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Contents

Federal Register

Vol. 89, No. 37

Friday, February 23, 2024

Separate Parts In This Issue

Reader Aids

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

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CFR PARTS AFFECTED IN THIS ISSUE

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

Rules and Regulations

Federal Register

Vol. 89, No. 37

Friday, February 23, 2024

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

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Doc. No. AMS–SC–23–0021]

Dried Prunes Produced in California; Suspension of the Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule suspends the Federal marketing order regulating dried prunes produced in California (Order) effective August 1, 2023, through July 31, 2030. After operating for 18 years without handling regulations, the Prune Administrative Committee (Committee) recommended the Agricultural Marketing Service (AMS) indefinitely suspend the Order. After reviewing the Committee's recommendation, AMS determined that regulatory suspension with a sunset provision of seven years is appropriate. This suspension period extends through the end of the 2029–2030 crop year and provides industry sufficient time to assess whether the Order's reinstatement is beneficial. If no recommendation is made by the Committee to reinstate the Order by the end of the 2029–2030 crop year, AMS will proceed to terminate the Order.

DATES: This rule is effective March 25, 2024, except for amendatory instruction 3 staying part 993, which is effective August 1, 2023, through July 31, 2030, stay part 993.

FOR FURTHER INFORMATION CONTACT: Jeremy Sasselli, Marketing Specialist, or Barry Broadbent, Acting Chief, West Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5901, or Email: *Jeremy.Sasselli@usda.gov* or *Barry.Broadbent@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–8085, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement No. 110 and Marketing Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes produced in California. Part 993 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of producers and handlers of dried prunes operating within the area of production, and one public member.

AMS is issuing this final rule in conformance with Executive Orders 12866 and 13563, and 14094. 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. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This final rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions have Tribal implications. AMS has determined that this rule is unlikely to have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule suspends the Order's regulatory provisions. The Committee recommended this action at its March 22, 2023, meeting. Section 993.90(a) of the Order provides that the Secretary shall terminate or suspend the operation of any or all of the provisions of the Order, whenever the Secretary finds that such provisions do not tend to effectuate the declared policy of the Act.

The Committee meets regularly to consider recommendations for modification, suspension, or termination of the Order, and such meetings are open to the public where interested persons may express their views at these meetings. AMS reviews Committee recommendations, including information provided by the Committee and from other available sources, and determines whether such recommendations would tend to effectuate the declared policy of the Act.

On May 27, 2005, following a recommendation from the Committee, AMS indefinitely suspended handling and reporting requirements under the Order, extended the temporary suspension of outgoing inspection and volume control regulations, and extended the temporary suspension of the Prune Import Regulation (70 FR 30610). Since 2005, the Committee has continued to perform the administrative duties prescribed under the Order, including the collection of assessments, conducting Committee nominations, and assessing whether to recommend a marketing policy, which may include handling regulations.

On March 22, 2023, the Committee held a public meeting to consider the future of regulation under the Order. The Committee determined that the 2005 suspension of handling and volume regulations did not adversely impact the marketing of California prunes and that there is no value in funding the administrative duties prescribed under the Order when the handling regulations and reserve control provisions are not in effect. The Committee discussed terminating the Order but rejected the idea because its members believe the sector of industry is not yet ready to terminate, given the length of time and expense that would be required to establish a new marketing order should regulation again be deemed necessary in the future. In addition, several Committee members expressed the opinion that future market conditions may warrant regulation, particularly volume control, and urged the Committee not to terminate the Order at this time. After much deliberation, the Committee voted unanimously to indefinitely suspend the Order with the expectation that the Order would either remain indefinitely suspended or AMS would at a future time act to terminate the Order if no recommendation for reinstatement is submitted by industry. In the event of no such recommendation for reinstatement, the Committee would take the necessary steps to ensure an orderly and complete termination of the Order.

The Committee recommended to AMS the Order's suspension for an indefinite period to allow for the reinstatement of regulation to remain an option and to provide industry time to assess the market environment and other external factors affecting California prunes. Under the suspension, handlers would no longer be required to pay assessments. The Committee believes this cost savings benefits both small and large handlers, and that producers will also be relieved of some costs because such payments are often passed onto them by handlers.

After reviewing the Committee's recommendation and supporting materials, AMS included a sunset provision that if no recommendation is received by July 31, 2030, AMS will then issue a rule proposing termination of the Order. The Committee agrees that a suspension period of seven years is adequate time for the California prune industry to assess future market conditions and reestablishment of the Order, if warranted.

This final rule lifts the portions of the Order currently under suspension and suspends the entire Order for seven years, beginning in the 2023–2024 crop year, which started on August 1, 2023, and ending with the 2029–2030 crop year, which ends on July 31, 2030. If industry does not recommend reinstating the Order by the end of the suspension period, AMS will issue a proposal to terminate the Order.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this final rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 600 producers of dried prunes in the production area and 27 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than $3,500,000, and small agricultural service firms are defined as those whose annual receipts are less than $34,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the average producer price for California dried prunes for the 2021 crop was $2,000 per ton. NASS further reported 2021 crop year production for California dried prunes was 74,000 tons. The estimated total 2021–22 crop year value of California dried prunes is $148,000,000 (74,000 tons times $2,000 per ton equals $148,000,000). Dividing the estimated total crop value by the estimated number of producers (600) yields an estimated average receipt per producer of $246,667, which is considerably lower than the $3,500,000 SBA small agricultural producer threshold.

In addition, according to USDA Market News data, the reported average terminal market price for 2022 for California dried prunes was $39.04 per carton. Dividing the average carton price by the 28-pound carton size yields an estimated price per pound of $1.39. ($39.04 average price divided by 28 pounds). Multiplying $1.39 per pound by 2,000 pounds yields $2,780 per ton, which, when multiplied by total estimated 2021 production of 74,000 tons, yields estimated total handler receipts of $205,720,000. Dividing this figure by the 27 regulated handlers yields estimated average annual handler receipts of $7,619,259, well below the $34 million SBA threshold for small agricultural service firms. Therefore, using the above data, the majority of producers and handlers of California dried prunes may be classified as small entities.

This final rule suspends all provisions of the Order starting August 1, 2023, through July 31, 2030. On March 22, 2023, the Committee voted unanimously to indefinitely suspend the Order after determining that the 2005 suspension of handling regulations, volume control and reporting requirements did not negatively impact the marketing of California prunes and that the costs to continue the Order outweighs its benefit to industry. The Committee believes the suspension will provide a cost savings to large and small handlers and producers.

After reviewing the Committee's recommendation and other supporting material, AMS included a sunset provision that if no recommendation for reinstatement is received during the suspension period, AMS will proceed to terminate the Order.

This action suspends the Federal marketing order regulating dried prunes produced in California though July 31, 2030. Authority for this action is provided in section 993.90(a) of the Order.

Committee meetings are widely publicized throughout the production area. The California dried prune industry and all interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. Similarly, the March 22, 2023, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178, Vegetable Crops. OMB's three-year approval of the forms in the Vegetable Crops package expires March 31, 2024. AMS's submission of the renewal package prior to its expiration will retain prune forms but will drawdown the information collection burden to zero during the time when respondents will not be completing and submitting the forms during the seven-year suspension. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule does not impose any additional reporting or recordkeeping requirements on either small or large California dried prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this action.

A proposed rule concerning this action was published in the **Federal Register** on October 12, 2023 (88 FR 70608). Copies of the proposed rule were also mailed or sent via email to California prune handlers. A copy of the proposed rule was made available through the internet by AMS via *https://www.regulations.gov.* A 30-day comment period ending November 13, 2023, was provided for interested persons to respond to the proposal. AMS received two comments. The first comment was in support of the proposal. The second commenter presented an alternative to the proposed suspension to transfer all remaining marketing order provisions over to the State of California Department of Food and Agriculture. In response to the second comment, the Committee determined, and AMS agrees, that there is no value in funding the administrative duties prescribed under the Order when the handling regulations and reserve control provisions are not in effect. Additionally, AMS determined that the suspension period, as established herein, will provide ample time for the consideration of other marketing programs should the prune industry choose to seek out such alternatives and request that AMS terminate the Order prior to the end of the suspension period. However, if no such request to terminate early is submitted or, conversely, a petition for reinstatement is not received during the suspension period, AMS will proceed with terminating the Order at end of the 2029–2030 crop year.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendations submitted by the Committee and other available information, AMS has determined that this rule tends to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 993 as follows:

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

■ 1. The authority citation for part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Effective March 25, 2024, in part 993, lift the suspension of May 27, 2005, on §§ 993.21d, 993.41, 993.48, 993.49, 993.50, 993.51, 993.52, 993.53, 993.54, 993.55, 993.56, 993.57, 993.58, 993.59, 993.62, 993.65, 993.72, 993.73, 993.74, 993.75, 993.97, 993.104, 993.105, 993.106, 993.107, 993.108, 993.149, 993.150, 993.156, 993.157, 993.158, 993.159, 993.162, 993.165, 993.172, 993.173, 993.174, 993.400, 993.409, 993.501, 993.503, 993.504, 993.505, 993.506, 993.515, 993.516, 993.517, 993.518, 993.601, and 993.602.

PART 993—[STAYED]

■ 3. Effective August 1, 2023, through July 31, 2030, stay part 993.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–03630 Filed 2–22–24; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. FAA–2022–1135]

Airworthiness Criteria: Special Class Airworthiness Criteria for the Blackshape S.p.A., Model BK160–200 Very Light Airplane

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Issuance of final airworthiness criteria.

SUMMARY: The FAA announces the airworthiness criteria for the Blackshape S.p.A., Model BK160–200 Very Light Airplane (VLA). This document sets forth the airworthiness criteria that the FAA finds to be appropriate and applicable for the VLA design.

DATES: These airworthiness criteria are effective February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Tara Fitzgerald, Certification Coordination Section, AIR–613, Certification Engagement Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration; telephone 781–238–7130; email *tara.fitzgerald@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The European Union Aviation Safety Agency (EASA) submitted an application to the FAA, on behalf of Blackshape S.p.A., on February 10, 2020, for a type certificate for the Model BK160–200 VLA. Under 14 CFR 21.17(b), VLA are a special class of aircraft that utilize airworthiness criteria the FAA finds to be appropriate to the specific type design.

The BK160–200 is a single reciprocating engine airplane (Lycoming IO–320–D1B with constant speed Hartzell propeller), full carbon composite low wing design, with a retractable tri-cycle landing gear. It has conventional control systems (elevator, aileron, rudder, flaps, and longitudinal trim) and provides seats for two persons in a tandem seat configuration with a maximum takeoff gross weight (MTGW) of 850 kilograms (kg) (1,874 pounds). It also has advanced avionic displays, a stall speed of 50 knots, a rechargeable lithium-ion battery, and will perform night visual flight rules (VFR) operations.

Discussion of Comments

The FAA issued a notice of proposed airworthiness criteria for the Blackshape

S.p.A., Model BK160–200 VLA, which published in the **Federal Register** on January 2, 2024 (89 FR 37). No comments were received, and the airworthiness criteria are adopted as proposed.

Applicability

These airworthiness criteria, established under the provisions of § 21.17(b), are applicable to the Blackshape S.p.A. Model BK160–200 VLA. Should Blackshape S.p.A. apply at a later date for a change to the type certificate to include another model, these airworthiness criteria would apply to that model as well, provided the FAA finds them appropriate in accordance with the requirements of subpart D to part 21.

Conclusion

This action affects only the airworthiness criteria for the Blackshape S.p.A. Model BK160–200 VLA. It is not a rule of general applicability.

Authority Citation

The authority citation for these airworthiness criteria is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

Airworthiness Criteria

Pursuant to the authority delegated to me by the Administrator, the following airworthiness criteria are issued as part of the type certification basis for the Blackshape S.p.A. Model BK160–200 VLA. The FAA finds these criteria to be appropriate for the aircraft and applicable to the specific type design and provide an equivalent level of safety to existing airworthiness standards.

EASA Certification Specifications (CS) for Very Light Aeroplanes CS–VLA, Amendment 1, dated March 5, 2009, with additional requirements identified in ''Policy for Type Certification of Very Light Airplanes as a Special Class of Aircraft'' (88 FR 70344, October 11, 2023) for Advanced Avionic Displays, Night-VFR Operations, Increased Maximum Certificated Takeoff Weight and Increased Stall Speed, and Rechargeable Lithium Ion Battery.

Issued in Washington, DC, on February 16, 2024.

James David Foltz,

Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2024–03728 Filed 2–22–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740, 744, and 774

[Docket No. 240130–0027]

RIN 0694–AI45

Revision of License Requirements of Certain Cameras, Systems, or Related Components

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: With this final rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR), which it maintains, by revising license requirements for certain cameras, systems, and related components. These revisions will better align controls with technological and commercial developments, such as the items' global commercial availability, while recognizing the cooperative strategic relationship the United States has with our closest allies. In addition to these changes, BIS is adding controls on certain cameras that are not already controlled by either export control classification number (ECCN) 6A003 or 6A203. These new controls are detailed under new ECCN 6A293, which is a classification for temporary controls for which BIS is seeking multilateral agreement.

DATES: This rule is effective March 8, 2024.

FOR FURTHER INFORMATION CONTACT: For questions on the part 744 changes, contact John Varesi at (202) 482–1114 or *John.Varesi@bis.doc.gov.*

For questions on the part 774 changes, contact Steve Clagett at (202) 482–1641 or *steven.clagett@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

BIS is amending the EAR (15 CFR parts 730–774) by revising the license requirements for cameras in part 744 and by adding an ECCN that controls additional cameras to part 774. Background regarding these changes is detailed below.

Part 744

Modification to Existing Camera License Requirements

This rule revises paragraph (a)(1) to § 744.9 of the EAR. Prior to the effective date of this rule, paragraph (a)(1) was divided into (a)(1)(i) and (a)(1)(ii). To help ensure the restrictions in this paragraph are easily understood, this rule restructures the paragraph by adding (a)(1)(iii). The introductory text of (a)(1) will retain the same background information regarding applicable reasons for control, but the specific items discussed will be divided among (a)(1)(i) through (iii).

Paragraph (a)(1)(i) will pertain to commodities controlled by ECCN 6A003.a.3, 6A003.a.4, or 6A003.a.6 that will be or are intended to be used by a 'military end-user,' as defined in paragraph (d) of § 744.9, in all destinations except Canada. This is a structural change to the paragraph only; the policy regarding these items remains the same. Similarly, this rule does not remove the license requirement forth in new paragraph § 744.9(a)(1)(iii) for cameras, systems and related components being exported for incorporation into foreign ''military commodities'' specified in ECCN 0A919.

Paragraph (a)(1)(ii) will revise the policy pertaining to the original items (other than those controlled in 6A003.a.3, 6A003.a.4, and 6A003.a.6) by adding the phrase ''in all destinations except countries specified in Country Group A:1.'' This change will thereby more specifically focus the license requirement for the export, reexport, and transfer (in-country) on certain cameras, systems, and related components when destined for some of our closest allies. With this revision, BIS no longer requires a license for the cameras, systems, and related components described in ECCNs 0A504 (incorporating commodities controlled by ECCNs 6A002 or 6A003, or commodities controlled by 6A993.a that meet the criterion of Note 3.a to 6A003.b.4), 6A002, 6A003 (other than 6A003.a.3, 6A003.a.4, and 6A003.a.6), or 6A993.a (having a maximum frame rate equal to or less than 9 Hz and thus meeting the criteria of Note 3.a to 6A003.b.4), or 8A002.d when the items are intended to be used by a military end user in Country Group A:1 countries. Prior to publication of this rule, a license was required for such transactions to all destinations except Canada.

With the effective date of this rule, focal plane arrays will continue to require a license to countries specified in Country Groups A:1 under other provisions of the EAR; these items are controlled for Regional Stability (RS) reasons to countries specified in RS Column 1 on the Commerce Country Chart in supplement no. 1 to part 738 of the EAR, as well as other parts of the EAR (*e.g.,* other sections in part 744 or sanctions provisions in part 746). BIS does not allow the use of License

Exception Strategic Trade Authorization (STA) (§ 740.20 of the EAR) for these items. Regional Stability controls are detailed under § 742.6(a)(2) of the EAR. As a conforming change, this rule updates the related controls in ECCNs 6A003 such that they more accurately reflect changes to § 744.9(a)(1).

Portions of the original national security rationale for § 744.9(a)(1) are no longer relevant. In 2009, when the license requirement for ECCN 6A003.b.4.b items was first imposed, BIS sought visibility into their use by military end users. A 2016 revision to § 744.9 expanded the license requirements to all items listed under ECCNs 6A002 and 6A003, and items listed under ECCN 6A993.a further reflected the interest in reviewing these transactions to military end users. However, the number of approved applications for these items going to County Group A:1 countries by BIS and the global commercial availability of these items warrants the removal of this license requirement.

Specifically, license data since 2009 demonstrates that these items, when destined for Country Group A:1 countries, do not pose a national security risk to the United States. As a practical matter, BIS, through the interagency license review process, has approved thousands of license applications for these items to Country Group A:1 countries over the past decade. Therefore, BIS has determined that U.S. Government and industry resources could be more effectively deployed reviewing transactions posing potentially higher risks.

As stated above, the items controlled by § 744.9 have become mainstream commercial products. In the aftermath of the COVID–19 global pandemic, one of the most popular uses of these cameras is to determine if a person has a fever before entering a building. However, prior to the publication of this rule, the export of these items under § 744.9 for a similar purpose by a military end user in any country would require a license. BIS determined this type of transaction no longer warrants review when destined to close allies. Given the high number of approvals and the absence of denials, the growing burden the regulations have placed on industry, and the licensing burden placed on BIS itself, BIS is removing the license requirements for these items when going to military end users in Country Group A:1 countries.

BIS also notes the increased commercial availability of the items listed in § 744.9. At the time § 744.9 was first published, the commercial market for the items listed in the section was relatively new and U.S. exports of these items were not heavily impacted by the regulatory requirement. Since the 2016 revision, the global commercial market for these items has continued to expand. These items are now manufactured and widely available outside the United States, including in China. The combined impact of the expanded controls and growing global manufacturing of the items has resulted in restricted exports of U.S.-origin products and increased competition from non-U.S.-origin products. In many cases, the manufacturers who made these sales are located in countries outside of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, such as China. This rule ensures that U.S. companies are operating on a level playing field with foreign competitors when selling to end users in County Group A:1 countries.

Part 774

Addition of New Controls for Cameras Under ECCN 6A293

As stated above, this final rule adds certain cameras under ECCN 6A293 on the Commerce Control List (CCL), supplement no. 1 to part 774. While ECCNs 6A003 and 6A203 control specified cameras, this new control will capture cameras that are not controlled by either ECCNs 6A003 or 6A203 and have the following characteristics: (1) minimum exposure time of 1 microsecond or faster; and (2) a throughput of 13.43 Giga Pixels per second or greater when taken at 205,000 frames per second. The control also includes a technical note with a formula for throughput and a note that describes some of the ways these cameras may be referenced by the public in non-technical terms. ECCN 6A293 has NP Column 1 and Anti-Terrorism (AT) Column 1 reasons for control; these reasons for control are detailed in part 742 of the EAR. ECCN 6A293 is not eligible for License Exception STA. As conforming changes, this rule updates the related controls in ECCNs 6A003 and 6A203 to include ECCN 6A293; this rule also revises § 740.20(b)(2)(x) to include the limitation on STA for ECCN 6A293.

ECCNs 6A003 and 6A203 control certain high-speed cameras that are on the Nuclear Suppliers Group (NSG) Dual Use Annex. The NSG is a multilateral regime of nuclear supplier countries seeking to address the non-proliferation of nuclear weapons through export controls. Following a technical analysis of high-speed camera systems, the U.S. Government determined that additional cameras, with specifications differing from those in ECCNs 6A003 and 6A203, have similar applications of proliferation concern. Accordingly, the new controls of these cameras under ECCN 6A293 are warranted. Cameras controlled in this new ECCN may be exported to NSG participating countries without a license, except to Russia, Belarus, and China. New ECCN 6A293 will allow implementation of these warranted temporary controls while BIS seeks multilateral agreement.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA), 50 U.S.C. 4801–4852. ECRA, as amended, provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 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, distribute 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 final rule has been designated a ''significant regulatory action,'' under Executive Order 12866.

2. Notwithstanding any other provision of law, no person may be required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves a collection currently approved by OMB under control number 0694–0088, Simplified Network Application Processing System. This collection includes, among other things, license applications and commodity classification, and carries a burden estimate of 29.6 minutes for a manual or electronic submission for a total burden estimate of 31,835 hours. BIS does not expect the burden hours associated with this collection to change.

3. This rule does not contain policies with federalism implications as that

term is defined under Executive Order 13132.

4. Pursuant to Section 1762 of ECRA (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation and delay in effective date.

5. Because neither the Administrative Procedure Act nor any other law requires that notice of proposed rulemaking and an opportunity for public comment be given for this rule, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no Final Regulatory Flexibility Analysis is required and none has been prepared.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, parts 740, 744, and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 740—LICENSE EXCEPTIONS

■ 1. The authority citation for 15 CFR part 740 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. Section 740.20 is amended by revising paragraph (b)(2)(x) to read as follows:

§ 740.20 License Exception Strategic Trade Authorization (STA).

* * * * *

(b) * * *

(2) * * *

(x) License Exception STA may not be used for items controlled by ECCN 6A002; 6A293; 6D002 (software ''specially designed'' for the ''use'' of commodities controlled under 6A002.b); 6D003.c; 6D991 (software ''specially designed'' for the ''development,'' ''production,'' or ''use'' of commodities controlled under 6A002 or 6A003); 6E001 (''technology'' for the ''development'' of commodities controlled under ECCN 6A002 or 6A003); or 6E002 ''technology'' (for the ''production'' of commodities controlled under ECCN 6A002 or 6A003).

* * * * *

PART 744—CONTROL POLICY: END-USER AND END-USE BASED

■ 3. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2022, 87 FR 57569 (September 21, 2022); Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 4. Amend § 744.9 by revising paragraph (a)(1) to read as follows:

§ 744.9 Restrictions on exports, reexports, and transfers (in-country) of certain cameras, systems, or related components.

(a) * * *

(1) In addition to the applicable license requirements for nuclear nonproliferation, national security, regional stability, anti-terrorism, and United Nations embargo reasons in §§ 742.3, 742.4, 742.6, 742.8, 746.1(b), and 746.3 of the EAR, a license is required pursuant to this section for specific exports, reexports, or transfers (in-country) if at the time of export, reexport, or transfer, the exporter, reexporter, or transferor knows or is informed that:

(i) Commodities controlled by ECCN 6A003.a.3, 6A003.a.4, or 6A003.a.6 will be or are intended to be used by a 'military end-user,' as defined in paragraph (d) of this section in all destinations except Canada.

(ii) Commodities described in ECCNs 0A504 (incorporating commodities controlled by ECCNs 6A002 or 6A003, or commodities controlled by 6A993.a that meet the criterion of Note 3.a to 6A003.b.4), 6A002, 6A003 (other than 6A003.a.3, 6A003.a.4, and 6A003.a.6), or 6A993.a (having a maximum frame rate equal to or less than 9 Hz and thus meeting the criteria of Note 3.a to 6A003.b.4), or 8A002.d will be or are intended to be used by a 'military end-user,' as defined in paragraph (d) of this section in all destinations except those specified in Country Group A:1.

(iii) Commodities described in ECCNs 0A504 (incorporating commodities controlled by ECCNs 6A002 or 6A003, or commodities controlled by 6A993.a that meet the criterion of Note 3.a to 6A003.b.4), 6A002, 6A003, or 6A993.a (having a maximum frame rate equal to or less than 9 Hz and thus meeting the criteria of Note 3.a to 6A003.b.4), or 8A002.d will be or are intended to be incorporated into a ''military commodity'' controlled by ECCN 0A919 in all destinations except Canada.

* * * * *

PART 774—COMMERCE CONTROL LIST

■ 5. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 6. Amend supplement no. 1 to part 774 by:

■ a. Revising ECCNs 6A003 and 6A203; and

■ b. Adding ECCN 6A293.

The revisions and addition read as follows:

* * * * *

6A003 Cameras, systems or equipment, and ''components'' therefor, as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, NP, RS, AT, UN

Control(s)	*Country Chart (see Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 2
NP applies to cameras controlled by 6A003.a.3 or a.4 and to plug-ins in 6A003.a.6 for cameras controlled by 6A003.a.3 or a.4.	NP Column 1

Control(s)	Country Chart (see Supp. No. 1 to part 738)
RS applies to 6A003.b.3, 6A003.b.4.a, 6A003.b.4.c and to items controlled in 6A003.b.4.b that have a frame rate greater than 60 Hz or that incorporate a focal plane array with more than 111,000 elements, or to items in 6A003.b.4.b when being exported or reexported to be embedded in a civil product. (But see § 742.6(a)(2)(iii) and (v) for certain exemptions).	RS Column 1
RS applies to items controlled in 6A003.b.4.b that have a frame rate of 60 Hz or less and that incorporate a focal plane array with not more than 111,000 elements if not being exported or reexported to be embedded in a civil product.	RS Column 2
AT applies to entire entry.	AT Column 1
UN applies to 6A003.b.3 and b.4.	See § 746.1(b) for UN controls

License Requirement Note: Commodities that are not subject to the ITAR but are of the type described in USML Category XII(c) are controlled as cameras in ECCN 6A003 when they incorporate a camera controlled in this ECCN.

Reporting Requirements

See § 743.3 of the EAR for thermal camera reporting for exports that are not authorized by an individually validated license of thermal imaging cameras controlled by ECCN 6A003.b.4.b to destinations in Country Group A:1 (see Supplement No. 1 to part 740 of the EAR), must be reported to BIS.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: $1500, except N/A for 6A003.a.3 through a.6, b.1, b.3 and b.4.
GBS: N/A

Special Conditions for STA

STA: License Exception STA may not be used to ship any commodity in 6A003.b.3 or b.4 to any of the destinations listed in Country Group A:6 (See Supplement No.1 to part 740 of the EAR).

List of Items Controlled

Related Controls: (1) See ECCNs 6E001 (''development''), 6E002 (''production''), and 6E201 (''use'') for technology for items controlled under this entry. (2) Also see ECCN 6A203. (3) See ECCN 0A919 for foreign made military commodities that incorporate cameras described in 6A003. (4) Section 744.9 imposes a license requirement on cameras described in 6A003 if being exported, reexported, or transferred (in-country) for use by certain military end-users or for incorporation into a commodity controlled by ECCN 0A919. (5) See USML Category XII(c) and (e) for cameras subject to the ITAR. (6) Also see ECCN 6A293.
Related Definitions: N/A
Items:

a. Instrumentation cameras and ''specially designed'' ''components'' therefor, as follows:

Note: Instrumentation cameras, controlled by 6A003.a.3 to 6A003.a.5, with modular structures should be evaluated by their maximum capability, using plug-ins available according to the camera manufacturer's specifications.

a.1. [Reserved]

a.2. [Reserved]

a.3. Electronic streak cameras having temporal resolution better than 50 ns;

a.4. Electronic framing cameras having a speed exceeding 1,000,000 frames/s;

a.5. Electronic cameras having all of the following:

a.5.a. An electronic shutter speed (gating capability) of less than 1µs per full frame; *and*

a.5.b. A read out time allowing a framing rate of more than 125 full frames per second;

a.6. Plug-ins having all of the following characteristics:

a.6.a. ''Specially designed'' for instrumentation cameras which have modular structures and that are controlled by 6A003.a; *and*

a.6.b. Enabling these cameras to meet the characteristics specified by 6A003.a.3, 6A003.a.4 or 6A003.a.5, according to the manufacturer's specifications;

b. Imaging cameras as follows:

Note: 6A003.b does not control television or video cameras ''specially designed'' for television broadcasting.

b.1. Video cameras incorporating solid state sensors, having a peak response in the wavelength range exceeding 10 nm, but not exceeding 30,000 nm and having all of the following:

b.1.a. Having any of the following:

b.1.a.1. More than 4 x 10^6 ''active pixels'' per solid state array for monochrome (black and white) cameras;

b.1.a.2. More than 4 x 10^6 ''active pixels'' per solid state array for color cameras incorporating three solid state arrays; *or*

b.1.a.3. More than 12 x 10^6 ''active pixels'' for solid state array color cameras incorporating one solid state array; *and*

b.1.b. Having any of the following:

b.1.b.1. Optical mirrors controlled by 6A004.a.;

b.1.b.2. Optical control equipment controlled by 6A004.d.; *or*

b.1.b.3. The capability for annotating internally generated 'camera tracking data';

Technical Notes:

1. For the purposes of 6A003.b.1, digital video cameras should be evaluated by the maximum number of ''active pixels'' used for capturing moving images.

2. For the purposes of 6A003.b.1.b.3, 'camera tracking data' is the information necessary to define camera line of sight orientation with respect to the earth. This includes: (1) the horizontal angle the camera line of sight makes with respect to the earth's magnetic field direction and; (2) the vertical angle between the camera line of sight and the earth's horizon.

b.2. Scanning cameras and scanning camera systems, having all of the following:

b.2.a. A peak response in the wavelength range exceeding 10 nm, but not exceeding 30,000 nm;

b.2.b. Linear detector arrays with more than 8,192 elements per array; *and*

b.2.c. Mechanical scanning in one direction;

Note: 6A003.b.2 does not apply to scanning cameras and scanning camera systems, ''specially designed'' for any of the following:

a. Industrial or civilian photocopiers;

b. Image scanners ''specially designed'' for civil, stationary, close proximity scanning applications (*e.g.,* reproduction of images or print contained in documents, artwork, or photographs); *or*

c. Medical equipment.

b.3. Imaging cameras incorporating image intensifier tubes having the characteristics listed in 6A002.a.2.a or 6A002.a.2.b;

b.4. Imaging cameras incorporating ''focal plane arrays'' having any of the following:

b.4.a. Incorporating ''focal plane arrays'' controlled by 6A002.a.3.a to 6A002.a.3.e;

b.4.b. Incorporating ''focal plane arrays'' controlled by 6A002.a.3.f; *or*

b.4.c. Incorporating ''focal plane arrays'' controlled by 6A002.a.3.g;

Note 1: Imaging cameras described in 6A003.b.4 include ''focal plane arrays'' combined with sufficient ''signal processing'' electronics, beyond the read out integrated circuit, to enable as a minimum the output of an analog or digital signal once power is supplied.

Note 2: 6A003.b.4.a does not control imaging cameras incorporating linear ''focal plane arrays'' with 12 elements or fewer, not employing time-delay-and-integration within the element and designed for any of the following:

a. Industrial or civilian intrusion alarm, traffic or industrial movement control or counting systems;

b. Industrial equipment used for inspection or monitoring of heat flows in buildings, equipment, or industrial processes;

c. Industrial equipment used for inspection, sorting or analysis of the properties of materials;

d. Equipment ''specially designed'' for laboratory use; *or*

e. Medical equipment.

Note 3: 6A003.b.4.b does not control imaging cameras having any of the following:

a. A maximum frame rate equal to or less than 9 Hz;

b. Having all of the following:

1. Having a minimum horizontal or vertical 'Instantaneous-Field-of-View (IFOV)' of at least 2 mrad (milliradians);

2. Incorporating a fixed focal-length lens that is not designed to be removed;

3. Not incorporating a 'direct view' display; *and*

Technical Note: For the purposes of 6A003.b.4 Note 3.b.3, 'direct view' refers to an imaging camera operating in the infrared spectrum that presents a visual image to a human observer using a near-to-eye micro display incorporating any light-security mechanism.

4. Having any of the following:

a. No facility to obtain a viewable image of the detected field-of-view; *or*

b. The camera is designed for a single kind of application and designed not to be user modified; *or*

Technical Note: For the purposes of 6A003.b.4 Note 3.b.1, 'Instantaneous-Field-of-View (IFOV)' is the lesser figure of the 'Horizontal IFOV' or the 'Vertical IFOV'.

'Horizontal IFOV' = horizontal Field-of-View (FOV)/number of horizontal detector elements

'Vertical IFOV'= vertical Field-of-View (FOV)/number of vertical detector elements.

c. The camera is ''specially designed'' for installation into a civilian passenger land vehicle and having all of the following:

1. The placement and configuration of the camera within the vehicle are solely to assist the driver in the safe operation of the vehicle;

2. Is operable only when installed in any of the following:

a. The civilian passenger land vehicle for which it was intended and the vehicle weighs less than 4,500 kg (gross vehicle weight); *or*

b. A ''specially designed'', authorized maintenance test facility; *and*

3. Incorporates an active mechanism that forces the camera not to function when it is removed from the vehicle for which it was intended.

Note: When necessary, details of the items will be provided, upon request, to the Bureau of Industry and Security in order to ascertain compliance with the conditions described in Note 3.b.4 and Note 3.c in this Note to 6A003.b.4.b.

Note 4: 6A003.b.4.c does not apply to 'imaging cameras' having any of the following characteristics:

a. Having all of the following:

1. Where the camera is ''specially designed'' for installation as an integrated component into indoor and wall-plug-operated systems or equipment, limited by design for a single kind of application, as follows:

a. Industrial process monitoring, quality control, or analysis of the properties of materials;

b. Laboratory equipment ''specially designed'' for scientific research;

c. Medical equipment;

d. Financial fraud detection equipment; *and*

2. Is only operable when installed in any of the following:

a. The system(s) or equipment for which it was intended; *or*

b. A ''specially designed,'' authorized maintenance facility; *and*

3. Incorporates an active mechanism that forces the camera not to function when it is removed from the system(s) or equipment for which it was intended;

b. Where the camera is ''specially designed'' for installation into a civilian passenger land vehicle or passenger and vehicle ferries and having all of the following:

1. The placement and configuration of the camera within the vehicle or ferry are solely to assist the driver or operator in the safe operation of the vehicle or ferry;

2. Is only operable when installed in any of the following:

a. The civilian passenger land vehicle for which it was intended and the vehicle weighs less than 4,500 kg (gross vehicle weight);

b. The passenger and vehicle ferry for which it was intended and having a length overall (LOA) 65 m or greater; *or*

c. A ''specially designed'', authorized maintenance test facility; *and*

3. Incorporates an active mechanism that forces the camera not to function when it is removed from the vehicle for which it was intended;

c. Limited by design to have a maximum ''radiant sensitivity'' of 10 mA/W or less for wavelengths exceeding 760 nm, having all of the following:

1. Incorporating a response limiting mechanism designed not to be removed or modified; and

2. Incorporates an active mechanism that forces the camera not to function when the response limiting mechanism is removed; and

3. Not ''specially designed'' or modified for underwater use; or

d. Having all of the following:

1. Not incorporating a 'direct view' or electronic image display;

2. Has no facility to output a viewable image of the detected field of view;

3. The ''focal plane array'' is only operable when installed in the camera for which it was intended; and

4. The ''focal plane array'' incorporates an active mechanism that forces it to be permanently inoperable when removed from the camera for which it was intended.

Note: *When necessary, details of the item will be provided, upon request, to the Bureau of Industry and Security in order to ascertain compliance with the conditions described in Note 4 above.*

b.5. Imaging cameras incorporating solid-state detectors specified by 6A002.a.1.

* * * * *

6A203 High-speed cameras, imaging devices and ''components'' therefor, other than those controlled by 6A003 (see List of Items Controlled).

License Requirements

Reason for Control: NP, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NP applies to entire entry.	NP Column 1
AT applies to entire entry.	AT Column 1

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A

GBS: N/A

List of Items Controlled

Related Controls: (1) See ECCNs 6E001 (''development''), 6E002 (''production''), and 6E201 (''use'') for technology for items controlled under this entry. (2) See ECCN 6A003.a.3 and a.4. (3) Also see ECCN 6A293.

Related Definitions: N/A

Items:

a. Streak cameras and ''specially designed'' components therefor, as follows:

a.1. Streak cameras with writing speeds greater than 0.5 mm/μs;

a.2. Electronic streak cameras capable of 50 ns or less time resolution;

a.3. Streak tubes for cameras described in 6A203.a.2;

a.4. Plug-ins, ''specially designed'' for use with streak cameras having modular structures, that enable the performance characteristics described in 6A203.a.1 or .a.2;

a.5. Synchronizing electronics units, and rotor assemblies consisting of turbines, mirrors and bearings, that are ''specially designed'' for cameras described in 6A203.a.1.

b. Framing cameras and ''specially designed'' components therefor, as follows:

b.1. Framing cameras with recording rates greater than 225,000 frames per second;

b.2. Framing cameras capable of 50 ns or less frame exposure time;

b.3. Framing tubes, and solid-state imaging devices, that have a fast image gating (shutter) time of 50 ns or less and are ''specially designed'' for cameras described in 6A203.b.1 or .b.2;

b.4. Plug-ins, ''specially designed'' for use with framing cameras having modular structures, that enable the performance characteristics described in 6A203.b.1 or .b.2;

b.5. Synchronizing electronic units, and rotor assemblies consisting of turbines, mirrors, and bearings, that are ''specially designed'' for cameras described in 6A203.b.1 or .b.2.

c. Solid-state or electron tube cameras and ''specially designed'' components therefor, as follows:

c.1. Solid-state cameras, or electron tube cameras, with a fast image gating (shutter) time of 50 ns or less;

c.2. Solid-state imaging devices, and image intensifiers tubes, that have a fast image gating (shutter) time of 50 ns or less and are ''specially designed'' for cameras described in 6A203.c.1;

c.3. Electro-optical shuttering devices (Kerr or Pockels cells) with a fast image gating (shutter) time of 50 ns or less;

c.4. Plug-ins, ''specially designed'' for use with cameras having modular structures, that enable the performance characteristics described in 6A203.c.1.

Technical Note: *High speed single frame cameras can be used alone to produce a single image of a dynamic event, or several such cameras can be combined in a sequentially-triggered system to produce multiple images of an event.*

d. Radiation-hardened TV cameras, or lenses therefor, ''specially designed'' or rated as radiation hardened to withstand a total radiation dose greater than 5×10^4 Gy (silicon) without operational degradation.

Technical Note: *The term Gy (silicon) refers to the energy in Joules per kilogram absorbed by an unshielded silicon sample when exposed to ionizing radiation.**

* * * * *

6A293 Cameras not classified ECCNs 6A003 or 6A203 with all the following characteristics: (see List of Items Controlled).

License Requirements

Reason for Control: NP, AT

Control(s)	*Country chart (see Supp. No. 1 to part 738)*
NP applies to entire entry.	NP Column 1
AT applies to entire entry.	AT Column 1

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

Special Conditions for STA

STA: License Exception STA (§ 740.20 of the EAR) may not be used for ECCN 6A293.

List of Items Controlled

Related Controls: See ECCNs 6A003 and 6A203.
Related Definitions: N/A
Items:

a. Minimum exposure time of 1 microsecond or faster, and

b. a throughput of 13.43 Giga Pixels/s or greater when taken at 205,000 frames/s.

Technical Note: *Throughput = Width (pixels) x Height (pixels) x Frames per Second. The width and Height in pixels are those that are achieved at 205,000 frames per second.*

Note: *This entry includes cameras which may be referred to as high-speed digital imaging cameras, high-speed video cameras or slow-motion cameras or any other camera that meets these parameters.*

* * * * *

Thea R. Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2024–03661 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 684, 686, and 688

[Docket No. ETA–2022–0005]

RIN 1205–AC08

Workforce Innovation and Opportunity Act Title I Non-Core Programs Effectiveness in Serving Employers Performance Indicator

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Final rule.

SUMMARY: The Workforce Innovation and Opportunity Act (WIOA) establishes six primary indicators of performance for certain WIOA-authorized programs and defines five of the six performance indicators. The U.S. Departments of Labor and Education (the Departments) published a final rule under RIN 1205–AC01 to define the sixth performance indicator—effectiveness in serving employers—as Retention with Same Employer into the implementing regulations for the six WIOA core programs. In this related final rule, the Department of Labor (DOL or the Department) is incorporating the same definition of the ESE performance indicator into regulations for the following WIOA title I non-core programs: the Indian and Native American (INA), the Job Corps, and the YouthBuild program. This final rule makes two changes from the notice of proposed rulemaking (NPRM) for the WIOA title I non-core programs: the final rule permits the use of supplemental wage information in the definition of the effectiveness in serving employers performance indicator, and it specifies that the definition is measuring retention in unsubsidized employment.

DATES: This final rule is effective March 25, 2024.

FOR FURTHER INFORMATION CONTACT: Michelle Paczynski, Administrator, Office of Policy Development and Research, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue NW, Room N–5641, Washington, DC 20210, Telephone: 202–693–3700 (voice) (this is not a toll-free number), 1–877–872–5627, or 1–800–326–2577 (telecommunications device for the deaf).

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

Acronyms and Abbreviations

AEFLA Adult Education and Family Literacy Act
AJC American Job Center
CFR Code of Federal Regulations
Departments U.S. Departments of Labor and Education
DOL *or* Department U.S. Department of Labor
E.O. Executive Order
ES Employment Service
ETA Employment and Training Administration
FR Federal Register
GPMS Grantee Performance Management System
ICR Information Collection Request
INA Indian and Native American
MSFW migrant and seasonal farmworker
NAETC Native American Employment and Training Council
NFJP National Farmworker Jobs Program
NPRM *or* proposed rule notice of proposed rulemaking
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
PIRL Participant Individual Record Layout
PRA Paperwork Reduction Act of 1995
Pub. L. Public Law

PY Program Year
REO Reentry Employment Opportunities
RFA Regulatory Flexibility Act
RIA Regulatory impact analysis
RIN Regulation Identifier Number
Stat. United States Statutes at Large
UI unemployment insurance
UMRA Unfunded Mandates Reform Act
U.S.C. United States Code
TEGL Training and Employment Guidance Letter
VR Vocational Rehabilitation
WIOA Workforce Innovation and Opportunity Act
WIPS Workforce Integrated Performance System

I. Background and Rulemaking Authority

A. WIOA Background

President Barack Obama signed WIOA into law on July 22, 2014. WIOA superseded the Workforce Investment Act of 1998 and amended the Wagner-Peyser Act and the Rehabilitation Act of 1973. In WIOA sec. 503(f), Congress directed the Department to issue regulations implementing statutory requirements to ensure that the public workforce system operates as a comprehensive, integrated, and streamlined system to provide pathways to prosperity and continuously improve the quality and performance of its services to job seekers and employers. Additionally, WIOA sec. 189(a) permits the Secretary of Labor to prescribe rules and regulations to carry out title I of WIOA.

The law includes a common performance accountability system, consisting of six statutory primary indicators of performance, applicable to all WIOA core programs: adult, dislocated worker, and youth programs under title I of WIOA; the Adult Education and Family Literacy Act (AEFLA) program under title II; the Employment Service (ES) program authorized under the Wagner-Peyser Act as amended by WIOA title III; and the Vocational Rehabilitation (VR) program authorized under title I of the Rehabilitation Act as amended by WIOA title IV. WIOA also requires that the six statutory primary indicators of performance apply to four WIOA title I, DOL-administered non-core programs: INA programs (WIOA sec. 166(e)(5)), the NFJP (WIOA sec. 167(c)(2)(C)), Job Corps (WIOA sec. 159(c)(1)), and YouthBuild (WIOA sec. 171(f)(1)) (hereinafter ''title I non-core programs'').

Although not mandated by WIOA, the Department requires several other DOL-administered WIOA title I non-core programs and projects also to report on the WIOA sec. 116 primary indicators of performance. For example, the Department requires Reentry Employment Opportunities (REO) grants (authorized under WIOA sec.169 and annual appropriation acts) to report on the sec. 116 primary indicators of performance. The Department anticipates applying the definition of the effectiveness in serving employers performance indicator adopted in this final rule to those programs.

In WIOA, Congress directed the Department to issue regulations implementing statutory requirements to ensure that the public workforce system operates as a comprehensive, integrated, and streamlined system in order to provide pathways to prosperity and continuously improve the quality and performance of its services to job seekers and employers. On August 19, 2016, the Department issued the *Workforce Innovation and Opportunity Act; Final Rule* (DOL WIOA Final Rule) to implement WIOA for the title I non-core programs (81 FR 56071). That same day the Departments jointly issued the *Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Final Rule* (Joint WIOA Final Rule) to implement WIOA for the six core programs (81 FR 55791).

The WIOA statute defines five of the six performance indicators. However, the statute did not specify how the sixth performance indicator, effectiveness in serving employers, should be measured. Instead, WIOA directed the Departments to develop a definition for the effectiveness in serving employers performance indicator (WIOA sec. 116(b)(2)(A)(iv)).[1] At that time, the Departments concluded that there was not enough evidence of what should be measured to assess the effectiveness in serving employers to adopt a standard definition. Therefore, in the Joint WIOA Final Rule, the Departments determined that it was prudent to pilot three definitions for the sixth performance indicator to test the feasibility and rigor of three approaches to measure a State's effectiveness in serving employers through its WIOA-authorized core programs. As discussed more fully below, during the pilot period, the Department, through guidance[2] and the ''DOL-Only Performance Accountability, Information, and Reporting System'' Information Collection Request (ICR), approved under Office of Management and Budget (OMB) Control Number 1205–0521, required the WIOA title I non-core programs to report on Retention with the Same Employer, one of the three definitions being piloted by the six WIOA core programs.

That pilot, as well as a study of the results from the pilot, are now complete. The definition in this final rule applies to both WIOA core programs—which are addressed in the concurrently published *Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator; Joint Final Rule* (RIN 1205–AC01) (hereinafter referred to as Joint WIOA Effectiveness in Serving Employers Final Rule)—as well as the four title I non-core programs, which are addressed in this final rule.

WIOA secs. 159(c)(1) (Job Corps), 166(e)(5) (INA), 167(c)(2)(C) (NFJP), and 171(f)(1) (YouthBuild) specify that performance for these title I non-core programs must be assessed using the primary indicators of performance in sec. 116 of WIOA. On September 14, 2022, the Departments published a joint NPRM in which the Departments proposed to codify the approach for evaluating a WIOA core program's effectiveness in serving employers (87 FR 56318) (Joint WIOA Effectiveness in Serving Employers NPRM). On the same day, DOL published an NPRM in which the Department proposed to codify the approach for evaluating a WIOA title I non-core program's effectiveness in serving employers (87 FR 56340) (hereinafter referred to as the NPRM).

B. Summary of Changes From NPRM to Final Rule of the Effectiveness in Serving Employers Performance Indicator for WIOA Non-Core Programs

This final rule implements Retention with the Same Employer as the definition for effectiveness in serving employers for WIOA title I non-core programs, as proposed in the NPRM, with two changes from the NPRM made in response to comments received on the Joint WIOA Effectiveness in Serving

[1] Section 116(b)(2)(A)(i) of WIOA states the primary indicators of performance: (1) the percentage of participants who are employed during the second and (2) fourth quarters after exit from the program, (3) the median earnings of participants who are employed during the second quarter after exit, (4) the percentage of participants who obtain a recognized postsecondary credential during the program or within 1 year of exit, (5) the percentage of participants who achieve measurable skill gains during a program year, and (6) ''indicators of effectiveness in serving employers.'' This last indicator is the subject of this final rule. Definitions of the others were included in the WIOA regulations promulgated in August 2016 (81 FR 55791; see 20 CFR 677.155, 34 CFR 361.155, 34 CFR 463.155).

