conservatorship, or other fiduciary proceedings;

(i) In so doing, the Legal Assistance Developer shall take into consideration promotion of activities to increase awareness of and access to self-directed financial management services and legal assistance and;

(ii) The Legal Assistance Developer shall also take into consideration promotion of activities that proactively enable older adults and those they designate as decisional supporters through powers of attorney, health care proxies, supported decision making and similar instruments or approaches to be connected to resources and education to manage their finances and the decisions they make about their lives so as to limit their risk for guardianship, conservatorship, or more restrictive fiduciary proceedings.

(5) State capacity to assist older individuals in understanding their rights, exercising choices, benefiting from services and opportunities authorized by law, and maintaining the rights of older individuals at risk of guardianship, conservatorship, or other fiduciary proceedings;

(i) In so doing, the Legal Assistance Developer shall take into consideration engaging in activities aimed at preserving an individual's rights or autonomy, including, but not limited to, increasing awareness of and access to least-restrictive alternatives to guardianship, conservatorship, or more restrictive fiduciary proceedings, such as supported decision making, and legal assistance;

(ii) In so doing, the Legal Assistance Developer shall adhere to the restrictions contained in section 321(a)(6)(B)(i) of the Act (42 U.S.C. 3030d(a)(6)(B)(i)) regarding the involvement of legal assistance providers in guardianship proceedings, and shall apply these restrictions to conservatorship and other fiduciary proceedings;

(iii) In undertaking this activity, the Legal Assistance Developer shall take into consideration coordination of efforts with legal assistance providers funded under the Act contracted by area agencies on aging, any Bar Association Elder Law section, and other elder rights or entities active in the State.

(6) State capacity to improve the quality and quantity of legal services provided to older individuals.

(b) *State plan.* The activities designated by the State agency for the Legal Assistance Developer, in accordance with paragraphs (a)(1)

through (6) of this section, shall be contained in the State plan, per section 307 of the Act (42 U.S.C. 3027) and as set forth in § 1321.27 of this chapter.

(c) *Knowledge, resources, and capacity.* The State agency shall ensure that the Legal Assistance Developer has the knowledge, resources, and capacity to conduct the activities outlined in paragraph (a) of this section.

(d*) Conflicts of interest.* (1) In designating a Legal Assistance Developer, the State agency shall consider any potential conflicts of interest posed by any candidate for the role, and take steps to prevent, remedy, or remove such conflicts of interest.

(2) In designating a Legal Assistance Developer, the State agency shall consider both organizational and individual interests that may impact the effectiveness and credibility of the work of the Legal Assistance Developer to coordinate legal assistance and work to secure, protect, and promote the legal rights of older adults in the State.

(i) This includes holding a position or performing duties that could lead to decisions that are or have the appearance of being contrary to the Legal Assistance Developer's duties as defined in this section and contained in the State plan as set forth in § 1321.27 of this chapter.

(ii) [Reserved]

(3) The State agency shall not designate as Legal Assistance Developer any individual who is:

(i) Serving as a director of adult protective services, or as legal counsel to adult protective services;

(ii) Serving as a State Long-Term Care Ombudsman, or as legal counsel to a State Long-Term Care Ombudsman Program;

(iii) Serving as a hearing officer, administrative law judge, trier of fact or counsel to these positions in an administrative proceeding related to the legal rights of older adults, such as one in which a legal assistance provider might appear;

(iv) Serving as legal counsel or a party to an administrative proceeding related to long-term care settings, including residential settings;

(v) Conducting surveys of and licensure certifications for long-term care settings, including residential settings, or serving as counsel or advisor to such positions;

(vi) Serving as a public or private guardian, conservator, or fiduciary or operating such a program, or serving as counsel to these positions or programs.

(4) The State agency and the Legal Assistance Developer shall be responsible for identifying any other actual and potential conflicts of interest and circumstances that may lead to the appearance of a conflict of interest; identifying processes for preventing conflicts of interest and, where a conflict of interest has been identified, for removing or remedying the conflict.

(5) The State agency shall develop and implement policies and procedures to ensure that the Legal Assistance Developer is not required or permitted to hold positions or perform duties that would constitute a conflict of interest.

Xavier Becerra,

Secretary, Department of Health and Human Services.

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