[2] ETA, TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611.*

Employers NPRM, which were also relevant to the NPRM.

Specifically, in the Joint WIOA Effectiveness in Serving Employers Final Rule the Departments determined that supplemental wage information plays a vital role when wage records are either unavailable for a participant or difficult to obtain. For this reason, the Departments revised § 677.155(a)(1)(vi) and (c)(6) in the Joint WIOA Effectiveness in Serving Employers Final Rule to remove the requirement that wage records be used to document a participant's employment status for purposes of the effectiveness in serving employers performance indicator, thereby allowing for the use of supplemental wage data. Second, the Joint WIOA Effectiveness in Serving Employers Final Rule definition for effectiveness in serving employers adds the requirement that the participant must have been in ''unsubsidized employment'' in the second and fourth quarters after exit. The reasons for changing the Joint WIOA Effectiveness in Serving Employers Final Rule text also apply to the WIOA title I non-core programs. Therefore, the changes to the § 677.155 regulatory text have been carried over to this final rule at revised § 684.460(a)(6) for INA Youth, revised § 684.620(a)(6) for INA, revised § 686.1010(f) for Job Corps, and revised § 688.400(f) for YouthBuild.

C. Effectiveness in Serving Employers Performance Indicator Approaches for WIOA Core Programs, as Relevant to WIOA Title I Non-Core Programs

Section 677.155 sets forth the primary indicators by which the performance of core programs is evaluated, as required by WIOA sec. 116(b)(2)(A)(i). These primary indicators of performance apply to the core programs described in WIOA sec. 116(b)(3)(A)(ii), as well as to the title I non-core programs. These primary indicators of performance create a common language shared across the programs' performance metrics, support system alignment, enhance programmatic decision making, and help participants make informed decisions related to training. Sections 116(b)(2)(A)(i)(VI) and (b)(2)(A)(iv) of WIOA require the Secretaries of Labor and Education to jointly develop and establish the sixth performance indicator—effectiveness in serving employers—after consultation with representatives of State and local governments, business and industry, and other interested parties.

In the Joint WIOA Effectiveness in Serving Employers NPRM, the Departments proposed to define the effectiveness in serving employers performance indicator in § 677.155(a)(1)(vi) as the percentage of participants with wage records who exited a program and were employed by the same employer in the second and fourth quarters after exit and specified that this is a statewide indicator reported by one core program on behalf of all six core programs in the State. In the NPRM, the Department proposed this same language for the WIOA title I non-core programs; however, as proposed in the NPRM, the statewide aspect of the proposed definition in the Joint WIOA Effectiveness in Serving Employers NPRM would not apply to WIOA title I non-core programs. The Department sought comment on how the proposed definition of effectiveness in serving employers performance indicator would impact the WIOA title I non-core programs.

Prior to selecting this single approach to propose, the Departments selected three approaches for measuring effectiveness in serving employers to be piloted by WIOA core programs. The Departments assessed the use of each of the three approaches with a focus on minimizing employer burden and using information that would provide an accurate picture of how well the public workforce system serves employers.

Under the guidance of the Departments,[3] each State piloted its choice of any two of three definitions for the effectiveness in serving employers performance indicator for WIOA core programs: (1) *Retention with the Same Employer:* Percentage of participants with wage records who exited from WIOA core programs and were employed by the same employer in the second and fourth quarters after exit; (2) *Repeat Business Customer:* Percentage of employers who have used WIOA core program services more than once during the last three reporting periods; and (3) *Employer Penetration:* Percentage of employers using WIOA core program services out of all employers in the State.

The Departments assessed the pilot through a DOL contract that resulted in a final report titled *Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act* (Final Pilot Study Report).[4] Specifically, the study assessed each approach to defining the effectiveness in serving employers performance indicator for validity, reliability, practicality, and unintended consequences.[5] Though the study did not definitively recommend one approach, in assessing the study's findings for each of the three approaches of the effectiveness in serving employers performance indicator, the Departments concluded that the Retention with the Same Employer approach provides a valid and reliable approach to measuring the indicator, while also placing the least amount of burden on States to implement.

D. Effectiveness in Serving Employers Performance Indicator for WIOA Title I Non-Core Programs

Although the four WIOA title I non-core programs discussed in this rule—Job Corps, INA, NFJP, and YouthBuild—did not participate in the core program pilot, these title I non-core program fund recipients (*i.e.,* Job Corps contractors and INA, NFJP, and YouthBuild grantees) have been required to report on Retention with the Same Employer since 2019, following the issuance of Training and Employment Guidance Letter (TEGL) No. 14–18 on March 25, 2019.[6] In TEGL No. 14–18, the Department

[3] This joint guidance, ''Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs,'' was concurrently issued on December 19, 2016, as TEGL No. 10–16 by the Department of Labor, and as Office of Career, Technical, and Adult Education Program Memorandum 17–2 and Rehabilitation Services Administration Technical Assistance Circular (TAC) TAC–17–01 by the Department of Education.

[4] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf* (hereinafter ''Final Pilot Study Report'').

[5] See id. at 3–6 (stating that validity ''is used to assess whether you are measuring what you intend to measure''; that reliability ''refers to the ability to maintain consistency in data collection over time and across the organizations collecting the data''; that practicality means that the measure ''must be relatively uncomplicated and simple to administer to avoid threats to reliability and validity'' and ''must be practical to use in administrating programs''; and that unintended consequences are ''negative consequences or behaviors that result . . . such as the displacement of other goals or conflict between goals'').

[6] See Joint WIOA Final Rule, 81 FR 55791, 55845–55846 (discussing the pilot and the three proposed definitions for the effectiveness in serving employers performance indicator); ETA, TEGL No. 10–16, ''Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs,'' Dec. 19, 2016, *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8226;* ETA, TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611* (referring the title I non-core programs to TEGL No. 10–16 for a description of the pilot).

implemented WIOA's performance reporting requirements by requiring the title I non-core programs to use the Retention with the Same Employer definition of the effectiveness in serving employers performance indicator.

Under this final rule, the WIOA title I non-core programs will be subject to the same data collection and reporting requirements as they have been under TEGL No. 14–18. The TEGL specified that, starting in Program Year (PY) 2018 (or the point at which wage matching data becomes available to the program), the Job Corps, INA, NFJP, and YouthBuild programs were to begin tracking the effectiveness in serving employers performance indicator using the Retention with the Same Employer definition.

Consistent with related guidance issued in PYs 2016, 2017, and 2018,[7] these programs were required to use the Workforce Integrated Performance System (WIPS), the online performance reporting system for the Department's employment and training grants,[8] to submit information that would be used for calculating the effectiveness in serving employers performance indicator.[9] These requirements are all included in an existing information collection, the WIOA Participant Individual Record Layout (PIRL) (ETA 9172), in the ''DOL-Only Performance Accountability, Information, and Reporting System'' ICR, approved under OMB Control Number 1205–0521.

By codifying the use of Retention with the Same Employer for this indicator, this final rule requires programs to use already-collected data and the existing performance reporting system, WIPS. Thus, programs will not have additional burden to collect and report on any other type of additional data to calculate and report results for other possible approaches to defining this performance indicator.

Finally, TEGL No. 14–18 also put forth program-specific timelines for implementation of the WIOA reporting requirements factoring in data lags associated with the performance indicator as well as known implementation actions such as case management system development, which are further detailed in each program-specific section in the section-by-section discussion of the final rule below (Section II).

In summary, for the Job Corps, INA, and YouthBuild programs, this final rule codifies in regulation the existing practice of reporting Retention with the Same Employer in order to measure a program's effectiveness in serving employers and adds the option for WIOA title I grantees and Job Corps contractors to choose to provide supplemental wage information on the measure. The Department will use this same definition for the effectiveness in serving employers performance indicator for the NFJP program. Existing guidance in Appendix VI of TEGL No. 14–18 addresses the use of supplemental wage information for WIOA core performance indicators, so the use of supplemental wage information will not be new to the regulated community. The Department intends to issue updated guidance regarding use of supplemental wage information specifically for the effectiveness in serving employers performance indicator for these programs.

In the NPRM, the Department solicited comments to better inform implementation of the effectiveness in serving employers performance indicator for these programs, particularly challenges that they might face in implementing this proposed definition of the effectiveness in serving employers performance indicator; challenges they have faced under TEGL No. 14–18; and other definitions that might be more suitable.

E. Public Comments Received on the Proposed Rule

The NPRM invited written comments from the public concerning the proposed rule through November 14, 2022. No commenters requested an extension of the comment period. The comments received may be viewed by entering docket number ETA–2022–0005 at *https://www.regulations.gov.*

The Department received 18 comments in the docket for this rulemaking. Of these 18 comments, 10 were unique, 6 were form letter copies, 1 was a duplicate, and 1 was outside the scope of the proposed rule. Public sector commenters included State and local government agencies and one-stop operators. Non-profit sector commenters included professional associations and career or employment services providers. The Department also received comments from anonymous commenters.

This section of the final rule provides a general overview of the comments received. Section II (Section-by-Section Discussion of this Final Rule) describes the comments in more detail and provides the Department's responses to them.

Some commenters expressed overall concerns about and opposed the proposed Retention with the Same Employer definition of the effectiveness in serving employers performance indicator. Other commenters suggested that the Department consider other potential approaches for defining the effectiveness in serving employers performance indicator. The Department's responses to concerns about Retention with the Same Employer definition and suggestions for alternative are discussed below in Section II.A.

With regard to impact or concerns about the four specific WIOA title I non-core programs subject to this rule, the Department received a total of three comments. The Department did not receive any comments on the impacts of the proposed Retention with the Same Employer effectiveness in serving employers definition on three of the four programs: NFJP, Job Corps, or YouthBuild programs. The proposed regulatory changes for the INA programs received one comment submission that expressed concerns about reporting burden for INA programs under the proposed rule and requested that the Department consult with the WIOA sec. 166 programs, the Native American Employment and Training Council (NAETC), and Tribal officials to develop and establish the effectiveness in serving employers performance indicator. Another commenter discussed the impact of the proposed rule on non-core WIOA programs providing employment services to two specific target demographics: justice-involved individuals and older workers. The Department's responses to the INA-related comments are discussed below in Section II.B and responses to comments for programs serving justice-

[7] ETA, Training and Employment Notice (TEN) No. 08–16, ''Implementation of an Integrated Performance Reporting System for Multiple Employment and Training Administration (ETA) and Veterans' Employment and Training Service (VETS) Administered Programs,'' Aug. 24, 2016, *https://wdr.doleta.gov/directives/attach/TEN/TEN_08-16.pdf;* ETA, TEN No. 40–16, ''Workforce Integrated Performance System (WIPS) User Resource Library Information Page,'' Apr. 11, 2017, *https://wdr.doleta.gov/directives/attach/TEN/TEN_40-16_Acc.pdf.;* ETA, TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611.*

[8] ETA, ''Workforce Integrated Performance System (WIPS),'' *https://www.dol.gov/agencies/eta/performance/wips* (last visited October 30, 2023).

[9] Specifically, the programs are required to report the Social Security Number (SSN) from the relevant participants who chose to disclose their SSN in order to obtain an unemployment insurance (UI) wage record match or may use available supplemental wage information, as directed in program-specific guidance. These data are used to identify whether a program participant's employer is the same in the second and fourth quarters after exit from the program.

involved individuals and older workers are discussed below, in Section II.F.

II. Section-by-Section Discussion of This Final Rule

Section II of this final rule provides the Department's responses to comments and explains the two changes in the final rule from the proposed rule. Section II.A discusses comments received on the proposed definition for and implementation of the effectiveness in serving employers performance indicator for the WIOA title I non-core programs. Sections II.B, II.C, II.D, and II.E address comments received on the proposed changes to ETA's INA program regulations (20 CFR part 684), NFJP regulations (20 CFR part 685), Job Corps program regulations (20 CFR part 686), and YouthBuild program regulations (20 CFR part 688) to adopt Retention with the Same Employer as the definition for the effectiveness in serving employers performance indicator, respectively. Section II.F discusses comments received relating to impacts that this final rule could have on other non-core WIOA programs for which the Department has applied the WIOA sec. 116 primary indicators of performance.

A. Comments Received on the Effectiveness in Serving Employers Performance Indicator, as Relevant to WIOA Title I Non-Core Programs

Support for Retention With the Same Employer Definition

Comments: Expressing support for Retention with the Same Employer, one commenter argued that Retention with the Same Employer is easy to administer and consistent across WIOA programs. Similarly, another commenter stated that it would be the least burdensome of the WIOA core programs' three piloted approaches to administer.

Department Response: We appreciate commenters supporting Retention with the Same Employer as the definition for effectiveness in serving employers. We agree that this definition best aligns with WIOA employment performance indicators by using existing PIRL terms and data elements (*i.e.,* use of ''participants,'' ''unsubsidized employment,'' and ''exit'') and measuring the same quarters as the employment rate indicators (*i.e.,* the second and fourth quarters after program exit). Additionally, we agree that Retention with the Same Employer is the least burdensome definition of the WIOA core programs' three piloted measures, effectively illustrates the workforce system's ability to serve employers by reducing new employee turnover, and minimizes the burden on WIOA title I non-core grantees and Job Corps contractors and employers in measuring effectiveness in serving employers.

Retention With the Same Employer and Job Seeker/Worker Mobility

Comments: One commenter expressed concern that the Retention with the Same Employer measure could limit job seekers' ability to move from low-wage jobs into higher wage jobs. Another commenter stated that measuring success through Retention with the Same Employer is contrary to American Job Center (AJC) practice and DOL guidance encouraging job seekers to work to gain skills and experience that allow them to move to higher paying jobs. A third commenter also opposed the proposed definition, stating that service providers do not play a significant role in how long a participant decides to stay with the same employer. Another commenter stated that high housing costs and inflation have caused many workers to move and change employers, and Retention with the Same Employer is a particularly undesirable measure in States where many workers are transient.

Department Response: In the NPRM, the Department acknowledged that the limitations for Retention with the Same Employer could include the unintended consequences that this approach may be at odds with an employee seeking a higher paying job or employment benefits, and the possibility that the performance outcome for this indicator might not be the result of an employer receiving a service from the workforce development system. The Department agrees that many circumstances affect an employer's retention of employees, some of which may be outside the purview of WIOA services, including the general economy and business landscape of an area, which may include seasonal employers, transient worker populations, or industries with cyclical work cycles that could impact calculated retention rates. However, the Department determined that Retention with the Same Employer is the preferred approach of measuring effectiveness in serving employers, due to the prioritization of and weight placed on the advantages of Retention with the Same Employer: stable data collection mechanism, alignment with other employment performance indicators, and demonstrating maintained relationships between employers and employees. For these reasons, the Department defines effectiveness in serving employers for WIOA title I non-core programs using Retention with the Same Employer in this final rule.

The Department notes that individuals who move to a new job with the same employer would be considered a successfully retained participant under this indicator because the indicator measures retention ''with the same employer'' in the second and fourth quarters; there is no requirement the participant remain in the same employment status (*e.g.,* full-time vs. part-time) or position with the employer to count as a positive outcome. The Department also notes that the employer that will be measured for purposes of this indicator for this particular participant is not always the same employer that received services from a WIOA title I non-core program and initially hired the participant.

The Department acknowledges that individuals may leave for higher wages with a new employer, but WIOA title I non-core grantees and program operators can seek to address these concerns in a variety of ways that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer. Despite these concerns, the Department is adopting the Retention with the Same Employer definition of the indicator for multiple reasons, specifically because it: is the least burdensome since it uses data elements reported by WIOA title I non-core grantees and Job Corps contractors for other performance indicators; has a stable data collection mechanism in that the requisite data are already reported via an OMB-approved information collection request; aligns with other employment performance indicators in that it uses similar terminology and data elements; and demonstrates maintained relationships between employers and employees, thereby demonstrating that the services provided by the WIOA programs not only meet the long-term needs of the participants but also the needs of employers in each State. The Department gives particular weight to reporting burden, especially for the competitive grantees with generally less reporting capacity than States, in order to allow WIOA title I non-core grantees and Job Corps contractors to focus on services and improve the accuracy and completeness of the data.

Retention With the Same Employer and Other Aspects of Effectiveness in Serving Employers

Comments: One commenter asserted that Retention with the Same Employer has no mechanism for linking the retention of a particular employee with instances of employer services being provided, therefore only indirectly reflecting effectiveness in serving employers and failing to inform strategic action to improve performance.

Another commenter noted Retention with the Same Employer does not speak to ''acuity'' of a job placement (*e.g.,* how difficult a position was to fill, how in demand the position is, whether the role was seasonal specific and not intended to maintain retention, rarity of skill set, or time to hire).

One commenter asserted that the proposed measure is not a good indicator of WIOA program performance because it is significantly impacted by employers' choices as to wages, working conditions, and workplace culture, over which WIOA programs have little control.

Another commenter expressed concern that Retention with the Same Employer would not capture all services provided to employers by workforce systems; in particular, services to employers that are not attached to WIOA-funded job seekers.

Department Response: The Department recognizes that there are many factors beyond the control of the programs that can impact a participant's retention with the same employer. However, as noted previously, the Department has determined that an indication that an employee maintains employment with the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for employers (*i.e.,* successfully preparing participants to fill jobs that meet employers' needs), as well as a success for WIOA service providers in matching the employer with the job seeker.

Regarding the commenter's concern that it would be inappropriate to only measure success for WIOA-enrolled customers, the Department notes that the services delivered by WIOA-funded program operators routinely benefit the broader employer community by increasing basic skills of the candidate pool, enhancing free job posting and search tools, and preparing workplaces and job seekers with disabilities for successful employment. Program participants who receive services that successfully prepare them to fill jobs that meet employers' needs benefit all the employers in the local economy, regardless of whether a specific employer directly received services from a grantee. Therefore, the Department has determined that excluding employers that have not received a service from a grantee under a non-core program or a Job Corps contractor within the reporting period is not an appropriate holistic measure of the workforce system's impact on Retention with the Same Employer.

In fact, such an approach would be contrary to the purpose of the performance measure itself. For example, it would be possible for a participant to obtain employment as a result of services received under a WIOA title I non-core program, but change jobs within the first quarter after exiting the program to a new job where the participant remained for at least a year. In this final rule, the Department defines the effectiveness in serving employers performance indicator as the participant's Retention with the Same Employer in the second and fourth quarters after exiting the program. In other words, in this example, the employer that will be measured for purposes of this indicator for this particular participant is not the same employer that received services from a WIOA title I non-core program and initially hired the participant. Regarding concerns that the Retention with the Same Employer indicator does not measure the acuity of the WIOA participant's job placement, the Department acknowledges that this metric is one of many aspects of effectiveness in serving employers but believes that retention is an important aspect to measure as stated by employer representatives during stakeholder engagements. The Department encourages grantees and contractors under WIOA title I non-core programs to also measure effectiveness in serving employers using other methods for their own program management purposes, though these other methods are not required to be reviewed or submitted to the Department.

Regarding whether the proposed indicator measures all aspects of effectiveness in serving employers, the Department believes there are many aspects to a program's effectiveness in serving employers, some of which are very difficult to quantify and report. Therefore, the Department chose one aspect of effectiveness that employers stated would be beneficial and can be measured across WIOA core programs and title I non-core programs with minimal burden to employers—employee retention.

Retention With the Same Employer Is Not a Good Fit for Certain Sectors

Comments: A commenter argued that Retention with the Same Employer would be particularly problematic for seasonal employment in agriculture, hospitality, and construction. This commenter urged the Department to modify the statistical adjustment model to account for fluctuations in the seasonal workforce.

Department Response: In cases of temporary seasonal work, WIOA title I non-core grantees and Job Corps contractors should strive to place participants into long-term employment opportunities when possible. While a seasonal employee may not be a positive outcome in the indicator, the Department understands this concern and does not expect grantees and Job Corps contactors to achieve a 100 percent positive outcome. The Department will take these factors into account when analyzing a grantee's performance on this indicator. For example, the Department could exercise its discretion when establishing performance goals to set feasible targets for the grantee to meet taking into account that programs that have high placement in seasonal employment might have a lower retention rate than other programs. Furthermore, for the INA and NFJP programs, the WIOA statute requires the Department to use a statistical adjustment model, when practicable. When the Department uses a statistical adjustment model for establishing effectiveness in serving employers indicator targets for WIOA title I non-core programs, the Department anticipates that the statistical adjustment model will adjust for these issues.

Performance Goals for Retention With the Same Employer

Comment: One commenter asserted that, while the proposed measure might be the least burdensome of the piloted measures, meeting performance goals under it would be challenging and negate any cost savings.

Department Response: The Department recognizes that drawbacks to this definition exist for the WIOA title I non-core programs, especially due to the unique nature of each of these programs. Nevertheless, the Department believes that the benefits of this approach outweigh those drawbacks. As explained above, the benefits of this definition are that Retention with the Same Employer will be straightforward to implement because the measure uses already-collected data and the existing performance reporting system, thereby avoiding any additional burden. Moreover, the Department intends to mitigate any drawbacks, if necessary, by exercising its discretion, to establish appropriate performance goals and place appropriate weight on the effectiveness in serving employers performance indicator. WIOA title I non-core programs that serve youth, for example, focus on employment, career readiness, retention in education, and life skills to support youth participants in obtaining academic and career skills necessary to be successful in the job market, and success for youth is more likely to include progression in jobs. Recognizing the unique circumstances WIOA title I non-core programs may face, the Department expects variability in the reported outcomes from program to program, especially for programs serving youth, and intends to take this variability into account when negotiating levels of performance. These considerations are consistent with TEGL No. 14–18 guidance for applicability of primary performance indicators, which specifies that, as a general matter, participants' outcomes on the applicable primary indicators of performance may be relevant for negotiating levels of performance, decisions related to contract awards and renewal, and the award of competitive grants.[10]

Other Approaches To Measuring Effectiveness in Serving Employers

Comments: One commenter opposed to the proposed Retention with the Same Employer definition and stated that the other piloted measures for the WIOA core programs more directly relate to WIOA employer services delivered. The commenter stated that the Repeat Business Customer measure would reflect the employer's perception or experience of the quality of services received and that the Employer Penetration measure would represent the level of impact of employer services in a State. Another commenter remarked that Retention with the Same Employer was the least selected approach among the piloted measures for the WIOA core programs.

Another commenter recommended that the Department review other methods of assessing effectiveness in serving employers, including: measuring the use of incumbent worker training to serve local businesses, scored based on the overall percentage of WIOA funds used and the number of businesses served. Another commenter recommended that effectiveness in serving employers should positively count any individual who is employed in the fourth quarter after exit and who has improved either their wages, benefits, or working conditions since the second quarter after exit, rather than only those with the same employer. Another commenter asserted that the proposed rule does not establish an objective standard for measuring effectiveness in serving employers, and suggested that the measure could address timeliness, professionalism, or English proficiency.

Department Response: The Department appreciates these suggestions and acknowledges the potential benefits of the different proposed approaches for measuring the effectiveness in serving employers indicator, however the Department does not think that these metrics apply well to the WIOA title I non-core programs due to differences in program design. Additionally, the Department considered the possibility of implementing more than one metric for measuring effectiveness in serving employers. However, the Department determined a single indicator approach is most logistically feasible due to its alignment with the existing performance indicator structure (*i.e.,* the performance indicators for employment in the second and fourth quarters after exit, which are existing performance indicators on which all programs already report) and its reporting burden to WIOA title I non-core program grantees and contractors and employers relative to the other definitions piloted by the core programs.

The suggested alternative approaches mentioned in the comments, such as Employer Penetration and Repeat Business Customer, were ultimately not selected as the definition for the effectiveness in serving employer performance indicator due to: (1) the nature of a very low employer penetration rate compared to all businesses within a State, leading to difficulties in improving the measure over time; and (2) the fact that a satisfied business may not need to partner with the State workforce system again. Additionally, these alternative measures are not based on existing standardized reporting mechanisms and would be impractical to apply to all grantees across WIOA core programs and WIOA title I non-core programs.

Regarding the commenter's observation that the fewest number of States selected Retention with the Same Employer measure for the WIOA core program pilot and the commenter's interpretation that this lowest adoption rate indicates that States did not think it was a useful measure for the WIOA core program, the Department did not inquire why States chose certain measures during the pilot period and notes that there is no evidence that a lower adoption rate correlates with a lack of usefulness in measuring effectiveness in serving employers in the State . The Department notes that Retention with the Same Employer was the easiest measure for States to implement for the WIOA core programs based on it being calculated from existing PIRL elements. Therefore, it is plausible that fewer States chose to pilot this measure for WIOA core programs because they already knew how to calculate this measure and would not have needed to test how to implement it in their State. They may have wanted to assess how the two other pilot measures would work for WIOA core programs.

The Department appreciates the commenters' ideas for additional data points to be collected and encourages WIOA title I non-core program grantees and Job Corps contractors to do so where it aids in guiding service delivery policies. Specifically, a commenter recommended including collecting and reporting data on: the number of job orders posted and number of candidates referred per posting; use of incumbent worker training (by percentage of WIOA funds used and number of businesses served); number, array, and availability of business services offered by a workforce development board or AJC; funding passed from workforce development boards or AJCs through to local businesses; or number of businesses engaged with Registered Apprenticeship opportunities through workforce development boards or AJCs. The Department declines to use these additional data points in defining the effectiveness in serving employers indicator because they are not applicable to all of the WIOA title I non-core programs and would, therefore, not further the goal of consistent performance measurement across all WIOA programs. In cases where the metric is a count of services, these suggested data collection points would merely measure the quantity of services provided to employers rather than the effectiveness of those services rather than quality or effectiveness. The Department believes these suggestions would measure outputs compared to an outcome. In most cases, an output like the number of services provided may not correlate to the ultimate goal, placing and retaining quality employees

[10] ETA, TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' p. 8, Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611.*

in this case, and therefore is not ideal for measuring effectiveness in serving employers.

Regarding suggestions that the measure could address timeliness, professionalism, or English proficiency of participants, the Department has considered these approaches, but rejects them and declines to make revisions. These types of factors are subjective, not easily measurable, and may require the use of surveys. The Department notes that employer satisfaction surveys introduce a higher level of burden and potentially inconsistent results compared to the Retention with the Same Employer metric. Furthermore, during previous webinars and town halls with State workforce agencies, members of the employer community, and other stakeholders that the Departments held in September and October 2014 to inform the development of the Joint WIOA NPRM (80 FR 20609) and the Joint WIOA Final Rule (81 FR 55848), employers specifically commented that they consider satisfaction surveys burdensome and recommended they not be used in this indicator.

After careful consideration of public comment opportunities, ongoing stakeholder engagement efforts,[11] review of WIOA core program pilot data and narrative input submitted since 2017 through required annual performance reports for WIOA core programs,[12] and a third-party study, the Department is not persuaded to change course and adopt either of the other alternative definitions for the effectiveness in serving employers performance indicator for the WIOA title I non-core programs. Instead, as discussed above, the Department concluded that the Retention with the Same Employer approach provided a valid and reliable approach to measuring the indicator while placing the least amount of burden on WIOA title I non-core program grantees and Job Corps contractors to implement.

Data Sources for Retention With Same Employer

Comment: One commenter stated that workforce programs may not receive hiring outcome information and may be unable to report data for performance measures. The commenter also expressed concern that wage records are not readily available for Federal, military, and self-employment, which could significantly impact the reported performance of States with high proportions of such employment.

Department Response: The Department proposed that the effectiveness in serving employers indicator only include participants whose employment status is obtainable through wage records because wage records are the least burdensome records to use and they are the most standardized and statistically valid records available. Most employers are covered through unemployment insurance (UI) wage records and, therefore, wage records remain the most accurate and least burdensome method of calculating this indicator.

However, the Department acknowledges that certain categories of employment, such as entrepreneurial employment, Federal employment, employment with the U.S. Postal Service and the military, and farmwork, are not reflected in State UI wage record databases. Additionally, participants are not required to provide Social Security numbers, which are needed to use wage records, to obtain services and some participants may be reluctant to share this information.

To ensure that effectiveness in serving these additional employers is assessed, the Department concurs with commenters that the Retention with the Same Employer measure should be expanded to include the number of participants with wage records or supplemental wage information who exit during the reporting period and were employed by the same employer during the second quarter after exit and the fourth quarter after exit divided by the number of participants with wage records or supplemental wage information who exit and were employed during the second quarter after exit. Organizations collecting supplemental wage information for the purposes of calculating Retention with the Same Employer must be able to ascertain that the participant's wage information reflects the same establishment (which may include tax documents, payroll records, employer records, and follow-up surveys from program participants) in both the second and fourth quarters after exit.

The Department agrees that supplemental wage information could play a vital role when wage records are either unavailable for a participant or difficult to obtain. For this reason, we have revised proposed §§ 684.460(a)(6), 684.620(a)(6), 686.1010(f), and 688.400(f) to remove the requirement that wage records be used to document a participant's employment status for purposes of the effectiveness in serving employers performance indicator. This change allows for the effectiveness in serving employers indicator to include the same data sources as other employment-based primary indicators of performance, including supplemental wage information.

As noted above, the Department also wants to make clear the final rule uses the term ''unsubsidized employment'' to align the effectiveness in serving employers performance indicator to WIOA statutory language, specifically referring to unsubsidized employment in the second and fourth quarters after exit, which are key inputs to this indicator's definition of Retention with the Same Employer. These changes to the § 677.155 regulatory text for WIOA core programs have been carried over to this final rule at revised § 684.460(a)(6) for INA Youth, revised § 684.620(a)(6) for INA, revised § 686.1010(f) for Job Corps, and revised § 688.400(f) for YouthBuild, where the regulatory text changes were intended to align with the § 677.155 WIOA core programs definition of the effectiveness in serving employers performance indicator.

B. Part 684—Indian and Native American Programs

Part 684 governs the INA programs authorized under WIOA sec. 166, including programs for Native American youth (INA Supplemental Youth Services). The INA programs are intended to support employment and training activities for INA program participants in order to develop more fully academic, occupational, and literacy skills and to serve unemployed and low-income Indian and Native American populations seeking to achieve economic self-sufficiency consistent with the goals and values of the particular communities. Where active, INA programs are required one-stop center partners. The Department administers these programs to maximize Federal commitment to support the growth and development of INAs and their communities as determined by representatives of such communities while meeting the applicable statutory and regulatory requirements.

[11] ETA's WorkforceGPS technical assistance website provides access to materials from trainings and stakeholder engagements, including: (1) the Effectiveness in Serving Employers Resource Page accessible at *https://performancereporting.workforcegps.org/resources/2018/01/29/21/13/Effectiveness-in-Serving-Employers-Resource-Page;* (2) the 2019 Performance Accountability Training accessible at *https://performancereporting.workforcegps.org/resources/2019/10/03/20/25/WIOA_2019_Performance_Accountability_Training;* and (3) the January 2020 Peer Learning Group event accessible at *https://www.workforcegps.org/events/2020/01/13/17/40/WIOA-Performance-Peer-Learning-Group-Effectiveness-in-Serving-Employers.*

[12] Annual performance reports can be found on ETA's website. ETA, ''Workforce Performance Results,'' *https://www.dol.gov/agencies/eta/performance/results* (last visited Oct 30, 2023).

WIOA sec. 166(h)(2) requires the Department to reach an agreement with the entities described in WIOA sec. 166(c) as to the levels of performance required for each core indicator, including an effectiveness in serving employers performance indicator. The Department is also required to work with the NAETC to develop a set of performance indicators and standards for the INA adult and youth programs in addition to the primary indicators used to measure performance (WIOA sec. 166(h)(1)(A)).

Section III.F of this document, which pertains to Executive Order (E.O.) 13175 (Indian Tribal Governments), summarizes details from the Department's efforts to engage with INA program grantees and representatives of Tribal entities to explain how the indicator works and receive feedback on concerns INA program grantees may have with the effectiveness in serving employers performance indicator.

In response to the NPRM, the Department received feedback on the proposed use of Retention with the Same Employer as the effectiveness in serving employers performance indicator for INA programs.

Comments: A commenter expressed concern that the proposed rule would increase the reporting burden for the INA programs under WIOA sec. 166 due to the greater complexity of the performance measures used and urged the Department to consider how effectiveness in serving employers performance indicator will be implemented and managed. The commenter suggested that grantees should not be penalized if reported outcomes do not meet established target levels for the effectiveness in serving employers performance indicator, and that the indicator should instead serve only as ''credit for job retention as required by the program.''

The commenter also discussed the regulatory background requiring WIOA sec. 166 programs to be consistent with the self-determined economic and social development goals of the Indian, Alaska Native, and Hawaiian communities served, the Indian Self-Determination and Education Assistance Act, and the government-to-government relationship between the Federal Government and Indian Tribal Governments, and concluded that the effectiveness in serving employers performance measure does not meet the needs of the communities represented and should not be applied to the WIOA INA programs for adult and youth.

Department Response: The Department appreciates concerns about reporting burden and acknowledges the challenges related to reporting for INA program grantees. The Department continues to work to ensure that all INA program grantees have the systems and resources needed to report the information required for this performance indicator. Part of this is accomplished by the Department continuing to conduct UI wage record matching on behalf of grantees for all employment-related performance indicators to mitigate any reporting burdens. Because the final rule adds the option for grantees to provide supplemental wage information, but does not require use of supplemental information, grantees may elect to rely on UI wage record matching as the Department conducts wage matching on behalf of INA grantees. The Department also notes that this final rule is codifying in regulations what is already required of grantees currently in the ''DOL-Only Performance Accountability, Information, and Reporting System'' ICR, approved under OMB Control Number 1205–0521, and therefore grantees should not see an increased burden in reporting on the effectiveness in serving employers indicator.

The Department acknowledges the commenter's concern about the impact of the effectiveness in serving employers indicator on grantee performance reports. The Department intends to exercise its discretion to place appropriate weight on the effectiveness in serving employers performance indicator relative to other indicators of performance in assessing current or past grantee performance. For example, the Department could exercise its discretion when reviewing grantee performance during monitoring in order to take all indicators into consideration including the additional measures described in TEGL No. 04–19, ''Waiver Authority for the INA Program and Implementation of Additional Indicators of Performance,'' discussed further below. The Department could also exercise its discretion when setting criteria in grant competitions, such as limiting the weight the Department places on previous performance of this measure or only considering it alongside the employment goals, economic situation, and unique circumstances of the individuals the grantee serves. Recognizing the unique circumstances WIOA title I non-core programs may face, the Department expects variability in the reported outcomes from program to program, especially for programs serving youth, and intends to take this variability into account when establishing levels of performance. These considerations are consistent with TEGL No. 14–18 guidance for applicability of primary performance indicators, which specifies that, as a general matter, participants' outcomes on the applicable primary indicators of performance may be relevant for establishing levels of performance, decisions related to contract awards and renewal, and the award of competitive grants.[13]

The Department also notes that WIOA sec. 166(i)(3) and the WIOA regulations at 20 CFR part 684, subpart I allow the Department to waive requirements, including performance requirements, that are inconsistent with the specific needs of INA grantees if certain conditions are met. Based on consultation with the NAETC, the Department issued guidance TEGL No. 04–19, ''Waiver Authority for the INA Program and Implementation of Additional Indicators of Performance,''[14] which explains how INA grantees can request waivers of performance indicators. With this final rule and consistent with this waiver guidance, the Department will accept and promptly make determinations on requests submitted by grantees for waivers of performance indicators, including effectiveness in serving employers, so that grantees can structure their performance indicators to best fit the economic circumstances of the communities served and improve positive outcomes.

The Department appreciates the commenter's suggestion to use the effectiveness in serving employers indicator as a ''credit,'' rather than for assessing the performance of the grantee. However, the Department has determined that WIOA sec. 166(h) requires the use of all performance indicators under WIOA sec. 116(b)(2)(A), including the indicator on effectiveness in serving employers at sec. 116(b)(2)(A)(i)(VI), for assessing performance. Moreover, the Department disagrees that using this measure as a ''credit'' is appropriate. The Department recognizes that there are many ways to consider the success of grantees in addition to performance measurement outcomes. The Department gathers qualitative information from grantees in grant competitions and through grant

[13] ETA, TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' p. 8, Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611.*

[14] ETA, TEGL No. 04–19, ''Waiver Authority for the INA Program and Implementation of Additional Indicators of Performance,'' Aug. 29, 2019, *https://wdr.doleta.gov/directives/attach/TEGL/TEGL_4-19_acc.pdf.*

monitoring to consider the totality of grantee performance. Therefore, the Department will not use this indicator as a ''credit.'' The Department notes that WIOA sec. 116(h)(2) requires the Department to reach agreement on the levels of performance with grantees taking into account economic conditions, characteristics of the individuals served, and other appropriate factors. The Department will take these factors into consideration in establishing the anticipated level of performance on this indicator and, as mentioned above, the Department intends to exercise its discretion and apply appropriate weight to the effectiveness in serving employers performance indicator relative to the other primary indicators of performance in assessing current or past grantee performance.

Regarding the commenter's conclusion that performance measures do not meet the needs of the communities represented and should not be applied to the WIOA INA programs for adult and youth, the Department acknowledges the concerns of Tribal communities and their unique needs. The Department notes that WIOA makes provision for the Department to negotiate additional performance indicators and standards taking into account the needs of participants and the economic circumstances of the communities INA program grantees serve. See WIOA sec. 166(h)(1). The Department has negotiated these additional performance indicators which are described in TEGL No. 04–19. INA program grantee performance also is assessed based on these outcomes. Effectiveness in serving employers is not the only metric for assessing INA program grantee performance.

We also note that WIOA requires the performance of these programs to be measured using the WIOA sec. 116 six statutory indicators of performance, including effectiveness in serving employers. Specifically, WIOA sec. 166(h)(2) requires the Secretary to reach agreement on the levels of performance for each of the primary indicators of performance described in WIOA sec. 116(b)(2)(A), which includes the effectiveness in serving employers indicator.

Further, as explained above, the benefits of defining this measure using Retention with the Same Employer, including that it minimizes reporting burdens for INA program grantees, outweigh the drawbacks, as well as providing more benefits than the use of either of the other performance indicator definitions piloted by the core programs. To fulfill the intent of WIOA's common performance accountability system, the final rule defines effectiveness in serving employers for the INA programs using the Retention with the Same Employer approach so that the Department can measure effectiveness in serving employers consistently across core programs and the WIOA title I non-core programs.

The commenter also requested that the Department consult with the WIOA sec. 166 programs, the NAETC, and Tribal officials in the development and establishment of the effectiveness in serving employers performance indicator definition. As further detailed below in Section III.F, the Department conducted a Tribal consultation to consult with Tribal leaders and WIOA sec. 166 grantees.

Section 684.460—What performance indicators are applicable to the supplemental youth services program?

Section 684.460(a) sets out the performance indicators that apply to INA youth programs, including an indicator of the effectiveness of serving employers—specifically in paragraph (a)(6)—as established under WIOA sec. 116(b)(2)(A)(iv). The NPRM proposed to change the language in paragraph (a)(6) to align with the effectiveness in serving employers performance indicator language proposed at § 677.155(a)(1)(vi) in the Joint WIOA Effectiveness in Serving Employers NPRM. For the reasons discussed earlier in this section, the Department affirms the approach of aligning changes to § 684.460(a)(6) with the effectiveness in serving employers performance indicator language adopted for WIOA core programs in the Joint WIOA Effectiveness in Serving Employers Final Rule.

The final rule implements the § 684.460(a)(6) changes as proposed, except with minor modifications reflecting the revisions made to § 677.155(a)(1)(vi) in the Joint WIOA Effectiveness in Serving Employers Final Rule. Specifically, § 684.460(a)(6) defines the required effectiveness in serving employers performance indicator as the percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. As discussed above, these revisions from the proposed rule align the regulations for INA youth program with the Joint WIOA Effectiveness in Serving Employers Final Rule and remove the requirement that wage records be used to document a participant's employment status for purposes of the effectiveness in serving employers performance indicator, thereby allowing for the use of supplemental wage information. Additionally, § 684.460(a)(6) now uses the term ''unsubsidized employment'' to better align with WIOA statutory language, specifically referring to unsubsidized employment in the second and fourth quarters after exit, which are key inputs to the definition of Retention with the Same Employer.

Section 684.620—What performance indicators are in place for the Indian and Native American program?

Section 684.620(a) lists the performance indicators used to evaluate the INA programs, including an effectiveness in serving employers performance indicator. Like the changes to § 684.460(a)(6), the Department is revising the language at § 684.620(a)(6) to define the required effectiveness in serving employers performance indicator as the percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. This definition of effectiveness in serving employers at § 684.620(a)(6) aligns with the effectiveness in serving employers performance indicator language at § 677.155(a)(1)(vi), as discussed above.

C. Part 685—National Farmworker Jobs Program

Part 685 establishes regulations for NFJP, authorized in title I, subtitle D of WIOA. The NFJP is a nationally directed, locally administered program of services for migrant and seasonal farmworkers (MSFW) and their dependents. Grant recipients help program participants acquire new skills to either stabilize or advance their agricultural careers or obtain employment in a new industry. The program also works to meet the critical need of safe and sanitary permanent and temporary housing for farmworkers and their families.

Section 167(c)(3) of WIOA (29 U.S.C. 3222) requires the Department to use the six WIOA primary indicators of performance, including the effectiveness in serving employers performance indicator, to assess the performance of the NFJP. As explained in the proposed rule, part 685 specifies that NFJP grantees providing career services and training must use the indicators of performance described in WIOA sec. 116(b)(2)(A) (§ 685.400(a) and (b)) but does not list each performance indicator. Therefore, the Department did not propose any changes to part 685.

NFJP housing grantees, which provide housing assistance rather than training and employment placement services, are required to report a different set of performance indicators as defined in § 685.400(c), specifically the total number served of eligible MSFWs, other individuals, eligible MSFW families, and other families. Therefore, the revised definition of the effectiveness in serving employers performance indicator in 20 CFR part 677 finalized in the Joint WIOA Effectiveness in Serving Employers Final Rule applies to NFJP career services grantees but not housing grantees.

The Department notes that this will have no noticeable change to procedures for career services grantees, as they already report this information in accordance with TEGL No. 14–18, using the Retention with the Same Employer definition of the performance indicator.

No comments were received on the applicability of the effectiveness in serving employers performance indicator to the NFJP in response to the proposed rule. With the Joint WIOA Effectiveness in Serving Employers Final Rule, NFJP career services grantees will use the revised definition of the effectiveness in serving employers performance indicator in 20 CFR part 677.

D. Part 686—Job Corps Program

Part 686 establishes regulations for the Job Corps program, authorized in title I, subtitle C of WIOA. Job Corps is a no-cost education and career technical training program administered by the Department, which includes 121 Job Corps centers across the United States. The program aims to help young people—ages 16 to 24—gain academic credentials and career technical training skills and secure quality employment. No comments were received on the proposed changes to part 686 and, thus, the Department adopts the proposed changes to § 686.1010, with minor revisions, as described below.

Job Corps historically has used post-separation surveys to capture post-program employment results. Job Corps' current surveys (OMB Control Number 1205–0426) are administered to participants immediately following the second and fourth quarters after exit and capture information related to whether they are employed or in an educational or training program during those quarters and if they have attained any additional certifications or credentials after exit from the program. In PY 2018, Job Corps revised the reporting periods in the post-separation surveys to replace program-specific definitions of the second and fourth quarters after exit with the same definitions used by other DOL employment and training programs.

This definitional shift created alignment with quarterly wage records and facilitated calculation of common exit and outcomes across WIOA programs. With this change in definition, Job Corps has been able to apply the effectiveness in serving employers performance indicator as it is described in TEGL No. 14–18, using the Retention with the Same Employer definition of the performance indicator. While the post-separation surveys are a supplemental data source for reporting on the primary indicators of performance, Job Corps did not gain access to wage record matches, the primary data source, until the fourth quarter of PY 2020. All reported outcomes for Job Corps prior to this period were based solely on the supplemental data source. Job Corps began certifying its program results in WIPS for all the primary measures of performance, including the Retention with the Same Employer indicator, in the first quarter of PY 2020.

Starting with the fourth quarter of PY 2020, Job Corps obtained quarterly wage record matches and, combined with the supplemental data from the surveys, has been able to report fully on the primary measures of performance, including the Retention with the Same Employer indicator.

Section 686.1010—What are the primary indicators of performance for Job Corps centers and the Job Corps program?

Section 686.1010 lists the primary indicators used to measure the performance of Job Corps centers, which includes the effectiveness in serving employers performance indicator. This performance indicator is reported based on data collected from former students during the second and fourth quarters after exit.

No comments were received on the applicability of the effectiveness in serving employers performance indicator to the Job Corps Program in response to the proposed rule. However, as discussed above, the final rule implements the § 686.1010(f) changes as proposed, but with minor modifications reflecting the revisions made to § 677.155(a)(1)(vi) in the Joint WIOA Effectiveness in Serving Employers Final Rule. Specifically, revised § 686.1010(f) defines the required effectiveness in serving employers performance indicator as the percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit.

E. Part 688—YouthBuild Programs

Part 688 establishes regulations for the YouthBuild programs, authorized in title I, subtitle D of WIOA. YouthBuild is a pre-apprenticeship program that provides education and job training opportunities for at risk youth (ages 16–24) who have dropped out of school, or subsequently re-enrolled, and meet certain other requirements. Program participants learn vocational skills focused on the construction industry, as well as other in-demand industries including healthcare, information technology, and hospitality, while also earning their high school diploma. No comments were received on the proposed changes to part 688 and, thus, the Department adopts the proposed changes to § 688.400, with minor revisions, as described below.

Section 688.400—What are the performance indicators for YouthBuild grants?

Section 688.400 lists the primary indicators used to measure the performance of YouthBuild programs, which also includes a performance indicator for effectiveness in serving employers.

No comments were received on the applicability of the effectiveness in serving employers performance indicator to the YouthBuild programs in response to the proposed rule. However, as discussed above, the final rule implements the § 688.400(f) changes as proposed, but with minor modifications reflecting the revisions made to § 677.155(a)(1)(vi) in the Joint WIOA Effectiveness in Serving Employers Final Rule. Specifically, finalized § 688.400(f) defines the required effectiveness in serving employers performance indicator as the percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit.

F. Impacts of the Final Rule on Other Non-Core WIOA Programs for Which the Department Has Applied WIOA Sec. 116 Primary Indicators of Performance

Although WIOA only mandated the use of the sec. 116 performance indicators for the four non-core programs addressed in this final rule, the Department has chosen to apply the sec. 116 performance indicators to other non-core programs to assess program performance, including REO grants (authorized under WIOA sec. 169 and annual appropriations acts).[15] The NPRM stated that, for these programs, the proposed definition of the effectiveness in serving employers performance indicator also would be applied. The Department maintains this same position in this final rule and intends to continue to apply the same definition of effectiveness in serving employers to these other non-core programs after publication of this final rule.

Comment: One commenter discussed the impact of the proposed rule on the REO grants program, which provides employment services to justice-involved individuals. The commenter argued that performance accountability for the WIOA non-core programs should reflect the distinct populations served by those programs (*e.g.,* reentry programs help justice-involved individuals overcome barriers to employment). As the NPRM noted, the commenter remarked, a limitation of the Retention with the Same Employer measure of effectiveness in serving employers is that it may not reflect the career path of greatest opportunity for those employment program participants who seek to change their jobs for improved opportunities, which the commenter said is a point of particular concern for REO grant program participants who are reentering the job market after leaving the justice system. The commenter wrote that while gaining work experience is ''an important first step toward a rewarding career'' for justice-involved individuals, continuing with the same employer could deny them opportunities to achieve greater financial stability and advance in their careers.

The commenter also stated a concern with the proposed requirement that REO programs collect and report supplemental wage information, discussing the ways this requirement to retain paystubs or other wage documentation would put a distinct burden on REO program staff to collect additional information and follow up with program participants. The commenter also expressed concern that disclosure of a program participant's criminal background to an employer could limit the participant's prospects for job placement. The commenter suggested that supplemental wage data should be accessible from the employment programs themselves, not the employers, in order to give program participants the best chance at moving forward and to best fulfill the missions of these programs.

To address these concerns, the commenter recommended the Department do the following:

• Provide clear program guidance for REO program grantees on regulatory definitions.

• Determine that grantees can access wage record data in order to report employment outcomes of program participants.

• Consider other performance outcomes that would capture effectiveness in serving employers and provide a benefit to fair-chance employers, like the Federal bonding program and Work Opportunity Tax Credit do.

• Find measures of program performance that align with the goals of providing the best chances for success for justice-involved individuals.

Department Response: While reporting this performance indicator contributes to the holistic data analysis of the workforce system, the Department recognizes that drawbacks to this proposed definition exist for the title I non-core programs, especially due to the unique nature of programs focused on youth and justice-involved individuals. Nevertheless, the Department believes that the benefits of this approach outweigh those drawbacks. Moreover, the Department intends to mitigate these drawbacks, if necessary, by exercising its discretion to place appropriate weight on the effectiveness in serving employers performance indicator relative to the other primary indicators of performance in assessing current or past grantee performance.

As the commenter mentions, success for justice-involved individuals is more likely to include progression in jobs. Recognizing the unique circumstances such as this, the Department expects variability in the reported outcomes from program to program and intends to take this variability into account when negotiating levels of performance. These considerations are consistent with TEGL No. 14–18 guidance for applicability of primary performance indicators, which specifies that, as a general matter, participants' outcomes on the applicable primary indicators of performance may be relevant for negotiating levels of performance, decisions related to contract awards and renewal, and the award of competitive grants.[16]

It should be kept in mind that the effectiveness in serving employers performance indicator is unique among all other indicators in that it is employer-focused. Employers are critical partners with WIOA title I non-core programs in providing quality services and employment opportunities to program participants. Furthermore, there is anecdotal evidence from employers, as well as a few small studies that suggest justice-involved individuals tend to have lower turnover rates relative to the average employee.[17] Tracking this performance indicator will provide further evidence to evaluate the potential employer benefit for hiring justice-involved individuals.

The Department also notes that while this indicator allows for the use of supplemental wage information, collecting such information is not mandatory. ETA will continue to conduct UI wage matching on behalf of reentry grantees for this and other employment-related performance indicators to reduce the burden of collecting this information manually. Therefore, it is not necessary for grantees to have access to wage record data to comply with this reporting requirement.

[15] Pages 2 through 5 of TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' provide the current list of DOL-administered non-core programs for which DOL has chosen to apply these performance reporting requirements, which include programs authorized by WIOA, as well as programs authorized by other Federal legislation. ETA, TEGL No. 14–18, Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611.*

[16] ETA, TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' p. 8, Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611.*

[17] Patricia M. Harris and Kimberly S. Keller, ''Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions,'' Journal of Contemporary Criminal Justice, 2005, pages 6–30, *https://journals.sagepub.com/doi/10.1177/1043986204271678;* Jennifer Hickes Lundquist, Devah Pager, and Eiko Strader, ''Does a Criminal Past Predict Worker Performance? Evidence from One of America's Largest Employers,'' Social Forces, March 2018, pages 1039–1068, *https://academic.oup.com/sf/article-abstract/96/3/1039/4802355?redirectedFrom=fulltext;* Dylan Minor, Nicola Persico, and Deborah M. Weiss, ''Criminal Background and Job Performance,'' Feb. 3 2017, *https://insight.kellogg.northwestern.edu/article/should-you-hire-someone-with-a-criminal-record;* Oluwasegun Obatusin and Debbie Ritter-Williams, ''A phenomenological study of employer perspectives on hiring ex-offenders,'' Cogent Social Sciences, Feb. 14, 2019, *https://doi.org/10.1080/23311886.2019.1571730;* Pamela D. Paulk, ''The Johns Hopkins Hospital Success in Hiring Ex-Offenders,'' May 2015, *https://www.bgcheckinfo.org/sites/default/files/public/5thMtg_1-0c-Plenary_Pamela_Paulk_Presentation.pdf;* SHRM Foundation, ''2021 Getting Talent Back to Work Report,'' 2021, *https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW_Report.pdf;* Prison Fellowship, ''6 Lessons for Employers Considering Hiring Former Prisoners,'' Prison Fellowship,'' *https://www.prisonfellowship.org/resources/support-friends-family-of-prisoners/supporting-successful-prisoner-reentry/6-lessons-for-employers-considering-hiring-former-prisoners/* (last visited Nov. 9, 2023).

The Department considered the commenter's request that the other performance outcomes be used such as is done with the Federal bonding program and the Work Opportunity Tax Credit. However, the Department has determined Retention with the Same Employer is appropriate after piloting three approaches of the effectiveness in serving employers performance indicator. The Department concluded that the Retention with the Same Employer approach provides a valid and reliable approach to measuring the indicator, while also placing the least amount of burden on REO grant recipients to implement.

The Department will update guidance and technical assistance on this topic for reentry grantees as needed following the publication of the final rule.

Comment: One commenter discussed the impact of the proposed rule on Senior Community Service Employment Program (SCSEP), which provides employment services to older workers. The commenter discussed the unique needs and employment patterns of the older workers served by SCSEP programs, who may have more ''fluid'' employment patterns than other workers due to health issues, caregiving obligations, or preferences for part-time employment. The commenter wrote that the SCSEP program it administers uses surveys to assess employer satisfaction and expressed interest in continuing this practice, stating that it provides depth of analysis and affords careful delivery of targeted programs utilizing strong employer partnerships. The commenter urged the Department to allow these assessment practices to continue in order to best maintain targeted SCSEP program deliverables for the target population of older workers.

To address these concerns, the commenter recommended the Department do the following:

- Retain the current definition and practices for assessing effectiveness of SCSEP programs in serving employers.
- Provide clear guidance on any intentions to change definitions of the performance indicator of effectiveness in serving employers for SCSEP programs.

Department Response: The Department notes that this indicator does not apply to the SCSEP program grantees, and the Department will not be making changes to any SCSEP definitions as a result of this rule.

Comment: Discussing the impact of the proposed rule on non-core WIOA programs providing employment services to justice-involved individuals and older workers, a commenter argued that the Department has an obligation to provide clear guidance to program grantees working with these target populations on the implications of the rulemaking process and possible implementation of rule changes. Relatedly, the commenter suggested that the Department should continue to work with reentry service providers, SCSEP providers, and related stakeholders to best address the needs of the target populations by providing further opportunities to share insights, present feedback, and raise concerns and questions on the proposed rule.

Department Response: The Department is committed to providing clear guidance and technical assistance to grantees in implementing any changes, and notes that this rule does not change any current practices for reentry providers and SCSEP providers.

III. Regulatory Analysis and Review

A. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review) and Subtitle E of the Small Business Regulatory and Fairness Act of 1996)

Under E.O. 12866, the Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. See 58 FR 51735 (Oct. 4, 1993). Section 1(b) of E.O. 14094 amends sec. 3(f) of E.O. 14094 to define a ''significant regulatory action'' as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more, or adversely affect in a material way 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 (also referred to as economically significant); (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O. See 88 FR 21879 (Apr. 11, 2023). This final rule is a significant regulatory action under section 3(f) of E.O. 12866, as amended by E.O.14094.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

1. Outline of the Analysis

Section III.A.2 provides a summary of the results of the RIA. Section III.A.3 describes the need for the final rule, and Section III.A.4 describes the process used to estimate the costs of the final rule and the general inputs used, such as wages and number of affected entities. Section III.A.5 explains how the provisions of the final rule will result in quantifiable costs and presents the calculations the Department used to estimate them. In addition, Section III.A.5 describes the qualitative benefits of the final rule. Section III.A.6 summarizes the estimated first-year and 10-year total and annualized costs of the final rule. Finally, Section III.A.7 describes the regulatory alternatives considered when developing the final rule.

2. Analysis Overview

The Department did not receive comments on the proposed rule economic analysis. Changes in this final rule economic analysis include updating wage rates and the number of affected entities to reflect the most recent data available. The new wage rates and affected entities are presented in Section III.A.4.

The Department estimates that the final rule will result in costs and qualitative benefits. As shown in Exhibit 1, the final rule is expected to have a one-time cost of $52,223. The Department estimates that the final rule will result in an annualized net quantifiable cost of $7,435 at a discount rate of 7 percent and expressed in 2022 dollars.

EXHIBIT 1—ESTIMATED MONETIZED COSTS OF THE FINAL RULE

[2022 dollars]

	Cost
10-Year Total with a Discount Rate of 3%	$52,223
10-Year Total with a Discount Rate of 7%	52,223
10-Year Average	5,222

EXHIBIT 1—ESTIMATED MONETIZED COSTS OF THE FINAL RULE—Continued

[2022 dollars]

	Cost
Annualized at a Discount Rate of 3%	6,122
Annualized at a Discount Rate of 7%	7,435

The cost of the final rule is associated with rule familiarization for all 121 Job Corps centers and 97 career transition service providers for a total of 218 Job Corps entities, 53 NFJP career service and training grantees, 64 INA youth grantees, 97 INA adult grantees, and 237 YouthBuild grantees.[18] See the costs subsections of Section III.A.5 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department cannot quantify the benefits of the final rule; therefore, Section III.A.5 (Subject-by-Subject Analysis) describes the benefits qualitatively.

3. Need for Regulation

This final rule is necessary to complete implementation of the performance accountability requirements as discussed in the Joint WIOA Final Rule and required by statute. WIOA included a common performance accountability system, consisting of six statutory primary indicators of performance, applicable to all WIOA core programs: adult, dislocated worker, and youth programs under title I of WIOA; the AEFLA program under title II; the ES program authorized under the Wagner-Peyser Act as amended by WIOA title III; and the VR program authorized under title I of the Rehabilitation Act, as amended by WIOA title IV. WIOA also required that the six statutory primary indicators of performance apply to four WIOA title I, DOL-administered non-core programs: INA, NFJP, Job Corps, and YouthBuild (''title I non-core programs''). The statute defines five of the six performance indicators. However, WIOA did not specify how effectiveness in serving employers should be measured. Instead, WIOA directed the Departments to develop a definition for the effectiveness in serving employers performance indicator (WIOA sec. 116(b)(2)(A)(iv)). In the Joint WIOA Final Rule, the Departments determined that it was prudent to pilot three definitions for the sixth performance indicator, which measures a State's effectiveness in serving employers through its WIOA-authorized programs. As explained earlier in this final rule, that pilot, as well as a study of the results from the pilot, *Measuring the Effectiveness of Services to Employers: Options for Performance Measures Under the Workforce Innovation and Opportunity Act*[19] (Final Pilot Study Report), is now complete. The Departments are engaging in two rulemakings to incorporate into the WIOA regulations a standard definition of the performance indicator for effectiveness in serving employers. This performance indicator definition is meant to apply to both WIOA core programs—which are addressed in the concurrently published Joint WIOA Effectiveness in Serving Employers Final Rule—as well as the four title I non-core programs, which are addressed in this final rule. This rule codifies the use of all the primary performance indicators for the evaluation of title I non-core program performance—including the effectiveness in serving employers indicator—just as with the WIOA core programs.

4. Analysis Considerations

a. Baseline for Title I Non-Core Programs: Indian and Native American, National Farmworker Jobs, Job Corps, and YouthBuild

The Department estimated the costs of the final rule relative to the existing baseline. The Department determined that the final rule will result in no change from the baseline for the title I non-core programs. As a result, the Department estimates only the costs of rule familiarization for the title I non-core programs.

WIOA secs. 159(c)(1) (Job Corps), 166(e)(5) (INA), 167(c)(2)(C) (NFJP), and 171(f)(1) (YouthBuild) specify that performance for these title I non-core programs must be assessed using the WIOA sec. 116 primary indicators of performance for WIOA core programs. In this final rule, the Department is codifying the approach for evaluating a program's effectiveness in serving employers, as put into practice through previously issued guidance[20] and the ''DOL-Only Performance Accountability, Information, and Reporting System'' ICR, approved under OMB Control Number 1205–0521 for the title I non-core programs.

All title I non-core programs, except the INA Supplemental Youth Services program, are able to report the Retention with the Same Employer definition of effectiveness in serving employers performance indicator, as required in TEGL No. 14–18, through WIPS or GPMS. Unlike the other title I non-core programs, the INA Supplemental Youth Services program is not currently reporting, and will not immediately be able to report, the effectiveness in serving employers performance indicator. The INA Supplemental Youth Services case management system is available for grantees to enter data for youth participants who were served on or after April 15, 2023, and produces program reports. Because grantees are still tracking in legacy systems the data for participants whose services began before April, INA youth grantees will, for a period of time, use WIOA transition authority with regard to collecting and reporting on WIOA performance indicators, including the effectiveness in serving employers performance indicator. The Department is continuing, independent of this rulemaking, to build new functionality into the recent case management system for INA youth grantees that provides for the collection and reporting of the effectiveness in serving employers performance indicator. Therefore, this final rule does not impose any new cost associated with the case management system. When the case management system is built, the INA youth grantees will use it to collect and report the outcomes for the effectiveness in serving employers performance indicator. The use of the new system to report the effectiveness in serving employers performance indicator will impose a de minimis cost for the INA youth grantees. When the INA Supplemental Youth Services case management system is complete, the INA youth program grantees would face a de minimis cost associated with reporting the effectiveness in serving employers performance indicator in the new system.

Exhibit 2 presents the number of entities the Department expects the final rule to affect. The Department provides these estimates and uses them to

[18] The 237 YouthBuild entities consist of grantees within each of the four currently active grant classes (68 grantees in the 2022 class, 68 grantees in the 2021 class, 68 grantees in the 2020 class, and 34 grantees in the 2019 grant class).

[19] See S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, Chapter 5 (Alternative Measures and Data Sources), *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf.*

[20] ETA, TEGL No. 14–18, ''Aligning Performance Accountability Reporting, Definitions, and Policies Across Workforce Employment and Training Programs Administered by the U.S. Department of Labor (DOL),'' Mar. 25, 2019, *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7611.*

calculate the cost of rule familiarization for the title I non-core programs.

EXHIBIT 2—TITLE I NON-CORE PROGRAMS NUMBER OF AFFECTED ENTITIES BY TYPE

Entity type	Number
Job Corps:	
Current centers	121
Career transition service providers	97
NFJP:	
Career services and training grantees	53
Indian and Native American:	
Number of INA youth grants awarded under WIOA sec. 166	64
Grantees for the Comprehensive Services Program/INA adult program	97
YouthBuild:	
Grantees in active grant classes	237

b. Compensation Rates

In Section III.A.5 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the final rule. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in level of effort (workload) due to the final rule. We use the Bureau of Labor Statistics (BLS) mean hourly wage rate for local government employees.[21] To reflect total compensation, wage rates include nonwage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent[22] and a fringe benefits rate of 62 percent,[23] which represents the ratio of average total compensation to average wages for State and local government workers in March 2022. We then multiply the sum of the loaded wage factor and overhead rate by the corresponding occupational category wage rate to calculate an hourly compensation rate.

EXHIBIT 3—COMPENSATION RATES

[2022 dollars]

Position	Grade level	Base hourly wage rate	Loaded wage factor	Overhead costs	Hourly compensation rate
		(a)	(b)	(c)	d = a + b + c
Management Analyst	N/A	$43.61	$27.04 ($43.61 × 0.62)	$7.41 ($43.61 × 0.17)	$78.06

5. Subject-by-Subject Analysis

The Department's analysis below covers the estimated cost of the final rule.

c. Costs

The following sections describe the costs of the final rule.

(1) DOL-Only Non-Core Programs Rule Familiarization

INA, YouthBuild, NFJP, and Job Corps programs would need to familiarize themselves with the new regulation. Consequently, this will impose a one-time cost in the first year.

To estimate the first-year cost of rule familiarization for INA, YouthBuild, NFJP, and Job Corps programs, the Department multiplied the estimated number of management analysts (1) by the time required to read and review the rule (1 hour), and by the applicable hourly compensation rate ($78.06/hour). We multiplied this result by the number Job Corps active centers (218), NFJP grantees (53), INA Youth program grantees (64), INA Adult program grantees (97), and the number of YouthBuild grantees (237). This calculation yields $52,536 in one-time labor costs for Job Corps, NFJP, YouthBuild, INA Youth, and INA Adult programs to read and review the rule. Over the 10-year period of analysis, these estimated one-time costs result in an average annual cost of $5,222 undiscounted, or $6,122 and $7,435 at discount rates of 3 and 7 percent, respectively.

d. Qualitative Benefits Discussion

(1) General Benefits of Measuring Effectiveness in Serving Employers

The Department cannot quantify the final rule's benefits associated with improving the title I non-core programs' effectiveness in serving employers. Measuring effectiveness in serving employers allows title I non-core programs to set goals, monitor, and learn how to serve employers more effectively.[24] Reporting a measure of effectiveness in serving employers also helps Federal, State, and local policymakers evaluate program performance and inform future policy changes to better meet program goals, particularly providing employers with skilled workers and other services.

The Department cannot quantify these estimated benefits because we do not have quantitative data on how the effectiveness in serving employers performance indicator has influenced program implementation and how much it would influence future policies.

(2) Specific Benefits of Reporting Retention With the Same Employer

Requiring the calculation and reporting of Retention with the Same Employer as the effectiveness in serving employers performance indicator will make it easier to compare WIOA title I

[21] BLS, ''May 2022 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999300—Local Government, excluding schools and hospitals (OEWS Designation),'' *https://www.bls.gov/oes/current/naics4_999300.htm* (last updated April 25, 2023).

[22] U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' June 10, 2002, *https://www.regulations.gov/document/EPA-HQ-OPPT-2018-0321-0046.* DOL has used 17 percent in prior final rules including the Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States Final Rule (RIN 1205–AC05), Temporary Agricultural Employment of H–2A Nonimmigrants in the United States (RIN 1205–AB89), Cranes and Derricks in Construction: Railroad Roadway Work (RIN 1218–AD07), and Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors Final Rule (RIN 1218–AD29).

[23] BLS, ''Employer Costs for Employee Compensation—March 2022,'' June. 16, 2022, *https://www.bls.gov/news.release/archives/ecec_06162022.pdf.* Calculated using Table 1. Employer Costs for Employee Compensation by ownership

[24] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act (Research Report),'' Jan. 2021, *https://www.urban.org/sites/default/files/publication/104160/measuring-the-effectiveness-of-services-to-employers_1_0.pdf.*

non-core programs' effectiveness in serving employers performance across grant programs. Retention with the Same Employer demonstrates a continued relationship between the employer and participants who have exited WIOA programs. While many circumstances can have an impact on an employer's retention of employees, an indication that an employee is still working for the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for both parties, as retention of an employee reduces the costs to the employer associated with employee turnover and retraining. Thus, reporting Retention with the Same Employer can help inform design and implementation of program services to reduce job turnover and improve employer-employee match quality. Improved matching and reduced turnover allow employees and employers to operate closer to their productive potential and can make it more worthwhile for employers to invest in training its employees and for employees to invest in learning employer-specific skills.

6. Summary of the Analysis

The Department estimates the total net cost of the final rule at $52,223 at a discount rate of 7 percent. The Department estimates the annualized net cost of the final rule at $7,435 at a discount rate of 7 percent. Exhibit 4 summarizes the estimated cost of the final rule over the 10-year analysis period.

EXHIBIT 4—ESTIMATED MONETIZED COSTS OF THE FINAL RULE

[2022 dollars]

	Costs
2024	$52,223
2025	0
2026	0
2027	0
2028	0
2029	0
2030	0
2031	0
2032	0
2033	0
10-Year Total with a Discount Rate of 3%	52,223
10-Year Total with a Discount Rate of 7%	52,223
10-Year Average	5,222
Annualized with a Discount Rate of 3%	6,122
Annualized with a Discount Rate of 7%	7,435

7. Regulatory Alternatives

The Department considered two alternatives to the finalized definition of the effectiveness in serving employers performance indicator. First, the Department considered requiring use of the Employer Penetration pilot approach, which reports the percentage of employers using services out of all employers in the State. This approach would have required counts of services provided to employers requiring States and local areas to report unique counts of employer establishments receiving services through WIOA's programs. Employer Penetration would require a more data-intensive analysis than the Retention with the Same Employer approach. Employer Penetration would have the benefit of capturing the extent to which employers within a State are engaged with WIOA-funded services and would provide State programs an incentive to work with additional employers. In the Final Pilot Report Study, the Department found weaknesses in this pilot approach including: (1) emphasis on quantity rather than quality or intensity of the employer service provided; (2) reliability issues associated with data entry and the process to count unique establishments; (3) measurement of program output rather than outcome; (4) potential for creation of perverse incentives to prioritize program breadth rather than depth in service and delivery; and (5) lack of sensitivity to industry sectors targeted by State and local workforce agencies.[25]

The Department considered a second regulatory alternative that would require the use of the Repeat Business Customer approach to the effectiveness in serving employers performance indicator, which reports the percentage of employers receiving services in a year who also received services within the previous 3 years. This approach to the effectiveness in serving employers measure requires counts of services provided to employers through WIOA's programs. Repeat Business Customer requires a more data-intensive analysis than the proposed approach of Retention with the Same Employer. Repeat Business Customer captures the extent to which employers within a State can find workers and the employer's level of satisfaction with the public workforce system services. In the Final Pilot Study Report, the Department found weaknesses in this pilot approach including that it: (1) may provide a disincentive to reach out to new employers; (2) is subject to variation in industry and sector economic conditions; and (3) may require a SAM to mitigate the weaknesses and improve implementation and interpretation.[26]

The Department prefers the Retention with the Same Employer approach because it has data more readily available and, therefore, it is less burdensome. The Retention with the Same Employer approach better aligns with workforce system goals of matching employers with job seekers and reducing turnover without the weaknesses associated with the other two approaches to defining the effectiveness in serving employers performance indicator. In addition, because title I non-core programs are already required to report the Retention with the Same Employer measure, the two alternative measures would impose new costs to affected entities associated with collecting data, calculation of, and reporting the alternative measure.

B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 and 604.

The Department finds that this final rule will not have a significant economic impact on a substantial number of small entities. Based on this determination, the Department certifies

[25] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act (Research Report),'' Jan. 2021, *https://www.urban.org/sites/default/files/publication/104160/measuring-the-effectiveness-of-services-to-employers_1_0.pdf.*

[26] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf.*

that this final rule does not have a significant economic impact on a substantial number of small entities. This finding is supported, in large measure, by the fact that small entities are already receiving financial assistance under WIOA. In addition, the calculated cost of this rule is a one-time per-entity cost of $78.06 associated with rule familiarization and would therefore have a de minimis impact on any particular entity.

This final rule can be expected to impact small entities within the Job Corps, NFJP, and INA programs. These small entities can be, for example, Tribal or non-profit grantees, including regionally focused entities. The Department has estimated costs that are new to this final rule. As discussed in Section III.A, the calculated cost of this rule is a one-time per-entity cost of $78.06 associated with rule familiarization and would, therefore, have a de minimis impact on any one particular entity. Therefore, the Department certifies that this final rule does not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Department previously submitted and received OMB approval for the information collection discussed above (OMB Control Number 1205–0521) in Section I, Background and Rulemaking Authority. See ICR Reference Number 202104–1205–003 (OMB Control Number 1205–0521). This final rule does not modify any of the content in the exiting OMB Control Number 1205–0521.

D. Executive Order 13132 (Federalism)

E.O. 13132 aims to guarantee the division of governmental responsibilities between the National Government and the States and to further the policies of the Unfunded Mandates Reform Act of 1995 (UMRA). Accordingly, E.O. 13132 requires executive departments and agencies to ensure that the principles of federalism guide them in the formulation and implementation of policies. Further, agencies must adhere to constitutional principles, examine the constitutional and statutory authority supporting a regulation that would limit the policymaking discretion of the States, and assess the need for such a regulation. To the extent practicable, agencies must consult State and local officials before implementing any such regulation.

E.O. 13132 further provides that agencies must implement a regulation that limits the policymaking discretion of the States only where there is constitutional and statutory authority for the regulation and it addresses a problem of national significance. For a regulation administered by the States, the National Government must grant the States the maximum administrative discretion possible to avoid intrusive Federal oversight of State administration, and agencies must adhere to special requirements for a regulation that preempts State law. E.O. 13132 also sets forth the procedures that agencies must follow for certain regulations with federalism implications, such as preparation of a summary impact statement.

Accordingly, the Department has reviewed this WIOA-required final rule and has concluded that the rule has no Federalism implications. This final rule has no substantial direct effects on States, on the relationships between the States, or on the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, the Department has concluded that this final rule does not have a sufficient Federalism implication to warrant the preparation of a summary impact statement.

E. Unfunded Mandates Reform Act

UMRA directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, as well as the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or Tribal governments, or imposes a duty upon the private sector that is not voluntary.

Following consideration of the above factors, the Department has concluded that this final rule contains no unfunded Federal mandates, which are defined in 2 U.S.C. 658(6) to include either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' No additional burden related to reporting the effectiveness in serving employers performance indicator is being placed on State, local, and Tribal governments, as this information already is being collected and reported on. Furthermore, the reporting is a contingent to receiving Federal program funding. Any associated reporting mandate cannot, therefore, be considered ''unfunded.'' Because the decision by a private training entity to participate as a provider under a WIOA core program is purely voluntary, the information collection burden does not impose a duty on the private sector that is not voluntarily assumed.

F. Executive Order 13175 (Indian Tribal Governments)

The Department reviewed this final rule, as well as the Joint WIOA Effectiveness in Serving Employers Final Rule published concurrently with this final rule elsewhere in this issue of the **Federal Register**, under the terms of E.O. 13175 and DOL's Tribal Consultation Policy (77 FR 71833 (Dec. 4, 2012)) and has determined that it will have Tribal implications, because the final rule would have substantial direct effects on: one or more Indian Tribes; the relationship between the Federal Government and Indian Tribes; or the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, the Department prepared a Tribal summary impact statement.

Engagement With Indian Tribes

The Department engaged with INA grantees and the Tribal community at several points in this rulemaking. Prior to issuing the NPRM, the Department held two events to consult with INA program grantees and representatives of Tribal institutions about their experiences with the implementation and operation of the effectiveness in serving employers performance indicator. These two events consisted of a town hall meeting attended both in person and virtually and a formal consultation webinar. The town hall, entitled ''Town Hall Discussion: Effectiveness in Serving Employers Performance Indicator,'' occurred on September 21, 2021, at the 41st National Indian and Native American Employment and Training conference.[27] The consultation webinar, entitled ''Tribal Consultation for WIOA Effectiveness in Serving Employers Indicator Proposed Rulemaking,'' occurred on October 19, 2021.[28] At the consultation webinar, the Department provided an opportunity for stakeholders to submit written feedback through DOL's Tribal consultation email account by October 29, 2021. The Department did not receive any written

[27] NAETC, ''41st National Indian and Native American Employment and Training Program,'' Sept. 20–23, 2021, *http://www.ninaetc.net/41%20NINAETC%20PROGRAM_FINAL.pdf.*

[28] DOL, ''Tribal Consultation for WIOA Effectiveness in Serving Employers Indicator Proposed Rulemaking,'' *https://www.workforcegps.org/events/2021/09/14/13/57/Tribal-Consultation-for-WIOA-Effectiveness-in-Serving-Employers-Indicator-Proposed-Rulemaking* (last visited Nov. 10, 2023); see also ''Tribal Consultation; Workforce Innovation and Opportunity Act, Implementation of the Effectiveness in Serving Employers Performance Indicator; Notice of Tribal Consultation; Virtual Meeting,'' 86 FR 54244 (Sept. 30, 2021).

feedback through DOL's Tribal consultation email account but received one letter after the consultation period for October 2021 consultation webinar, which raised similar issues to those articulated at the consultation event and summarized below. This letter was not formally considered during the development of the NPRM due to the late nature of its submission, though it raised similar issues to those articulated at the consultation event and summarized below.

After the release of the NPRM, the Department discussed the NPRM with NAETC at the October 2022 NAETC meeting.[29] During this discussion, the Department encouraged submission of comments on the NPRM. In response to the NPRM, the Department received one public comment submission, which is discussed above in Section III.F, and that requested that the Department consult with the WIOA sec. 166 programs, the NAETC, and Tribal officials in order to develop and establish the performance indicator.

Summary of Concerns

These various engagements provided the Department with feedback from the INA community, Tribal representatives, and the general public that indicating several areas of interest concerning the definition of the effectiveness in serving employers performance indicator for WIOA programs. These concerns are summarized below.

Employer, Wage, or Position Changes

Consultation participants expressed concern about impacts of individuals changing employers for higher wages or different positions. Specifically, several consultation participants asked how the Retention with the Same Employer definition of the performance indicator would apply to individuals who have continuous employment through the second and fourth quarters, but with different employers. Some consultation participants expressed concern that this definition of the performance indicator would not consider individuals who advance to better employment opportunities. One consultation participant expressed concern that the program would be penalized if employees change employers.

Temporary, Seasonal, and Youth Employment

Many consultation participants expressed concern about how temporary jobs, such as seasonal or contract-based employment, would be considered. Specifically, one consultation participant gave an example of contractor jobs where individuals may not stay with the same employer and instead change from job to job, such as in construction. Additionally, another consultation participant stated that employers that regularly lay off and then rehire employees would affect outcomes.

A consultation participant asked if this measure applies to the INA youth program. Another consultation participant expressed concern about the impact on performance of limited-duration summer employment opportunities for high school students within INA youth programs. The consultation participants also questioned DOL's willingness to invest in developing a data collection and reporting process for INA youth programs.

Other consultation participants expressed concern about how seasonal jobs would be addressed and that certain areas have more seasonal employment than other areas do. Another consultation participant stated that individuals who participate in the program on a short-term basis while serving time with the Department of Corrections and later return to a different State may impact the performance indicator calculation. A different consultation participant stated that many participating employers primarily provide entry-level positions focused on gaining work experience.

Performance Indicator Calculation

Many consultation participants inquired about how the performance indicator is calculated. One consultation participant asked a question in which the sound quality of the audio was not clear. However, the subject-matter expert interpreted the question to ask if supplemental wages are considered. One consultation participant stated that UI records may not capture individuals who are self-employed. Another consultation participant said that certain States do not have access to UI information that would enable them to calculate the performance indicator.

Many consultation participants suggested other ways to calculate the performance indicator. Examples provided by one consultation participant included employer satisfaction surveys, number of employers served, number of repeat employers, and number of job fairs coordinated with employers. Another consultation participant said they measure success when an employer enquires about recent graduates to fill open positions. A different consultation participant stated that they understood the options DOL considered for how to measure effectiveness in serving employers to include how well programs have assisted employers in hiring new employees through job fairs, work experience to full-time hires, pre-screening of candidates, and individual hiring events for specific employers.

Tribal Community Impacts

Some consultation participants had questions and comments about how the performance indicator would specifically impact Tribal communities. One consultation participant expressed the need for consideration of all Tribal communities and their unique needs. The consultation participant stated that measures used for all INA programs must not only satisfy the intent of the performance indicator but also be meaningful, which is part of the purpose of WIOA sec. 166. The commenter also suggested that grantees should establish a work group within the NAETC to develop information to share with Tribal leaders so that they have background and can communicate what these performance indicators would mean for INA programs.

Another consultation participant cited the DOL-commissioned third-party study of the performance indicator, ''Measuring the Effectiveness of Service to Employers,'' and questioned why some States with many Indian and Native American participants were not included in the pilot study. The consultation participant also asked if any INA WIOA programs were included in the study. Additionally, a consultation participant said that DOL is seeking support from Tribes on how to measure a performance indicator they may not want.

Process Questions and Other Observations

Many consultation participants asked questions about the rulemaking process and how the Department decided on the proposed definition of the performance indicator. Some consultation participants asked if this performance indicator is required. One consultation participant asked if the performance indicator can be customized based on the grantee's status, for example with different requirements for rural and urban programs. A different consultation participant asked if DOL would decide after consultation with Tribes whether or not to apply the performance indicator to INA programs. Other consultation participants asked if the definition of this performance

[29] Meeting proceedings are located on the NAETC web page. ETA, ''Native American Employment and Training Council,'' *https://www.dol.gov/agencies/eta/dinap/council* (last visited Nov. 10, 2023).

indicator would be permanent or if it would be re-evaluated in the future. Additionally, a consultation participant asked if they could review the draft rule with others before it is published, when the proposed rule would be published, and when the final rule would take effect.

A consultation participant asked if other performance indicator definitions have been submitted for consideration, for example from the NAETC. Another consultation participant stated that grantees with direct employer relationships differ from grantees that work with AJCs to facilitate employment for employers. Additionally, a consultation participant asked how grantees can assist participants who are facing issues at a new employment site, such as being picked on or treated unfairly, and whether it would be appropriate to act as a mediator between the employer and the participant.

Need for the Regulation

The Department appreciates the valuable feedback received through these engagements with INA program grantees and representatives of Tribal institutions and has considered this feedback carefully in crafting this final rule and its planned implementation. The effectiveness in serving employers performance indicator is required by the WIOA statute for the INA program, as WIOA sec. 166(h)(2) requires using the primary indicators of performance described in sec. 116(b)(2)(A). Therefore, the Department has determined that a standard definition for the effectiveness in serving employers performance indicator would be proposed and finalized for the INA program. As such, the Department is aligning its definition of this indicator for the sec. 166 INA program with the WIOA Effectiveness in Serving Employers Joint Final Rule.

However, the Department acknowledges the concerns raised through the consultations. In recognition of these concerns, the Department intends to take several steps to address these matters. First, as discussed above in Section III.F, the Department will exercise its discretion to place appropriate weight on the effectiveness in serving employers performance indicator in assessing INA grantee performance. The Department recognizes the unique circumstances INA grantees may face and the expects variability in the reported outcomes from program to program, especially for programs serving youth, and intends to take this variability into account when establishing levels of performance. These considerations are consistent with TEGL No. 14–18 guidance for applicability of primary performance indicators, which specifies that, as a general matter, participants' outcomes on the applicable primary indicators of performance may be relevant for establishing levels of performance, decisions related to contract awards and renewal, and the award of competitive grants.

Second as explained above in Section I.D and III.F, the Department notes that the selected measure should not impose any additional burden on INA program grantees as the definition of the effectiveness in serving employers measure will not require any additional reporting from INA program grantees above what is currently collected for the approved ''DOL-Only Performance Accountability, Information, and Reporting System'' ICR.

Finally, the Department reaffirms the ability of INA program grantees to request a waiver of performance indicators as described in TEGL No. 04–19, ''Waiver Authority for the INA Program and Implementation of Additional Indicators of Performance,'' and discussed above in Section III.F. As part of the implementation of this final rule, the Department will provide dedicated technical assistance to INA program grantees regarding the use of this indicator.

List of Subjects

20 CFR Part 684

Employment, Grant programs—labor, Indians, Reporting and recordkeeping requirements.

20 CFR Part 686

Employment, Grant programs—labor, Job Corps.

20 CFR Part 688

Employment, Grant programs—labor, Youth, YouthBuild.

For the reasons discussed in the preamble, the Department of Labor proposes to amend 20 CFR parts 684, 686, and 688 as follows:

PART 684—INDIAN AND NATIVE AMERICAN PROGRAMS UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

■ 1. The authority citation for part 684 continues to read as follows:

Authority: Secs. 134, 166, 189, 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

Subpart D—Supplemental Youth Services

■ 2. Amend § 684.460 by revising paragraph (a)(6) to read as follows:

§ 684.460 What performance indicators are applicable to the supplemental youth services program?

(a) * * *

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit.

* * * * *

Subpart F—Accountability for Services and Expenditures

■ 3. Amend § 684.620 by revising paragraph (a)(6) to read as follows:

§ 684.620 What performance indicators are in place for the Indian and Native American program?

(a) * * *

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit.

* * * * *

PART 686—THE JOB CORPS UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

■ 4. The authority citation for part 686 continues to read as follows:

Authority: Secs. 142, 144, 146, 147, 159, 189, 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

Subpart J—Performance

■ 5. Amend § 686.1010 by revising paragraph (f) to read as follows:

§ 686.1010 What are the primary indicators of performance for Job Corps centers and the Job Corps program?

* * * * *

(f) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit.

PART 688—PROVISIONS GOVERNING THE YOUTHBUILD PROGRAM

■ 6. The authority citation for part 688 continues to read as follows:

Authority: Secs. 171, 189, 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

Subpart D—Performance Indicators

■ 7. Amend § 688.400 by revising paragraph (f) to read as follows:

§ 688.400 What are the performance indicators for YouthBuild grants?

* * * * *

(f) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit; and

* * * * *

Julie A. Su,

Acting Secretary of Labor.

[FR Doc. 2024–03279 Filed 2–22–24; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 28, 30, 87, 180, and 3282

[Docket No. FR–6446–F–01]

Adjustment of Civil Monetary Penalty Amounts for 2024

AGENCY: Office of the General Counsel, HUD.

ACTION: Final rule.

SUMMARY: This rule provides for 2024 inflation adjustments of civil monetary penalty amounts required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act).

DATES: *Effective date for 2024 inflation adjustment:* March 25, 2024.

FOR FURTHER INFORMATION CONTACT: Aaron Santa Anna, Associate General Counsel for Legislation and Regulations, Office of the General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20024; telephone number 202–402–5138 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as from individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) (Pub. L. 114–74, Sec. 701), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), requires agencies to make annual adjustments to civil monetary penalty (CMP) amounts for inflation ''notwithstanding section 553 of title 5, United States Code.'' Section 553 refers to the Administrative Procedure Act, which provides for advance notice and public comment during the rulemaking process. However, as explained in Section III below, HUD has determined that advance notice and public comment on this final rule is unnecessary.

This annual adjustment is for 2024. The annual adjustment is based on the percent change between the U.S. Department of Labor's Consumer Price Index for All Urban Consumers (''CPI–U'') for the month of October preceding the date of the adjustment, and the CPI–U for October of the prior year (28 U.S.C. 2461 note, section (5)(b)(1)). Based on that formula, the cost-of-living adjustment multiplier for 2024 is 1.03241.[1] Pursuant to the 2015 Act, adjustments are rounded to the nearest dollar.[2]

II. This Final Rule

This final rule makes the required 2024 inflation adjustment of HUD's civil money penalty amounts. The 2024 increases apply to penalties assessed[3] on or after this rule's effective date (if the violation occurred after the enactment of the 2015 Act). HUD provides a table showing how, for each component, the penalties are being adjusted for 2024 pursuant to the 2015 Act. In the first column (''Description''), HUD provides a description of the penalty. In the second column (''Statutory Citation''), HUD provides the United States Code statutory citation providing for the penalty. In the third column (''Regulatory Citation''), HUD provides the Code of Federal Regulations citation under Title 24 for the penalty. In the fourth column (''Previous Amount''), HUD provides the amount of the penalty pursuant to the rule implementing the 2023 adjustment (88 FR 9745, February 15, 2023). In the fifth column (''2024 Adjusted Amount''), HUD lists the penalty after applying the 2024 inflation adjustment.

Description	Statutory citation	Regulatory citation (24 CFR)	Previous amount	2024 Adjusted amount
False Claims	Omnibus Budget Reconciliation Act of 1986 (31 U.S.C. 3802(a)(1)).	§ 28.10(a)	$13,508	$13,946.
False Statements	Omnibus Budget Reconciliation Act of 1986 (31 U.S.C. 3802 (a)(2)).	§ 28.10(b)	$13,508	$13,946.
Advance Disclosure of Funding	Department of Housing and Urban Development Act (42 U.S.C. 3537a(c)).	§ 30.20	$23,727	$24,496.
Disclosure of Subsidy Layering	Department of Housing and Urban Development Act (42 U.S.C. 3545(f)).	§ 30.25	$23,727	$24,496.
FHA Mortgagees and Lenders Violations.	HUD Reform Act of 1989 (12 U.S.C. 1735f–14(a)(2)).	§ 30.35	Per Violation: $11,864; Per Year: $2,372,677.	Per Violation: $12,249; Per Year: $2,449,575.
Other FHA Participants Violations.	HUD Reform Act of 1989 (12 U.S.C. 1735f–14(a)(2)).	§ 30.36	Per Violation: $11,864; Per Year: $2,372,677.	Per Violation: $12,249; Per Year: $2,449,575.
Indian Home Loan Guarantee Lender or Holder Violations.	Housing Community Development Act of 1992 (12 U.S.C. 1715z–13a(g)(2)).	§ 30.40	Per Violation: $11,864; Per Year: $2,372,677.	Per Violation: $12,249; Per Year: $2,449,575.
Multifamily & Section 202 or 811 Owners Violations.	HUD Reform Act of 1989 (12 U.S.C. 1735f–15(c)(2)).	§ 30.45	$59,316	$61,238.
Ginnie Mae Issuers & Custodians Violations.	HUD Reform Act of 1989 (12 U.S.C. 1723i(a))	§ 30.50	Per Violation: $11,864; Per Year: $2,372,677.	Per Violation: $12,249; Per Year: $2,449,575.

[1] Office of Management and Budget, M–24–07–, Memorandum for the Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2024, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. (*https://www.whitehouse.gov/wp-content/uploads/2023/12/M-24-07-Implementation-of-Penalty-Inflation-Adjustments-for-2024.pdf*). (October 2023 CPI–U (307.671)/October 2022 CPI–U (298.012) = 1.03241).

[2] 28 U.S.C. 2461 note.

[3] For certain programs including Multifamily, Section 202, and Section 811 mortgagors under 24 CFR 30.45 and Section 8 owners under 24 CFR 30.68, penalty amounts provided in a pre-penalty notice to a respondent pursuant to 24 CFR 30.70 is not considered having been assessed under this rule. For these programs, penalty amounts are considered to be assessed once the penalty amounts have been adjudicated as final or agreed upon under a settlement agreement.

Description	Statutory citation	Regulatory citation (24 CFR)	Previous amount	2024 Adjusted amount
Title I Broker & Dealers Violations.	HUD Reform Act of 1989 (12 U.S.C. 1703)	§ 30.60	Per Violation: $11,864; Per Year: $2,372,677.	Per Violation: $12,249; Per Year: $2,449,575.
Lead Disclosure Violation	Title X—Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4852d(b)(1)).	§ 30.65	$21,018	$21,699.
Section 8 Owners Violations	Multifamily Assisted Housing Reform and Affordability Act of 1997 (42 U.S.C. 1437z–1(b)(2)).	§ 30.68	$46,102	$47,596.
Lobbying Violation	The Lobbying Disclosure Act of 1995 (31 U.S.C. 1352).	§ 87.400	Min: $23,727; Max: $237,268	Min: $24,496; Max: $244,958.
Fair Housing Act Civil Penalties	Fair Housing Act (42 U.S.C. 3612(g)(3))	§ 180.671(a)	No Priors: $24,793; One Prior: $61,982; Two or More Priors: $123,965.	No Priors: $25,597; One Prior: $63,991; Two or More Priors: $127,983.
Manufactured Housing Regulations Violation.	Housing Community Development Act of 1974 (42 U.S.C. 5410).	§ 3282.10	Per Violation: $3,446; Per Year: $4,307,160.	Per Violation: $3,558; Per Year: $4,446,755.

III. Justification for Final Rulemaking for the 2024 Adjustments

HUD generally publishes regulations for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking in 24 CFR part 10. However, part 10 provides for exceptions to the general rule if the agency finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is ''impractical, unnecessary, or contrary to the public interest'' (see 24 CFR 10.1). As discussed, this final rule makes the required 2024 inflation adjustment, which HUD does not have discretion to change. Moreover, the 2015 Act specifies that a delay in the effective date under the Administrative Procedure Act is not required for annual adjustments under the 2015 Act. HUD has determined, therefore, that it is unnecessary to delay the effectiveness of the 2024 inflation adjustments to solicit public comments.

Section 7(o) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(o)) requires that any HUD regulation implementing any provision of the Department of Housing and Urban Development Reform Act of 1989 that authorizes the imposition of a civil money penalty may not become effective until after the expiration of a public comment period of not less than 60 days. This rule does not authorize the imposition of a civil money penalty—rather, it makes a standard inflation adjustment to penalties that were previously authorized. As noted above, the 2024 inflation adjustments are made in accordance with a statutorily prescribed formula that does not provide for agency discretion.

Accordingly, a delay in the effectiveness of the 2024 inflation adjustments in order to provide the public with an opportunity to comment is unnecessary because the 2015 Act exempts the adjustments from the need for delay, the rule does not authorize the imposition of a civil money penalty or alter the requirements in any way, and, in any event, HUD would not have the discretion to make changes as a result of any comments.

IV. Findings and Certifications

Regulatory Review—Executive Orders (E.O.) 12866, as Amended by E.O. 14094, and 13563

Under E.O. 12866 (Regulatory Planning and Review) (58 FR 51735), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. E.O. 13563 (Improving Regulations and Regulatory Review) (76 FR 3821) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' E.O. 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 (Modernizing Regulatory Review) amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

As discussed above in this preamble, this final rule adjusts existing civil monetary penalties for inflation by a statutorily required amount. HUD determined that this rule was not significant under E.O. 12866, as amended by E.O. 14094, and E.O. 13563.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because HUD has determined that good cause exists to issue this rule without prior public comment, this rule is not subject to the requirement to publish an initial or final regulatory flexibility analysis under the RFA as part of such action.

Unfunded Mandates Reform

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) [4] requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a 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. If a budgetary impact statement is required, section 205 of UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.[5] However, the UMRA applies only to rules for which an agency publishes a general notice of proposed rulemaking. As discussed above, HUD has determined, for good cause, that prior notice and public comment is not required on this rule and, therefore, the UMRA does not apply to this final rule.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') (64 FR 43255) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the

[4] 2 U.S.C. 1532.

[5] 2 U.S.C. 1535.

consultation and funding requirements of section 6 of the Executive order. This rule will not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

Environmental Review

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern, or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

List of Subjects

24 CFR Part 28

Administrative practice and procedure, Claims, Fraud, Penalties.

24 CFR Part 30

Administrative practice and procedure, Grant programs—housing and community development, Loan programs—housing and community development, Mortgage insurance, Mortgages, Penalties.

24 CFR Part 87

Government contracts, Government employees, Grant programs, Loan programs, Lobbying, Penalties, Reporting and recordkeeping requirements.

24 CFR Part 180

Administrative practice and procedure, Aged, Civil rights, Fair housing, Individuals with disabilities, Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements.

24 CFR Part 3282

Administrative practice and procedure, Consumer protection, Intergovernmental relations, Investigations, Manufactured homes, Reporting and recordkeeping requirements, Warranties.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 28, 30, 87, 180, and 3282 to read as follows:

PART 28—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

■ 1. The authority citation for part 28 continues to read as follows:

Authority: 28 U.S.C. 2461 note; 31 U.S.C. 3801–3812; 42 U.S.C. 3535(d).

■ 2. Amend § 28.10 by revising the introductory text of paragraphs (a)(1) and (b)(1) to read as follows:

§ 28.10 Basis for civil penalties and assessments.

(a) * * *

(1) A civil penalty of not more than $13,946 may be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know:

* * * * *

(b) * * *

(1) A civil penalty of not more than $13,946 may be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that:

* * * * *

PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

■ 3. The authority citation for part 30 continues to read as follows:

Authority: 12 U.S.C. 1701q–1, 1703, 1723i, 1735f–14, and 1735f–15; 15 U.S.C. 1717a; 28 U.S.C. 1 note and 2461 note; 42 U.S.C. 1437z–1 and 3535(d).

■ 4. In § 30.20, revise paragraph (b) to read as follows:

§ 30.20 Ethical violations by HUD employees.

* * * * *

(b) Maximum penalty. The maximum penalty is $24,496 for each violation.

■ 5. In § 30.25, revise paragraph (b) to read as follows:

§ 30.25 Violations by applicants for assistance.

* * * * *

(b) *Maximum penalty.* The maximum penalty is $24,496 for each violation.

■ 6. In § 30.35, revise the first sentence in paragraph (c)(1) to read as follows:

§ 30.35 Mortgagees and lenders.

* * * * *

(c)(1) *Amount of penalty.* The maximum penalty is $12,249 for each violation, up to a limit of $2,449,575 for all violations committed during any one-year period. * * *

* * * * *

■ 7. In § 30.36, revise the first sentence in paragraph (c) to read as follows:

§ 30.36 Other participants in FHA programs.

* * * * *

(c) *Amount of penalty.* The maximum penalty is $12,249 for each violation, up to a limit of $2,449,575 for all violations committed during any one-year period. * * *

■ 8. In § 30.40, revise the first sentence in paragraph (c) to read as follows:

§ 30.40 Loan guarantees for Indian housing.

* * * * *

(c) *Amount of penalty.* The maximum penalty is $12,249 for each violation, up to a limit of $2,449,575 for all violations committed during any one-year period. * * *

■ 9. In § 30.45, revise paragraph (g) to read as follows:

§ 30.45 Multifamily and section 202 or 811 mortgagors.

* * * * *

(g) *Maximum penalty.* The maximum penalty for each violation under paragraphs (c) and (f) of this section is $61,238.

* * * * *

■ 10. In § 30.50, revise the first sentence in paragraph (c) to read as follows:

§ 30.50 GNMA issuers and custodians.

* * * * *

(c) *Amount of penalty.* The maximum penalty is $12,249 for each violation, up to a limit of $2,449,575 during any one-year period. * * *

■ 11. In § 30.60, revise paragraph (c) to read as follows:

§ 30.60 Dealers or sponsored third-party originators.

* * * * *

(c) *Amount of penalty.* The maximum penalty is $12,249 for each violation, up to a limit for any particular person of $2,449,575 during any one-year period.

■ 12. In § 30.65, revise paragraph (b) to read as follows:

§ 30.65 Failure to disclose lead-based paint hazards.

* * * * *

(b) *Amount of penalty.* The maximum penalty is $21,699 for each violation.

■ 13. In § 30.68, revise paragraph (c) to read as follows:

§ 30.68 Section 8 owners.

* * * * *

(c) *Maximum penalty.* The maximum penalty for each violation under this section is $47,596.

* * * * *

PART 87—NEW RESTRICTIONS ON LOBBYING

■ 14. The authority citation for part 87 continues to read as follows:

Authority: 28 U.S.C. 1 note; 31 U.S.C. 1352; 42 U.S.C. 3535(d).

■ 15. In § 87.400, revise paragraphs (a), (b), and (e) to read as follows:

§ 87.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $24,496 and not more than $244,958 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B to this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $24,496 and not more than $244,958 for each such failure.

* * * * *

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $24,496, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $24,496 and $244,958, as determined by the agency head or his or her designee.

* * * * *

PART 180—CONSOLIDATED HUD HEARING PROCEDURES FOR CIVIL RIGHTS MATTERS

■ 16. The authority citation for part 180 continues to read as follows:

Authority: 28 U.S.C. 1 note; 29 U.S.C. 794; 42 U.S.C. 2000d–1, 3535(d), 3601–3619, 5301–5320, and 6103.

■ 17. In § 180.671, revise paragraphs (a)(1) through (3) to read as follows:

§ 180.671 Assessing civil penalties for Fair Housing Act cases.

(a) * * *

(1) $25,597, if the respondent has not been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act or any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local governmental agency, to have committed any prior discriminatory housing practice.

(2) $63,991, if the respondent has been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act, or under any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, to have committed one other discriminatory housing practice and the adjudication was made during the 5-year period preceding the date of filing of the charge.

(3) $127,983, if the respondent has been adjudged in any administrative hearings or civil actions permitted under the Fair Housing Act, or under any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, to have committed two or more discriminatory housing practices and the adjudications were made during the 7-year period preceding the date of filing of the charge.

* * * * *

PART 3282—MANUFACTURED HOME PROCEDURAL AND ENFORCEMENT REGULATIONS

■ 18. The authority citation for part 3282 continues to read as follows:

Authority: 15 U.S.C. 2697, 28 U.S.C. 2461 note, 42 U.S.C. 3535(d), 5403, and 5424.

■ 19. Revise § 3282.10 to read as follows:

§ 3282.10 Civil and criminal penalties.

Failure to comply with these regulations may subject the party in question to the civil and criminal penalties provided for in section 611 of the Act, 42 U.S.C. 5410. The maximum penalty imposed under section 611 of the Act shall be $3,558 for each violation, up to a maximum of $4,446,755 for any related series of violations occurring within one year from the date of the first violation.

Damon Smith,

General Counsel.

[FR Doc. 2024–03736 Filed 2–22–24; 8:45 am]

BILLING CODE 4210–67–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 1601 and 1614

RIN 3046–AB31

[FR Doc. 2024–02764]

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

AGENCY: Equal Employment Opportunity Commission.

ACTION: Correcting amendments.

SUMMARY: On February 14, 2024, the Equal Employment Opportunity Commission (''EEOC'' or ''Commission'') amended its procedural regulations to include references to the Pregnant Workers Fairness Act (''PWFA''). Due to drafting errors, two of those changes would not be recognized in the Code of Federal Regulations as drafted, and the Commission therefore issues these correcting amendments to ensure that its procedural regulations reference the PWFA where appropriate.

DATES: These correcting amendments are effective February 23, 2024.

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.

SUPPLEMENTARY INFORMATION: The Pregnant Workers Fairness Act (''PWFA'') became law on December 29, 2022, and became effective on June 27, 2023. In crafting the PWFA enforcement section, Congress incorporated the existing mechanisms and procedures for redress of other forms of employment discrimination. Procedural regulations were amended to include the PWFA in an interim final rule published in the **Federal Register** on February 14, 2024 (89 FR 11167).[1] When the interim final rule was published, 29 CFR 1601.17(a) was inadvertently included in instruction 5.f., which replaced the text ''title VII, the ADA, or GINA'' with ''title VII, the ADA, GINA, or the PWFA,'' instead of in instruction 6, which replaced references to ''title VII, the ADA, and GINA'' with ''title VII, the ADA, GINA, and the PWFA.'' Additionally, the interim final rule's section heading for 29 CFR 1614.407 was revised without a specific instruction to revise the section heading. These correcting amendments fix those errors.

List of Subjects in 29 CFR Parts 1601 and 1614

Administrative practice and procedure, Equal employment opportunity.

Accordingly, 29 CFR parts 1601 and 1614 are amended by making the following correcting amendments:

[1] These PWFA references in procedural regulations should not be confused with the EEOC's efforts to publish substantive interpretations of the PWFA. The EEOC is engaged in separate rulemaking to address those substantive provisions, and issued a Notice of Proposed Rulemaking, *Regulations to Implement the Pregnant Workers Fairness Act,* 88 FR 54714 (Aug. 11, 2023). The final rule is currently under OIRA review.

PART 1601—PROCEDURAL REGULATIONS

■ 1. The authority citation for part 1601 continues 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.

§ 1601.17 [Amended]

■ 2. In § 1601.17, in the first and second sentences of paragraph (a), remove the words ''title VII, the ADA, and GINA'' and add in their place the words ''title VII, the ADA, GINA, and the PWFA''.

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

■ 3. The authority citation for part 1614 continues 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.

■ 4. In § 1614.407, revise the section heading 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.

* * * * *

Dated: February 16, 2024.

For the Commission.

Charlotte A. Burrows,

Chair.

[FR Doc. 2024–03691 Filed 2–22–24; 8:45 am]

BILLING CODE 6570–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2024–0109]

Special Local Regulation; Marine Events Within the Eleventh Coast Guard District-Mark Hahn Memorial 300 Mile PWC Endurance Race

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Mark Hahn Memorial 300 Mile Personal Watercraft (PWC) Endurance Race special local regulation on the waters of Lake Havasu, Arizona from February 23 through February 25, 2024. This special local regulation is necessary to provide for the safety of the participants, crew, sponsor vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from entering, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1102 will be enforced from 7 a.m. until 6 p.m., each day from February 23, 2024, through February 25, 2024, for the location described in Item No. 14 in Table 1 to § 100.1102.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant Shelley Turner, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone 619–278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1102 for the Mark Hahn Memorial 300 Mile PWC Endurance Race on Lake Havasu, AZ for the location described in Table 1 to § 100.1102, Item No. 14 of that section, from 7 a.m. to 6 p.m. on February 23, 2024, through February 25, 2024. This action is being taken to provide for the safety of life on the navigable waterway during the race. Our regulation for recurring marine events on the Colorado River, between Davis Dam (Bullhead City, Arizona) and Headgate Dam (Parker, Arizona), § 100.1102, Table 1 to § 100.1102, Item No. 14, specifies the location of the regulated area for the Mark Hahn Memorial 300 PWC Endurance Race, which encompasses portions of Lake Havasu. Under the provisions of § 100.1102, persons and vessels are prohibited from entering, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners and local advertising by the event sponsor.

If the Captain of the Port Sector San Diego or his designated representative determines that the regulated area need not be enforced for the full duration stated on this document, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

J.W. Spitler,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2024–03756 Filed 2–22–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2024–0051, Sequence No. 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2024–03; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide (SECG).

SUMMARY: This document is issued under the joint authority of DoD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2024–03, which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2024–03, which precedes this document.

DATES: February 23, 2024.

ADDRESSES: The FAC, including the SECG, is available at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2024–03 and the FAR Case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

RULES LISTED IN FAC 2024–03

Item	Subject	FAR case	Analyst
*I	Certification of Service-Disabled Veteran-Owned Small Businesses	2022–009	Moore.
II	Trade Agreements Thresholds	2023–012	Jackson.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents preceding these item summaries. FAC 2024–03 amends the FAR as follows:

Item I—Certification of Service-Disabled Veteran-Owned Small Businesses (FAR Case 2022–009)

This interim rule amends the Federal Acquisition Regulation to implement the Governmentwide certification requirement for service-disabled veteran-owned small business (SDVOSB) concerns seeking sole-source and set-aside awards under the SDVOSB Program. Beginning January 1, 2024, SDVOSB concerns must either be certified by the Small Business Administration (SBA), or have both submitted an application for certification to SBA on or before December 31, 2023, and represented that it is an SDVOSB in the System for Award Management (SAM), in order to be eligible for sole-source or set-aside awards under the SDVOSB Program. This rule also requires that an SDVOSB concern update its status in the System for Award Management no later than two days after the date of a final determination that the concern does not meet the requirements of the status the concern claims to hold, and provides new SDVOSB protest and appeal procedures. The interim rule will not have a significant economic impact on a substantial number of small entities because the rule simply implements the requirements of SBA's regulations and does not impose any additional compliance burden on entities.

Item II—Trade Agreements Thresholds (FAR Case 2023–012)

This final rule amends the FAR to adjust the thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements as determined by the United States Trade Representative, according to predetermined formulae under the agreements.

William F. Clark,

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

[FR Doc. 2024–02799 Filed 2–22–24; 8:45 am]

BILLING CODE 6820–EP–P

Proposed Rules

Federal Register

Vol. 89, No. 37

Friday, February 23, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0234; Project Identifier MCAI–2023–01215–A]

RIN 2120–AA64

Airworthiness Directives; GA8 Airvan (Pty) Ltd 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 GA8 Airvan (Pty) Ltd Model GA8 and GA8–TC320 airplanes. This proposed AD was prompted by reports of insufficient electrical bonding of the solenoid (relay) box assembly that could result in degraded performance, errors, or intermittent failures of equipment connected to electrical Bus 1, Bus 2, associated electrical control, and protective devices fitted within or attached to the solenoid box. This proposed AD would require inspecting for an existing wire connecting the relay box earth point to the ground power socket, and if one is not present, installing a mechanical connection. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by April 8, 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–2024–0234; 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 GA8 Airvan (Pty) Ltd, P.O. Box 881, Morwell, Victoria 3840, Australia; phone: +61 (0)3 5172 1200; email: *TECHPUBS@gippsaero.com.au;* website: *gippsaero.com.au.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@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–2024–0234; Project Identifier MCAI–2023–01215–A'' 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 Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The Civil Aviation Safety Authority (CASA), which is the aviation authority for Australia, has issued CASA Australia AD GA8/11, dated November 21, 2023 (CASA Australia AD GA8/11) (also referred to as the MCAI), to correct an unsafe condition on all GA8 Airvan (Pty) Ltd Model GA8 and GA8–TC320 airplanes. The MCAI states that operators made two reports and a few anecdotal reports of intermittent system discrepancies attributed to insufficient electrical bonding of the solenoid (relay) box assembly. Without a dedicated solenoid box electrical bonding connection, these airplanes may suffer degraded performance, errors, or intermittent failures of equipment connected to electrical Bus 1, Bus 2, associated electrical control, and protective devices fitted within or attached to the solenoid box. The majority of Model GA8 and GA8–TC320 airplanes were produced with the relay box electrically bonded to the airframe via the relay box lid and the hardware (screws) holding it in place. The relay box did not have a dedicated bonding point or mechanical connection.

The MCAI requires doing the actions specified in GippsAero Service Bulletin SB–GA8–2023–216, Issue 1, dated February 24, 2023 (GippsAero SB–GA8–2023–216, Issue 1). These actions include inspecting for an existing wire connecting the relay box earth point to the ground power socket, and if one is not present, installing a mechanical connection.

The FAA is proposing this AD to address this unsafe condition. Not having a dedicated solenoid box electrical bonding connection, if not addressed, could result in degraded electrical equipment performance, errors, or intermittent failures of equipment connected to electrical Bus 1, Bus 2, associated electrical control, and protective devices fitted within or attached to the solenoid box, which could lead to loss of equipment essential for safe flight.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0234.

Related Service Information Under 1 CFR Part 51

The FAA reviewed GippsAero SB–GA8–2023–216, Issue 1. This service information specifies procedures for inspecting for an existing wire connecting the relay box earth point to the ground power socket, and if one is not present, installing a mechanical connection.

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**.

FAA's Determination

These products have been approved by the aviation authority of another country and are 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 MCAI, except as discussed under ''Differences Between This Proposed AD and the MCAI.''

Differences Between This Proposed AD and the MCAI

The MCAI applicability is Gippsland Aeronautics Model GA8 Series airplanes. The applicability in this proposed AD would be GA8 Airvan (Pty) Ltd Model GA8 and GA8–TC320 airplanes because that is what is on the FAA type certificate.

Part A, step 4. of the Accomplishment Instructions in GippsAero Service Bulletin SB–GA8–2023–216, Issue 1, specifies to proceed to the Documentation section to update the airplane logbook, but that action would not be specifically required by this proposed AD as current FAA regulations already require a logbook entry for compliance with AD actions.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 62 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
Inspect for mechanical connection	1 work-hour × $85 per hour = $85	$0	$85	$5,270

The FAA estimates the following costs to do any necessary actions that would be required based on the results of the proposed inspection. The agency has no way of determining the number of airplanes that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Install mechanical connection	1 work-hour × $85 per hour = $85	$170	$255

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some 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:

GA8 Airvan (Pty) Ltd: Docket No. FAA–2024–0234; Project Identifier MCAI–2023–01215–A.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by April 8, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to GA8 Airvan (Pty) Ltd Model GA8 airplanes, all serial numbers up to and including GA8–20–262; and Model GA8–TC320 airplanes, all serial numbers up to and including GA8–TC 320–20–261; certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2497, Electrical Power System Wiring.

(e) Unsafe Condition

This AD was prompted by reports of insufficient electrical bonding of the solenoid (relay) box assembly. The FAA is issuing this AD to address possible missing mechanical connections. The unsafe condition, if not addressed, could result in degraded electrical equipment performance, errors, or intermittent failures of equipment connected to electrical Bus 1, Bus 2, associated electrical control and protective devices fitted within or attached to the solenoid box, which could lead to loss of equipment essential for safe flight.

(f) Compliance

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

(g) Required Actions

(1) Within 100 hours time-in-service (TIS) after the effective date of this AD, inspect for a mechanical connection between the relay box earth point to the ground power socket in accordance with Part A, steps 1. through 4. of the Accomplishment Instructions in GippsAero Service Bulletin SB–GA8–2023–216, Issue 1, dated February 24, 2023 (GippsAero SB–GA8–2023–216, Issue 1), except where step 4. specifies to proceed to the Documentation section to update the airplane logbook, that action is not specifically required by this AD.

(2) If no mechanical connection between the relay box earth point to the ground power socket is found during the inspection required by paragraph (g)(1) of this AD, before further flight, install a mechanical connection in accordance with Part B, steps 1. through 3. of the Accomplishment Instructions in GippsAero SB–GA8–2023–216, Issue 1.

(h) 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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (i)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local Flight Standards District Office/certificate holding district office.

(i) Additional Information

(1) Refer to Civil Aviation Safety Authority (CASA) Australia AD GA8/11, dated November 21, 2023, for related information. This CASA Australia AD may be found in the AD docket at regulations.gov under Docket No. FAA–2024–0234.

(2) For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference 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) GippsAero Service Bulletin SB–GA8–2023–216, Issue 1, dated February 24, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact GA8 Airvan (Pty) Ltd, PO Box 881, Morwell, Victoria 3840, Australia; phone: +61 (0)3 5172 1200; email: *TECHPUBS@gippsaero.com.au;* website: *gippsaero.com.au.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

(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 16, 2024.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–03720 Filed 2–22–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AR10

Updating VA Adjudication Regulations for Disability or Death Benefit Claims Related to Exposure to Certain Herbicide Agents

Correction

In Proposed Rule Document 2024–02590, appearing on pages 9803–9813, in the issue of Monday, February 12, 2024, make the following correction:

On page 9803, in the second column, beginning on the thirty-third line, under the heading **DATES:**, the text reading ‘‘[insert date 60 days after date of publication in the **Federal Register**]’’ should read ‘‘April 12, 2024’’.

[FR Doc. C1–2024–02590 Filed 2–22–24; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2023–0600; FRL–11593–01–R10]

Air Plan Approval; OR; Regional Haze Plan for the Second Implementation Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the regional haze state implementation plan revision submitted by Oregon on April 29, 2022, as supplemented on November 22, 2023, as satisfying applicable requirements under the

Clean Air Act and the EPA's Regional Haze Rule for the program's second implementation period. The Oregon submission addressed the requirement that states must periodically revise their long-term strategies for making reasonable progress towards the national goal of preventing any future, and remedying any existing, anthropogenic impairment of visibility, including regional haze, in mandatory Class I Federal areas. The Oregon submission also addressed other applicable requirements for the second implementation period of the regional haze program. Upon final action, the Oregon submission will become part of the Oregon SIP.

DATES: Written comments must be received on or before March 25, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2023–0600 at *https://www.regulations.gov.* For comments submitted at regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about confidential business information or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, WA 98101, at (206) 553–6357 or *hunt.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the use of "we" and "our" means the EPA.

Table of Contents

I. Proposed Action

On April 29, 2022 and November 22, 2023, Oregon submitted a state implementation plan (SIP) revision and supplement to address regional haze for the second implementation period. Oregon made the submissions to satisfy the Clean Air Act regional haze program requirements pursuant to Clean Air Act sections 169A and 169B and the EPA's implementing regulations in the Code of Federal Regulations (CFR) at 40 CFR 51.308. The EPA is proposing to find that the Oregon submissions meet the applicable statutory and regulatory requirements and thus we are proposing to approve the submissions into the SIP. We are also proposing to approve, and incorporate by reference into the Oregon SIP at 40 CFR part 52, subpart MM, specific regulatory provisions and source-specific requirements included in the submissions. These provisions are detailed in section V. of this preamble.

II. Background and Requirements for Regional Haze Plans

A. Regional Haze Background

In the 1977 Clean Air Act Amendments, Congress created a program [1] to protect visibility in the nation's mandatory class I Federal areas, which include certain national parks and wilderness areas.[2] Congress established as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." [3] Congress further directed the EPA to promulgate regulations to assure reasonable progress toward meeting this national goal.[4] On December 2, 1980, the EPA promulgated regulations to address visibility impairment in mandatory class I Federal areas (hereinafter referred to as "Class I areas") that is "reasonably attributable" to a single source or small group of sources.[5] These regulations, codified at 40 CFR 51.300 through 51.307, represented the first phase of the EPA's efforts to address visibility impairment. In 1990, Congress added section 169B to the Clean Air Act to further address visibility impairment, specifically, impairment from regional haze. The EPA subsequently promulgated the Regional Haze Rule on July 1, 1999 (64 FR 35714), codified at 40 CFR 51.308.[6] These regional haze regulations are a central component of the EPA's comprehensive visibility protection program for Class I areas.

Regional haze is visibility impairment that is produced by a multitude of anthropogenic sources and activities which are located across a broad geographic area and that emit pollutants that impair visibility. Visibility impairing pollutants include fine and coarse particulate matter (PM) (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and

[1] Clean Air Act section 169A.

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

[3] Clean Air Act section 169A(a)(1).

[4] Clean Air Act section 169A(a)(4).

[5] 45 FR 80084, December 2, 1980.

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

their precursors (*e.g.,* sulfur dioxide (SO_2), nitrogen oxides (NO_X), and, in some cases, volatile organic compounds (VOC) and ammonia (NH_3)). Fine particle precursors react in the atmosphere to form fine particulate matter ($PM_{2.5}$), which impairs visibility by scattering and absorbing light. Visibility impairment reduces the perception of clarity and color, as well as visible distance.[7]

To address regional haze visibility impairment, the 1999 Regional Haze Rule established an iterative planning process that requires both states in which Class I areas are located and states ''the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility'' in a Class I area to periodically submit SIP revisions to address such impairment.[8] Under the Clean Air Act, each SIP submission must contain ''a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal.'' [9] The initial round of SIP submissions also had to address the statutory requirement that certain older, larger sources of visibility impairing pollutants install and operate the best available retrofit technology (BART).[10] States' first regional haze SIPs were due by December 17, 2007,[11] with subsequent SIP submissions containing updated long-term strategies originally due July 31, 2018, and every ten years thereafter.[12] The EPA established in the 1999 Regional Haze Rule that all states either have Class I areas within their borders or ''contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area''; therefore, all states must submit regional haze SIPs.[13]

Much of the focus in the first implementation period of the regional haze program, which ran from 2007 through 2018, was on satisfying states' BART obligations. First implementation period SIPs were additionally required to contain long-term strategies for making reasonable progress toward the national visibility goal, of which BART is one component. The core required elements for the first implementation period SIPs (other than BART) are laid out in 40 CFR 51.308(d). Those provisions required that states containing Class I areas establish reasonable progress goals that are measured in deciviews and reflect the anticipated visibility conditions at the end of the implementation period including from implementation of states' long-term strategies. The first planning period reasonable progress goals were required to provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period. In establishing the reasonable progress goals for any Class I area in a state, the state was required to consider four statutory factors: the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources.[14]

States were also required to calculate baseline (using the five year period of 2000–2004) and natural visibility conditions (*i.e.,* visibility conditions without anthropogenic visibility impairment) for each Class I area, and to calculate the linear rate of progress needed to attain natural visibility conditions, assuming a starting point of baseline visibility conditions in 2004 and ending with natural conditions in 2064. This linear interpolation is known as the ''uniform rate of progress'' and is used as a tracking metric to help states assess the amount of progress they are making towards the national visibility goal over time in each Class I area.[15] The 1999 Regional Haze Rule also provided that states' long-term strategies must include the ''enforceable emissions limitations, compliance, schedules, and other measures as necessary to achieve the reasonable progress goals.'' [16] In establishing their long-term strategies, states are required to consult with other states that also contribute to visibility impairment in a given Class I area and include all measures necessary to obtain their shares of the emission reductions needed to meet the reasonable progress goals.[17] The 1999 Regional Haze Rule also contains seven additional factors states must consider in formulating their long-term strategies,[18] as well as provisions governing monitoring and other implementation plan requirements.[19] Finally, the 1999 Regional Haze Rule required states to submit periodic progress reports—SIP revisions due every five years that contain information on states' implementation of their regional haze plans and an assessment of whether anything additional is needed to make reasonable progress [20]—and to consult with the Federal Land Manager(s) [21] responsible for each Class I area

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

[8] Clean Air Act section 169A(b)(2). See also 40 CFR 51.308(b), (f) (establishing submission dates for iterative regional haze SIP revisions (64 FR 35714, 35768, July 1, 1999). The Regional Haze Rule expresses the statutory requirement for states to submit plans addressing out-of-state Class I areas by providing that states must address visibility impairment ''in each mandatory Class I Federal area located outside the State that may be affected by emissions from within the State.'' 40 CFR 51.308(d), (f).

[9] Clean Air Act section 169A(b)(2)(B).

[10] Clean Air Act section 169A(b)(2)(A); 40 CFR 51.308(d), (e).

[11] 40 CFR 51.308(b).

[12] 64 FR 35714, 35768, July 1, 1999.

[13] 64 FR 35714, 35721, July 1, 1999. In addition to each of the fifty states, the EPA also concluded that the Virgin Islands and District of Columbia must also submit regional haze SIPs because they either contain a Class I area or contain sources whose emissions are reasonably anticipated to contribute regional haze in a Class I area. See 40 CFR 51.300(b), (d)(3).

[14] Clean Air Act section 169A(g)(1); 40 CFR 51.308(d)(1).

[15] 40 CFR 51.308(d)(1)(i)(B), (d)(2). The EPA established the uniform rate of progress framework in the 1999 Regional Haze Rule to provide ''an equitable analytical approach'' to assessing the rate of visibility improvement at Class I areas across the country. The start point for the uniform rate of progress analysis is 2004 and the endpoint was calculated based on the amount of visibility improvement that was anticipated to result from implementation of existing Clean Air Act programs over the period from the mid-1990s to approximately 2005. Assuming this rate of progress would continue into the future, the EPA determined that natural visibility conditions would be reached in 60 years, or 2064 (60 years from the baseline starting point of 2004). However, the EPA did not establish 2064 as the year by which the national goal *must* be reached. 64 FR 35714, 35731–32, July 1, 1999. That is, the uniform rate of progress and the 2064 date are not enforceable targets, but are rather tools that ''allow for analytical comparisons between the rate of progress that would be achieved by the state's chosen set of control measures and the [uniform rate of progress] URP.'' (82 FR 3078, 3084, January 10, 2017).

[16] 40 CFR 51.308(d)(3).

[17] 40 CFR 51.308(d)(3)(i), (ii).

[18] 40 CFR 51.308(d)(3)(v).

[19] 40 CFR 51.308(d)(4).

[20] See 40 CFR 51.308(g), and (h).

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

according to the requirements in Clean Air Act 169A(d) and 40 CFR 51.308(i).

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

The EPA provided guidance to the states for their second implementation period SIP submissions in the preamble to the 2017 Regional Haze Rule Revisions as well as in subsequent, stand-alone guidance documents. In August 2019, the EPA issued ''Guidance on Regional Haze State Implementation Plans for the Second Implementation Period'' (''2019 Guidance'').[22] On July 8, 2021, the EPA issued a memorandum containing ''Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period'' (''2021 Clarifications Memo'').[23] Additionally, the EPA further clarified the recommended procedures for processing ambient visibility data and optionally adjusting the uniform rate of progress to account for international anthropogenic and prescribed fire impacts in two technical guidance documents: the December 2018 ''Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program'' (''2018 Visibility Tracking Guidance''),[24] and the June 2020 ''Recommendation for the Use of Patched and Substituted Data and Clarification of Data Completeness for Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program'' and associated Technical Addendum (''2020 Data Completeness Memo'').[25]

As previously explained in the 2021 Clarifications Memo, the EPA intends for the second implementation period of the regional haze program to secure meaningful reductions in visibility impairing pollutants that build on the significant progress states have achieved to date. The EPA also recognizes that analyses regarding reasonable progress are state-specific and that, based on states' and sources' individual circumstances, what constitutes reasonable reductions in visibility impairing pollutants will vary from state-to-state. While there exist many opportunities for states to leverage both ongoing and upcoming emission reductions under other Clean Air Act programs, the EPA expects states to undertake rigorous reasonable progress analyses that identify further opportunities to advance the national visibility goal consistent with the statutory and regulatory requirements.[26] This is consistent with Congress's determination that a visibility protection program is needed in addition to the Clean Air Act's National Ambient Air Quality Standards and Prevention of Significant Deterioration programs, as further emission reductions may be necessary to adequately protect visibility in Class I areas throughout the country.[27]

B. Roles of Agencies in Addressing Regional Haze

Because the air pollutants and pollution affecting visibility in Class I areas can be transported over long distances, successful implementation of the regional haze program requires long-term, regional coordination among multiple jurisdictions and agencies that have responsibility for Class I areas and the emissions that impact visibility in those areas. In order to address regional haze, states need to develop strategies in coordination with one another, considering the effect of emissions from one jurisdiction on the air quality in another. Five regional planning organizations,[28] which include representation from state and tribal governments, the EPA, and Federal Land Managers, were developed in the lead-up to the first implementation period to address regional haze. Regional planning organizations evaluate technical information to better understand how emissions from State and Tribal lands impact Class I areas across the country, pursue the development of regional strategies to reduce emissions of particulate matter and other pollutants leading to regional haze, and help states meet the consultation requirements of the Regional Haze Rule.

Western Regional Air Partnership

The Western Regional Air Partnership (WRAP)[29] is one of the five regional planning organizations and functions as a voluntary partnership of state, Tribal, Federal, and local air agencies whose purpose is to understand current and evolving regional air quality issues in the West. There are 15 member states in the WRAP, including Oregon, in addition to 28 tribes and 30 local air

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

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

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

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

[26] See generally 2021 Clarifications Memo.

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

[28] Regional planning organizations are sometimes also referred to as ''multi-jurisdictional organizations''. For the purposes of this document, the terms regional planning organizations and multi-jurisdictional organizations are synonymous.

[29] The WRAP website may be found at *https://www.wrapair2.org.*

agency members.[30] WRAP Federal partners are the EPA, National Parks Service, Fish and Wildlife Service, Forest Service, and Bureau of Land Management. The WRAP membership formed a workgroup to develop a planning framework for state regional haze second planning period SIPs. Based on emissions and monitoring data supplied by its membership, the WRAP produced a technical system to support regional modeling of visibility impacts at Class I areas across the west.[31] The WRAP Technical Support System consolidated air quality monitoring data, meteorological and receptor modeling data analyses, emissions inventories and projections, and gridded air quality/visibility regional modeling results. The WRAP Technical Support System is accessible by member states and allows for the creation of maps, figures, and tables to export and use in state plan development, and maintains the original source data for verification and further analysis.

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

Under the Clean Air Act and the EPA's regulations, all 50 states, the District of Columbia, and the United States (U.S.) Virgin Islands are required to submit regional haze SIPs satisfying the applicable requirements for the second implementation period of the regional haze program by July 31, 2021. Each state's SIP must contain a long-term strategy for making reasonable progress toward meeting the national goal of remedying any existing and preventing any future anthropogenic visibility impairment in Class I areas.[32] To this end, 40 CFR 51.308(f) lays out the process by which states determine what constitutes their long-term strategies, with the order of the requirements in § 51.308(f)(1) through (3) generally mirroring the order of the steps in the reasonable progress analysis [33] and (f)(4) through (6) containing additional, related requirements. Broadly speaking, a state first must identify the Class I areas within the state and determine the Class I areas outside the state in which visibility may be affected by emissions from the state. These are the Class I areas that must be addressed in the state's long-term strategy.[34] For each Class I area within its borders, a state must then calculate the baseline, current, and natural visibility conditions for that area, as well as the visibility improvement made to date and the uniform rate of progress.[35] Each state having a Class I area and/or emissions that may affect visibility in a Class I area must then develop a long-term strategy that includes the enforceable emission limitations, compliance schedules, and other measures that are necessary to make reasonable progress in such areas. A reasonable progress determination is based on applying the four factors in CAA section 169A(g)(1) to sources of visibility-impairing pollutants that the state has selected to assess for controls for the second implementation period. Additionally, as further explained below, the RHR at 40 CFR 51.308(f)(2)(iv) separately provides five "additional factors" [36] that states must consider in developing their long-term strategies. See 40 CFR 51.308(f)(2). A state evaluates potential emission reduction measures for those selected sources and determines which are necessary to make reasonable progress. Those measures are then incorporated into the state's long-term strategy. After a state has developed its long-term strategy, it then establishes reasonable progress goals for each Class I area within its borders by modeling the visibility impacts of all reasonable progress controls at the end of the second implementation period, *i.e.,* in 2028, as well as the impacts of other requirements of the Clean Air Act. The reasonable progress goals include reasonable progress controls not only for sources in the state in which the Class I area is located, but also for sources in other states that contribute to visibility impairment in that area. The reasonable progress goals are then compared to the baseline visibility conditions and the uniform rate of progress to ensure that progress is being made towards the statutory goal of preventing any future and remedying any existing anthropogenic visibility impairment in Class I areas.[37]

In addition to satisfying the requirements at 40 CFR 51.308(f) related to reasonable progress, the regional haze SIP revisions for the second implementation period must address the requirements in 40 CFR 51.308(g)(1) through (5) pertaining to periodic reports describing progress towards the reasonable progress goals, 40 CFR 51.308(f)(5), as well as requirements for Federal Land Manager consultation that apply to all visibility protection SIPs and SIP revisions.[38]

A state must submit its regional haze SIP and subsequent SIP revisions to the EPA according to the requirements applicable to all SIP revisions under the Clean Air Act and the EPA's regulations.[39] Upon EPA approval, a SIP is enforceable by the EPA and the public under the Clean Air Act. If the EPA finds that a state fails to make a required SIP revision, or if the EPA finds that a state's SIP is incomplete or if disapproves the SIP, the EPA must promulgate a Federal implementation plan (FIP) that satisfies the applicable requirements.[40]

A. Identification of Class I Areas

The first step in developing a regional haze SIP is for a state to determine which Class I areas, in addition to those within its borders, "may be affected" by emissions from within the state. In the 1999 Regional Haze Rule, the EPA determined that all states contribute to visibility impairment in at least one Class I area and explained that the statute and regulations lay out an "extremely low triggering threshold" for determining "whether States should be required to engage in air quality planning and analysis as a prerequisite to determining the need for control of emissions from sources within their State." [41]

A state must determine which Class I areas must be addressed by its SIP by evaluating the total emissions of visibility impairing pollutants from all sources within the state. While the Regional Haze Rule does not require this evaluation to be conducted in any particular manner, the EPA's 2019 Guidance provides recommendations for how such an assessment might be accomplished, including by, where appropriate, using the determinations previously made for the first implementation period. 2019 Guidance at 8–9. In addition, the determination of which Class I areas may be affected by a state's emissions is subject to the requirement in 40 CFR 51.308(f)(2)(iii) to "document the technical basis, including modeling, monitoring, cost,

[30] The WRAP membership list may be found at *https://www.wrapair2.org/membership.aspx.*

[31] Technical information may be found at *https://www.wrapair2.org/RHPWG.aspx.*

[32] Clean Air Act section 169A(b)(2)(B).

[33] The EPA explained in the 2017 Regional Haze Rule Revisions that we were adopting new regulatory language in 40 CFR 51.308(f) that, unlike the structure in 51.308(d), "tracked the actual planning sequence." (82 FR 3091, January 10, 2017).

[34] 40 CFR 51.308(f), (f)(2).

[35] 40 CFR 51.308(f)(1).

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

[37] 40 CFR 51.308(f)(2) and (3).

[38] 40 CFR 51.308(i).

[39] See Clean Air Act section 169(b)(2); Clean Air Act section 110(a).

[40] Clean Air Act section 110(c)(1).

[41] 64 FR 35714, 35720–35722, July 1, 1999.

engineering, and emissions information, on which the State is relying to determine the emission reduction measures that are necessary to make reasonable progress in each mandatory Class I Federal area it affects.''

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

As part of assessing whether a SIP submission for the second implementation period is providing for reasonable progress towards the national visibility goal, the Regional Haze Rule contains requirements in 40 CFR 51.308(f)(1) related to tracking visibility improvement over time. The requirements of this section apply only to states having Class I areas within their borders; the required calculations must be made for each such Class I area. The EPA's 2018 Visibility Tracking Guidance [42] provides recommendations to assist states in satisfying their obligations under 40 CFR 51.308(f)(1); specifically, in developing information on baseline, current, and natural visibility conditions, and in making optional adjustments to the uniform rate of progress to account for the impacts of international anthropogenic emissions and prescribed fires.[43]

The Regional Haze Rule requires tracking of visibility conditions on two sets of days: the clearest and the most impaired days. Visibility conditions for both sets of days are expressed as the average deciview index for the relevant five-year period (the period representing baseline or current visibility conditions). The Regional Haze Rule provides that the relevant sets of days for visibility tracking purposes are the 20% clearest (the 20% of monitored days in a calendar year with the lowest values of the deciview index) and 20% most impaired days (the 20% of monitored days in a calendar year with the highest amounts of anthropogenic visibility impairment).[44] A state must calculate visibility conditions for both the 20% clearest and 20% most impaired days for the baseline period of 2000–2004 and the most recent five-year period for which visibility monitoring data are available (representing current visibility conditions).[45] States must also calculate natural visibility conditions for the clearest and most impaired days,[46] by estimating the conditions that would exist on those two sets of days absent anthropogenic visibility impairment.[47] Using all these data, states must then calculate, for each Class I area, the amount of progress made since the baseline period (2000–2004) and how much improvement is left to achieve in order to reach natural visibility conditions.

Using the data for the set of most impaired days only, states must plot a line between visibility conditions in the baseline period and natural visibility conditions for each Class I area to determine the uniform rate of progress—the amount of visibility improvement, measured in deciviews, that would need to be achieved during each implementation period in order to achieve natural visibility conditions by the end of 2064. The uniform rate of progress is used in later steps of the reasonable progress analysis for informational purposes and to provide a non-enforceable benchmark against which to assess a Class I area's rate of visibility improvement.[48] Additionally, in the 2017 Regional Haze Rule Revisions, the EPA provided states the option of proposing to adjust the endpoint of the uniform rate of progress to account for impacts of anthropogenic sources outside the U.S. and/or impacts of certain types of wildland prescribed fires. These adjustments, which must be approved by the EPA, are intended to avoid any perception that states should compensate for impacts from international anthropogenic sources and to give states the flexibility to determine that limiting the use of wildland-prescribed fire is not necessary for reasonable progress.[49]

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

C. Long-Term Strategy for Regional Haze

The core component of a regional haze SIP submission is a long-term strategy that addresses regional haze in each Class I area within a state's borders and each Class I area that may be affected by emissions from the state. The long-term strategy ''must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv).'' [50] The amount of progress that is ''reasonable progress'' is based on applying the four statutory factors in Clean Air Act section 169A(g)(1) in an evaluation of potential control options for sources of visibility impairing pollutants, which is referred to as a ''four-factor'' analysis. The outcome of that analysis is the emission reduction measures that a particular source or group of sources needs to implement in order to make reasonable progress towards the national visibility goal.[51] Emission reduction measures that are necessary to make reasonable progress may be either new, additional control measures for a source, or they may be the existing emission reduction measures that a source is already implementing.[52] Such measures must be represented by ''enforceable emissions limitations, compliance schedules, and other measures'' (*i.e.,* any additional compliance tools) in a state's long-term strategy in its SIP.[53]

Section 51.308(f)(2)(i) provides the requirements for the four-factor analysis. The first step of this analysis entails selecting the sources to be evaluated for emission reduction measures; to this end, states should

[42] The 2018 Visibility Tracking Guidance references and relies on parts of the 2003 Tracking Guidance: ''Guidance for Tracking Progress Under the Regional Haze Rule,'' which can be found at *https://www.epa.gov/sites/default/files/2021-03/documents/tracking.pdf.*

[43] 82 FR 3078, 3103–05, January 10, 2017.

[44] 40 CFR 51.301. This document also refers to the 20% clearest and 20% most anthropogenically impaired days as the ''clearest'' and ''most impaired'' or ''most anthropogenically impaired'' days, respectively.

[45] 40 CFR 51.308(f)(1)(i), (iii).

[46] The Regional Haze Rule at 40 CFR 51.308(f)(1)(ii) contains an error related to the requirement for calculating two sets of natural conditions values. The rule says ''most impaired days or the clearest days'' where it should say ''most impaired days and clearest days.'' This is an error that was intended to be corrected in the 2017 Regional Haze Rule Revisions but did not get corrected in the final rule language. This is supported by the preamble text at 82 FR 3098, January 0, 2017: ''In the final version of 40 CFR 51.308(f)(1)(ii), an occurrence of ''or'' has been corrected to ''and'' to indicate that natural visibility conditions for both the most impaired days and the clearest days must be based on available monitoring information.''

[47] 40 CFR 51.308(f)(1)(ii).

[48] Being on or below the uniform rate of progress is not a ''safe harbor''; *i.e.,* achieving the uniform rate of progress does not mean that a Class I area is making ''reasonable progress'' and does not relieve a state from using the four statutory factors to determine what level of control is needed to achieve such progress. See, *e.g.,* 82 FR 3078, 3093, January 10, 2017.

[49] 82 FR 3078, 3107, January 10, 2017, footnote 116.

[50] 40 CFR 51.308(f)(2).

[51] 40 CFR 51.308(f)(2)(i).

[52] See 2019 Guidance at 43; 2021 Clarifications Memo at 8–10.

[53] 40 CFR 51.308(f)(2).

consider ''major and minor stationary sources or groups of sources, mobile sources, and area sources'' of visibility impairing pollutants for potential four-factor control analysis.[54] A threshold question at this step is which visibility impairing pollutants will be analyzed. As the EPA previously explained, consistent with the first implementation period, the EPA generally expects that each state will analyze at least SO_2 and NO_X in selecting sources and determining control measures.[55] A state that chooses not to consider at least these two pollutants should demonstrate why such consideration would be unreasonable.[56]

While states have the option to analyze all sources, the 2019 Guidance explains that ''an analysis of control measures is not required for every source in each implementation period,'' and that ''[s]electing a set of sources for analysis of control measures in each implementation period is . . . consistent with the Regional Haze Rule, which sets up an iterative planning process and anticipates that a state may not need to analyze control measures for all its sources in a given SIP revision.'' [57] However, given that source selection is the basis of all subsequent control determinations, a reasonable source selection process ''should be designed and conducted to ensure that source selection results in a set of pollutants and sources the evaluation of which has the potential to meaningfully reduce their contributions to visibility impairment.'' [58]

The EPA explained in the 2021 Clarifications Memo that each state has an obligation to submit a long-term strategy that addresses the regional haze visibility impairment that results from emissions from within that state. Thus, source selection should focus on the in-state contribution to visibility impairment and be designed to capture a meaningful portion of the state's total contribution to visibility impairment in Class I areas. A state should not decline to select its largest in-state sources on the basis that there are even larger out-of-state contributors.[59]

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

Once a state has selected the set of sources, the next step is to determine the emissions reduction measures for those sources that are necessary to make reasonable progress for the second implementation period.[60] This is accomplished by considering the four factors—''the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements.'' [61] The EPA has explained that the four-factor analysis is an assessment of potential emission reduction measures (*i.e.,* control options) for sources; ''use of the terms 'compliance' and 'subject to such requirements' in section 169A(g)(1) strongly indicates that Congress intended the relevant determination to be the requirements with which sources would have to comply in order to satisfy the [Clean Air Act's] reasonable progress mandate.'' [62] Thus, for each source it has selected for four-factor analysis,[63] a state must consider a ''meaningful set'' of technically feasible control options for reducing emissions of visibility impairing pollutants.[64] The 2019 Guidance provides that ''[a] state must reasonably pick and justify the measures that it will consider, recognizing that there is no statutory or regulatory requirement to consider all technically feasible measures or any particular measures. A range of technically feasible measures available to reduce emissions would be one way to justify a reasonable set.'' [65]

The EPA's 2021 Clarifications Memo provides further guidance on what constitutes a reasonable set of control options for consideration: ''A reasonable four-factor analysis will consider the full range of potentially reasonable options for reducing emissions.'' [66] In addition to add-on controls and other retrofits (*i.e.,* new emission reduction measures for sources), the EPA explained that states should generally analyze efficiency improvements for sources' existing measures as control options in their four-factor analyses, as in many cases such improvements are reasonable given that they typically involve only additional operation and maintenance costs. Additionally, the 2021 Clarifications Memo provides that states that have assumed a higher emission rate than a source has achieved or could potentially achieve using its existing measures should also consider lower emission rates as potential control options. That is, a state should consider a source's recent actual and projected emission rates to determine if it could reasonably attain lower emission rates with its existing measures. If so, the state should analyze the lower emission rate as a control option for reducing emissions.[67] The EPA's recommendations to analyze potential efficiency improvements and achievable lower emission rates apply to both sources that have been selected for four-factor analysis and those that have forgone a four-factor analysis on the basis of existing ''effective controls.'' [68]

After identifying a reasonable set of potential control options for the sources it has selected, a state then collects

[54] 40 CFR 51.308(f)(2)(i).

[55] See 2019 Guidance at 12, 2021 Clarifications Memo at 4.

[56] 2021 Clarifications Memo at 4.

[57] 2019 Guidance at 9.

[58] 2021 Clarifications Memo at 3.

[59] *Id.* at 4. Similarly, in responding to comments on the 2017 Regional Haze Rule Revisions EPA explained that ''[a] state should not fail to address its many relatively low-impact sources merely because it only has such sources and another state has even more low-impact sources and/or some high impact sources.'' Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule. 81 FR 26942, 26987–26988, May 4, 2016.

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

[61] Clean Air Act section 169A(g)(1).

[62] 82 FR 3078, 3091, January 10, 2017.

[63] ''Each source'' or ''particular source'' is used here as shorthand. While a source-specific analysis is one way of applying the four factors, neither the statute nor the Regional Haze Rule requires states to evaluate individual sources. Rather, states have ''the flexibility to conduct four-factor analyses for specific sources, groups of sources or even entire source categories, depending on state policy preferences and the specific circumstances of each state.'' 82 FR 3078, 3088, January 10, 2017. However, not all approaches to grouping sources for four-factor analysis are necessarily reasonable; the reasonableness of grouping sources in any particular instance will depend on the circumstances and the manner in which grouping is conducted. If it is feasible to establish and enforce different requirements for sources or subgroups of sources, and if relevant factors can be quantified for those sources or subgroups, then states should make a separate reasonable progress determination for each source or subgroup. 2021 Clarifications Memo at 7–8.

[64] 82 FR 3078, 3088, January 10, 2017.

[65] 2019 Guidance at 29.

[66] 2021 Clarifications Memo at 7.

[67] Ibid.

[68] See 2021 Clarifications Memo at 5, 10.

information on the four factors with regard to each option identified. The EPA has also explained that, in addition to the four statutory factors, states have flexibility under the Clean Air Act and Regional Haze Rule to reasonably consider visibility benefits as an additional factor alongside the four statutory factors.[69] The 2019 Guidance provides recommendations for the types of information that can be used to characterize the four factors (with or without visibility), as well as ways in which states might reasonably consider and balance that information to determine which of the potential control options is necessary to make reasonable progress.[70] The 2021 Clarifications Memo contains further guidance on how states can reasonably consider modeled visibility impacts or benefits in the context of a four-factor analysis.[71] Specifically, the EPA explained that while visibility can reasonably be used when comparing and choosing between multiple reasonable control options, it should not be used to summarily reject controls that are reasonable given the four statutory factors.[72] Ultimately, while states have discretion to reasonably weigh the factors and to determine what level of control is needed, § 51.308(f)(2)(i) provides that a state ''must include in its implementation plan a description of . . . how the four factors were taken into consideration in selecting the measure for inclusion in its long-term strategy.''

As explained above, 40 CFR 51.308(f)(2)(i) requires states to determine the emission reduction measures for sources that are necessary to make reasonable progress by considering the four factors. Pursuant to 40 CFR 51.308(f)(2), measures that are necessary to make reasonable progress towards the national visibility goal must be included in a state's long-term strategy and in its SIP.[73] If the outcome of a four-factor analysis is a new, additional emission reduction measure for a source, that new measure is necessary to make reasonable progress towards remedying existing anthropogenic visibility impairment and must be included in the SIP. If the outcome of a four-factor analysis is that no new measures are reasonable for a source, continued implementation of the source's existing measures is generally necessary to prevent future emission increases and thus to make reasonable progress towards the second part of the national visibility goal: preventing future anthropogenic visibility impairment.[74] That is, when the result of a four-factor analysis is that no new measures are necessary to make reasonable progress, the source's existing measures are generally necessary to make reasonable progress and must be included in the SIP. However, there may be circumstances in which a state can demonstrate that a source's existing measures are *not* necessary to make reasonable progress. Specifically, if a state can demonstrate that a source will continue to implement its existing measures and will not increase its emission rate, it may not be necessary to have those measures in the long-term strategy in order to prevent future emission increases and future visibility impairment. The EPA's 2021 Clarifications Memo provides further explanation and guidance on how states may demonstrate that a source's existing measures are not necessary to make reasonable progress.[75] If the state can make such a demonstration, it need not include a source's existing measures in the long-term strategy or its SIP.

As with source selection, the characterization of information on each of the factors is also subject to the documentation requirement in 40 CFR 51.308(f)(2)(iii). The reasonable progress analysis, including source selection, information gathering, characterization of the four statutory factors (and potentially visibility), balancing of the four factors, and selection of the emission reduction measures that represent reasonable progress, is a technically complex exercise, but also a flexible one that provides states with bounded discretion to design and implement approaches appropriate to their circumstances. Given this flexibility, 40 CFR 51.308(f)(2)(iii) plays an important function in requiring a state to document the technical basis for its decision making so that the public and the EPA can comprehend and evaluate the information and analysis the state relied upon to determine what emission reduction measures must be in place to make reasonable progress. The technical documentation must include the modeling, monitoring, cost, engineering, and emissions information on which the state relied to determine the measures necessary to make reasonable progress. This documentation requirement can be met through the provision of and reliance on technical analyses developed through a regional planning process, so long as that process and its output has been approved by all state participants. In addition to the explicit regulatory requirement to document the technical basis of their reasonable progress determinations, states are also subject to the general principle that those determinations must be reasonably moored to the statute.[76] That is, a state's decisions about the emission reduction measures that are necessary to make reasonable progress must be consistent with the statutory goal of remedying existing and preventing future visibility impairment.

The four statutory factors (and potentially visibility) are used to determine what emission reduction measures for selected sources must be included in a state's long-term strategy for making reasonable progress. Additionally, the Regional Haze Rule at 40 CFR 51.308(f)(2)(iv) separately provides five ''additional factors'' [77] that states must consider in developing their long-term strategies: (1) emission reductions due to ongoing air pollution control programs, including measures to address reasonably attributable visibility impairment; (2) measures to reduce the impacts of construction activities; (3) source retirement and replacement schedules; (4) basic smoke management practices for prescribed fire used for agricultural and wildland vegetation management purposes and smoke management programs; and (5) the anticipated net effect on visibility due to

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

[70] See 2019 Guidance at 30–36.

[71] 2021 Clarifications Memo at 12–13, 14–15.

[72] 2021 Clarifications Memo at 13.

[73] States may choose to, but are not required to, include measures in their long-term strategies beyond just the emission reduction measures that are necessary for reasonable progress. See 2021 Clarifications Memo at 16. For example, states with smoke management programs may choose to submit their smoke management plans to the EPA for inclusion in their SIPs but are not required to do so. See, *e.g.,* 82 FR 3078, 3108–3109, January 10, 2017 (requirement to consider smoke management practices and smoke management programs under 40 CFR 51.308(f)(2)(iv) does not require states to adopt such practices or programs into their SIPs, although they may elect to do so).

[74] See Clean Air Act section 169A(a)(1). See also 2021 Clarifications Memo at 8.

[75] See 2021 Clarifications Memo at 8–10.

[76] See *Arizona ex rel. Darwin* v. *U.S. EPA*, 815 F.3d 519, 531 (9th Cir. 2016); *Nebraska* v. *U.S. EPA*, 812 F.3d 662, 668 (8th Cir. 2016); *North Dakota* v. *EPA*, 730 F.3d 750, 761 (8th Cir. 2013); *Oklahoma* v. *EPA*, 723 F.3d 1201, 1206, 1208–10 (10th Cir. 2013); cf. also *National Parks Conservation Association* v. *EPA*, 803 F.3d 151, 165 (3d Cir. 2015); *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461, 485, 490 (2004).

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

projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy. The 2019 Guidance provides that a state may satisfy this requirement by considering these additional factors in the process of selecting sources for four-factor analysis, when performing that analysis, or both, and that not every one of the additional factors needs to be considered at the same stage of the process.[78] The EPA provided further guidance on the five additional factors in the 2021 Clarifications Memo, explaining that a state should generally not reject cost-effective and otherwise reasonable controls merely because there have been emission reductions since the first planning period owing to other ongoing air pollution control programs or merely because visibility is otherwise projected to improve at Class I areas. Additionally, states generally should not rely on these additional factors to summarily assert that the state has already made sufficient progress and, therefore, no sources need to be selected or no new controls are needed regardless of the outcome of four-factor analyses.[79]

Because the air pollution that causes regional haze crosses state boundaries, 40 CFR 51.308(f)(2)(ii) requires a state to consult with other states that also have emissions that are reasonably anticipated to contribute to visibility impairment in a given Class I area. Consultation allows for each state that impacts visibility in an area to share whatever technical information, analyses, and control determinations may be necessary to develop coordinated emission management strategies. This coordination may be managed through inter- and intra-regional planning organization consultation and the development of regional emissions strategies; additional consultations between states outside of regional planning organization processes may also occur. If a state, pursuant to consultation, agrees that certain measures (*e.g.,* a certain emission limitation) are necessary to make reasonable progress at a Class I area, it must include those measures in its SIP.[80] Additionally, the Regional Haze Rule requires that states that contribute to visibility impairment at the same Class I area consider the emission reduction measures the other contributing states have identified as being necessary to make reasonable progress for their own sources.[81] If a state has been asked to consider or adopt certain emission reduction measures, but ultimately determines those measures are not necessary to make reasonable progress, that state must document in its SIP the actions taken to resolve the disagreement.[82] The EPA will consider the technical information and explanations presented by the submitting state and the state with which it disagrees when considering whether to approve the state's SIP.[83] Under all circumstances, a state must document in its SIP submission all substantive consultations with other contributing states.[84]

D. Reasonable Progress Goals

Reasonable progress goals ''measure the progress that is projected to be achieved by the control measures states have determined are necessary to make reasonable progress based on a four-factor analysis.'' [85] Their primary purpose is to assist the public and the EPA in assessing the reasonableness of states' long-term strategies for making reasonable progress towards the national visibility goal.[86] States in which Class I areas are located must establish two reasonable progress goals, both in deciviews—one representing visibility conditions on the clearest days and one representing visibility on the most anthropogenically impaired days—for each area within their borders.[87] The two reasonable progress goals are intended to reflect the projected impacts, on the two sets of days, of the emission reduction measures the state with the Class I area, as well as all other contributing states, have included in their long-term strategies for the second implementation period.[88] The reasonable progress goals also account for the projected impacts of implementing other Clean Air Act requirements, including non-SIP based requirements. Because reasonable progress goals are the modeled result of the measures in states' long-term strategies (as well as other measures required under the Clean Air Act), they cannot be determined before states have conducted their four-factor analyses and determined the control measures that are necessary to make reasonable progress.[89]

For the second implementation period, the reasonable progress goals are set for 2028. Reasonable progress goals are not enforceable targets, 40 CFR 51.308(f)(3)(iii); rather, they ''provide a way for the states to check the projected outcome of the [long-term strategy] against the goals for visibility improvement.'' [90] While states are not legally obligated to achieve the visibility conditions described in their reasonable progress goals, 40 CFR 51.308(f)(3)(i) requires that ''[t]he long-term strategy and the reasonable progress goals must provide for an improvement in visibility for the most impaired days since the baseline period and ensure no degradation in visibility for the clearest days since the baseline period.'' Thus, states are required to have emission reduction measures in their long-term strategies that are projected to achieve visibility conditions on the most impaired days that are better than the baseline period and shows no degradation on the clearest days compared to the clearest days from the baseline period. The baseline period for the purpose of this comparison is the baseline visibility condition—the annual average visibility condition for the period 2000–2004.[91]

So that reasonable progress goals may also serve as a metric for assessing the amount of progress a state is making towards the national visibility goal, the Regional Haze Rule requires states with Class I areas to compare the 2028 reasonable progress goal for the most impaired days to the corresponding point on the uniform rate of progress line (representing visibility conditions in 2028 if visibility were to improve at a linear rate from conditions in the baseline period of 2000–2004 to natural visibility conditions in 2064). If the most impaired days reasonable progress goal in 2028 is above the uniform rate of progress (*i.e.,* if visibility conditions are improving more slowly than the rate

[78] See 2019 Guidance at 21.

[79] 2021 Clarifications Memo at 13. In particular, the EPA explained in the 2021 Clarifications Memo that states should not rely on the considerations in 40 CFR 51.308(f)(2)(iv)(A) and (E) to summarily assert that the state has already made sufficient progress and therefore does not need to achieve any additional emission reductions. 2021 Clarifications Memo at 13.

[80] 40 CFR 51.308(f)(2)(ii)(A).

[81] 40 CFR 51.308(f)(2)(ii)(B).

[82] 40 CFR 51.308(f)(2)(ii)(C).

[83] See id.; 2019 Guidance at 53.

[84] 40 CFR 51.308(f)(2)(ii)(C).

[85] 82 FR 3078, 3091, January 10, 2017.

[86] See 40 CFR 51.308(f)(3)(iii) and (iv).

[87] 40 CFR 51.308(f)(3)(i).

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

[89] 2021 Clarifications Memo at 6.

[90] 2019 Guidance at 46.

[91] 40 CFR 51.308(f)(1)(i), 82 FR 2078, 3097–98, January 10, 2017.

described by the uniform rate of progress), each state that contributes to visibility impairment in the Class I area must demonstrate, based on the four-factor analysis required under 40 CFR 51.308(f)(2)(i), that no additional emission reduction measures would be reasonable to include in its long-term strategy.[92] To this end, 40 CFR 51.308(f)(3)(ii) requires that each state contributing to visibility impairment in a Class I area that is projected to improve more slowly than the uniform rate of progress provide ''a robust demonstration, including documenting the criteria used to determine which sources or groups [of] sources were evaluated and how the four factors required by paragraph (f)(2)(i) were taken into consideration in selecting the measures for inclusion in its long-term strategy.'' The 2019 Guidance provides suggestions about how such a ''robust demonstration'' might be conducted.[93]

The 2017 Regional Haze Rule, 2019 Guidance, and 2021 Clarifications Memo also explain that projecting a reasonable progress goal that is on or below the uniform rate of progress based on only on-the-books and/or on-the-way control measures (*i.e.,* control measures already required or anticipated before the four-factor analysis is conducted) is not a ''safe harbor'' from the Clean Air Act's and Regional Haze Rule's requirement that all states must conduct a four-factor analysis to determine what emission reduction measures constitute reasonable progress. The uniform rate of progress is a planning metric used to gauge the amount of progress made thus far and the amount left before reaching natural visibility conditions. However, the uniform rate of progress is not based on consideration of the four statutory factors and therefore cannot answer the question of whether the amount of progress being made in any particular implementation period is ''reasonable progress.'' [94]

E. Monitoring Strategy and Other State Implementation Plan Requirements

Section 51.308(f)(6) requires states to have certain strategies and elements in place for assessing and reporting on visibility. Individual requirements under this section apply either to states with Class I areas within their borders, states with no Class I areas but that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area, or both. A state with Class I areas within its borders must submit with its SIP revision a monitoring strategy for measuring, characterizing, and reporting regional haze visibility impairment that is representative of all Class I areas within the state. SIP revisions for such states must also provide for the establishment of any additional monitoring sites or equipment needed to assess visibility conditions in Class I areas, as well as reporting of all visibility monitoring data to the EPA at least annually. Compliance with the monitoring strategy requirement may be met through a state's participation in the Interagency Monitoring of Protected Visual Environments (IMPROVE) monitoring network, which is used to measure visibility impairment caused by air pollution at the 156 Class I areas covered by the visibility program.[95] The IMPROVE monitoring data is used to determine the 20% most anthropogenically impaired and 20% clearest sets of days every year at each Class I area and tracks visibility impairment over time.

All states' SIPs must provide for procedures by which monitoring data and other information are used to determine the contribution of emissions from within the state to regional haze visibility impairment in affected Class I areas.[96] Section 51.308(f)(6)(v) further requires that all states' SIPs provide for a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area; the inventory must include emissions for the most recent year for which data are available and estimates of future projected emissions. States must also include commitments to update their inventories periodically. The inventories themselves do not need to be included as elements in the SIP and are not subject to EPA review as part of the EPA's evaluation of a SIP revision.[97] All states' SIPs must also provide for any other elements, including reporting, recordkeeping, and other measures, that are necessary for states to assess and report on visibility.[98] Per the 2019 Guidance, a state may note in its regional haze SIP that its compliance with the Air Emissions Reporting Rule in 40 CFR part 51, subpart A satisfies the requirement to provide for an emissions inventory for the most recent year for which data are available. To satisfy the requirement to provide estimates of future projected emissions, a state may explain in its SIP how projected emissions were developed for use in establishing reasonable progress goals for its own and nearby Class I areas.[99]

Separate from the requirements related to monitoring for regional haze purposes under 40 CFR 51.308(f)(6), the Regional Haze Rule also contains a requirement at 40 CFR 51.308(f)(4) related to any additional monitoring that may be needed to address visibility impairment in Class I areas from a single source or a small group of sources. This is called ''reasonably attributable visibility impairment.'' [100] Under this provision, if the EPA or the Federal Land Manager of an affected Class I area has advised a state that additional monitoring is needed to assess reasonably attributable visibility impairment, the state must include in its SIP revision for the second implementation period an appropriate strategy for evaluating such impairment.

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

Section 51.308(f)(5) requires a state's regional haze SIP revision to address the requirements of paragraphs 40 CFR 51.308(g)(1) through (5) so that the plan revision due in 2021 will serve also as a progress report addressing the period since submission of the progress report for the first implementation period. The regional haze progress report requirement is designed to inform the public and the EPA about a state's implementation of its existing long-term strategy and whether such implementation is in fact resulting in the expected visibility improvement.[101] To this end, every state's SIP revision for the second implementation period is required to describe the status of implementation of all measures included in the state's long-term strategy, including BART and reasonable progress emission reduction measures from the first implementation period, and the resulting emissions reductions.[102]

A core component of the progress report requirements is an assessment of changes in visibility conditions on the

[92] 40 CFR 51.308(f)(3)(ii).

[93] 2019 Guidance at 50–51.

[94] 82 FR 3078, 3093, 3099–3100, January 10, 2017; 2019 Guidance at 22; 2021 Clarifications Memo at 15–16.

[95] 40 CFR 51.308(f)(6), (f)(6)(i), (f)(6)(iv).

[96] 40 CFR 51.308(f)(6)(ii), (iii).

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

[98] 40 CFR 51.308(f)(6)(vi).

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

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

[101] 81 FR 26942, 26950, May 4, 2016; 82 FR 3078, 3119, January 10, 2017.

[102] 40 CFR 51.308(g)(1) and (2).

clearest and most impaired days. For second implementation period progress reports, 40 CFR 51.308(g)(3) requires states with Class I areas within their borders to first determine current visibility conditions for each area on the most impaired and clearest days, 40 CFR 51.308(g)(3)(i)(B), and then to calculate the difference between those current conditions and baseline (2000–2004) visibility conditions in order to assess progress made to date.[103] States must also assess the changes in visibility impairment for the most impaired and clearest days since they submitted their first implementation period progress reports.[104] Since different states submitted their first implementation period progress reports at different times, the starting point for this assessment will vary state by state.

Similarly, states must provide analyses tracking the change in emissions of pollutants contributing to visibility impairment from all sources and activities within the state over the period since they submitted their first implementation period progress reports.[105] Changes in emissions should be identified by the type of source or activity. Section 51.308(g)(5) also addresses changes in emissions since the period addressed by the previous progress report and requires states' SIP revisions to include an assessment of any significant changes in anthropogenic emissions within or outside the state. This assessment must include an explanation of whether these changes in emissions were anticipated and whether they have limited or impeded progress in reducing emissions and improving visibility relative to what the state projected based on its long-term strategy for the first implementation period.

G. Requirements for State and Federal Land Manager Coordination

Clean Air Act section 169A(d) requires that before a state holds a public hearing on a proposed regional haze SIP revision, it must consult with the appropriate Federal Land Manager or Federal Land Managers; pursuant to that consultation, the state must include a summary of the Federal Land Managers' conclusions and recommendations in the notice to the public. Consistent with this statutory requirement, the Regional Haze Rule also requires that states ''provide the [Federal Land Manager] with an opportunity for consultation, in person and at a point early enough in the State's policy analyses of its long-term strategy emission reduction obligation so that information and recommendations provided by the [Federal Land Manager] can meaningfully inform the State's decisions on the long-term strategy.''[106] Consultation that occurs 120 days prior to any public hearing or public comment opportunity will be deemed ''early enough,'' but the Regional Haze Rule provides that in any event the opportunity for consultation must be provided at least 60 days before a public hearing or comment opportunity. This consultation must include the opportunity for the Federal Land Managers to discuss their assessment of visibility impairment in any Class I area and their recommendations on the development and implementation of strategies to address such impairment.[107] In order for the EPA to evaluate whether Federal Land Manager consultation meeting the requirements of the Regional Haze Rule has occurred, the SIP submission should include documentation of the timing and content of such consultation. The SIP revision submitted to the EPA must also describe how the state addressed any comments provided by the Federal Land Managers.[108] Finally, a SIP revision must provide procedures for continuing consultation between the state and Federal Land Managers regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.[109]

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

A. Background on the Oregon First Implementation Period SIP Submission

Oregon submitted its regional haze SIP for the first implementation period (2008 through 2018) on December 9, 2010, as supplemented on February 01, 2011. The Clean Air Act required that the initial round of regional haze plans include, among other things, a long-term strategy for making reasonable progress and best available retrofit technology requirements for certain older stationary sources, where applicable.[110] The EPA approved Oregon's first implementation period SIP submission in two actions published July 5, 2011 (76 FR 38997) and August 22, 2012 (77 FR 50611). Subsequently, on July 18, 2017, Oregon submitted a five-year progress report and the EPA approved the progress report on May 17, 2018 (83 FR 22853).[111] In our action, we concluded that Oregon made adequate progress in improving visibility as a result of actions identified in the regional haze SIP. Specifically, based on 2010 through 2014 data, Oregon Class I areas attained the 2018 reasonable progress goals for improved visibility, except for one IMPROVE monitor highly impacted by wildfire.[112]

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

On April 29, 2022, and November 22, 2023, Oregon submitted revisions to the SIP to address its regional haze obligations for the second implementation period (2018 through 2028).[113] The submissions may be found in the docket for this action. Oregon made its April 29, 2022 submission available for public comment on August 27, 2021 through November 1, 2021[114] and held a public hearing on October 27, 2021.[115] The state received and responded to public comments and included the comments and comment responses in the SIP submission.[116] Oregon made its November 22, 2023 submission available for public comment September 15, 2023 through October 21, 2023 and held a public hearing on October 16, 2023.[117] The State received and responded to public comments and included the comments and comment responses in the SIP submission.[118]

The following sections of this preamble describe the Oregon SIP submission, including air quality

[103] 40 CFR 51.308(g)(3)(ii)(B).

[104] 40 CFR 51.308(g)(3)(iii)(B), (f)(5).

[105] See 40 CFR 51.308(g)(4), (f)(5).

[106] 40 CFR 51.308(i)(2).

[107] Ibid.

[108] 40 CFR 51.308(i)(3).

[109] 40 CFR 51.308(i)(4).

[110] The requirements for regional haze SIPs for the first implementation period are contained in Clean Air Act section 169A(b)(2)(B) and 40 CFR 51.308(d) and (e). See also 40 CFR 51.308(b).

[111] For details, please see the progress report in the docket for the EPA's approval action on May 17, 2018 (83 FR 22853) at *https://www.regulations.gov* under docket number EPA–R10–OAR–2017–0482.

[112] See Section III.B. *Summary of Visibility Conditions* of the proposed rule. 83 FR 11927, 11930, March 19, 2018.

[113] Clean Air Act sections 169A and 40 CFR 51.308(f).

[114] Notice of Proposed Rulemaking, August 27, 2021, included in the docket for this action.

[115] Staff report for the Oregon Environmental Quality Commission Meeting February. 3–4, 2022, included in the docket for this action.

[116] Staff report for the Oregon Environmental Quality Commission Meeting February. 3–4, 2022, Summary of Public Comments and DEQ Responses.

[117] Staff report for the Oregon Environmental Quality Commission Meeting November 17, 2023, at page 15–16.

[118] Staff report for the Oregon Environmental Quality Commission Meeting November 17, 2023, at page 16.

modeling conducted, source selection, four-factor analyses to determine what emission reduction measures constitute reasonable progress for the long-term strategy, assessment of progress made since the first implementation period in reducing emissions of visibility impairing pollutants, and the visibility improvement progress at Class I areas in Oregon and other states impacted by Oregon sources. This preamble also contains the EPA's evaluation of the Oregon SIP submission against the requirements of the Clean Air Act and Regional Haze Rule for the second implementation period of the regional haze program.

C. Identification of Class I Areas

Section 169A(b)(2) of the Clean Air Act requires each state in which any Class I area is located or ''the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility'' in a Class I area to have a plan for making reasonable progress toward the national visibility goal. The Regional Haze Rule implements this statutory requirement at 40 CFR 51.308(f), which provides that each state's plan ''must address regional haze in each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State that may be affected by emissions from within the State,'' and (f)(2), which requires each state's plan to include a long-term strategy that addresses regional haze in such Class I areas.

Oregon Class I Areas

Oregon has 12 designated Class I areas, including Crater Lake National Park, managed by the National Parks Service, and 11 wilderness areas, managed by the U.S. Forest Service, or in the case of Hells Canyon Wilderness Area, managed jointly by the U.S. Forest Service and the Bureau of Land Management.[119]

Mt. Hood Wilderness Area

The Mt. Hood Wilderness Area consists of 47,160 acres on the slopes of Mt. Hood in the northern Oregon Cascades. Wilderness elevations range from 3,426 meters (m) (11,237 feet (ft.)) on the summit of Mt. Hood down to almost 600 m (2,000 ft.) at the western boundary. It is almost adjacent to the Portland, Oregon metropolitan area; the westernmost boundary is about 20 kilometers (km) east of the Portland, Oregon suburb of Sandy and 40 km from the heavily populated metropolitan center, elevation 100 m (300 ft.). Visitation to the Mt. Hood Wilderness Area is approximately 50,000 visitors a year, primarily between May and October. Most visitors come from the Portland/Vancouver area that has a population of approximately 2 million.

Mt. Jefferson Wilderness Area

The Mt. Jefferson Wilderness Area consists of 107,008 acres on the crest of the Cascade Range in central Oregon. Its southern boundary is a few km north of the northern boundary of the Mt. Washington Wilderness and it extends 40 to 50 km north along the Cascade crest. West of the crest, it consists primarily of the eastern side of the North Santiam River headwaters basin that connects to the Willamette Valley source region near Salem, Oregon, 100 km (60 miles (mi)) to the west. East of the crest it occupies the western slopes of the Metolius River drainage that connects eastern slopes with Deschutes River in eastern Oregon. The highest elevation is 3,200 m (10,497 ft.) at the summit of Mt. Jefferson in the northern part of the Wilderness. The lowest Wilderness elevations are near 1,000 m (3,000 ft.) along the western boundary in the North Santiam headwaters basin and along the eastern boundary in the Metolius River basin.

Mt. Washington Wilderness Area

The Mt. Washington Wilderness Area consists of 52,516 acres on the crest of the Cascade Range in central Oregon. Like the Three Sisters Wilderness that it borders to the south, it includes headwaters tributaries of the McKenzie River that flow west into the Willamette Valley near Eugene and connect the Wilderness with that source region. On the east side, eastern slopes of the Cascades descend to the Deschutes River near Bend. The highest Wilderness elevation is 2,376 m (7,794 ft.) at the summit of Mt. Washington. The lowest elevations are near 900 m (3,000 ft.) in the upper headwaters basin of the McKenzie River.

Three Sisters Wilderness Area

The Three Sisters Wilderness Area consists of 285,202 acres abreast the crest of the Cascade Range in central Oregon. It includes headwaters tributaries of the McKenzie River that flow west into the Willamette Valley near Eugene and connect the Wilderness with that source region. On the east side, streams flow east to the Deschutes River near Bend. The highest crest elevation is 3,158 m (10,358 ft.) at the summit of the South Sister. The lowest elevations are near 600 m (2,000 ft.) where the South Fork of the McKenzie River exits the Wilderness on the west boundary. This is about 500 m (1,600 ft.) above the Willamette Valley at Eugene 70 km (40 mi) west.

Diamond Peak Wilderness Area

The 52,337 acre Diamond Peak Wilderness Area straddles the Cascade Range 50 km (30 mi) north of Crater Lake National Park. The highest crest elevation in the Wilderness is 2,666 m (8,744 ft.) at Diamond Peak, which is also the highest summit in this region of the Cascade Range. The lowest elevations are near 1,450 m (5,000 ft.) where streams exit the Wilderness on the west side. On the east side, the Wilderness is bordered by mountain lakes with elevations from 1,459 m to 1,693 m (4,786 to 5,553 ft.). The area includes headwaters of the Middle Fork of the Willamette River that flows to the Willamette Valley near Eugene, elevation 100 m (300 ft.) and 90 km (60 mi) distant. Wilderness elevations are thus some 1,400 m (4,600 ft.) above the Willamette Valley floor. East of the Cascade crest, streams flow to the Deschutes River in eastern Oregon.

Crater Lake National Park

Crater Lake National Park is the only national park in Oregon. The park was established on May 22, 1902, and now consists of 183,315 acres. It is located in southwestern Oregon on the crest of the Cascade Mountain range, 100 miles east of the Pacific Ocean. The crater's rim elevations range from about 900 to 1,873 ft. above lake level. The highest park elevation is 8,929 ft. at the peak of Mt. Scott, in the eastern park area. The National Park includes headwaters of the Rogue River that flows southwest towards the Medford/Grants Pass area, and Sun Creek/Wood River that flows southeast to the Klamath Falls area.

Mountain Lakes Wilderness Area

The Mountain Lakes Wilderness Area, encompassing 23,071 acres, is a relatively small Class I area in southern Oregon, 50 km (30 mi) south of Crater Lake National Park. It consists of several peaks with a highest elevation of 2,502 m (8,208 ft.) at the crest of Aspen Butte. The lowest elevations are near 1,500 m (5,000 ft.). Primary drainages are Varney Creek and Moss Creek that flow into the Upper Klamath Lake, 3 km northeast of the Wilderness boundary.

Gearhart Mountain Wilderness Area

The Gearhart Mountain Wilderness Area consists of 22,809 acres on the flanks of Gearhart Mountain in south central Oregon, primarily the northern

[119] Section 169A of the Clean Air Act was established in 1977 to protect visibility in all wilderness areas over 5,000 acres and all national parks over 6,000 acres. 156 such areas were designated throughout the U.S.

slope and eastern drainages of Gearhart Mountain, the dominant topographic feature. Elevations range from near 5,900 ft. at the North Fork of the Sprague River in the northern Wilderness to 8,364 ft. at the summit of Gearhart Mountain.

Kalmiopsis Wilderness Area

The Kalmiopsis Wilderness Area consists of 179,700 acres and is located in the Klamath Mountains of southwestern Oregon, part of the coastal temperate rainforest zone that lies between the Pacific Ocean and the east side of the coast ranges in northwestern U.S. and Canada. Its western boundary is 20 to 25 km (12 to 15 mi) from the coast. Its easternmost extent is about 40 km (25 mi) from the coast. Elevations range from about 300 m (900 ft.) on the western boundary where the Chetco River exits the Wilderness towards the Pacific Ocean 25 to 30 miles further west, to 1,554 m (5,098 ft.) on Pearsoll Peak on the eastern Wilderness boundary. The terrain in the Wilderness is steep canyons and long broad ridges. The Wilderness is mostly west of the general crest of the coast range, thus exposed to precipitation caused by lifting of eastward moving maritime air, primarily during the winter. Precipitation ranges from 150 to 350 cm (60 to 140 inches (in)) annually, depending on elevation.

Strawberry Mountain Wilderness Area

The Strawberry Mountain Wilderness Area consists of 69,350 acres in eastern Oregon, just east of John Day. The Wilderness comprises most of the Strawberry Mountain Range. The terrain is rugged, with elevations ranging from 1,220 m (4,000 ft.) to 2,755 m (9,038 ft.) at the summit of Strawberry Mountain. The Wilderness borders the upper John Day River valley to the north.

Eagle Cap Wilderness Area

The Eagle Cap Wilderness Area consists of 360,275 acres in northeastern Oregon. The terrain is characterized by bare peaks and ridges and U-shaped glaciated valleys. Elevations range from 5,000 ft. in lower valleys to near 10,000 ft. at the highest mountain summits. The Lostine and Minam Rivers flow north from the center of the Wilderness towards Pendleton and the Columbia, 130 km northwest.

Hells Canyon Wilderness Area

The Hells Canyon Wilderness Area consists of 214,944 acres and is located on the Oregon-Idaho border. The Snake River divides the wilderness, with 131,133 acres in Oregon, and 83,811 acres in Idaho. The Snake River canyon is the deepest river gorge in North America. The higher terrain is located on the Oregon side. Popular Oregon-side viewpoints are McGraw, Hat Point, and Somers Point.

Oregon Visibility Monitoring Network

Haze species in Oregon are measured and analyzed via the Interagency Monitoring of Protected Visual Environments (IMPROVE) network.[120] Table 1 of this preamble lists the IMPROVE stations representing visibility at Oregon Class I areas. Due to the remote nature of some of the Class I areas, several areas share a common IMPROVE station.

TABLE 1—OREGON IMPROVE STATIONS AND CLASS I AREAS

Monitor ID	Class I area	Sponsor	Years operated
MOHO	Mt. Hood Wilderness	U.S. Forest Service	2000–present.
THSI	Mt. Jefferson Wilderness	U.S. Forest Service	1993–present.
	Mt. Washington Wilderness		
	Three Sisters Wilderness		
CRLA	Crater Lake National Park	National Parks Service	1988–present.
	Diamond Peak Wilderness		
	Mountain Lakes Wilderness		
	Gearhart Mountain Wilderness		
KALM	Kalmiopsis Wilderness	U.S. Forest Service	2000–present.
STAR	Strawberry Mountain Wilderness	U.S. Forest Service	2000–present.
	Eagle Cap Wilderness		
HECA	Hells Canyon Wilderness Area	U.S. Forest Service	2000–present.

Identification of Class I Areas in Other States

The Oregon Department of Environmental Quality (ODEQ) used a Q/d screening approach in developing a list of sources for potential four-factor analysis, as discussed in more detail in section IV.E.a of this preamble. Q/d is equal to the emissions (Q) in tons per year of visibility-impairing pollutants (NO_X, SO_2, and particulate matter less than 10 microns in diameter (PM_{10})) divided by the distance to a Class I area (d) in kilometers. The resulting ratio is commonly used as a metric to assess a source's potential visibility impacts on a particular Class I area. Importantly, ODEQ used permitted emissions limits, called Plant Site Emissions Limits (PSELs),[121] for a facility in 2017 to calculate Q.

ODEQ determined that this approach based on permitted emissions or potential to emit was more rigorous and environmentally protective than relying

[120] IMPROVE website at *http://vista.cira.colostate.edu/Improve.*

[121] PSELs are used to protect ambient air quality standards, prevent significant deterioration of air quality, and to ensure protection of visibility. Establishing such a limit is a mandatory step in the Oregon permitting process. A PSEL is designed to be set at the actual baseline emissions from a source plus approved emissions increases and minus required emissions reductions. This design is intended to maintain a more realistic emissions inventory. Oregon uses a fixed baseline year of 1977 or 1978 (or a prior year if more representative of normal operation) and factors in all approved emissions increases and required emissions decreases since baseline, to set the allowable emissions in the PSEL. Increases and decreases since the baseline year do not affect the baseline, but are included in the difference between baseline and allowable emissions. Oregon's PSEL program is used, in part, to implement NSR permitting. For major NSR, if a PSEL is calculated at a level greater than an established significant emission rate (SER) over the baseline actual emission rate, an evaluation of the air quality impact and major NSR permitting are required. If not, the PSEL is set without further review (a construction permit may also be required). For minor NSR (State NSR), a similar calculation is conducted. If the difference is greater than the SER, an air quality analysis is required to evaluate whether ambient air quality standards and increments are protected. The air quality analysis results may require the source to reduce the airshed impact and/or comply with a tighter emission limit. See 82 FR 14654, March 22, 2017, p. 14661. Oregon's PSEL requirements are codified at OAR 340, Division 222. These requirements are approved into the Oregon SIP at 40 CFR 52.1970(c). Oregon imposes the PSEL requirements via its major and minor new source review permitting programs at OAR 340, Divisions 216 and 224. Thus, PSELs are applicable requirements included in Title V operating permits for major stationary sources in Oregon.

on actual 2017 emissions which could increase in the future. Using this approach, ODEQ identified Oregon facilities with a Q/d ≥ 5 based on PSELs as having potential visibility impacts on other states shown in table 2 of this preamble.[122] Based on the Q/d calculation, two facilities, PGE Beaver/Port Westward I and Georgia Pacific-Wauna Mill potentially impact visibility in Mount Rainier National Park, Washington with Q/d values slightly higher than the most impacted Oregon Class I area, Mount Hood Wilderness.[123] All other facilities have higher potential Q/d impacts on Oregon Class I areas than the respective out-of-state Class I areas.[124] Descriptions of the controls imposed at the facilities listed in table 2 are contained in section IV.E.b. of this preamble.

TABLE 2—IMPACT OF OREGON FACILITIES ON OTHER STATES' CLASS I AREAS

Facility name	Closest non-Oregon Class I area	Actual Q/d	Q/d PSEL	Nearest Oregon Class I area	Actual Q/d	Q/d PSEL
A Division of Cascades Holding US Inc.	Mount Adams Wilderness, WA	2.69	56.77	Mount Hood Wilderness	3.02	63.72
Ash Grove Cement Company	Sawtooth Wilderness, ID	5.31	11.01	Eagle Cap Wilderness	18.54	38.47
Beaver Plant/Port Westward I Plant	Mount Rainier NP, WA	3.75	40.15	Mount Hood Wilderness	3.24	34.60
Biomass One, L.P	Marble Mountain Wilderness, CA	3.06	6.33	Mountain Lakes Wilderness	4.77	9.86
Boise Cascade-Medford	Marble Mountain Wilderness, CA	3.25	5.45	Mountain Lakes Wilderness	4.19	7.02
Collins Products, L.L.C	Lava Beds/Schonchin Wilderness, CA.	2.43	5.48	Mountain Lakes Wilderness	4.78	10.82
EVRAZ Inc. NA	Mount Adams Wilderness, WA	2.44	8.14	Mount Hood Wilderness	3.57	11.92
Georgia Pacific-Wauna Mill	Mount Rainier NP, WA	17.94	31.48	Mount Hood Wilderness	16.18	28.38
Georgia-Pacific-Toledo	Mount Adams Wilderness, WA	4.64	12.04	Three Sisters Wilderness	7.83	20.33
Halsey Pulp Mill	Mount Adams Wilderness, WA	3.11	8.32	Three Sisters Wilderness	8.86	23.69
Klamath Cogeneration Project	Lava Beds/Schonchin Wilderness, CA.	3.66	8.69	Mountain Lakes Wilderness	6.91	16.40
Oregon City Compressor Station	Mount Adams Wilderness, WA	1.49	5.53	Mount Hood Wilderness	3.64	13.49
Owens-Brockway Glass Container Inc.	Mount Adams Wilderness, WA	6.13	11.85	Mount Hood Wilderness	10.86	21.00
Roseburg Forest Products—Dillard	Redwood NP, CA	10.39	16.70	Kalmiopsis Wilderness	19.07	30.67
Willamette Falls Paper Company	Mount Adams Wilderness, WA	1.75	12.23	Mount Hood Wilderness	3.79	26.46

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

Section 51.308(f)(1) requires states to determine the following for ''each mandatory Class I Federal area located within the State:'' baseline visibility conditions for the most impaired and clearest days, natural visibility conditions for the most impaired and clearest days, progress to date for the most impaired and clearest days, the differences between current visibility conditions and natural visibility conditions, and the uniform rate of progress. This section also provides the option for states to propose adjustments to the uniform rate of progress line for a Class I area to account for visibility impacts from anthropogenic sources outside the U.S. and/or the impacts from wildland prescribed fires that were conducted for certain, specified objectives.[125]

Tracking Visibility in Oregon

Oregon's SIP submission addresses baseline, current and natural visibility conditions for each of these IMPROVE stations as required by the 2017 Regional Haze Rule and the EPA's technical guidance on tracking visibility progress. ODEQ reviewed visibility data from 2000 through 2018 and determined that current visibility at all Class I areas for both the clearest and most impaired days has improved since the baseline period. In addition, all areas have met the uniform rate of progress (URP) for 2018.[126] Additionally, many Class I areas such as the Mt. Hood, Strawberry Mountain, Eagle Cap, and Hells Canyon wilderness areas are already meeting the 2028 URP for the Most Impaired Days (MID) based on current 2014–2018 monitoring data. Oregon did not choose to adjust its URP for international anthropogenic impacts or to account for the impacts of wildland prescribed fires resulting in a more stringent, environmentally protective URP glidepath as discussed in section IV.F. of this preamble.

TABLE 3—HAZE INDICES (DECIVIEWS) FOR OREGON IMPROVE STATIONS[127]

Monitor ID	Class I area	Baseline 2000–2004	2018 URP	Current conditions 2014–2018	2028 URP	Natural 2064
Most Impaired Days						
MOHO	Mt. Hood Wilderness Area	12.10	10.81	9.27	9.90	6.59
THSI	Mt. Jefferson, Mt. Washington, and Three Sisters Wilderness Areas.	12.80	11.52	11.28	10.60	7.30

[122] While PGE Boardman's emissions in 2017 would have screened the facility into four-factor analysis based on the facility PSELs, and actual emissions, this facility closed operations in 2020. The closure of this facility, the last coal-fired power plant in Oregon, was a product of the first round of Regional Haze planning.

[123] Please see the EPA's evaluation of 40 CFR 51.308(f)(3)(ii)(B) for Mount Rainier National Park under section IV.F of this preamble.

[124] April 29, 2022, Oregon SIP submission, Chapters 3.1. Q/d screening process and 3.3. Impact of facilities in other states on Oregon Class I areas.

[125] 40 CFR 51.308(f)(1)(vi)(B).

[126] April 29, 2022 Oregon SIP submission. Tables 2–6 and 2–7.

[127] ODEQ used data drawn from ''Availability of Modeling Data and Associated Technical Support Document for the EPA's Updated 2028 Visibility Air Quality Modeling'' (EPA 2019) with corrected data as applicable from the June 2020 EPA Memo, ''Technical addendum including updated visibility data through 2018 for the memo titled 'Recommendation for the Use of Patched and Substituted Data and Clarification of Data Completeness for Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program.''

TABLE 3—HAZE INDICES (DECIVIEWS) FOR OREGON IMPROVE STATIONS [127]—Continued

Monitor ID	Class I area	Baseline 2000–2004	2018 URP	Current conditions 2014–2018	2028 URP	Natural 2064
CRLA	Crater Lake National Park; Diamond Peak, Mountain Lakes, and Gearhart Mountain Wilderness Areas.	9.36	8.38	7.98	7.70	5.16
KALM	Kalmiopsis Wilderness Area	13.34	12.04	11.97	11.13	7.78
STAR	Strawberry Mountain and Eagle Cap Wilderness Areas.	14.53	12.68	11.19	11.35	6.58
HECA	Hells Canyon Wilderness Area	16.51	14.19	12.33	12.53	6.57
Clearest Days						
MOHO	Mt. Hood Wilderness Area	2.17	Not applicable	1.39	Not applicable	0.88
THSI	Mt. Jefferson, Mt. Washington, and Three Sisters Wilderness Areas.	3.04	NA	2.61	NA	1.86
CRLA	Crater Lake National Park; Diamond Peak, Mountain Lakes, and Gearhart Mountain Wilderness Areas.	1.69	NA	1.05	NA	0.10
KALM	Kalmiopsis Wilderness Area	6.27	NA	5.90	NA	3.70
STAR	Strawberry Mountain and Eagle Cap Wilderness Areas.	4.49	NA	2.79	NA	1.48
HECA	Hells Canyon Wilderness Area	5.52	NA	4.00	NA	2.52

The EPA is proposing to find that Oregon has submitted a regional haze plan that meets the requirements of 40 CFR 51.308(f)(1) related to the calculations of baseline, current, and natural visibility conditions; progress to date; and the uniform rate of progress for the second implementation period.

E. Long-Term Strategy for Regional Haze

a. The Oregon Long-Term Strategy

Each state having a Class I area within its borders or emissions that may affect visibility in a Class I area must develop a long-term strategy for making reasonable progress towards the national visibility goal.[128] As explained in the background discussion in section II. of this preamble, reasonable progress is achieved when all states contributing to visibility impairment in a Class I area are implementing the measures determined—through application of the four statutory factors to sources of visibility impairing pollutants—to be necessary to make reasonable progress.[129] Each state's long-term strategy must include the enforceable emission limitations, compliance schedules, and other measures that are necessary to make reasonable progress.[130] All new (*i.e.,* additional) measures that are the outcome of four-factor analyses are necessary to make reasonable progress and must be in the long-term strategy. If the outcome of a four-factor analysis and other measures necessary to make reasonable progress is that no new measures are reasonable for a source, that source's existing measures are necessary to make reasonable progress, unless the state can demonstrate that the source will continue to implement those measures and will not increase its emission rate. Existing measures that are necessary to make reasonable progress must also be in the long-term strategy. In developing its long-term strategies, a state must also consider five additional factors.[131] As part of its reasonable progress determinations, the state must describe the criteria used to determine which sources or group of sources were evaluated (*i.e.,* subjected to four-factor analysis) for the second implementation period and how the four factors were taken into consideration in selecting the emission reduction measures for inclusion in the long-term strategy.[132]

The following paragraphs summarize how the Oregon submissions addressed the requirements of 40 CFR 51.308(f)(2)(i). The EPA's evaluation of the Oregon submission is contained in section IV.E.b. of this preamble. The Oregon submission includes analysis and modeling conducted by the State, the EPA and the WRAP, a narrative description of the State's long-term strategy, and enforceable emissions limitations embodied in State administrative orders and permits.[133]

States may rely on technical information developed by the regional planning organizations of which they are members to select sources for four-factor analysis and to conduct that analysis, as well as to satisfy the documentation requirements under 40 CFR 51.308(f). Where a regional planning organization has performed source selection and/or four-factor analyses (or considered the five additional factors in 40 CFR 51.308(f)(2)(iv)) for its member states, those states may rely on the regional planning organization's analyses for the purpose of satisfying the requirements of 40 CFR 51.308(f)(2)(i) so long as the states have a reasonable basis to do so and all state participants in the regional planning organization process have approved the technical analyses.[134] States may also satisfy the requirement of 40 CFR 51.308(f)(2)(ii) to engage in interstate consultation with other states that have emissions that are reasonably anticipated to contribute to visibility impairment in a given Class I area under the auspices of intra- and inter-regional planning organization engagement.

The WRAP is the regional planning organization to which Oregon belongs. The WRAP coordinated technical services, modeling, data management, and consulting during the second planning period. The WRAP developed technical tools, emission inventories, and air quality modeling with input and involvement from states in the region. Oregon has participated actively in the WRAP and used WRAP technical products to help develop the Oregon submissions.

In the submissions, Oregon conducted technical analyses to identify sources and source categories with the largest potential to contribute to visibility impairment at Class I areas in Oregon and other states. Based on the composition of regional haze forming pollutants at the IMPROVE stations, ODEQ determined that the majority of U.S. anthropogenic contribution to

[128] Clean Air Act section 169A(b)(2)(B).

[129] 40 CFR 51.308(f)(2)(i).

[130] 40 CFR 51.308(f)(2).

[131] 40 CFR 51.308(f)(2)(iv).

[132] 40 CFR 51.308(f)(2)(iii).

[133] April 29, 2022 Oregon SIP submission, Chapter 2.5.1 Estimated future projected emissions.

[134] 40 CFR 51.308(f)(3)(iii).

regional haze in Oregon Class I areas is ammonium nitrate. This varies seasonally and by monitor.[135] Statewide, NO_X emissions are primarily from mobile sources, at about 80% of the inventory, with another 13% of the inventory coming from fuel combustion from area and stationary sources.[136] At some monitors, such as the IMPROVE stations in the Cascades (THIS and CRLA) and Kalmiopsis (KALM), ammonium sulfate is a proportionally larger contributor to regional haze formation. ODEQ determined the ammonium sulfate contribution is primarily from international anthropogenic sources and is projected to decrease by 77% due to new standards for international marine shipping fuels which became effective in 2020.[137] Specifically, in 2010, the International Marine Organization (IMO) established emission standards for vessels operating in designated waters off the coast of North America. MARPOL Annex VI is codified at 33 U.S.C. 1901 *et seq.* Pursuant to 33 U.S.C. 1907, it is unlawful to act in violation of the MARPOL Protocol. The North American Emissions Control Area (ECA) covers most coastal areas of the United States. Vessels operating in the area must burn low sulfur marine fuel, 1,000 ppm sulfur content (0.10% sulfur by weight). In addition, as of January 1, 2020, the IMO limited sulfur in fuel for ships operating outside designated ECAs to 5,000 ppm sulfur content (0.50% sulfur by weight). This limit represents a substantial reduction from the prior IMO limit of 35,000 ppm sulfur content (3.5% sulfur by weight). Fuel sulfur limits are codified at 40 CFR part 1043. See 84 FR 69335, 69336 (December 18, 2019). The levels of organic mass and elemental carbon, likely from wildfire, prescribed burning, and anthropogenic and biogenic sources of volatile organic compounds vary at all Oregon IMPROVE stations from 2000 to 2018 but show no significant trend.[138]

In addition to selecting and evaluating stationary sources for four-factor analysis, Oregon also used EPA emissions inventory data from 2017 to review emissions from mobile sources such as nonroad vehicles (*e.g.,* construction, agriculture, lawn and garden, recreational equipment) and onroad vehicles (*e.g.* commercial trucks, passenger cars and trucks), as well as agriculture, fugitive dust, marine shipping, oil and gas, prescribed fires, and railroads. The submissions address these sectors and their potential to contribute to visibility impairment in Chapter 2.3. *Emissions Inventory Analysis* and Chapter 4 *Long-term Strategy.*

With respect to analyzing stationary sources, Oregon used a Q/d methodology to select sources for evaluation under the four statutory factors. This methodology does not take into consideration topography, transport direction/pathway and dispersion, and photochemical processes. However, it is an adequate tool for source selection and is consistent with the EPA guidance. Specifically, Oregon's submission determined ''Q/d'' where ''Q'' is a source's emissions and ''d'' is the distance from the source to the nearest Class I area. Oregon identified permitted point sources by their Q/d values, calculated using the sum of all emissions of sulfur dioxide, nitrogen oxides and particulate matter less than 10 microns in diameter (as measured in tons per year), divided by the distance to a Class I area (measured in kilometers from the facility to the nearest boundary of the Class I area) for all Class I areas within 400 km of the source. Rather than using actual emissions to screen facilities in, Oregon was more conservative and used permitted emissions, called Plant Site Emissions Limits (PSELs) to effectively screen in more sources than would otherwise have been identified.[139]

As discussed in more detail in section IV.E.b of this preamble, Oregon selected 32 sources for review using the Q/d screening methodology. Of these 32 sources, several incorporated enforceable emissions limits into their permits or in agreed orders resulting in PSELs below the screening threshold, and several had recently imposed controls already in place, with the remaining 23 sources conducting four-factor analyses. ODEQ reviewed the four-factor analyses submitted by the sources and found that 6 of the sources that additional controls were above the $10,000 cost per ton reduction threshold established by ODEQ. For the remaining 17 sources, ODEQ determined that additional controls might be cost effective and initiated a second round of review evaluating 43 emissions units and a total of 62 control devices. During this second round of review, an additional 4 sources incorporated facility-wide enforceable emissions limits effectively lowering PSELs below the screening threshold, and ODEQ negotiated permit modifications or agreed orders to install control devices or other emissions reductions at the remaining 13 facilities described in more detail in section IV.E.b. of this preamble.

After reviewing the submissions, the EPA proposes to determine that Oregon's long-term strategy includes the enforceable emissions limitations, compliance schedules, and other measures necessary to make reasonable progress. By extension, the EPA proposes to determine that Oregon's selection of sources for evaluation under the four statutory factors was reasonable and consistent with the requirements of the RHR and proposes to determine that Oregon determined the controls necessary for reasonable progress based on a reasonable consideration of the four factors, as described in the evaluation below.

b. The EPA's Evaluation of the Oregon Long-Term Strategy

The EPA is proposing to find that Oregon has satisfied the requirements of 40 CFR 51.308(f)(2)(i) related to evaluating sources and determining the emission reduction measures that are necessary to make reasonable progress by considering the four statutory factors. The EPA is proposing to find that Oregon has satisfied the four-factor analysis requirement through its evaluation and actions documented in the Oregon regional haze plan for the second planning period. Section 51.308(f)(2)(i) requires states to evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the four statutory factors to sources in a control analysis. As laid out in further detail in the following paragraphs of this preamble, the EPA is proposing to find that the Oregon submission, as supplemented, satisfies the requirement of 40 CFR 51.308(f)(2)(i). The emission reduction measures that are necessary to

[135] April 29, 2022 Oregon SIP submission, Chapter 2.4 Pollutant Components of Visibility Impairment.

[136] April 29, 2022 Oregon SIP submission, Chapter 2.3 Emissions Inventory Analysis.

[137] International Marine Organization. 2020. A Breath of Fresh Air. *https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Sulphur%202020%20infographic%202%20page.pdf.*

[138] April 29, 2022 Oregon SIP submission, Chapter 2.4 Pollutant Components of Visibility Impairment.

[139] Save for certain exceptions, PSELs are included in all Air Contaminant Discharge Permits (ACDP) and Title V Operating Permits issued to sources in Oregon. See OAR 340–222–0020. This program is approved into the Oregon SIP. 40 CFR 52.1970(c). Oregon establishes PSELs for multiple pollutants, including SO_2, NO_X, PM_{10}, and $PM_{2.5}$. *Id.* Sources are required to monitor pollutant emissions and comply with the PSELs. 340–222–0080. PSELs serve as a basis for, among other things, assuring compliance with ambient air quality standards and Prevention of Significant Deterioration increments. OAR 340–222–0020. ODEQ sets PSELs based on a variety of factors; in general, PSELs are set at levels above the projected actual or actual emissions of the source. OAR 340–222–0041; 0042.

make reasonable progress must be included in the long-term strategy, *i.e.,* in the Oregon SIP. 40 CFR 51.308(f)(2).

Division 223 Regional Haze Rules

On May 28, 2021, Oregon opened public comment on revisions to the Division 223 Regional Haze rules to update the provisions for the second regional haze planning period.[140] The Oregon Environmental Quality Commission adopted the revisions to the Division 223 Regional Haze rules at its July 22–23, 2021 meeting, and the rules became effective July 23, 2021.[141] A detailed redline/strikeout of the rule revisions is included in the docket for this action.[142] The revisions removed outdated BART provisions from the first planning period, including source-specific requirements in Oregon Administrative Rules (OAR) 340–223–0040 for the Amalgamated Sugar Company which ceased operation on December 9, 2010, and closed permanently in September 2016.[143] The revisions also repealed outdated BART provisions in OAR 340–223–0030 through 340–223–0080 for the Portland General Electric (PGE) coal-fired power plant in Boardman which ceased operation on October 15, 2020, pursuant to the requirements of the regional haze plan for the first implementation period. Documentation of the closure of the coal-fired power plant is included in the docket for this action.[144]

In addition to removing outdated provisions, Oregon added new rule provisions to implement the regional haze program for the second implementation period. OAR 340–223–0100 *Screening Methodology for Sources for Round II of Regional Haze* established the screening methodology for stationary sources in the regional haze second planning period. Pursuant to this rulemaking sources were required to undergo review if the source's Q/d was greater than 5, where Q equals the sum of the source's PSELs for NO_X, SO_2, and PM_{10}.

OAR 340–223–0110 *Options for Compliance with Round II of Regional Haze* imposed the obligation on screened sources to conduct four-factor analyses and established the process for imposition of controls determined by ODEQ to be cost effective based on those four-factor analyses, using a cost-effectiveness threshold of $10,000 or less per ton of reductions for any single or combination of regional haze pollutants. Specifically, OAR 340–223–0110(1) requires each source screened into review to submit a four-factor analysis and install controls determined by ODEQ to be cost effective following ODEQ's adjustment and review of the four-factor analysis. OAR 340–223–0110(2) allows alternative compliance options under an agreed order with ODEQ (stipulated agreement and final order or SAFO) as summarized below:

- Accept federally enforceable reductions of combined plant site emission limits of regional haze pollutants to bring the source's Q/d below 5.00. A source may take a PSEL reduction below the generic PSEL to achieve an overall PSEL of regional haze pollutants below a Q/d of 5.00. A source's Q/d will be considered to be brought below 5.00 when Q/d is below 5.00 using the calculation in OAR 340–223–0100(2), except that the Q factor shall be calculated by adding the plant site emission limits for regional haze pollutants as stated in the stipulated agreement and final order;
- Install controls identified by the source in a four-factor analysis as cost-effective for that source for reducing regional haze pollutants. ODEQ must agree that the controls identified will result in the greatest cost-effective emissions reduction at the identified emissions unit and ODEQ must establish a timeline for installation of those controls that is the fastest practicable timeline for installation of the identified controls and that is no later than July 31, 2026;
- Install controls or reduce emissions for regional haze pollutants that ODEQ determines, in its sole discretion, provide equivalent emissions reductions to controls that would be identified as cost effective for that source following the adjustment and review of a four-factor analysis. ODEQ must establish a timeline for installation of those controls that is the fastest practicable timeline for installation of the identified controls and that is no later than July 31, 2026;
- Maintain controls that the source has already installed to control regional haze pollutants or maintain reduced emissions of regional haze pollutants that ODEQ determines, in its sole discretion, have provided and will continue to provide equivalent emissions reductions to controls that would be identified as cost effective for that source following adjustment and review of a four-factor analysis; or
- Replace an emissions unit with a new emissions unit that meets the emission limits and requirements of the most recent applicable standard in place at the time of the permitting of the new emissions unit. ODEQ must establish a timeline for installation of the new emissions unit that is the fastest practicable timeline for installation of the new emissions unit and that is no later than July 31, 2031.

OAR 340–223–0120 *Four Factor Analysis* established the requirements sources must follow in conducting the four-factor analyses consistent with the Clean Air Act four statutory factors and provides ODEQ with authority to request additional information or adjust the four-factor analyses for consistency. Lastly, OAR 340–223–0130 *Final Orders Ordering Compliance with Round II of Regional Haze* provides ODEQ unilateral order authority to address those sources that do not enter into a stipulated agreement and final order (SAFO) under OAR 340–223–0110(2). OAR 340–223–0130 also outlines the contested case hearing process for sources that challenge the unilateral orders issued by ODEQ.

We have reviewed the revisions to the Division 223 Regional Haze Rules and we are proposing to determine that they provide Oregon with adequate authority to implement the regional haze program and are consistent with CAA requirements and the EPA's Regional Haze Rule. ODEQ submitted the revised Division 223 Regional Haze Rules for incorporation by reference into the SIP at 40 CFR 52.1970(c) *EPA approved regulations and statutes* and requested that the EPA remove from the SIP the outdated source-specific BART provisions for the Amalgamated Sugar Company and the PGE coal-fired power plant in Boardman, which closed pursuant to the regional haze plan for the first implementation period. We are proposing to approve this request and incorporate by reference the submitted revised rules.

Stationary Source Screening

Pursuant to OAR 340–223–0100 *Screening Methodology for Sources for Round II of Regional Haze,* ODEQ identified 32 facilities for analysis using the four factors. As described in the previous paragraphs, the PGE coal-fired power plant in Boardman ceased operation on October 15, 2020, and ODEQ removed the facility from the initial list of 32 facilities. The remaining operations onsite are known as Carty

[140] 016_4.1.2 SOS.Notice.FilingReceipt.pdf included in the docket for this action.

[141] 018_4.2.2 SOS.Filing.Receipt.DEQ_14–2021.pdf included in the docket for this action.

[142] 004_3.1 RHSIP2021.Rules_.doc included in the docket for this action.

[143] April 29, 2022 Oregon SIP submission, Chapter 2.1.1 Status of implementation of control measures included in the original regional haze SIP.

[144] See 200_boardman closure_25–0016–TV–01_AR_2020, 201_boardman closure_25–0016–TV–01_AR_2021, 202_boardman closure_AIRS_AFS Search_US EPA, 203_2022 PSD permit_boardman carty_25–0016–ST–02_PM_2022_3.

Generating Station with an expected maximum Q/d of slightly over 1.00.[145]

Limits To Align PSELs to the Screening Threshold

As previously noted, ODEQ took a more inclusive approach of using permitted emissions limits, PSELs, to screen facilities for source selection. This yielded a much larger pool of facilities in the initial screening rather than using projected actuals as suggested by the 2019 Guidance.[146] OAR 340–223–0110(2)(b)(A) allows ODEQ to enter into an agreement with a source to ''accept federally enforceable reductions of combined plant site emission limits of round II regional haze pollutants to bring the source's Q/d below 5.00.'' As noted in ODEQ's April 29, 2021, SIP submission, ''if a facility's actual emissions were below the screening threshold and potential emissions above the screening threshold, ODEQ provided the source an opportunity to either reduce pollutant-specific PSELs or take a limit on combined NO_X, SO_2, and PM_{10} PSELs such that Q/d would be less than 5.00.'' [147] If a source chose the option to reduce PSELs, OAR 340–223–0110(2)(b)(A) exempted the source from further control analysis. Importantly, OAR 340–223–0110(2)(b)(A) allows sources to reduce PSELs as a compliance option at any point in the process from initial screening through final agreements.[148] To make the limits Federally enforceable and permanent, ODEQ submitted the SAFOs and/or permit conditions listed in table 7 for incorporation into the SIP in 40 CFR 52.1970(d) *EPA approved state source-specific requirements.*

The EPA proposes to determine that Oregon's source selection was reasonable and consistent with the requirements of 40 CFR 51.308(f)(2)(i). ODEQ included a thorough description of its source selection methodology. ODEQ selected 23 sources for analysis under the four factors. Considering these sources' PSELs and recent actual emissions, ODEQ's source selection methodology targeted the sources with the highest potential to impair visibility at mandatory Class 1 areas. Conversely, those sources ODEQ screened out have comparatively limited potential impacts on visibility, specifically, all facilities that accepted emission limits to screen out of analysis would have been screened out of analysis using a Q/d <5 of actual emissions. Thus, the EPA proposes to determine that Oregon's application of OAR 340–223–0110(2)(b)(A) is a reasonable means of preventing future emissions growth for facilities with relatively low Q/d values based on actual current emissions.

TABLE 4—FACILITIES SCREENED IN USING Q/d [149]

Facility	2017 Actual Q/d	2017 PSEL Q/d	Outcome
PGE Boardman	38.24	116.21	No four-factor analysis (FFA). Facility shut down coal-fired operations in 2020.
Ash Grove Cement Company	18.54	38.47	No FFA. ODEQ determined 2013 consent decree with the EPA represented existing effective controls.
Klamath Energy LLC	6.91	16.40	No FFA. ODEQ determined that newly installed controls yield a Q/d <5.00.
Kingsford Manufacturing Company [150]	8.38	NA	No FFA—lowered PSEL to Q/d <5.00.
Cascades Tissue Group: A Division of Cascades Holding US Inc.	3.02	63.72	No FFA—lowered PSEL to Q/d <5.00.
Timber Products Co. Limited Partnership	1.63	6.07	No FFA—lowered PSEL to Q/d <5.00.
PGE Beaver Plant/Port Westward I Plant	3.24	34.60	No FFA—lowered PSEL to Q/d <5.00.
Roseburg Forest Products—Riddle Plywood	2.10	5.29	No FFA—lowered PSEL to Q/d <5.00.
Roseburg Forest Products—Medford MDF	2.91	8.84	No FFA—lowered PSEL to Q/d <5.00.
Boise Cascade Wood Products, LLC—Medford	4.19	7.02	Conducted FFA—then lowered PSEL to Q/d <5.00.
Gas Transmission Northwest LLC—Compressor Station 12.	2.33	14.13	Conducted FFA—then lowered PSEL to Q/d <5.00.
JELD–WEN	2.13	6.30	Conducted FFA—then lowered PSEL to Q/d <5.00.
Northwest Pipeline LLC—Baker Compressor Station [151]	4.02	14.81	Conducted FFA—then lowered PSEL to Q/d <5.00.
Pacific Wood Laminates, Inc	8.29	12.50	Conducted FFA—ODEQ determined no controls <$10K.
Swanson Group Mfg. LLC	4.16	6.39	Conducted FFA—ODEQ determined no controls <$10K.
Ochoco Lumber Company	4.60	14.19	Conducted FFA—ODEQ determined no controls <$10K.
Columbia Forest Products, Inc	4.10	7.75	Conducted FFA—ODEQ determined no controls <$10K.
Collins Products, L.L.C	4.78	10.82	Conducted FFA—ODEQ determined no controls <$10K.
Woodgrain Millwork LLC—Particleboard	13.32	18.41	Conducted FFA—ODEQ determined no controls <$10K

[145] The Carty Generating Station is a 450 megawatt (MW), combined-cycle natural gas-fueled electric generating power plant, and includes a not-yet-constructed 50 MW solar PV electric power generating unit (Carty Solar Farm) on 315 acres (0.49 sq. miles). See *https://www.oregon.gov/energy/facilities-safety/facilities/pages/cgs.aspx.*

[146] 2019 Guidance at 17.

[147] April 29, 2022 Oregon SIP submission, Chapter 3.4. Four Factor Analysis.

[148] April 29, 2022 Oregon SIP submission, Chapter 6.6. Public Comments and Responses, at page 147.

[149] April 29, 2022 Oregon SIP submission, Chapter 3.7 Facility-specific findings and results.

[150] ODEQ reviewed Kingsford Manufacturing Company which originally screened into analysis with a Q/d = 8.39 based on actual emissions as reported to the 2017 National Emissions Inventory (NEI) because a 2017 PSEL was not available at that time. However, in a letter dated May 22, 2020, ODEQ acknowledged a 2019 permit modification that had already lowered PSELs for NO_X, SO_2, and PM_{10} to a Q/d = 4.02.[150] As part of the November 22, 2023 supplement, ODEQ submitted revised permit conditions for the Kingsford Manufacturing Company that limit the combined PSELs and unassigned emissions to 304 tons per year yielding a Q/d = 4.98.

[151] Alternatively, under Order 01–0038, the facility, up until July 2026, could opt to commit to replace units EU1 and EU2 with new technology by July 31, 2031, that would reduce Round 2 regional haze pollutants. The technology would have to meet the emission limits and requirements of the most recent New Source Performance Standard in place at the time of the permittee submitting a permit application for the project. PSELs for Round 2 regional haze pollutants for the replacement shall be no more than 201 tons/year.

TABLE 4—FACILITIES SCREENED IN USING Q/d [149]—Continued

Facility	2017 Actual Q/d	2017 PSEL Q/d	Outcome
Gilchrist Forest Products	8.42	15.74	Conducted FFA—source determined controls cost effective. Modified permit to incorporate controls.
Owens-Brockway Glass Container Inc	10.86	21.00	Conducted FFA—agreed order to impose additional controls.
Boise Cascade Wood Products, LLC—Elgin Complex	10.08	15.04	Conducted FFA—agreed order to impose additional controls.
Georgia Pacific—Wauna Mill	16.18	28.38	Conducted FFA—agreed order to impose additional controls.
Cascade Pacific Pulp, LLC—Halsey Pulp Mill	8.86	23.69	Conducted FFA—agreed order to impose additional controls.
Gas Transmission Northwest LLC—Compressor Station 13.	2.34	19.68	Conducted FFA—agreed order to impose additional controls.
International Paper—Springfield	16.51	67.24	Conducted FFA—agreed order to impose additional controls.
Georgia-Pacific—Toledo LLC	7.83	20.33	Conducted FFA—agreed order to impose additional controls.
Northwest Pipeline LLC—Oregon City Compressor Station.	3.64	13.49	Conducted FFA—agreed order to impose additional controls.
EVRAZ Inc. NA	3.57	11.92	Conducted FFA—agreed order to impose additional controls.
Biomass One, L.P	4.77	9.86	Conducted FFA—agreed order to impose additional controls.
Roseburg Forest Products—Dillard	19.07	30.67	Conducted FFA—agreed order to impose additional controls.
Willamette Falls Paper Company	3.79	26.46	Conducted FFA—agreed order to impose additional controls.

Sources That Already Have Effective Emission Control Technology in Place

In certain circumstances, states may properly determine that a particular facility already has effective emission control technology in place.[152] A state that does not select a source or sources for this reason should explain why the decision is consistent with the requirement to make reasonable progress. ODEQ determined that 2 facilities of the originally screened 32 met this criterion, Klamath Energy LLC and Ash Grove Cement.

In a May 28, 2020, letter from ODEQ to Klamath Energy, ODEQ acknowledged plans by the facility to install ultra low-NO_X burners on the facility's combined cycle combustion turbines (emissions units CT1 and CT2). These planned upgrades are in addition to Selective Catalytic Reduction (SCR) control technology already in place at the CT1 and CT2 units and other associated units, CT3 through CT6. ODEQ estimated that the planned upgrades would reduce the facility combined PM_{10}, SO_2, and NO_X PSELs to 122 tons per year, yielding a Q/d less than 5.00. Importantly, the 2020 permit modification did not include revised PSELs, but relied on installation of planned controls by January 1, 2022, as required under condition 3.a. of the permit modification. Therefore, as part of the November 22, 2023 supplement to the regional haze plan, ODEQ submitted relevant portions of the December 8, 2020, permit modification detailing installation and operation of the ultra low-NO_X combustors, as well as relevant conditions from the June 12 2017, permit to include the existing pollution control devices for the remaining emissions units for incorporation by reference into the SIP. In reviewing the planned controls for these units, as well as the existing controls for other units at the facility, we are proposing to determine the facility has effective emission control technology in place, and those controls and associated emissions limits are included in the SIP.

As discussed in Oregon's May 18, 2020, letter included in the docket for this action, the Ash Grove Cement, Durkee plant recently underwent a control analysis and ODEQ determined that no additional controls required through the regional haze second implementation period were likely to be effective or reasonable.[153] To reach this determination, ODEQ reviewed information the facility sent regarding particulate matter emissions which are controlled by a recently installed baghouse system in accordance with the 2018 Portland Cement National Emission Standards for Hazardous Air Pollutants (NESHAP) revisions, the facility's Air Contaminant Discharge Permit (ACDP) from 2017 (Permit No. 01–0029–CS–01), and the 2017 administrative amendment to the permit (Permit No. 01–0029–TV–01).[154] In addition, ODEQ considered the enforcement actions that the EPA took on Portland Cement companies in conjunction with the State of Oregon and the resulting consent decrees to further control emissions.[155] With respect to the plant in Durkee, the consent decree required installation and continuous operation of selective noncatalytic reduction (SNCR) at Kiln 1, a 30-day rolling average emission limit of 2 pounds NO_X per ton of clinker, and a 3-hour average emission limit of 0.4 pounds SO_2 per ton of clinker. Based on the controls from the 2018 NESHAP and the consent decree requirements, ODEQ determined that the facility has effective emission control technology in place. We are proposing to concur with that determination for this planning period. ODEQ submitted the October 16, 2020, Title V permit for Ash Grove Cement for the incorporation of relevant permit conditions in the SIP for the existing controls and emissions limits related to regional haze.

[152] 2019 Guidance at 22; 2021 Clarifications Memo at 9.

[153] 100_haze-AshGroveCement-Durkee.pdf.

[154] April 29, 2022 Oregon SIP submission, Chapter 3.7.2 Ash Grove Cement Co, Durkee (01–0029).

[155] 100a_ashgrove-cd.pdf included in the docket for this action.

Facilities With Additional Controls

Under OAR 340–223–0110(1) all sources subject to the requirements of the regional haze second implementation period, as determined in OAR 340–223–0100 *Screening Methodology for Sources for Round II of Regional Haze,* were required to submit a four-factor analysis consistent with the provisions of OAR 340–223–0120 *Four Factor Analysis.* Specifically, sources were required to conduct four-factor analyses for all ''round II regional haze pollutants'' defined by Oregon as SO_2, NO_X, and PM_{10}. Under 340–223–0120, ODEQ may adjust information in the four-factor analyses for consistency or adjust the four-factor analyses based on other information ODEQ determines to be accurate, adequate, and sufficient. ODEQ reviewed the four-factor analyses from the facilities and adjusted for consistency with basic factors such as interest rates, equipment lifetime, and using potential to emit (PSEL) levels instead of actual emissions in determining potential cost-effective controls.

The four-factor analyses submitted to ODEQ pursuant to 340–223–0120, with the exception of Owens-Brockway and Gilchrist Forest Products, indicated that additional NO_X, PM_{10}, and SO_2 controls were either technologically infeasible or not cost effective. Nevertheless, Oregon reviewed these analyses and determined that in some cases controls may be feasible and cost effective. Accordingly, in letters dated January 21, 2021, ODEQ notified facilities based on the information provided in the four-factor analyses submitted by the sources that additional controls may be reasonable at the cost effective $10,000 per ton reduction threshold. ODEQ provided preliminary determinations of the control measures that may be reasonable based on rough cost control analyses. Importantly, these preliminary determinations did not factor in site-specific feasibility or other source-specific considerations. Therefore, the January 21, 2021, letters invited the affected facilities to discuss ODEQ's preliminary determination and provide additional information as the basis for alternative compliance through a SAFO between the parties under OAR 340–223–0110(2). These SAFOs and permit conditions imposed the new controls, emission limits, and/or emission monitoring at 13 facilities discussed below.

Boise Cascade Wood Products, LLC—Elgin Complex—Order 31–0006 and Associated Permit Conditions [156]

- Establishing a PSEL for SO_2 effective July 31, 2022.
- Installation of a Continuous Emission Monitoring System (CEMS) on Boiler 1 and Boiler 2 to measure NO_X emissions by September 31, 2022.
- Installation of combustion improvement project or projects designed to achieve emissions reductions of NO_X from Boiler 1 and Boiler 2 by 15% by July 31, 2023.

Biomass One, L.P.—Order 15–0159

- Installation of CEMS on the north and south boilers by July 31, 2022.
- NO_X optimization plan within 180 days after installation of the NO_X CEMS.
- If Permittee is able to finalize a new power purchase agreement (PPA), Permittee shall notify ODEQ in writing within 14 calendar days. Or, if no new PPA is signed, Permittee shall cease operation by January 1, 2027, and request cancellation of their Title V operating permit.
- If a new PPA is signed, then no later than 180 days after notifying ODEQ of the new PPA, the Permittee shall submit a complete application for installation of NO_X reduction technology that includes SCR on the North Boiler and South Boiler or demonstrates SCR is technically infeasible or presents other unacceptable energy or non-air quality impact. If SCR is technically infeasible or presents such other unacceptable impacts, the Permittee will propose the best available, technically feasible, and achievable NO_X reduction option for ODEQ's review and approval. ODEQ will notify Permittee and provide Permittee with a reasonable opportunity to comment before approving a NO_X reduction option in response to Permittee's application.

EVRAZ Inc.—Order 26–1865

- By December 31, 2024, install low NO_X burners on the pre-heat portions of EU–10 Reheat Furnace with a designed NO_X emission factor of 170 pounds per million cubic feet of natural gas.
- During 2025, the permittee shall conduct source testing to verify the NO_X emission factor for the EU–10 reheat furnace. After consultation with the permittee, ODEQ will calculate the new potential to emit (PTE) from EU–10 reheat furnace using the new NO_X emission factor and adjust the permittee's NO_X PSEL in its permit to account for the revised PTE, either pursuant to OAR 340–218–0200(1)(a)(A), as applicable, or upon permit renewal.

Georgia-Pacific—Toledo LLC—Order 21–0005

- By July 31, 2026, the permittee shall complete a NO_X reduction project that includes the installation of low NO_X burners, flue gas recirculation, and CEMS on the three boilers, EU–11, EU–13, and EU–18 in order to achieve an emissions rate no greater than 0.09 lb/MMBtu on a seven day rolling basis.
- Or, the permittee shall complete replacement of EU–11, EU–13, and EU–18 with new technology no later than July 3l, 2031. PSELs for the replacement shall be 889 tons per year of NO_X, 437 tons per year of SO_2, and 311 tons per year of PM_{10}, or the PSELs of the replaced units, whichever is lower. Under this option, the permittee shall not operate EU–11, EU–13, and EU–18 after July 31, 2031.

Georgia Pacific—Wauna Mill—Order No. 04–0004, Amendment No. 04–004–A1

- NO_X PSEL reductions phased from 2022 to 2026.
- By December 31, 2024, the permittee shall replace the existing Yankee burner with a low NO_X burner achieving less than or equal to 0.03 pounds per million British thermal unit (lb/MMBtu).
- For Paper Machine 6: TAD1 Burner and TAD2 Burner, and Paper Machine 7: TAD1 Burner and TAD 2 Burner, the permittee shall have a NO_X emissions rate no greater than 0.06 lb/MMBtu for each emissions point and shall use this emission rate for calculating compliance with PSELs.
- By July 31, 2026, the permittee shall install low NO_X burners, flue gas recirculation, and CEMS on the power boiler to achieve an emissions rate no greater than 0.09 lb/MMBtu on a seven day rolling basis.

International Paper Company—Springfield Mill—Order 208850 and Associated Permit Conditions [157]

- Effective July 31, 2022, the permittee's combined assigned PSELs for the power boiler, package boiler, lime kilns and recovery furnace shall be 237 tons per year for SO_2, 962 tons per year for NO_X, and 177 tons per year for PM_{10}, as a 12-month rolling average.

[156] Permit conditions: 56. Monitoring Requirement, 56a.Emission Calculation, Table 6 (Emission Factors) for Boilers 1 and 2 for PM_{10}, SO_2, NO_X, 59–61. General Monitoring Requirements, 62–65. General Recordkeeping Requirements, 66–70 Boiler NESHAP Recordkeeping Requirements, and 71–75 General Reporting Requirements.

[157] Permit conditions: 186–189: PSEL monitoring for PM_{10}, NO_X and SO_2, 192: recordkeeping requirements, and 198: PSEL compliance reporting.

• On the effective date of the SAFO, the permittee agrees to a fuel restriction to use natural gas for the power boiler and package boiler, except that it may operate on ultra-low sulfur diesel for no more than 48 hours per year and when needed for natural gas curtailments.

• On the effective date of the SAFO, the permittee agrees to a fuel restriction to use natural gas and black liquor solids for the recovery furnace, except that it may operate on ultra-low sulfur diesel for no more than 48 hours per year and when needed for natural gas curtailments.

• On the effective date of the SAFO, the permittee agrees to a fuel restriction to use natural gas, product turpentine, and product methanol for the lime kilns, except that it may operate the lime kilns on ultra-low sulfur diesel for no more than 48 hours per year and when needed for natural gas curtailments.

• By December 31, 2022, the permittee shall install CEMS and measure the emissions of NO_X from the power boiler.

• On and after January 31, 2025, International Paper shall meet the following emission limit: a 0.25 lb NO_X/MMBtu on a 7-day rolling average from the power boiler.

• On and after December 31, 2025, the assigned PSEL for the power boiler is: 179 tons per year for NO_X, as a 12-month rolling average.

In Oregon's November 22, 2023 supplement to the regional haze SIP,[158] ODEQ provided technical background information to demonstrate that the newly imposed conditions under Order 208850 at International Paper Company Springfield Mill for the second regional haze planning period provide more stringent emissions control than the prior emission limits and methods cited by the EPA in our determination that this source was not subject-to-BART in the first regional haze planning period.[159]

Owens-Brockway—Order 26–1876 and Associated Permit Conditions[160]

• Permanent shutdown of Furnace A.

• PSEL limit for combined PM_{10} + NO_X + SO_2 = 274.95 tons per year which results in a Q/d = 4.99, consistent with OAR 340–223–0110(2)(b)(A).

Willamette Falls Paper Company—Order 03–2145 and Associated Permit Conditions[161]

• Effective August 1, 2022, the permittee's PSELs shall be 20 tons per year for PM_{10}, 240 tons per year for NO_X, and 5 tons per year for SO_2.

• On the effective date of the SAFO, the permittee agrees to a restriction that the only fuel the permittee may combust in Boiler 1, Boiler 2 and Boiler 3 is natural gas, except for ultra-low sulfur diesel for no more than 48 hours per year.

Gas Transmission Northwest Compressor Station 13—OAH CASE NO. 2021–ABC–4835 DEQ CASE NO. AQ/RH–HQ–2021–140 and Associated Permit Conditions[162]

• By July 31, 2026, install and maintain SCR and an associated monitoring system on both Turbines 13C and 13D.

• Alternatively, by no later than July 31, 2031, replace Turbines 13C and 13D with new technology that meets the most recent permitting standards and requirements for new emission units (including but not limited to New Source Performance Standards) in place at the time of the respondent submitting a permit application for the project.

Gilchrist Forest Products—Permit 18–0005–TV–01, Addendum No. 1

• Installation of an electrostatic precipitator on boilers B–1 and B–2.

• A PM_{10} PSEL reduction from 172 tpy to 77 tpy.

Northwest Pipeline LLC—Oregon City Compressor Station—Order 03–2729, Amendment 03–2729–A1

• Under the SAFO, the permittee agrees to replace two reciprocating internal combustion engines to meet the emission limits and requirements of the most recent New Source Performance Standard. No later than July 1, 2026, ODEQ and the permittee will meet to discuss what permitting needs are necessary for the replacement, with replacement complete no later than July 31, 2031.

Cascade Pacific Pulp, LLC—Halsey Pulp Mill—Order 22–3501–A2

• By June 30, 2024, the permittee shall eliminate the use of #6 fuel oil.

• No later than July 31, 2031, replace power boiler #2 with a new emissions unit that will achieve a limit of 0.036 lbs NO_X/MMBtu as a 30-day rolling average.

• Upon replacement of power boiler #2, limit emissions from power boiler #1 to no more than 27 tons of NO_X per year.

Roseburg Forest Products, Dillard—Order 10–0025

• By July 31, 2022, the permittee shall install CEMS to measure the emissions of NO_X from Boiler 1, Boiler 2 and Boiler 6.

• From January 31, 2023, until June 30, 2025, the permittee shall meet the following emission limits: 0.30 lb NO_X/MMBtu on a 7-day rolling average at Boiler 1; 0.30 lb NO_X/MMBtu on a 7-day rolling average at Boiler 2; 0.28 lb NO_X/MMBtu on a 7-day rolling average at Boiler 6; Or average of emissions from boiler 1, boiler 2, and boiler 6 of 0.28 lb NO_X/MMBtu (7-day rolling average).

• By January 31, 2024, the permittee shall notify ODEQ whether the permittee will comply with the emission limits below using boiler optimization or through installation of SNCR. If permittee determines SNCR is necessary to meet emission limits, SNCR shall be installed, permitted, and operational by June 30, 2025.

• On and after June 30, 2025, the permittee shall meet the following emission limits: 0.27 lb NO_X/MMBtu on a 7-day rolling average at Boiler 1; 0.26 lb NO_X/MMBtu on a 7-day rolling average at Boiler 2; 0.26 lb NO_X/MMBtu on a 7-day rolling average at Boiler 6; or average of emissions from Boiler 1, Boiler 2, and Boiler 6 of 0.25 lb NO_X/MMBtu (7-day rolling average).

The EPA notes that each of the controls and emission limits discussed above limit emissions of one or more of the ''round II regional haze pollutants.'' In most cases, Oregon determined that NO_X was the dominant visibility-impairing pollutant from the sources and thus imposed additional NO_X controls or submitted the enforceable emission limitations for existing NO_X controls. For some emission units within the stationary sources discussed in the previous paragraphs, Oregon did not adopt additional pollutant-specific controls, primarily for PM_{10} and SO_2. Based on a review of the four-factor analyses, Oregon determined that these emission units either already employ existing effective controls or, by virtue of design, have insignificant emissions.

[158] Page 4.

[159] 75 FR 12651, March 8, 2011, at page 12660.

[160] Permit conditions: 33. Monitor and Record: for PM_{10}, SO_2, and NO_X, 34. General Testing Requirement, 35. EU4 Emission Factor Verification Testing Requirements: for PM_{10}, NO_X, SO_2, 36–38. General Monitoring and Recordkeeping Requirements, 39–42. General Recordkeeping Requirements, 43–46. General Reporting Requirements, and 47–48. Semi-annual and Annual Reports.

[161] Permit conditions: 40a–40g. Monitoring Requirement: for PM_{10}, NO_X, SO_2, 41. Visible Emission Monitoring Procedure, 42. Source Testing and Emission Factor Verification Procedure: for PM_{10}, NO_X, SO_2, 43–45. General Monitoring Requirements, 46–49. General Recordkeeping Requirements, 50–53. General Reporting Requirements, and 54–56. Semi-annual and Annual Reports.

[162] Permit conditions: 24–26. General Monitoring Requirements, 32–35. General Recordkeeping Requirements, 37–40. General Reporting Requirements, and 41–44. Semi-Annual and Annual Reports.

In particular, Oregon determined that PM_{10} emissions for most of the relevant emission units have been and continue to be controlled by multiclones, electrostatic precipitators, baghouses, or other feasible technology that consistently achieves >90% control efficiency for PM_{10}. As a general matter, the four-factor analyses indicated that PM_{10} controls have been in place for many years to meet Federal NESHAP, NSPS, or Oregon SIP requirements and that these controls must remain in place to meet these continuing standards for the duration of the second planning period.[163] Accordingly, Oregon determined that these existing effective controls were not necessary for reasonable progress for the second planning period.

In other cases, Oregon determined that the nature and mode of operation of particular sources yielded insignificant emissions. For example, at the Boise Cascade Wood Products, LLC's Elgin and Medford Mills the sulfur content of wood derived fuel is low, and the majority of the sulfur content is combined with the ash products of combustion.[164] Thus, Oregon either did not select these emission units for four-factor analysis for a given pollutant or determined that the existing emission limits for a given pollutant were not necessary for reasonable progress. Therefore, Oregon focused primarily on NO_X and SO_2, with PM_{10} analysis and limits when warranted. Accordingly, to the extent that Oregon did not submit the enforceable emission limitations for PM_{10} or other pollutant controls for certain emission units within a given source selected for four-factor analysis the EPA proposes to determine that Oregon's selection of emission units to review under the four factors is consistent with the Regional Haze Rule and that the existing effective controls are not necessary for reasonable progress.

Facilities for Which No Controls Were Cost-Effective

ODEQ reviewed the four-factor analyses from the facilities and adjusted for consistency with basic factors such as using current prime rate (3.25%), 30-year lifetime, and calculation of cost effective controls using PSEL emissions limits rather than actual emissions. After initial review, ODEQ ruled out control devices for which the cost of control was greater than $10,000 per ton or provided an emissions reduction (using emissions at PSEL) of less than 20 tons per year. In letters sent August and September 2020, ODEQ notified 6 facilities with the determination that the agency did not find any controls deemed cost effective at the $10,000/ton threshold.[165] These facilities were Pacific Wood Laminates, Inc., Swanson Group Mfg. L.L.C., Ochoco Lumber Company, Columbia Forest Products, Inc., Collins Products, L.L.C., and Woodgrain Millwork L.L.C.—Particleboard. In order to ensure no future impairment to visibility from these facilities, ODEQ submitted Title V permits for these facilities to incorporate into the SIP permitting conditions for these existing controls relevant to the regional haze program. The EPA reviewed these four-factor analyses, and we propose to find that ODEQ's determinations for these sources are reasonable and consistent with 40 CFR 51.308(f)(2)(i) and (iii).

The EPA's Proposed Approval Oregon's Long-Term Strategy for Stationary Sources

The EPA reviewed ODEQ's four-factor analyses, determinations of controls necessary for reasonable progress, and submitted SAFOs and permit conditions. Based on this review, the EPA proposes to determine that Oregon's long-term strategy meets the requirements of 40 CFR 51.308(f)(2)(i) through (iii). Oregon submitted numerous four-factor analyses and demonstrated that its determination of controls necessary for reasonable progress were an outgrowth of its consideration of the four statutory factors. Notably, Oregon's $10,000 cost per ton threshold is one of, if not the highest, cost thresholds established by any state specifically for evaluating controls for the regional haze program. Ultimately, Oregon imposed new, substantive controls at 13 facilities (covering over 36 emissions units) and established emissions limits at an additional 10 facilities with low actual emissions to ensure that future emissions do not rise above the screening threshold.

The EPA acknowledges that the final control measures imposed by the SAFOs and permits described in the preceding paragraphs in some cases differ from Oregon's preliminary control determinations contained in ODEQ's January 21, 2021, letters. We reviewed the four-factor analyses and Chapter 3.7 of Oregon's regional haze SIP, *Facility-Specific Findings and Results,* which contain a brief overview of the site-specific and feasibility concerns ODEQ considered in making final determinations, along with additional supporting information contained in the November 22, 2023, supplement.

Based on this review, the changes from preliminary to final control determinations appear reasonable and consistent with the Regional Haze Rule. Importantly, Oregon's iterative process to identify and adopt technically feasible, cost-effective controls reinforces that the State considered the four statutory factors to determine the controls necessary for reasonable progress.

Considering ODEQ's conservative screening methodology to use permitted emissions limits, the high $10,000 cost per ton reduction threshold Oregon used in reviewing the four-factor analyses submitted by the sources, the conservative methodology of evaluating controls using permitted emissions limits, the number of new emissions controls imposed specifically under the regional haze program, and the significant emissions reductions achieved through the SAFOs described in the previous paragraphs, we are proposing to determine that Oregon satisfied the requirement to determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment.

c. Additional Long-Term Strategy Requirements

The consultation requirements of 40 CFR 51.308(f)(2)(ii) provide that states must consult with other states that are reasonably anticipated to contribute to visibility impairment in a Class I area to develop coordinated emission management strategies containing the emission reductions measures that are necessary to make reasonable progress. Section 51.308(f)(2)(ii)(A) and (B) require states to consider the emission reduction measures identified by other states as necessary for reasonable progress and to include agreed upon measures in their SIPs, respectively. Section 51.308(f)(2)(ii)(C) speaks to what happens if states cannot agree on

[163] *See, e.g.,* 115_18-0013Collins4FA.pdf at 3–4; 104_haze_BoiseCasecade-ElginFFA.pdf at 2–14; 107_haze-BoiseCascade-Medford-FFA.pdf; 110_haze-CascadePacificPulp-HalseyMill-FFA.pdf at 2–8, 3–5, 4–6–4–11, 3; 117_18-0014ColumbiaForestProducts4FA.pdf at 11.

[164] See 104_haze_BoiseCasecade-ElginFFA.pdf at 2–15; 107_haze-BoiseCascade-Medford-FFA.pdf at 2–4.

[165] The facility-submitted four-factor analyses and ODEQ response letters are included in the docket for this action.

what measures are necessary to make reasonable progress.

Oregon participated in and provided documentation of the WRAP intra- and inter-regional planning organization consultation processes in the submission.[166] Oregon also had direct consultations with California, Idaho, Nevada, and Washington for sources where a Q/d analysis showed potential impacts on Oregon Class I areas or where Oregon sources may impact other states, as discussed in section IV.C of this preamble. The Oregon SIP submissions contain the list of out-of-state facilities potentially impacting Oregon Class I areas and a summary of the four-factor analysis process and the potential controls pursued by Idaho, Nevada, and Washington at the time of the consultation.[167] During the state-to-state consultation and WRAP process, no other states identified measures for Oregon to consider. Therefore, we are proposing to determine that the Oregon regional haze plan satisfies 40 CFR 51.308(f)(2)(ii)(A) and (B). Oregon also satisfies 40 CFR 51.308(f)(2)(ii)(C) by having participated in the WRAP's consultation process and direct consultation with California, Idaho, Nevada, and Washington. No disagreements were raised by other states with respect to Oregon's planning efforts. We propose to determine that Oregon has satisfied the consultation requirements of 40 CFR 51.308(f)(2)(ii).

The documentation requirement of 40 CFR 51.308(f)(2)(iii) provides that states may meet their obligations to document the technical bases on which they are relying to determine the emission reduction measures that are necessary to make reasonable progress through a regional planning organization, as long as the process has been ''approved by all State participants.'' As explained above, Oregon chose to rely on WRAP technical information, modeling, and analysis to support development of its long-term strategy, as well as the State's own analyses. The WRAP technical analyses on which Oregon relied are listed in the State's SIP submissions and include source contribution assessments, information on each of the four factors and visibility modeling information for selected sources, and evaluations of emission reduction strategies based on the anticipated control measures.[168] Oregon also provided supplemental information to demonstrate the technical bases and emission information on which it relied to determine the emission reductions measures that are necessary to make reasonable progress. Based on the documentation provided by the State, we propose to find that Oregon has satisfied the requirements of 40 CFR 51.308(f)(2)(iii).

Section 51.308(f)(2)(iii) also requires that the emissions information considered to determine the measures that are necessary to make reasonable progress include information on emissions for the most recent year for which the state has submitted triennial emissions data to the EPA (or a more recent year), with a 12-month exemption period for newly submitted data. Oregon's SIP submission included 2017 NEI emission data for regional haze forming pollutants. Based on Oregon's consideration and analysis of emissions data in their SIP submissions, the EPA proposes to find that Oregon has satisfied the emissions information requirement in 40 CFR 51.308(f)(2)(iii).

We also propose to find that Oregon reasonably considered the five additional factors in 40 CFR 51.308(f)(2)(iv) in developing its long-term strategy. Pursuant to 40 CFR51.308(f)(2)(iv)(A), Oregon detailed the existing and ongoing State and Federal emission control programs that contribute to emission reductions through 2028. The Oregon regional haze SIP highlights the State's aggressive programs for mobile sources, including Oregon's adoption of California rules for medium- and heavy-duty on-road vehicles, Low Emission Vehicle and ZEV standards for passenger vehicles, and a state clean fuels program.[169] Many of these same measures, as well as other measures for the nonroad mobile source category, also mitigate the impacts of construction activities as required by 40 CFR 51.308(f)(2)(iv)(B).[170]

Pursuant to 40 CFR 51.308(f)(2)(iv)(C), source retirements and replacement schedules are addressed in Chapter 4.4 *Necessary Emission Reduction Measures, On-going Air Pollution Control Programs and Source Retirement/Replacement* of Oregon's April 29, 2022, submission. The primary source retirement considered in developing the 2028 emission projections was permanent closure of the coal-fired power plant in Boardman, as required under the regional haze plan for the first implementation period.

In considering smoke management as required in 40 CFR 51.308(f)(2)(iv)(D), Oregon explained, in Chapter 4.6 *Smoke Management Practices and Programs and Area Source Strategies* that it addresses smoke management through its SIP-approved smoke management plan[171] and open burning rules.[172] Open burn rules limit all types of open burning within the State and require that, where open burning is allowed, it is conducted only after obtaining appropriate permits for burning in specific locations on approved dates. Oregon also has several existing measures that help improve visibility at Class I areas including SIP-approved residential woodstove restrictions.[173]

Oregon considered the anticipated net effect of projected changes in emissions as required by 40 CFR 51.308(f)(2)(iv)(E) by discussing, in Chapter 2.5 *Source Apportionment of Visibility Impairment and Weighted Emission Potential* of its April 29, 2022, submission, the photochemical modeling for the 2018–2028 period it conducted in collaboration with the WRAP.

Because Oregon has reasonably considered each of the five additional factors the EPA proposes to find that Oregon has satisfied the requirements of 40 CFR 51.308(f)(2)(iv).

F. Reasonable Progress Goals

Section 51.308(f)(3) contains the requirements pertaining to reasonable progress goals for each Class I area. Because Oregon is host to Class I areas, it is subject to both 40 CFR 51.308(f)(3)(i) and, potentially, to (ii). Section 51.308(f)(3)(i) requires a state in which a Class I area is located to establish reasonable progress goals—one each for the most impaired and clearest days—reflecting the visibility conditions that will be achieved at the end of the implementation period as a result of the emission limitations, compliance schedules and other measures required under paragraph (f)(2) to be in states' long-term strategies, as well as implementation of other Clean Air Act requirements. The long-term strategies as reflected by the reasonable progress goals must provide for an improvement in visibility on the most impaired days relative to the baseline period and ensure no degradation on the clearest days relative to the baseline period. Section

[166] April 29, 2022 Oregon SIP submission, Chapter 6.2. Consultations with States.

[167] April 29, 2022 Oregon SIP submission, Chapter 3.3 Impact of facilities in other states on Oregon Class 1 areas.

[168] April 29, 2022, Oregon SIP submission, Chapter 5.1 Reasonable progress goals for Class I areas.

[169] April 29, 2022 Oregon SIP submission, Chapter 4.5 Measures to Mitigate Impacts of Construction Activities and Mobile Source Strategies.

[170] Ibid.

[171] 86 FR 27976, May 25, 2021.

[172] 82 FR 47122, October 11, 2017.

[173] OAR Division 262—Heat Smart Program for Residential Woodstoves and Other Solid Fuel Heating Devices.

51.308(f)(3)(ii) applies in circumstances in which a Class I area's reasonable progress goals for the most impaired days represents a slower rate of visibility improvement than the uniform rate of progress calculated under 40 CFR 51.308(f)(1)(vi). Under 40 CFR 51.308(f)(3)(ii)(A), if the state in which a Class I area is located establishes a reasonable progress goal for the most impaired days that provides for a slower rate of visibility improvement than the uniform rate of progress, the state must demonstrate that there are no additional emission reduction measures for anthropogenic sources or groups of sources in the state that would be reasonable to include in its long-term strategy. Section 51.308(f)(3)(ii)(B) requires that if a state contains sources that are reasonably anticipated to contribute to visibility impairment in a Class I area in *another* state, and the reasonable progress goal for the most impaired days in that Class I area is above the uniform rate of progress, the upwind state must provide the same demonstration.

Chapters 2.1 *Most Impaired Days* and 2.2 *Clearest Days* of Oregon's regional haze SIP summarize baseline visibility conditions (*i.e.,* visibility conditions during the baseline period) for the most impaired and clearest days, as well as information on natural visibility conditions and the calculated URP in 2018 and 2028. Chapter 5.1 *Reasonable progress goals for Class I Areas* shows the 2028 RPGs for the most impaired days and clearest days. The 2028 RPG projections are based on WRAP modeling which represents regulations on the books as of 2020 plus stationary source controls recommended from ODEQ's review of the four-factor analyses submittals. The modeled 2028 RPGs for the most impaired days are presented in table 5 of this preamble, along with adjusted and unadjusted 2028 URP glidepaths as calculated by the EPA.[174]

TABLE 5—REASONABLE PROGRESS GOALS FOR THE MOST IMPAIRED DAYS

Monitor ID	Class I area	Baseline 2000–2004 (dv)	Current conditions 2014–2018 (dv)	WRAP 2028 RPGs (dv)	Unadjusted glidepath 20% most impaired days (dv)	EPA 2028 default adjusted glidepath (dv)
MOHO	Mt. Hood Wilderness Area	12.10	9.27	8.50	9.90	10.71
THSI	Mt. Jefferson, Mt. Washington, and Three Sisters Wilderness Areas.	12.80	11.28	10.86	10.60	11.62
CRLA	Crater Lake National Park; Diamond Peak, Mountain Lakes, and Gearhart Mountain Wilderness Areas.	9.36	7.98	7.72	7.70	8.85
KALM	Kalmiopsis Wilderness Area	13.34	11.97	11.63	11.13	11.87
STAR	Strawberry Mountain and Eagle Cap Wilderness Areas	14.53	11.19	10.47	11.35	12.69
HECA	Hells Canyon Wilderness Area	16.51	12.33	11.66	12.53	13.93

The 2017 Regional Haze Rule included a provision that allows states to propose an adjustment to the glidepath to account for impacts from anthropogenic sources outside the U.S. if the adjustment has been developed through scientifically valid data and methods. The EPA's visibility guidance states "to calculate the proposed adjustment(s), the State must add the estimated impact(s) to the natural visibility condition and compare the baseline visibility condition for the most impaired days to the resulting sum." In 2019, the EPA conducted modeling to assist states in the development of Regional Haze SIPs for the second implementation period. In particular, the modeling provided the EPA's first comprehensive estimate of international anthropogenic emissions contributions to visibility impairment at Class I areas.[175] ODEQ chose not to adjust the glidepath to account for impacts from anthropogenic sources outside the U.S.

As noted in Chapter 2.3 *Emissions Inventory Analysis* of Oregon's regional haze SIP submission, the 2017 SO_2 inventory is dominated by PGE Boardman's coal-fired power plant in Morrow County. With the closing of the plant in October 2020, statewide SO_2 emissions declined by 62%. ODEQ further concludes that at some monitors, ammonium sulfate is a large contributor to regional haze formation, but that contribution seems to be dominated by international anthropogenic sources and is projected to decrease by 77% as new standards for international marine shipping fuels take effect in 2020.[176] Therefore, even though Oregon declined to adjust the glidepath for international anthropogenic sources, such as marine shipping, we believe this is information relevant to our review. In particular, all IMPROVE stations for Class I areas in Oregon have modeled 2028 RPGs below the 2028 URP glidepath as adjusted for international anthropogenic contribution for the most impaired days. For the most impaired days, the 2028 RPGs also represent an improvement relative to both baseline visibility conditions and current visibility conditions. Similarly, for the clearest days, the 2028 RPGs also represent an improvement relative to both baseline visibility conditions and current visibility conditions, as shown in table 6 of this preamble.

TABLE 6—REASONABLE PROGRESS GOALS FOR THE CLEAREST DAYS

Monitor ID	Class I area	Baseline 2000–2004 (dv)	Current conditions 2014–2018 (dv)	WRAP 2028 RPGs (dv)
MOHO	Mt. Hood Wilderness Area	2.17	1.39	1.29

[174] Availability of Modeling Data and Associated Technical Support Document for the EPA's Updated 2028 Visibility Air Quality Modeling, September 2019.

[175] Availability of Modeling Data and Associated Technical Support Document for the EPA's Updated 2028 Visibility Air Quality Modeling, September 2019.

[176] April 29, 2022 Oregon SIP submission, Chapter 2.1 Most Impaired Days.

TABLE 6—REASONABLE PROGRESS GOALS FOR THE CLEAREST DAYS—Continued

Monitor ID	Class I area	Baseline 2000–2004 (dv)	Current conditions 2014–2018 (dv)	WRAP 2028 RPGs (dv)
THSI	Mt. Jefferson, Mt. Washington, and Three Sisters Wilderness Areas	3.04	2.61	2.53
CRLA	Crater Lake National Park; Diamond Peak, Mountain Lakes, and Gearhart Mountain Wilderness Areas.	1.69	1.05	0.98
KALM	Kalmiopsis Wilderness Area	6.27	5.90	5.84
STAR	Strawberry Mountain and Eagle Cap Wilderness Areas	2.17	1.39	1.29
HECA	Hells Canyon Wilderness Area	5.52	4.00	3.79

As noted in the RHR at 40 CFR 51.308(f)(3)(iii), the reasonable progress goals are not directly enforceable, but will be considered by the Administrator in evaluating the adequacy of the measures in the implementation plan in providing for reasonable progress towards achieving natural visibility conditions at specific Class I areas. Regardless of whether we use an adjusted or unadjusted URP glidepath to evaluate Oregon's 2028 RPGs for the most impaired days, the regulatory purpose of the RPGs has been fulfilled because visibility conditions for all IMPROVE stations have improved since the baseline period.

That said, because Oregon did not adjust the glidepath and because the 2028 RPGs for several Class I areas are above the unadjusted glidepath, the demonstration requirement under 40 CFR 51.308(f)(3)(ii)(A) is triggered. Oregon addressed this obligation in Chapter 5.2 *Glidepath policy choice* stating, ''DEQ's policy decision to represent URP as an unadjusted glidepath has some effect on whether 2028 visibility projections fall slightly below or slightly above the glidepath (primarily at the central and southern Oregon IMPROVE sites), but DEQ did not base regulatory stationary source control decisions on the URP. DEQ based control decisions on the factors described in section 3 of this plan, including analyses based on the four statutory factors. As discussed in section III.D. of this preamble, visibility projections below the glidepath do not provide 'safe harbor' for sources.

The EPA acknowledges Oregon's position. The IMPROVE monitoring stations in the Cascades (THSI and CRLA) and Kalmiopsis (KALM) that are projected to have 2028 RPGs at or above the unadjusted glidepath are the same IMPROVE monitoring stations that Oregon demonstrated are highly impacted by international marine shipping as described in section IV.E.a. of this preamble. These emissions are projected to decrease by 77% due to new standards for international marine shipping fuels which became effective in 2020.[177] Also as described in section IV.E.a. of this preamble, statewide NO_X emissions are primarily from mobile sources, at about 80% of the inventory. The Oregon regional haze SIP highlights the State's aggressive programs for mobile sources, including Oregon's adoption of California rules for medium- and heavy-duty on-road vehicles, Low Emission Vehicle and ZEV standards for passenger vehicles, and the State's clean fuels program, representing one of the most stringent mobile source programs allowed under the Federal Clean Air Act.

Section 51.308(f)(3)(ii)(A) requires that the state provide an assessment of the number of years it would take to attain natural visibility conditions if visibility improvement were to continue at the rate of progress selected by the state as reasonable for the implementation period. Because these two source categories described in the prior paragraphs, mobile source standards and international marine shipping, are generally outside the control of the State, ODEQ did not directly address this requirement. However, the State made clear in Chapter 5.2 *Glidepath policy choice* that Oregon fully intends to achieve natural conditions consistent with the unadjusted URP glidepath. Thus, Oregon's regional haze SIP clearly indicates that the State's assessment of the number of years it would take to achieve natural visibility conditions remains unchanged from that predicted by the URP glidepath at THIS and CRLA. In support of this argument, ODEQ highlighted the new standards for international marine shipping fuels that will dramatically reduce regional haze precursors, as discussed above. We are proposing to determine that this is a reasonable assumption because the State RPGs in question are only marginally above the unadjusted 2028 URP glidepath and generally well below the 2028 adjusted URP glidepath calculated by the EPA to account for contribution outside the State's control, such as international marine shipping. See Table 5 of this preamble.

Given the dominance of these two emissions source categories on the overall inventory, it is highly unlikely that differences in the stationary source controls selected by Oregon would significantly impact the projected RPG modeling for these IMPROVE monitoring stations. Nevertheless, as described in section IV.E.b. of this preamble, considering ODEQ's conservative screening methodology to use permitted emissions limits, the high $10,000 cost per ton reduction threshold Oregon used in reviewing the four-factor analyses submitted by the sources, the conservative methodology of evaluating controls using permitted emissions limits, the number of new emissions controls imposed specifically under the regional haze program, and the significant emissions reductions achieved, we are proposing to determine that there are no additional emission reduction measures for anthropogenic sources or groups of sources in the State that may reasonably be anticipated to contribute to visibility impairment in the Class I area that would be reasonable to include in the long-term strategy and that Oregon has met the robust demonstration requirement under 40 CFR 51.308(f)(3)(ii)(A).

Under 40 CFR 51.308(f)(3)(ii)(B), a state that contains sources that are reasonably anticipated to contribute to visibility impairment in a Class I area in another state for which a demonstration by the other state is required under 40 CFR 51.308(f)(3)(ii)(B) must demonstrate that there are no additional emission reduction measures that would be reasonable to include in its long-term strategy. Oregon's SIP revision included the modeled WRAP 2028 visibility projections for Redwood National Park and Lava Beds National Monument in California, both of which have WRAP-

[177] International Marine Organization. 2020. A Breath of Fresh Air. *https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Sulphur%202020%20infographic%202%20page.pdf.*

calculated 2028 RPGs slightly above the unadjusted 2028 URP glidepath. All other potentially affected Class I areas in Idaho (Hells Canyon Wilderness Area—HECA), and Washington (Mount Rainier National Park—MORA and Mount Adam Wilderness Area/Goat Rocks Wilderness Area—WHPA) had 2028 RPGs below the unadjusted 2028 URP glidepath.[178] Oregon addressed these two California Class I areas with RPGs above the unadjusted glidepath using the same rationale as the demonstration for 40 CFR 51.308(f)(3)(ii)(A).[179]

In reviewing Oregon's regional haze SIP submissions, we note that Oregon identified one facility, Roseburg Forest Products—Dillard, as potentially impacting Redwood National Park with a Q/d of 10.39 based on 2017 actual emissions. Oregon's regional haze SIP submissions include a four-factor analysis for the facility and enforceable controls to reduce NO_X emissions. Specifically, under the SAFO, the facility was provided the option to meet emissions limits by optimizing the operation of the boilers. However, should the facility not meet these emissions limits, SNCR must be installed, permitted, and made operational by June 30, 2025. With respect to Lava Beds National Monument in California, ODEQ determined that two facilities in Oregon potentially impact this Class I area. These facilities are Klamath Cogeneration Project and Collins Products, L.L.C. Klamath Cogeneration Project had a PSEL Q/d=8.69 and an actual Q/d=3.66, potential impact on this Class I area. Collins Products, L.L.C. had a PSEL Q/d=5.48 and an actual Q/d=2.43, potential impact on this Class I area. As previously discussed regarding adequate existing measures, Klamath Cogeneration Project is already well controlled with existing SCR on all six combustion turbine units, as well as the recent addition of ultra-low NO_X burners on two of the units. Lastly, Oregon included a four-factor analysis for Collins Products, L.L.C. in its regional haze SIP. Based on this analysis, Oregon determined that existing controls were necessary for reasonable progress and that additional controls were not cost effective. Therefore, Oregon submitted permit 18–0013–TV–01 to ensure these controls are Federally enforceable and permanent. While the EPA did not independently conduct our own four-factor analyses on these sources, we are proposing to determine, based on Oregon's application of a high cost-effectiveness threshold and the small Q/d based on actual emissions for two of the sources, that Oregon has satisfied the obligation under 40 CFR 51.308(f)(3)(ii)(B). We also note that Oregon conducted state-to-state consultation with California, Idaho, Nevada, Washington, and the WRAP states generally, and no disagreements under 40 CFR 51.308(f)(2)(ii)(C) were identified by California or any other state. The EPA proposes to determine that Oregon has satisfied the applicable requirements of 40 CFR 51.308(f)(3) relating to RPGs.

G. Monitoring Strategy and Other Implementation Plan Requirements

Section 51.308(f)(6) specifies that each comprehensive revision of a state's regional haze SIP must contain or provide for certain elements, including monitoring strategies, emissions inventories, and any reporting, recordkeeping and other measures needed to assess and report on visibility. A main requirement of this section is for states with Class I areas to submit monitoring strategies for measuring, characterizing, and reporting on visibility impairment. Compliance with this requirement may be met through participation in the Interagency Monitoring of Protected Visual Environments (IMPROVE) network.

Chapter 1.5.2 *Monitoring strategy* of Oregon's SIP submission states, ''Oregon will continue to participate in the IMPROVE monitoring network to measure, characterize and report aerosol monitoring data for long-term reasonable progress tracking. DEQ commits a portion of Oregon's $PM_{2.5}$ EPA funding to support the IMPROVE network. DEQ deems the IMPROVE network representative of conditions in all of Oregon's Class 1 areas and would rely on the IMPROVE Steering Committee to advise states if conditions changed such that additional monitors were necessary.''

Section 51.308(f)(6)(i) requires SIPs to provide for the establishment of any additional monitoring sites or equipment needed to assess whether reasonable progress goals to address regional haze for all mandatory Class I Federal areas within the state are being achieved. Regional haze data for Oregon Class I areas are collected by the IMPROVE monitoring stations shown in table 1 of this preamble. The monitoring stations are primarily operated by the U.S. Forest Service, except for the CRLA1 IMPROVE monitoring station which is operated and maintained by the National Parks Service. As noted in ODEQ's monitoring strategy chapter, Oregon would rely on the IMPROVE Steering Committee to advise if conditions changed such that additional monitors were necessary.

Section 51.308(f)(6)(ii) requires SIPs to provide for procedures by which monitoring data and other information are used in determining the contribution of emissions from within the state to regional haze visibility impairment at mandatory Class I Federal areas both within and outside the state. Oregon relied on the WRAP source apportionment modeling and the weighted emission potential (WEP) analysis to help discern the degree to which different sectors affect visibility in each Class I area. The source apportionment and WEP analysis are based on data from WRAP's Technical Support System website[180] for the Round 2 regional haze analysis.[181] We note that § 51.308(f)(6)(iii) does not apply to Oregon, because it has Class I areas.

Section 51.308(f)(6)(iv) requires the SIP to provide for the reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state. As noted in the prior paragraphs, the IMPROVE monitoring stations in Oregon are operated and maintained by the U.S. Forest Service and the National Park Service. The monitoring strategy for Oregon relies upon the continued availability of the IMPROVE network. Oregon supports the continued operation of the IMPROVE network by committing a portion of Oregon's $PM_{2.5}$ EPA funding to support the IMPROVE network.

Section 51.308(f)(6)(v) requires SIPs to provide for a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment, including emissions for the most recent year for which data are available and estimates of future projected emissions. It also requires a commitment to update the inventory periodically. Oregon provides for emissions inventories and estimates for future projected emissions by participating in the WRAP regional planning organization (RPO) and complying with the EPA's Air Emissions Reporting Rule (AERR). In 40 CFR part 51, subpart A, the AERR

[178] Although Nevada was included in Oregon's state to state consultation, Oregon's Q/d analysis showed greater potential impacts on California, Idaho, and Washington Class I areas. Therefore, Oregon's RPG analysis focused on those impacted Class I areas. See April 29, 2022, Oregon SIP submission, Table 3 3. Oregon facilities with potential visibility impacts on other states.

[179] April 29, 2022 Oregon SIP submission, Chapter 5.2 Glidepath policy choice.

[180] *http://views.cira.colostate.edu/tssv2/.*

[181] April 29, 2022 Oregon SIP submission, Chapter 2.5 Source Apportionment of Visibility Impairment and Weighted Emission Potential.

requires states to submit updated emissions inventories for criteria pollutants to the EPA's Emissions Inventory System (EIS) every three years. The emission inventory data is used to develop the NEI, which provides for, among other things, a triennial state-wide inventory of pollutants that are reasonably anticipated to cause or contribute to visibility impairment.

Chapter 2.3. *Emissions Inventory Analysis* of Oregon's submissions include tables of NEI data. The source categories of the emissions inventories included are: (1) point sources; (2) nonpoint sources; (3) non-road mobile sources; and (4) on-road mobile sources. Oregon included NEI emissions inventories based on 2017, the most recent year for which data are available. Oregon observed that statewide NO_X emissions are primarily from mobile sources, at about 80% of the inventory, with another 13% of the inventory coming from fuel combustion. The 2017 SO_2 inventory is largely overwhelmed by PGE Boardman's coal-fired power plant in Morrow County. With the closing of the coal-fired operations in October 2020, those SO_2 emissions have been eliminated, and the remainder of the emissions in the inventory come from fuel combustion and prescribed fires. For particulate matter, major source sectors include prescribed fire and agriculture, comprising 77% of the anthropogenic inventory.

Section 51.308(f)(6)(v) also requires states to include estimates of future projected emissions and include a commitment to update the inventory periodically. Oregon relied on the WRAP 2028 emissions projections for WRAP states. WRAP completed two 2028 projected emissions modeling cases—a 2028 base case that considers only on-the-books controls and a 2028 control case that considers implementation of the controls based on ODEQ's review of four-factor analyses submitted by the screened in sources.[182]

The EPA proposes to find that Oregon has met the requirements of 40 CFR 51.308(f)(6) as described in the prior paragraphs, including through its continued participation in the IMPROVE network and the WRAP RPO and its on-going compliance with the AERR, and that no further elements are necessary at this time for Oregon to assess and report on visibility pursuant to 40 CFR 51.308(f)(6)(vi).

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

Section 51.308(f)(5) requires that periodic comprehensive revisions of states' regional haze plans also address the progress report requirements of 40 CFR 51.308(g)(1) through (5). The purpose of these requirements is to evaluate progress towards the applicable reasonable progress goals for each Class I area within the state and each Class I area outside the state that may be affected by emissions from within that state. Sections 51.308(g)(1) and (2) apply to all states and require a description of the status of implementation of all measures included in a state's first implementation period regional haze plan and a summary of the emission reductions achieved through implementation of those measures. Section 51.308(g)(3) applies only to states with Class I areas within their borders and requires such states to assess current visibility conditions, changes in visibility relative to baseline (2000–2004) visibility conditions, and changes in visibility conditions relative to the period addressed in the first implementation period progress report. Section 51.308(g)(4) applies to all states and requires an analysis tracking changes in emissions of pollutants contributing to visibility impairment from all sources and sectors since the period addressed by the first implementation period progress report. This provision further specifies the year or years through which the analysis must extend depending on the type of source and the platform through which its emission information is reported. Finally, 40 CFR 51.308(g)(5), which also applies to all states, requires an assessment of any significant changes in anthropogenic emissions within or outside the state have occurred since the period addressed by the first implementation period progress report, including whether such changes were anticipated and whether they have limited or impeded expected progress towards reducing emissions and improving visibility.

Oregon's submission describes the status of measures of the long-term strategy from the first implementation period. The most significant was the amendment of the PGE Boardman Title V permit to include conditions requiring BART control installation and to permanently cease burning coal in the main boiler by December 31, 2020. In Oregon's 2017 5-year progress report, ODEQ reported that in 2011, PGE Boardman installed low NO_X burners with a modified over-fire air system and in 2014, BART SO_2 controls, consisting of a dry sorbent injection (DSI) system. PGE Boardman was meeting BART NO_X and SO_2 emission limitations. A second BART SO_2 emission limit was required in 2018 and the coal-fired facility closed permanently by December 2020. Chapter 2.1.2 *Emission Reductions Achieved by SIP Measures* of Oregon's SIP submissions show the most recent 2017 NEI data for sources subject to control in the first implementation period. Notably, SO_2 emissions declined dramatically with the 2020 closure of the PGE Boardman coal-fired power plant. The EPA proposes to find that Oregon has met the requirements of 40 CFR 51.308(g)(1) and (2) because its SIP submissions describe the measures included in the long-term strategy from the first implementation period, as well as the status of their implementation and the emission reductions achieved through such implementation.

Oregon's SIP submissions included summaries of the visibility conditions and the trend of the 5-year averages through 2018 at Class I area in the State.[183] As shown in table 2 of this preamble, the SIP submissions included the 5-year baseline (2000–2004) visibility conditions for the clearest and most impaired days. The SIP submissions also included the current 5-year status (2014–2018) for the clearest and most impaired days. The SIP submissions also illustrated in Figures 5.3 to 5.8 the visibility metrics levels at Oregon Class I areas, including the 5-year rolling average for the clearest and most impaired days.[184] The EPA therefore proposes to find that Oregon has satisfied the requirements of 40 CFR 51.308(g)(3).

Pursuant to § 51.308(g)(4), as part of the November 22, 2023 supplement to the submission,[185] Oregon provided a summary of emissions of NO_X, SO_2, PM_{10}, $PM_{2.5}$, VOCs, and NH_3 from all sources and activities, including from point, nonpoint, non-road mobile, and on-road mobile sources, for the time period from 2002 to 2021 (the most recent air pollutant emissions trends data available in the NEI at the time).[186] Oregon also included a detailed analysis of SO_2, NO_X, PM_{10} emissions for 2017 in the April 29, 2022 submission.

The reductions achieved by Oregon emission control measures are seen in the emissions inventory. Based on

[182] April 29, 2022 Oregon SIP submission, Chapter 5.1 Reasonable progress goals for Class I Areas.

[183] April 29, 2022 Oregon SIP submission, Chapters 2.1. Most Impaired Days and 2.2. Clearest Days.

[184] April 29, 2022 Oregon SIP submission, Chapter 5 Uniform Rate of Progress.

[185] Oregon RH Emission Trends.xlsx.

[186] *https://www.epa.gov/air-emissions-inventories/air-pollutant-emissions-trends-data.*

Oregon's SIP submissions, and the supplemental information in the ''Oregon RH Emission Trends'' spreadsheet included in the docket for this action, NO_X emissions have continuously declined in Oregon from 2002 through 2021, especially in the point, nonroad, and onroad mobile sectors. NO_X emissions are expected to continue to decrease as fleet turnover occurs and older more polluting vehicles and equipment are replaced by newer, cleaner ones. During that period, onroad sources contributed almost half of the emissions at 46%, followed by nonroad sources contributing 29%, and NEI point and nonpoint sources contributing 14%. Emissions of SO_2 have shown a significant decline in Oregon over the period 2002 to 2021, particularly in the point, and onroad and nonroad mobile sectors. NEI point and nonpoint emissions have declined 85%. Onroad SO_2 mobile source emissions have declined 96% and nonroad sources have declined 97%. These reductions are due in part to closure of the PGE Boardman coal-fired power plant, as well as low sulfur fuel regulations. PM_{10} emissions steadily decreased in the point, nonpoint, onroad, and nonroad categories for the period from 2002 to 2021. NEI point and nonpoint PM_{10} emissions declined 62%. Onroad mobile source emissions declined 29% and nonroad sources declined 68% for PM_{10}. $PM_{2.5}$ emissions declined 49% for the period from 2002 to 2021. Onroad mobile source emissions declined 63% and nonroad sources declined 68% for $PM_{2.5}$ due to Federal engine standards. VOC emissions declined 65% for the period 2002 to 2021 in part due to Federal new engine standards for onroad and nonroad vehicles and equipment, the State low emission vehicle programs, and SIP-approved area source rules. Ammonia (NH_3) emissions declined 34% for the period 2002 to 2021, with onroad mobile source emissions declining 30% due to Federal engine standards.

The EPA is proposing to find that the requirements of 40 CFR 51.308(g)(4) are satisfied by providing emissions information for NO_X, SO_2, PM_{10}, $PM_{2.5}$, VOCs, and NH_3 broken down by type of source. The emissions data in the SIP submission [187] and the supplemental trend information [188] support the assessment that anthropogenic haze-causing pollutant emissions in Oregon have decreased during the reporting period and that changes in emissions have not limited or impeded progress in reducing pollutant emissions and improving visibility. The EPA is proposing to find that the requirements of 40 CFR 51.308(g)(5) are met.

I. Requirements for State and Federal Land Manager Coordination

Section 169A(d) of the Clean Air Act requires states to consult with Federal Land Managers (FLMs) before holding the public hearing on a proposed regional haze SIP, and to include a summary of the Federal Land Managers' conclusions and recommendations in the notice to the public. In addition, 40 CFR 51.308(i)(2)'s Federal Land Manager consultation provision requires a state to provide FLMs with an opportunity for consultation that is early enough in the state's policy analyses of its emission reduction obligation so that information and recommendations provided by the FLMs can meaningfully inform the state's decisions on its long-term strategy. If the consultation has taken place at least 120 days before a public hearing or public comment period, the opportunity for consultation will be deemed early enough, Regardless, the opportunity for consultation must be provided at least sixty days before a public hearing or public comment period at the state level. Section 51.308(i)(2) also provides two substantive topics on which FLMs must be provided an opportunity to discuss with states: assessment of visibility impairment in any Class I area and recommendations on the development and implementation of strategies to address visibility impairment. Section 51.308(i)(3) requires states, in developing their implementation plans, to include a description of how they addressed FLM comments.

Chapter 6.3.2 *Consultations with Federal Land Managers* of ODEQ's April 29, 2022, submission discusses Oregon's consultation and coordination with the FLMs. The FLMs and ODEQ are partners in the WRAP, and as partners, engaged early in inter-state coordination calls and WRAP technical support system development calls. ODEQ provided a draft of the regional haze plan to the U.S. Forest Service and National Park Service on May 5, 2021. Additionally, ODEQ met with the National Park Service on January 9, 2020, September 25, 2020, February 19, 2021, May 27, 2021, June 30, 2021, and July 15, 2021, to discuss progress and provide updates on the regional haze plan. On July 23, 2021, ODEQ made all requested files available to National Parks Service on a Google drive, including an updated summary spreadsheet of ODEQ's findings and tentative agreements with facilities about control installation or emission reduction. ODEQ also met with the U.S. Forest Service on August 21, 2020, February 24, 2021, and May 27, 2021. ODEQ received U.S. Forest Service written comments on June 23, 2021. ODEQ received comments from the National Park service in several communications between April 2 and July 15, 2021. ODEQ summarized the dates and topics of the National Park Service comments received in table 6–1 of the April 29, 2022, submission. Chapter 6.3.4 *Federal Land Manager Comments and DEQ Responses* contains the FLM consultation comments and ODEQ responses, which were provided to the public as part of the comment period on the draft SIP. We have determined that Oregon provided adequate opportunity for FLM consultation, consistent with 40 CFR 51.308(i)(3).

On August 27, 2021, Oregon provided public notice on the draft SIP submission and held a public hearing on October 27, 2021. ODEQ notified the public, interested parties, the Federal Land Managers, air quality contacts from other states and regions, and the EPA.[189] ODEQ accepted written public comment on the proposed rulemaking until 4 p.m. on November 1, 2021, after granting a 30-day extension from the original end date for public comment. Similarly, as part of the November 22, 2023, supplement to the regional haze SIP, ODEQ provided the FLMs a 60-day consultation opportunity and included responses to the FLM's comments in the draft SIP supplement that went out for public comment on September 15, 2023.

For the reasons stated in the prior paragraphs, the EPA proposes to find that Oregon has satisfied the requirements under 40 CFR 51.308(i) to consult with the Federal Land Managers on its regional haze SIP for the second implementation period.

V. Proposed Action

The EPA is proposing to approve the Oregon SIP revision submitted on April 29, 2022, as supplemented on November 22, 2023, as satisfying the regional haze requirements for the second implementation period contained in 40 CFR 51.308(f).

The EPA is proposing to approve and incorporate by reference in 40 CFR 52.1970(c), *Table 2—EPA Approved Oregon Administrative Rules (OAR)* the following updates to Division 223

[187] April 29, 2022 Oregon SIP submission, Chapter 2.3. Emissions Inventory Analysis.

[188] Oregon RH Emission Trends.xlsx.

[189] See ''019_5.1.1 GovDelivery.BulletinDetail Report.8.27.21'' included in the docket for this action.

Regional Haze Rules, state effective July 26, 2021:

• 340–223–0010 *Purpose,* for maintaining reasonable progress and other requirements associated with Oregon's implementation of the Federal Regional Haze Rule;

• 340–223–0020 *Definitions,* updating this section to account for revised program requirements between the first regional haze implementation period and the second implementation period;

• 340–223–0100 *Screening Methodology for Sources for Round II of Regional Haze,* establishing the criteria for selecting sources for review under the regional haze program;

• 340–223–0110 *Options for Compliance with Round II of Regional Haze,* establishing requirements for sources and compliance options under the regional haze program;

• 340–223–0120 *Four Factor Analysis,* establishing the requirements for assessing potential controls for reasonable progress under the regional haze program; and

• 340–223–0130 *Final Orders Ordering Compliance with Round II of Regional Haze,* establishing ODEQ's unilateral order authority and procedures for contested case hearings under the regional haze program.

We are proposing to remove from incorporation by reference in 40 CFR 52.1970(c), *Table 2—EPA Approved Oregon Administrative Rules (OAR)* the outdated provisions from the first regional haze implementation period contained in sections 340–223–0030, 340–223–0040, 340–223–0050, 340–223–0060, 340–223–0070, and 340–223–0080, state-effective December 10, 2010, because the site-specific requirements contained in those revoked sections are no longer relevant. Specifically, the Portland General Electric (PGE) coal-fired power plant in Boardman ceased operation on October 15, 2020, pursuant to the requirements of the regional haze plan for the first implementation period as described in section IV.E. of this preamble.

In addition to the regulatory provisions, the EPA is proposing to approve and incorporate by reference in 40 CFR 52.1970(d), *EPA Approved Oregon Source-Specific Requirements* the source-specific requirements in table 7 of this preamble as part of Oregon's long-term strategy for regional haze.

TABLE 7—REGIONAL HAZE LONG-TERM STRATEGY SOURCE-SPECIFIC PROVISIONS

Name of source	Permit or order number	State effective date	Explanations
Ash Grove Cement Company	Permit No. 01–0029–TV–01	10/16/2020	Permit conditions (3), (9) through (11), (14), (16) through (28), (42), (45) through (76), (84) through (97), (99), (100), and (102) only.
Biomass One, L.P	Order No 15–0159	8/9/2021	
Boise Cascade Wood Products, LLC—Elgin Complex.	Order No. 31–0006	8/12/2021	
Boise Cascade Wood Products, LLC—Elgin Complex.	Permit No. 31–0006–TV–01	12/5/2016	Permit condition (56), (59) through (75), (77), and (78) only.
Boise Cascade Wood Products, LLC—Medford	Order No. 15–0004	8/9/2021	
Boise Cascade Wood Products, LLC—Medford	Permit No. 15–0004–TV–01	2/20/2020	Permit conditions (71), (72), and (74) through (88) only.
Cascade Pacific Pulp, LLC—Halsey Pulp Mill	Order No. 22–3501–A2	8/25/2023	
Cascades Tissue Group: A Division of Cascades Holding US Inc.	Order No. 05–1849	8/18/2021	
Cascades Tissue Group: A Division of Cascades Holding US Inc.	Permit No. 05–1849–TV–01	04/6/2018	Permit conditions (24), (25), (27), and (29) through (43) only.
Collins Products, L.L.C	Permit No. 18–0013–TV–01	1/26/2015	Permit conditions (3), (14) through (16), (19) through (24), (34) through (42), (63) through (75), and (77) only.
Columbia Forest Products, Inc	Permit No. 18–0014–TV–01	9/26/2017	Permit conditions (3), (8) through (20), (22), (23), (34) through (52), (58) through (66), (67—introductory paragraph), (67.a), (67.b.iii) through (67.b.v), and (68) through (70).
EVRAZ Inc	Order No. 26–1865	8/9/2021	
Gas Transmission Northwest LLC—Compressor Station 12.	Order No. 09–0084	8/9/2021	
Gas Transmission Northwest LLC—Compressor Station 12.	Permit No. 09–0084–TV–01	8/10/2017	Permit conditions (32) through (34) and (37) through (50) only.
Gas Transmission Northwest LLC—Compressor Station 13.	Order No. 03–2729–A1	6/1/2022	OAH CASE NO. 2021–ABC–04835; DEQ CASE NO. AQ/RH–HQ–2021–140
Gas Transmission Northwest LLC—Compressor Station 13.	Permit No. 18–0096–TV–01	7/11/2018	Permit conditions (24) through (26), (32) through (35), and (37) through (44) only.
Georgia-Pacific—Toledo LLC	Order No. 21–0005, Amendment No. 21–005–A1.	12/5/2022	
Georgia Pacific—Wauna Mill	Order No. 04–0004, Amendment No. 04–004–A1.	12/5/2022	
Gilchrist Forest Products	Permit No. 18–0005–TV–01	7/25/2023	Permit conditions (4), (5), (9), (10), (12) through (19), (41) through (43), (45) through (59), and (61) only.
International Paper—Springfield	Order No. 208850	8/9/2021	
International Paper—Springfield	Permit No. 208850	10/4/2016	Permit conditions (186) through (189), (192), and (198) only.
JELD–WEN	Permit No. 18–0006–TV–01	12/01/2021	Permit conditions (55) through (77) and (80) through (87) only.
JELD–WEN	Permit No. 18–0006–TV–01, Addendum No. 1	8/11/2022	Permit conditions 53 and 53b only.
Kingsford Manufacturing Company	Permit No. 204402, addendum No. 2	11/15/2021	Permit conditions (71) through (73) and (75) through (91) only.
Klamath Energy LLC—Klamath Cogeneration	Permit No. 18–0003–TV–01	6/12/2017	Permit conditions (10) through (16), (18), (24) through (28), (32) through (37), (39) through (49), (51), (52), and (54), and (56) only.
Klamath Energy LLC—Klamath Cogeneration	Permit No. 18–0003–TV–01, Addendum No. 1	12/8/2020	Permit conditions (3.a), (3.b), (61.l), and (66.b.xii).

TABLE 7—REGIONAL HAZE LONG-TERM STRATEGY SOURCE-SPECIFIC PROVISIONS—Continued

Name of source	Permit or order number	State effective date	Explanations
Northwest Pipeline LLC—Baker Compressor Station.	Order No. 01–0038, amendment 01–0038–A1	2/1/2022	
Northwest Pipeline LLC—Baker Compressor Station.	Permit No. 01–0038–TV–01	1/12/2017	Permit conditions (27) through (30) and (32) through (43) only.
Northwest Pipeline LLC—Oregon City Compressor Station.	Order No. 03–2729, amendment 03–2729–A1	2/1/2022	
Northwest Pipeline LLC—Oregon City Compressor Station.	Permit No. 03–2729–TV–01	2/19/2013	Permit conditions (7), (19), (25) through (27), (38), (41), (45), and (50) through (65).
Ochoco Lumber Company	Permit No. 12–0032–ST–01	6/25/2019	Permit conditions (1.1) through (1.3), (1.6), (2.1) through (2.5), (4.1) through (4.4), and (5.1) through (6.2).
Owens-Brockway Glass Container Inc	Order No. 26–1876	8/9/2021	
Owens-Brockway Glass Container Inc	Permit No. 26–1876–TV–01	12/10/2019	Permit conditions (33) through (48) only.
Pacific Wood Laminates, Inc	Permit No. 08–0003–TV–01	12/30/2019	Permit conditions (3), (9), (10), (12) through (19), (26) through (41), (56) through (71), and (73) only.
PGE Beaver Plant/Port Westward I Plant	Order No. 05–2606	8/10/2021	
PGE Beaver Plant/Port Westward I Plant	Permit No. 05–2520	01/21/2009	Permit conditions (62) through (66), (68) through (78), (79.a), (80) through (83), (85), (87), (88.a), (89.d), (89.f), and (89.i) only.
Roseburg Forest Products—Dillard	Order No. 10–0025	8/9/2021	
Roseburg Forest Products—Medford MDF	Permit No. 15–0073–TV–01	08/18/2022	Permit conditions (44) through (46), (48) through (61), (63), and (64) only.
Roseburg Forest Products—Riddle Plywood	Permit No. 10–0078–TV–01	07/31/2019	Permit conditions (65), (66), (68) through (81) only.
Swanson Group Mfg. LLC	Permit No. 10–0045–TV–01	06/12/2017	Permit conditions (4), (10) through (24), (25—introductory paragraph), (25.a) through (25.c), (27) through (40), (50) through (64), and (66) only.
Timber Products Co. Limited Partnership	Permit No. 15–0025–TV–01	6/23/2022	Permit conditions (70) through (72) and (74) through (90) only.
Willamette Falls Paper Company	Order No. 03–2145	8/9/2021	
Willamette Falls Paper Company	Permit No. 03–2145–TV–01	2/24/2016	Permit conditions (40) through (55) only.
Woodgrain Millwork LLC—Particleboard	Permit No. 31–0002–TV–01	5/24/2021	Permit conditions (3), (12) through (21), (22—introductory paragraph), (22.a), (22.e), (22.f), (23), (25) though (28), (30) through (35), (37), (39) through (41), (43), (44), (46), (48), (49), (51) through (72), (80) through (94), and (96) only.

VI. Incorporation by Reference

In this document, the EPA is proposing to include regulatory text in an EPA final rule that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the regulatory and source-specific provisions described in section V. of this preamble. The EPA has made, and will continue to make, these materials generally available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

The EPA is also proposing to remove from incorporation by reference the regulatory provisions described in section V. of this preamble.

VII. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

In addition, this proposed action, pertaining to the Oregon regional haze SIP submissions for the second planning period, would not be approved to apply on any Indian reservation land or in any other area where the EPA or an Indian Tribe has demonstrated that a Tribe has jurisdiction. In those areas of Indian country, the rulemaking would not have Tribal implications and would not impose substantial direct costs on tribal governments or preempt Tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Consistent with EPA policy, the EPA provided a consultation opportunity to Tribes located in Oregon, in letters dated May 4, 2022, included in the docket for this action.

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.'' The Oregon Department of Environmental Quality did evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

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

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

Dated: February 14, 2024.

Casey Sixkiller,

Regional Administrator, Region 10.

[FR Doc. 2024–03529 Filed 2–22–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1355

RIN 0970–AC98

Adoption and Foster Care Analysis and Reporting System

AGENCY: Children's Bureau (CB), Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: ACF proposes to amend the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations that require title IV–E agencies to collect and report data to ACF on children who enter out-of-home care, their providers, and children who have a title IV–E adoption or guardianship assistance agreement to collect additional data related to Indian children.

DATES: In order to be considered, we must receive written comments on or before April 23, 2024.

ADDRESSES: ACF encourages the public to submit comments electronically to ensure they are received in a timely manner. Please be sure to include identifying information on correspondence. To download an electronic version of the proposed rule, please go to *https://www.regulations.gov/.* You may submit comments, identified by docket number and/or RIN number, by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

• *Email: CBComments@acf.hhs.gov.* Include docket number and/or RIN number in subject line of the message.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *www.regulations.gov,* including any personal information provided.

Docket: Go to the Federal eRulemaking Portal at *https://www.regulations.gov* for access to the rulemaking docket, including any background documents and the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023.

FOR FURTHER INFORMATION CONTACT: Joe Bock, The Children's Bureau, (202) 205–8618. Telecommunications Relay users may dial 711 first. Email inquiries to *cbcomments@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Statutory Authority To Issue NPRM

This NPRM is published under the authority granted to the Secretary of Health and Human Services (HHS) by section 1102 of the Social Security Act (the Act), 42 U.S.C. 1302. Section 1102 of the Act authorizes HHS to publish regulations, not inconsistent with the Act, as may be necessary for the efficient administration of the functions for which HHS is responsible under the Act. Section 479 of the Act (42 U.S.C. 679) mandates HHS regulate a data collection system for national adoption and foster care data. Section 474(f) of the Act (42 U.S.C. 674(f)) requires HHS to impose penalties for non-compliant AFCARS data.

II. Background on AFCARS and Proposed Rule Development

Statute

AFCARS is authorized by section 479 of the Act (42 U.S.C. 679), which mandates that HHS regulate a data collection system for national adoption and foster care data. The regulation at 45 CFR 1356.60(d) and the statute at 42 U.S.C. 674(a)(3) detail cost-sharing requirements for the Federal and non-Federal share of data collection system initiation, implementation, and operation. A title IV–E agency may claim Federal Financial Participation (FFP) at the rate of 50 percent for costs of a data collection system specified by section 479 of the Act (42 U.S.C. 679). AFCARS data is used for a variety of requirements, including but not limited to, providing national statistics on the child welfare population, budgeting, providing reports to Congress, and monitoring compliance with the title IV–B and IV–E requirements. Title IV–E agencies must submit data files on a semi-annual basis to ACF. AFCARS regulations were first published in 1993 and states began submitting data in fiscal year (FY) 1995. AFCARS is regulated at 45 CFR 1355.41-.47.

Recent Regulatory History

ACF published a final rule revising the AFCARS regulations on December 14, 2016 (81 FR 90524, hereafter referred to as the ''2016 final rule''). The rule reflected child welfare legislative changes that occurred since 1993 and included many new data elements including information related to the Indian Child Welfare Act of 1978 (ICWA), and about the sexual orientation of the child and their providers (*i.e.,* foster parents, adoptive parents, and legal guardians), and implemented statutory fiscal penalties for non-compliant AFCARS data. This rule was never implemented. Before that rule became effective, ACF published a rule delaying the implementation timeframe (83 FR 42225, August 21, 2018). On May 12, 2020, ACF published a final rule to again amend the AFCARS regulations (*85 FR 28410,* hereafter referred to as the ''2020 final rule''). The 2020 final rule eliminated some of the data elements that were promulgated in the 2016 final rule and reduced the level of detail in others. The Executive Orders and actions leading to the 2020 final rule are explained in detail in the preambles to the following issuances: Advance Notice of Proposed Rulemaking (ANPRM) issued March 15, 2018 (*83 FR 11449*); NPRM issued April 19, 2019 (*84 FR 16572*); and the 2020 final rule, issued May 12, 2020 (*85 FR 28410*). The 2020 final rule was implemented on October 1, 2022, and title IV–E agencies are now required to report AFCARS data as codified in the regulation at 45 CFR 1355.41-.47. Title IV–E agencies were required to submit the first data files with this information to ACF in May 2023. More information is available on the CB website at: *https://www.acf.hhs.gov/cb/data-research/afcars-technical-assistance.*

Some of the data elements that were eliminated or altered in the 2020 final rule related to reporting on the details of ICWA's procedural protections (see also discussion at 84 FR 16573, 16575, 16577, and 85 FR 28411, and 28412). Other data elements, such as reporting on transition plans, educational stability, and health assessment dates and whether they were timely, were also eliminated or altered (see also 84 FR 16576 and 85 FR 28411).

Current NPRM Development

We are now proposing adding data elements and revising some of the current data elements to report more detailed information related to ICWA's procedural protections to AFCARS, in order to fulfill the AFCARS statutory mandate to provide comprehensive national information on the demographics of ''adoptive and foster children and their biological and adoptive foster parents'', ''the status of the foster care population'', and ''the extent and nature of assistance provided by Federal, state, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided'' (section 479(c)(3) of the Act (42 U.S.C. 679(c)(3))).

For American Indian and Alaska Native (AI/AN) children, who are subject to both Title IV–E of the Social Security Act and ICWA, it is impossible to fully understand their experiences in foster care without understanding the extent to which they receive the procedural protections of ICWA. ICWA was enacted in 1978 to ''promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.'' [1] Congress found ''that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.'' [2] These longstanding practices cause significant harm to Indian children by unnecessarily separating them from their families and communities. As the Supreme Court affirmed in its 2023 decision upholding ICWA:

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) out of concern that ''an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.'' 92 Stat. 3069, 25 U.S.C. 1901(4). Congress found that many of these children were being ''placed in non-Indian foster and adoptive homes and institutions,'' and that the States had contributed to the problem by ''fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.'' §§ 1901(4), (5). . . . The Act thus aims to keep Indian children connected to Indian families.

Haaland v. Brackeen, 143 S. Ct. 1609, 1623 (2023)

Congress recognized when it passed ICWA that the minimum Federal standards established by ICWA ''for the removal of Indian children from their families and the placement of these children in foster or adoptive homes'' were needed to counter the longstanding state policies and practices that contributed to the disproportionate removal of Indian children from their families and communities (see 81 FR 38779, June 14, 2016). ICWA's key protections include:

—A presumption that cases regarding foster care placement or termination of parental rights should be transferred to tribal courts if the parent, Indian custodian, or Indian tribe so requests (25 U.S.C. 1911(b));
—The right for Indian tribes and Indian custodians to intervene in state court proceedings regarding foster care placement and termination of parental rights (25 U.S.C. 1911(c));
—Requirement that a party seeking foster care placement or termination of parental rights for an Indian child must notify the parent or Indian custodian and the Indian child's tribe (25 U.S.C. 1912(a));
—Requirement to make active efforts to provide services to prevent the breakup of the Indian family before seeking foster care placement or termination of parental rights to an Indian child (25 U.S.C. 1912(d));
—Requirement that termination of parental rights may only be ordered if the court has determined that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The determination must be supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses (25 U.S.C. 1912(f) and 25 CFR 23.122).

However, inconsistent state practices in implementation ''ha[ve] led to significant variation in applying ICWA's statutory terms and protections'' (see 81 FR 38779, June 14, 2016). A final rule issued by the Department of Interior, Bureau of Indian Affairs (BIA) noted that at the time of ICWA's passage, ''Congress found that removal of children and unnecessary termination of parental rights were utilized to separate Indian children from their Indian

[1] 25 U.S.C. 1902.

[2] 25 U.S.C. 1901(4) and (5).

communities'' and that ''[t]he standards used by State and private child-welfare agencies to assess Indian parental fitness promoted unrealistic non-Indian socioeconomic norms and failed to account for legitimate cultural differences in Indian families'' (81 FR 38780, June 14, 2016). Additionally, there have been studies indicating that implementation of ICWA is inconsistent.[3] Forty-five years after the passage of ICWA, AI/AN children continue to be over-represented in the child welfare system: during FY 2021, AI/AN children made up one percent of the U.S. child population, but two percent of the child welfare population.[4] Additionally, recent data shows that AI/AN children are at greater risk than other children of being confirmed for maltreatment and placed in out-of-home care.[5] The American Academy of Pediatrics (AAP) recently stated in their Amicus brief to the Supreme Court for *Haaland* v. *Brackeen,* ''[R]emoving an AI/AN child from the child's parents and then failing to foster the child in an AI/AN community where possible would present a significant risk of exacerbating existing trauma—particularly by precluding the opportunity for the child to experience, internalize, and gain strength from the child's AI/AN community and culture, as well as the relationships that come with that community.''[6] And generally, studies show that procedural bias, such as lack of notice to Tribal parents in child welfare cases, contributed to displacements of AI/AN children from their communities.[7] Additionally, adverse childhood experiences[8] and generational/historical trauma[9] contribute to disparate outcomes of AI/AN youth. Specifically related to adverse childhood experiences, AI/AN children are more likely than children in the total U.S. population to have lived in poverty (27.8 versus 19.5 percent), been a victim of violence or witnessed violence in their neighborhood (15.9 versus 11.6 percent) and lived with a person with a substance use disorder (23.6 versus 11.6 percent).[10]

We anticipate that gathering more ICWA-related data would help ACF, researchers, and other policymakers better understand the status and experiences of AI/AN children and families interacting with the state child welfare systems and better address the continuing overrepresentation in foster care and other poor outcomes that AI/AN children experience. More complete data collection would provide a foundation for improved policy development, targeted technical assistance, and focused resource. This could assist in efforts to mitigate disproportionality for AI/AN children and families, support pathways to timely permanency for these children, and help maintain the integrity of tribal communities.

ACF also seeks additional input on how the data from this NPRM may be used and particularly seeks to understand how this data may be of utility via national statistics. ACF wishes to understand from states specifically on the utility of the data. Since it has been many years since the 2016 final rule and states have submitted data files under the 2020 final rule, ACF wishes to understand the state perspective for today's NPRM.

Under the 2020 rule, the ICWA-related information currently reported to AFCARS is:

- whether the child, mother, father, foster parents, adoptive parents, and legal guardians are tribal members,
- whether the state made inquiries whether the child is an Indian child as defined in ICWA,
- the date that the state was notified by the Indian tribe or state or tribal court that ICWA applies, and
- whether the Indian child's tribe(s) was sent legal notice.

While that is helpful, it does not provide sufficient information about the unique factors particular to AI/AN children to meaningfully inform policymaking. Collecting more data elements related to ICWA's procedural protections would enable HHS, other Federal agencies, and the states to target policy development, training, and technical assistance to specific areas of need.

ACF recognizes that this proposed rulemaking represents a change in approach from our most recent AFCARS rulemaking, the 2020 final rule, which had substantially reduced the number of ICWA data elements to be collected in AFCARS from those that were required under the 2016 final rule. This proposed rulemaking includes nearly all of the ICWA data elements from the 2016 final rule that were not included in the 2020 final rule, with some modified to reduce the reporting burden. As ACF has given the matter further consideration since issuing the 2020 final rule, ACF has determined that it is in the best interest to collect these additional data elements. Collecting these additional data elements related to ICWA's protections would provide critical information about ICWA's procedural protections. These procedural protections were affirmed in the 2023 *Brackeen* decision upholding ICWA, reaffirming ICWA's importance in addressing the longstanding practices that caused harm to Indian children by unnecessarily separating them from their families and communities. Also, collecting this data may provide insight into potential areas for technical assistance and supports to help improve child welfare outcomes. As we explained in the Supplemental Notice of Proposed Rulemaking in 2016, we view robust ICWA-related data as necessary to allow ACF to: assess the current state of adoption and foster care programs and relevant trends that affect AI/AN families; address the unique needs of AI/AN children in foster care and their families by clarifying how the ICWA requirements and title IV–E/IV–B requirements interact in practice; improve training and technical assistance to help states comply with titles IV–E and IV–B of the Social Security Act for AI/AN children; develop future national policies concerning AI/AN children served by

[3] See also *A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act,* Casey Family Programs (2015) *https://www.casey.org/media/measuring-compliance-icwa.pdf.*

[4] 4,622 children with a reported race (per 45 CFR 1355.44(b)(7)) of AI/AN entered foster care during FY 2021 (AFCARS Report 29). While that is two percent of the child welfare population, AI/AN children made up one percent of the child population (Child Welfare Information Gateway (2021) *Child Welfare Practice to Address Racial Disproportionality and Disparity, https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/*). We also want to note that the reported race of AI/AN is the closest we have to understanding whether a child is an ''Indian child'' as defined in ICWA at 25 U.S.C. 1903, as of FY 2021.

[5] *Ibid.*

[6] See page 21, retrieved from *https://www.supremecourt.gov/DocketPDF/21/21-376/234042/20220819140750948_21-376.amics.brief.FINAL.pdf.*

[7] Ryan Seelau, Regaining *Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice that Targeted Native American Youth,* 37 a.m. INDIAN L. REV. 63 (2012), *https://digitalcommons.law.ou.edu/ailr/vol37/iss1/3.*

[8] National Indian Child Welfare Association, *State of American Indian/Alaska Native Children and Families, Part 3: Adverse Childhood Experiences and Historical Trauma,* (2022) *https://www.nicwa.org/wp-content/uploads/2022/11/NICWA-State-of-AIAN-Children-and-Families-Report-PART-3.pdf.*

[9] Ehlers CL, Gizer IR, Gilder DA, Ellingson JM, Yehuda R. *Measuring historical trauma in an American Indian community sample: contributions of substance dependence, affective disorder, conduct disorder and PTSD.* Drug Alcohol Depend. 2013 Nov 1;133(1):180–7. doi: 10.1016/j.drugalcdep.2013.05.011. Epub 2013 Jun 20. PMID: 23791028; PMCID: PMC3810370. *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3810370/.*

[10] Around Him, D. & DeMand A., *American Indians and Alaska Natives Must Be Included in Research on Adverse Childhood Experiences* Child Trends, (2018) *https://www.childtrends.org/blog/american-indians-alaska-natives-adverse-childhood-experiences.*

child welfare programs; and inform and expand partnerships across Federal agencies that invest in Indian families and promote resilient, thriving tribal communities (81 FR 20283, April 17, 2016). Upon further consideration, ACF believes that these reasons remain equally valid now in determining the need for ICWA-related data collection.

While ACF's role is not to enforce state compliance with ICWA—that role falls to the Department of Interior's Bureau of Indian Affairs—it is ACF's role, in part, to ensure that state child welfare systems appropriately serve all children, including AI/AN children, and to set national child welfare policy that takes into account the needs of all foster and adoptive children. Additionally, there is no other comprehensive, national data collection related to ICWA that can inform our understanding of the experiences of tribal children in the child welfare system. Given the long history of removal of AI/AN children from their families and communities, the unique cultural considerations that apply to tribes,[11] and Congress's determination that the ICWA procedural protections are essential for AI/AN children and families,[12] we have determined that collecting robust ICWA-related data concerning AI/AN children in the child welfare system can provide valuable insights for ACF, states, tribes and policymakers. ACF is the most appropriate agency in the Federal government to collect data from state child welfare agencies. The proposed collection of ICWA-related data will allow ACF and other stakeholders to better understand how the ICWA procedural protections are operating in the context of child welfare, whether implementation of those protections results in improved outcomes for children, and where states are struggling to implement them or in need of additional resources.

We understand that in establishing these additional data elements, this proposed data collection would put an additional burden on state child welfare agencies. However, this will be the case for any additional data collection requirements. We have given this serious consideration, both out of concern for the effective functioning of those systems in their core function of serving at-risk families and because the AFCARS statute requires ACF to ''avoid unnecessary diversion of resources from agencies responsible for adoption and foster care'' when regulating AFCARS (section 479(c)(1) of the Act (42 U.S.C. 679(c)(1))). We are mindful of the cost to state title IV–E agencies of collecting this data, but at the same time, we are mindful of the costs to AI/AN children, families, and tribes, as well as ACF, states, and policymakers, of not collecting the data. While any data collection requirement imposes costs, the key consideration under the statute is whether such costs result in an ''unnecessary diversion of resources'' from agencies. ACF proposes to collect robust ICWA-related data in order to understand and identify policies to address the disproportionality of AI/AN child involvement in the child welfare system.[13][14] On balance, we have determined that the value of collecting the data outweighs the burden it imposes, and that any cost imposition is not ''unnecessary.''

In coming to this conclusion, we have considered the comments that we received on the 2018 ANPRM and the 2019 NPRM. Thirty-three states commented in 2018 and nine state/local agencies in 2019 expressing concern with the 2016 ICWA data reporting requirements.[15] They expressed concern that the requirements were too specific for a national data set and are better suited for a qualitative review.[16] Four states also reported that under one percent of the children in their out-of-home care population were ICWA-applicable. Of the few states that supported including the ICWA-related data elements (three in 2018 and three in 2019), they said that they had higher numbers of tribal children and supported including some additional ICWA-related data elements to better inform policy decisions and program management.

—In contrast, all of the Indian tribes/consortiums and organizations that represent Tribal interests that commented, supported maintaining all of the ICWA-related data elements from the 2016 final rule. They argued that the data elements should be maintained because: ICWA has been law for 40 years but there has been little in-depth data and limited Federal oversight regarding this law.
—Collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families are kept together when possible and provide insight into state compliance with ICWA's requirements.
—Without any uniform, national data regarding ICWA's requirements, policymakers do not understand the scope of issues to inform policy changes.
—While some Indian tribes reported good working relationships with some states, the commenters expressed concerns that there are children in state custody who are not identified as Indian children and thus are not protected under ICWA.[17]

We also note that in both 2018 and 2019, there were significant comments submitted by researchers, non-governmental organizations with relevant expertise, and other stakeholders and advocates. While these commenters were typically not in a position to address issues relating to costs of compliance, their comments were informative in considering the utility of the potential data collection. In the 2019 preamble, ACF stated that the ''majority of these commenters opposed streamlining the data [as compared with what was required in 2016] for reasons similar to the commenters representing tribal interests, such as underscoring the importance of certain casework activities and showing national trends. The advocates, tribes, and commenters representing tribal interests expressed that:

• Currently, there are few data collection efforts at the state and Federal level that provide meaningful data on American Indian and Alaska Native (AI/AN) children under the custody of state child welfare authorities and how ICWA is applied in their cases. This population is overrepresented within state foster care systems nationally—in some states by as much as 10 times their population rate. The Federal protections that ICWA provides these children and their families have the potential to reduce disproportionality and achieve permanency for these children. However, without the Federal government collecting more detailed case-level data, it is impossible to know how many AI/AN children are receiving ICWA protections. Collecting this data will also help the Administration for

[11] EagleWoman (Wambdi A. WasteWin), Sisseton-Wahpeton Dakota Oyate of the Lake Traverse Reservation, Angelique and G. William Rice, United Keetoowah Band of Cherokee Indians in Oklahoma. *American Indian Children and U.S. Policy.* Tribal Law Journal 16, 1 (2016). *https://digitalrepository.unm.edu/tlj/vol16/iss1/2.*

[12] 25 U.S.C. 1901 and 1902.

[13] Child Welfare Information Gateway (2021) *Child Welfare Practice to Address Racial Disproportionality and Disparity, https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/.*

[14] See literature review on protective factors research and calls for further research to assess protective factors for AI/AN children: Henson M., Sabo S., Trujillo A., Teufel-Shone N. *Identifying Protective Factors to Promote Health in American Indian and Alaska Native Adolescents: A Literature Review.* J Prim Prev. 2017 Apr;38(1–2):5–26. doi: 10.1007/s10935–016–0455–2. PMID: 27826690; PMCID: PMC5313316.

[15] 84 FR 16,572 at 74.

[16] 84 FR 16,572 at 74.

[17] 84 FR 16,572 at 74.

Children and Families (ACF) provided targeted assistance to states where there are implementation concerns.'' This comment was provided by the National Indian Child Welfare Association.

• States should currently be asking questions that ascertain whether a child is an Indian child as defined in ICWA, including inquiring about the family's tribal membership status;

• Specific data elements on notification of proceedings and transfers to tribal court are important because the timelines in ICWA are rarely met; and

• Information on termination of parental rights, removals under ICWA, and placement preferences are important for determining ICWA compliance (84 FR 16574).

Most other advocacy organizations opposed reducing the data elements as compared with what was required under the 2016 rule for reasons similar to the commenters representing tribal interests, such as underscoring the importance of certain casework activities and showing national trends. The commenters provided broad commentary on the benefit of having new data outweighs the burden of having to report it (84 FR 16574). In the 2020 final rule preamble, all Indian tribes, tribal organizations or consortiums, and organizations representing tribal interests opposed reducing the ICWA-related data elements primarily because they felt that all data elements in the 2016 final rule were needed to assess ICWA compliance, and that national information is important to address disparities, analyze outcomes, and help in working with Indian children and families (85 FR 28411). The national advocacy organizations and other individuals or entities that commented expressed general opposition to the reduction of required data elements for various reasons with the general sentiment being that the 2016 final rule would provide more insight into the foster care population, promote visibility for marginalized groups, and allow data-informed legislating, policy, and program decisions (85 FR 28411). The reasons set forth above align with ACF's need for including the expanded ICWA-related data elements.

In the 2019 NPRM, we had concluded that the concerns articulated by a set of states weighed in favor of significantly reducing the number of ICWA-related data elements from the 2016 final rule and proposed to reduce required ICWA reporting. In coming to that conclusion, among other reasons, we took the position that it was overly burdensome to require all states to modify their data systems to collect data that would only apply to a small percentage of children. However, while all states would have to modify their data systems to allow for collection of the proposed data elements, and report information from court orders, agency caseworkers will only have to actually collect and enter the new ICWA-related data elements proposed here for those children to whom ICWA in fact applies, so the ongoing burden on states with small AI/AN populations would be low (84 FR 16572, April 19, 2019).

In the 2020 final rule, we provided additional justification for the decision not to include additional ICWA-related data elements: (1) HHS is not the cognizant agency over implementing, overseeing, or assessing compliance with ICWA and thus is not able to interpret various ICWA requirements; (2) the IV–B statute at section 422(b)(9) of the Act (42 U.S.C. 622(b)(9)) does not provide authority for ACF to collect ICWA-related data in AFCARS; (3) the AFCARS statute does not authorize ACF to collect data in AFCARS for purposes of assessing states' compliance with ICWA; and (4) ACF would not be able to release specific information regarding a child's tribal membership or ICWA applicability to requestors, except to the Indian tribe in which the child is or may be a member, in order to protect confidentiality given the low numbers of children to whom ICWA applies. 85 FR at 28, 412–13.

Upon further consideration, we do not consider any of these points reasons to not collect the proposed data. First, ACF has never contended that HHS is the cognizant agency with responsibilities over implementing, overseeing, or assessing compliance with ICWA. Collecting the proposed data would provide valuable insights into the experiences of tribal children in the child welfare system, and the data would not be collected to implement, oversee or assess compliance with ICWA. ACF will consult with BIA to ensure that ACF's guidance is consistent with BIA's interpretations of the ICWA statute and regulations, but not because ACF has any role in ICWA enforcement.

Second, Section 422(b)(9) of the Act (42 U.S.C. 622(b)(9)) requires states to include in their child welfare services plans a description, developed after consultation with tribal organizations of the specific measures taken by the State to comply with ICWA. Neither in 2016 nor now is ACF relying on Section 422(b)(9) as authority for this proposed regulation, though the existence of Section 422(b)(9) does underscore Congress' recognition of the importance of ICWA compliance in the work of child welfare agencies.

The third point noted above—that the AFCARS statute does not authorize ACF to collect data in AFCARS for purposes of assessing states' compliance with ICWA—largely misses the point of this data collection. As discussed above, it is not to assess ICWA compliance, but rather to better understand the experiences of tribal children whose cases are subject to the requirements of ICWA.

The fourth point above was that ACF would not be able to release specific information regarding a child's tribal membership or ICWA applicability except to the Indian tribe in which the child is or may be a member in order to protect confidentiality. ACF had reached this decision in light of the need to ensure privacy and confidentiality as several states have less than a handful of Indian children in foster care. There is a significant privacy interest in that the information given could reveal a child's identity, which could allow the identification of children. Safeguarding information of children in small jurisdictions is consistent with existing practice. The current practice for small populations in jurisdictions is to aggregate the data into larger groups so that those children cannot be identified. This current practice would not change under this NPRM. Accordingly, this reduces the availability of data on Indian children to non-tribal members when there are small numbers of children in foster care. Nevertheless, ACF does not believe this is a sufficient basis for not moving forward with the rule.

In the 2020 Final Rule, ACF also based the decision not to reinstate additional ICWA-related data elements in part on concerns about the reliability and consistency of the data (85 FR 28411 and 28419). ACF's current understanding is that caseworkers would have to draw language from court orders and possibly transcripts to be able to report the specific information in these proposed data elements, and that this may be difficult at times. Furthermore, ACF's current belief is that information and actions taken to meet ICWA's requirements may be performed by the courts themselves, and therefore the state title IV–E agency currently cannot always guarantee they have the accurate information for reporting the AFCARS data elements. Both of these possibilities may raise questions about reliability, but they can be addressed through training and technical assistance. In order to better inform its understanding, ACF seeks comment from states on how this work is done currently, whether the information is available in the case management system or data fields that could be extracted for AFCARS reporting, and what measures states are taking to ensure the reliability of the data. With this information, ACF believes that it can provide specific and tailored technical assistance and training to states to address any reliability concerns. ACF plans to work with BIA on implementation of an eventual final rule and will work with BIA to clarify what information is required to be reviewed and interpreted so that agencies can input and report the proper data for AFCARS. ACF will also work with BIA to address instances where court orders are not clear or if specific information is missing within and how that affects AFCARS reporting. Given the importance of this data and why AFCARS is the right mechanism to collect it, as explained in the preamble, ACF is committed to providing the tailored technical assistance and training needed to help address any data reliability issues that may arise and believes it is sufficiently reliable to be worth collecting.

As studies cited previously in this preamble demonstrate, there are disproportionately negative outcomes generally for AI/AN children, youth, and families, AI/AN children continue to be over-represented in the child welfare system and are at greater risk than other children of being confirmed for maltreatment and placed in out-of-home care. Having more data on ICWA's procedural requirements may help these issues. ACF realizes that all states have or are in the process of modifying their data systems to collect the new data elements, largely unrelated to ICWA, required by the 2020 final rule. ACF also realizes that adding additional data elements to state data collection systems will present an additional financial and personnel cost and that the data is qualitative in nature, meaning that it likely will be more costly and time-consuming to report because, we understand, that the information is in paper files or case notes, and not already within data fields ready for reporting. However, ACF no longer sees these as sufficient reasons to not require reporting of ICWA procedural requirements in AFCARS. AFCARS may be modified when needed, for example, to reflect legislative changes and other changing needs for particular kinds of data. We plan to build in time for states to make the needed modifications and invite comments on what timeframe they would see as sufficient.

Regarding reliance interests of states for this AFCARS NPRM, ACF interprets this to mean that states may be relying on the 2020 final rule remaining in place the way it is. States are in the process of updating information systems to be able to report the 2020 final rule appropriately because most were not compliant in the first data file submission that occurred in May 2023. State will have to expend costs to implement an eventual final rule, as estimated in the Burden estimate section of this preamble. However, the AFCARS regulations may be amended at any time to accommodate changes in law, policy, or other matters that are tied to the title IV–B/IV–E programs. Accordingly, ACF does not view this NPRM as implicating states' reliance interests.

Executive Orders 13985 and 14091

This NPRM is consistent with the administration's priority of advancing equity for those historically underserved and adversely affected by persistent poverty and inequality (Executive Order 13985 *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,* Jan. 20, 2021 and 14091 *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,* Feb. 16, 2023). Research well-documents the overrepresentation of certain racial and ethnic groups in foster care relative to their representation in the general population. American Indian or Alaska Native children are at greater risk than other children of being confirmed for maltreatment and placed in out-of-home care. They stay in foster care longer. For example, they are less likely to reunify with their families.[18] Additionally, ACF, in using the additional data proposed in this NPRM, could use it to better understand opportunities to advance equity related to the disparate outcomes faced by AI/AN children in foster care.

Summary of Proposal

Currently, state title IV–E agencies report the following related to ICWA in AFCARS:

- Tribal membership of the child, mother, father, foster parents, adoptive parents, and legal guardians—§ 1355.44(b)(4), (c)(3) and (4), (e)(10) and (15), and (h)(4) and (9).
- Whether the state made inquiries whether the child is an Indian child as defined in ICWA—§ 1355.44(b)(3).
- Whether ICWA applies for the child and the date that the state was notified by the Indian tribe or state or tribal court that ICWA applies—§ 1355.44(b)(5).
- Whether the Indian child's tribe(s) was sent legal notice—§ 1355.44(b)(6).

Our proposal is to require state title IV–E agencies to revise some of the current data elements to report more detailed information on ICWA's procedural protections in section 1355.43(b) and to add data elements on certain aspects of ICWA's procedural protections for requests for transfers to tribal court, termination/modification of parental rights, and foster care, pre-adoptive and adoptive placement preferences, in a new § 1355.44(i).

In summary, we propose to require state title IV–E agencies to report the following additional information related to ICWA's procedural protections:

- Whether the state inquired with certain individuals as to whether the child is an Indian child as defined in ICWA and when the agency first discovered information indicating that the child is or may be an Indian child as defined in ICWA (section 1355.44(b)(3) and (4)).
- Information on whether a court determined that ICWA applies for the child, and whether the court decision included testimony of one or more qualified expert witnesses was included for voluntary and involuntary terminations of parental rights, and removals (section 1355.44(b)(6), (i)(2), (3), and (4)).
- Whether the child's parent or Indian custodian was sent notice in accordance with ICWA (section 1355.44(b)(5)).
- Information on requests to transfer cases to Tribal court (section 1355.44(i)(1)).
- Information on meeting the placement preferences under ICWA (section 1355.44(i)(5)–(8) and (10)–(13)).
- Whether the court determined that the IV–E agency made active efforts to prevent the breakup of the Indian family (section 1355.44(i)(9)).

The section-by-section preamble explains in detail how we propose the current CFR be amended to include the new information to report.

III. Implementation Timeframe

Implementation of changes to the AFCARS data elements as described in this NPRM and a precise effective date are dependent on the issuance of a final rule. We anticipate providing state title IV–E agencies with at least two full fiscal years before we will require them to collect and report additional data elements. We seek state title IV–E

[18] Child Welfare Information Gateway, 2021, *Child welfare practice to address racial disproportionality and disparity,* U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. *https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/.*

agency comments on the timeframe based on their experiences with implementation of the 2020 final rule.

IV. Public Participation

ACF welcomes comments on all aspects of this proposed rule. ACF specifically seeks comments on the potential benefits and disadvantages of including this data in AFCARS, and from state title IV–E agencies on the cost and burden to incorporate this proposal into their administrative data sets, including information on the following because this will be used to inform the burden estimates in the Paperwork Reduction Act section of an eventual final rule (see *VI. Regulatory Impact Analysis*):

- An estimate of recordkeeping hours to be spent annually to gather and enter the information proposed in this NPRM into the agency's electronic case management system, training and administrative tasks associated with training personnel on these requirements (*e.g.,* reviewing instructions, developing training and manuals), and developing or modifying procedures and systems to collect, validate, and verify the information and adjusting existing ways to comply with AFCARS requirements.
- Reporting hours spent annually extracting the information proposed in this NPRM for AFCARS reporting and transmitting to ACF.

V. Section-By-Section Discussion of Regulatory Provisions

References throughout this proposed rule to ''child'' or ''children'' are inclusive of youth and young adults aged 18 or older who are served by the title IV–E and IV–B programs. We use these terms in the regulatory text and section-by-section preamble discussion because these are used throughout the title IV–E and IV–B statute and regulations.

Severability

For the reasons described above, ACF believes that its authority to implement each of the provisions in the proposed regulation is well-supported in law and practice and should be upheld in any legal challenge. ACF also believes that its exercise of its authority reflects sound policy. However, in the event that any portion of the proposed rule is declared invalid, ACF intends that the other provisions be severable.

Section 1355.43 Data Reporting Requirements

This section contains data reporting requirements for AFCARS, such as report periods and deadlines for submitting data files, and descriptions of data quality errors. We propose technical edits to amend paragraphs (b)(1) and (2) to correct cross references to data elements in § 1355.44 and remove paragraph (b)(3) to eliminate obsolete dates.

Section 1355.44 Out-of-Home Care Data File Elements

This section contains the data element descriptions for the Out-of-Home Care Data File.

Section 1355.44(b) Child Information

Paragraph (b) contains specific information for the identified child who is in the Out-of-Home Care Reporting Population.

Researching reason to know a child is an ''Indian Child'' as defined in ICWA. In paragraph (b)(3), we propose that the state title IV–E agency report whether it researched whether there is reason to know that the child is an Indian child as defined in ICWA. We propose to require that the information in each paragraph (b)(3)(i) through (vi) is reported by the state title IV–E agency, which is whether it inquired with the following entities: the child; the child's biological or adoptive mother and father; the child's Indian custodian; and the child's extended family (as defined in ICWA). The state title IV–E agency must also indicate whether the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village. This proposal replaces and expands the current data element in § 1355.44(b)(3) that asks whether the state title IV–E agency made inquiries as to whether the child is an Indian child as defined in ICWA, with a yes/no response option.

Child's tribal membership and reason to know. In paragraph (b)(4), we propose that the state title IV–E agency continue to report information on the child's tribal membership and the state's discovery of information that the child may be an Indian child as defined in ICWA. In paragraphs (b)(4)(i) and (ii), we propose that the state title IV–E agency continue to report whether the child is a member of or eligible for membership in a Federally recognized Indian tribe, and if ''yes,'' the state title IV–E agency must indicate all Federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s). This information is currently reported in § 1355.44(b)(4)(i) and (ii) and is used to help identify children in the out-of-home care reporting population who are or may be tribal members.

In paragraphs (b)(4)(iii) and (iv), we propose to require the state title IV–E agency to indicate whether it knows or has reason to know that the child is an Indian child as defined in ICWA, and if ''yes,'' then the state title IV–E agency must indicate the date that it first discovered the information indicating the child is or may be an Indian child as defined in ICWA. The information reported for paragraphs (b)(4)(iii) and (iv) and (6) (discussed below) would replace the current data element in § 1355.44(b)(5), which requires the state IV–E agency to report only whether ICWA applies and if so, the date the state title IV–E agency was notified, because this proposal is requiring a state title IV–E agency to report more details related to ICWA's procedural requirements on ''reason to know''.

Notification. In paragraph (b)(5), we propose to require that the state title IV–E agency report whether certain entities were sent notice in accordance with ICWA. In paragraph (b)(5)(i) and (ii), we propose that the state title IV–E agency report whether the Indian child's tribe(s) was sent legal notice in accordance with 25 U.S.C. 1912(a) (which is currently required in § 1355.44(b)(6)) and newly require that if ''yes,'' the state title IV–E agency must report the Indian tribe(s) that were sent notice. In paragraph (b)(5)(iii), we propose that the state title IV–E agency report whether the Indian child's parent or Indian custodian was sent legal notice prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a). These data elements replace and expand on the information reported for the current data element in § 1355.44(b)(6) that asks whether the Indian child's tribe(s) was sent legal notice with yes/no response options.

Application of ICWA. In paragraph (b)(6), we propose that the state title IV–E agency report information related to ICWA's application. In paragraph (b)(6)(i), we propose to require the state title IV–E agency to report whether a court determined that ICWA applies or that the court is applying ICWA because it knows or has reason to know a child is an Indian child as defined in ICWA in accordance with 25 CFR 23.107(b)(2). If the state title IV–E agency indicates ''yes, ICWA applies,'' then it must complete paragraphs (b)(6)(ii) and (iii) and new paragraph (i) of this section. In paragraphs (b)(6)(ii) and (iii), we propose to require that the state title IV–E agency report the date that the court determined that ICWA applies and the Indian tribe that the court determined is the Indian child's tribe for ICWA purposes. The information reported for paragraphs (b)(6) and (4)(iii) and (iv) (as discussed above) would replace and expand the current data element in

§ 1355.44(b)(5) which only requires reporting whether ICWA applies and if so, the date the state title IV–E agency was notified that ICWA applies. Additionally, we propose to require that the state title IV–E agency report the data elements in new paragraph (i) of this section, if it reports ''yes, ICWA applies'' in paragraph (b)(6)(i). If the state title IV–E agency indicates ''no'' or ''unknown'' in paragraph (b)(6)(i), then the state title IV–E agency must leave new paragraph (i) blank. This instruction prompts state title IV–E agencies to report additional information for children to whom ICWA applies in new paragraph (i) of this section.

Section 1355.44(i) Data Elements Related to ICWA

In new paragraph (i), we propose to obtain information on certain requirements related to ICWA. This paragraph applies only to state title IV–E agencies that reported ''yes, ICWA applies'' in paragraph (b)(6)(i); otherwise, the state title IV–E agency must leave paragraph (i) blank. Tribal title IV–E agencies do not report information in paragraph (i). This section is new and is an expansion of the ICWA-related information state title IV–E agencies are currently required to report under § 1355.44. The information proposed to be reported relate to transfers to tribal court, involuntary and voluntary terminations/modifications or parental rights, active efforts, and placement preferences under ICWA.

Request to transfer to tribal court. In paragraphs (i)(1)(i) and (ii), we propose to require the state title IV–E agency to report whether the child's case record indicated a request to transfer to tribal court for each removal date reported in § 1355.44(d)(1). If the state title IV–E agency indicates ''yes,'' it must report whether the child's case record indicated that there was a denial of the request to transfer to tribal court in paragraph (i)(1)(ii).

Involuntary termination/modification of parental rights under ICWA. In paragraph (i)(2), we propose to require that the state title IV–E agency report information on involuntary terminations or modifications of parental rights under ICWA. The state title IV–E agency must complete this paragraph if it indicated ''involuntary'' in § 1355.44(c)(5). In paragraph (i)(2)(i), we propose to require that the state title IV–E agency indicate whether the state court found beyond a reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f). In paragraph (i)(2)(ii), we propose to require that the state title IV–E agency report whether the court decision to involuntarily terminate parental rights included the testimony of one or more qualified expert witnesses in accordance with 25 U.S.C. 1912(f). In paragraph (i)(2)(iii), we propose to require that the state title IV–E agency report whether, prior to terminating parental rights, the court concluded that active efforts had been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d).

Voluntary termination/modification of parental rights under ICWA. In paragraph (i)(3), we propose to require the state title IV–E agency to report information on voluntary terminations or modifications of parental rights under ICWA. The state title IV–E agency must complete the information in this paragraph if it indicated the termination of parental rights was ''voluntary'' in § 1355.44(c)(5). In paragraph (i)(3)(i) through (iii), we propose, in accordance with 25 CFR 23.125, that the state title IV–E agency indicate whether the consent to termination of parental or Indian custodian rights was:

- Executed in writing.
- Recorded before a court of competent jurisdiction.
- Accompanied with a certification by the court that the terms and consequences of consent were explained on the record in detail and were fully understood by the parent or Indian custodian in accordance with 25 CFR 23.125(a) and (c).

The state title IV–E agency must indicate ''yes'' or ''no'' for each paragraph.

Removals under ICWA. In paragraph (i)(4), we propose to require that the state title IV–E agency report information on removals under ICWA, for each date reported in § 1355.44(d)(1). In paragraph (i)(4)(i), we propose to require the state title IV–E agency to indicate whether the court order for foster care placement was made as a result of clear and convincing evidence that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e) and 25 CFR 23.121(a). In paragraph (i)(4)(ii), we propose to require that the state title IV–E agency indicate whether the evidence presented for foster care placement, as reported in paragraph (i)(4)(i), included the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e) and 25 CFR 23.121(a). In paragraph (i)(4)(iii), we propose to require that the state title IV–E agency indicate whether the evidence presented for foster care placement, as reported in paragraph (i)(4)(i), indicates that prior to each removal date reported in paragraph (d)(1) of this section, active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d).

Available ICWA foster care and pre-adoptive placement preferences. In paragraph (i)(5), we propose to require that the state title IV–E agency report which foster care or pre-adoptive placements (reported in § 1355.44(e)(1)) that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) and (c) were willing to accept placement for the child, from a list of five options. The following five options in paragraph (i)(5)(i) through (v) are: A member of the Indian child's extended family (as defined in ICWA); a foster home licensed, approved, or specified by the Indian child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; and a placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe. The state title IV–E agency must indicate in each paragraph (i)(5)(i) through (v) ''yes,'' or ''no,'' or ''not applicable.'' If the Indian child's tribe established a different order of preference by resolution in accordance with 25 U.S.C. 1915(c), the state title IV–E agency must complete paragraph (i)(5)(v) and leave paragraph (i)(5)(i) through (iv) blank.

Foster care and pre-adoptive placement preferences under ICWA. In paragraph (i)(6), we propose to require that the state title IV–E agency report whether each of the Indian child's foster care or pre-adoptive placements (reported in § 1355.44(e)(1)) meet the placement preferences of ICWA at 25 U.S.C. 1915(b) and (c) by indicating with whom the Indian child is placed from a list of six response options: a member of the Indian child's extended family; a foster home licensed, approved, or specified by the Indian child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe; or placement does not meet ICWA placement preferences.

Good cause under ICWA and Basis for good cause, foster care. For placements that do not meet the ICWA placement preferences (reported in paragraph (i)(6)), we propose to require that the state title IV–E agency report in paragraph (i)(7) whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA placement preferences in accordance with 25 U.S.C. 1915(b) or to depart from the placement preferences of the Indian child's tribe in accordance with 25 U.S.C. 1915(c). If the response is ''yes,'' then the state title IV–E agency must complete paragraph (i)(8), in which we propose to require that the state title IV–E agency report the state court's basis for determining good cause to depart from the ICWA placement preferences. The state title IV–E agency must indicate ''yes'' or ''no'' in each paragraph (i)(8)(i) through (v):

- Request of one or both of the Indian child's parents.
- Request of the Indian child.
- The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA at 25 U.S.C. 1915, but none has been located.
- The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.
- The presence of a sibling attachment that can be maintained only through a particular placement.

Active efforts. In paragraph (i)(9), we propose to require that the state title IV–E agency indicate whether it made active efforts to prevent the breakup of the Indian family in accordance with 25 U.S.C. 1912(d) and 25 CFR 23.2.

Available ICWA adoptive placements. If the state title IV–E agency indicated the child exited to adoption in § 1355.44(g)(3) *Exit reason,* we propose in paragraph (i)(10) to require that the state title IV–E agency indicate which adoptive placements from a list of four were willing to accept placement of the child. The following four options in paragraphs (i)(10)(i) through (iv) are: a member of the Indian child's extended family; other members of the Indian child's tribe; other Indian families; a placement that complies with the order of preference placements established by an Indian child's tribe. If the Indian child's tribe established a different order of preference by resolution in accordance with 25 U.S.C. 1915(c), the state title IV–E agency must complete paragraph (i)(10)(iv) and leave paragraph (i)(10)(i) through (iii) blank.

Adoption placement preferences under ICWA. If the state title IV–E agency indicated the child exited to adoption in § 1355.44(g)(3) *Exit reason,* we propose to require in paragraph (i)(11) that the state title IV–E agency indicate whether the child's adoptive placement meets the adoptive placement preferences of ICWA in 25 U.S.C. 1915(a) or (c) by indicating with whom the Indian child is placed from a list of the following five options: a member of the Indian child's extended family; other members of the Indian child's tribe; other Indian families; placement that complies with the order of preference for adoptive placements established by an Indian child's tribe; or placement does not meet ICWA placement preferences.

Good cause under ICWA and Basis for good cause, adoption. For placements that do not meet the ICWA placement preferences (as reported in paragraph (i)(11)), we propose to require that the state title IV–E agency indicate in paragraph (i)(12) whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA placement preferences under 25 U.S.C. 1915(a) or to depart from the placement preferences of the Indian child's tribe under 25 U.S.C. 1915(c). If the response for paragraph (i)(12) is ''yes,'' then the state title IV–E agency must complete paragraph (i)(13), in which we propose to require that the state title IV–E agency report the state court's basis for determining good cause to depart from the ICWA placement preferences. The state title IV–E agency must indicate ''yes'' or ''no'' in each paragraph (i)(13)(i) through (v):

- Request of one or both of the child's parents.
- Request of the Indian child.
- The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the adoptive placement preferences in ICWA at 25 U.S.C. 1915, but none has been located.
- The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the adoptive placement preferences live.
- The presence of a sibling attachment that can be maintained only through a particular adoptive placement.

VI. Regulatory Impact Analysis

Regulatory Planning and Review Executive Orders 12866, 13563, and 14094

Executive Orders 12866, 13563, and 14094 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 is supplemental to, and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Section 3(f) of Executive Order 12866 defines ''a significant regulatory action'' and was modified by Executive Order 14094 to mean as ''any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more . . . or adversely affect in a material way 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) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues for which centralized review would meaningfully further the President's priorities, or the principles set forth in the Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case''. A regulatory impact analysis must be prepared for rules determined to be significant regulatory actions within the scope of section 3(f)(1) of Executive Order 12866. ACF consulted OMB and determined that this proposed rule meets the criteria for a significant regulatory action under Executive Order 12866 and was subject to OMB review.

Costs and Benefits

AFCARS is the only comprehensive case-level data set on the incidence and experiences of children who are in out-of-home care under the placement and care of the title IV–E agency or who are under a title IV–E adoption or guardianship assistance agreement. The statute requires that AFCARS provide comprehensive national information with respect to these children. Collecting robust ICWA-related data will provide the major benefit of allowing ACF to better understand the underlying reasons for the disproportionality of AI/AN child involvement in the child welfare system.[19]

Federal reimbursement under title IV–E will be available for a portion of the costs that state title IV–E agencies will incur as a result of the revisions in this proposed rule, depending on each state title IV–E agency's cost allocation plan, information system, and other factors. Estimated costs to the Federal Government are provided below in the Burden estimate section. We estimate the Federal portion of the overall information collection costs to be $2,216,786.

Alternatives Considered

Federal agencies must justify the need for regulatory action and consider a range of policy alternatives. We speak to two alternatives that were considered and rejected.

- ACF considered not expanding the ICWA related data elements in AFCARS. An alternative course of action would be to do nothing and leave the requirements at § 1355.44 in place because they were streamlined in the 2020 final rule in response to comments solicited at that time. We rejected this option because of the reasons described earlier in the NPRM. Under this alternative, state title IV–E agencies would continue to report the ICWA-related data required through the 2020 final rule. However, this information would not be robust enough to provide the data on AI/AN children needed to understand their experiences in the foster care system.
- ACF also considered the alternative of implementing a process to monitor ICWA's procedural protections through a case review outside of AFCARS. We decided against that approach because we believe that requiring state title IV–E agencies to collect and report information related to the more detailed aspects of ICWA's procedural protections via AFCARS is preferable because it will result in comprehensive national data. AFCARS data is required to be ''reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies'' and ''provide comprehensive national information'' for the reporting populations (section 479(c)(2) and (3) of the Act (42 U.S.C. 679(c)(2) and (3))). The fact that the statutory penalties for noncompliant AFCARS submissions apply to data proposed under this NPRM may incentivize agencies to provide timely and complete data submissions (section 474(f) of the Act (42 U.S.C. 674)). (Note that agencies are afforded an opportunity to correct and resubmit noncompliant data files, as outlined in 45 CFR 1355.46.)

Congressional Review

The Congressional Review Act (CRA) allows Congress to review major rules issued by Federal agencies before the rules take effect (see 5 U.S.C. 801(a)(1)(A)). The CRA defines a ''major rule'' as one that has resulted, or is likely to result, in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (see 5 U.S.C. chapter 8). OMB's Office of Information and Regulatory Affairs has determined that this final rule does not meet the criteria set forth in 5 U.S.C. 804(2).

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (see 5 U.S.C. 605(b) as amended by the Small Business Regulatory Enforcement Fairness Act) requires Federal agencies to determine, to the extent feasible, a rule's impact on small entities, explore regulatory options for reducing any significant impact on a substantial number of such entities, and explain their regulatory approach. The term ''small entities,'' as defined in the RFA, comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least 5 percent of small entities. However, the Secretary proposes to certify, under 5 U.S.C. 605(b), as enacted by the RFA (Pub. L. 96–354), that this rulemaking will not result in a significant impact on a substantial number of small entities. This proposed rule does not affect small entities because it is applicable only to state title IV–E agencies. Therefore, an initial regulatory flexibility analysis is not required for this proposed rule.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) was enacted to avoid imposing unfunded Federal mandates on state, local, and tribal governments, or on the private sector. Section 202 of UMRA requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold is approximately $177 million. This proposed rule does not contain mandates that will impose spending costs on state, local, or tribal governments in the aggregate, or on the private sector, in excess of the threshold.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 2000 requires Federal agencies to determine whether a policy or regulation may negatively affect family well-being. If the agency determines a policy or regulation negatively affects family well-being, then the agency must prepare an impact assessment addressing seven criteria specified in the law. ACF believes it is not necessary to prepare a family policymaking assessment (see Pub. L. 105–277) because the action it takes in this NPRM would not have any impact on the autonomy or integrity of the family as an institution.

Executive Order 13132

Executive Order 13132 on Federalism requires that Federal agencies consult with state and local government officials in the development of regulatory policies with Federalism implications. Consistent with Executive Order 13132, we specifically solicit comment from State and local government officials on this proposed rule.

Paperwork Reduction Act

This proposed rule contains information collection requirements (ICRs) that are subject to review by OMB under the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. PRA of 1995 sought to minimize government-imposed burden from information collections on the public. In keeping with the notion that

[19] Child Welfare Information Gateway (2021) *Child Welfare Practice to Address Racial Disproportionality and Disparity, https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/.*

government information is an asset, it also is intended to improve the practical utility, quality, and clarity of information collected, maintained, and disclosed. The PRA defines ''information'' as any statement or estimate of fact or opinion, regardless of form or format, whether numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic, or other media (5 CFR 1320.3(h)). A description of the PRA provisions is given in the following paragraphs with an estimate of the annual burden. To fairly evaluate whether an information collection should be approved by OMB, the Department solicits comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Information collection for AFCARS is currently authorized under OMB number 0980–0267. This proposed rule contains information collection requirements in proposed § 1355.44 the Out-Of-Home Care Data File that the Department has submitted to OMB for its review. We propose to require that state title IV–E agencies report ICWA-related information for children who are in the Out-of-Home Care Reporting Population (§ 1355.42(a)) for the data elements proposed in § 1355.44(b) and (i).

Burden Estimate

The following are estimates.

Discussion: ACF estimates the burden and costs associated with this NPRM using the estimates from the 2020 final rule as a base by which to estimate the burden of adding the ICWA-related data elements as proposed in this NPRM. The 2020 final rule estimates can be seen beginning at 85 FR 28421. Through this comment solicitation, ACF anticipates further informing the burden estimate for an eventual final rule. This NPRM has a narrow focus in that we propose to add data elements related to ICWA's procedural protections applicable only to state title IV–E agencies. Because ICWA does not apply to tribal title IV–E agencies, they do not have to report the data elements proposed in this NPRM, thus they are not included in this burden estimate. ACF believes that the public comments on this proposal will provide valuable information regarding the cost and burden to implement the changes proposed in this NPRM. Specifically, state title IV–E agencies will be able to consider their cost and burden to implement the current AFCARS requirements finalized in 2020.

Respondents: The respondents comprise 52 state title IV–E agencies.

Recordkeeping burden: Searching data sources, gathering information, and entering the information into the system, developing or modifying procedures and systems to collect, validate, and verify the information and adjusting existing ways to comply with AFCARS requirements (including testing), administrative tasks associated with training personnel on the AFCARS requirements (*e.g.,* reviewing instructions, developing the training and manuals), and training personnel on AFCARS requirements. We understand that actual burden hours and costs will vary due to sophistication and capacity of information systems and availability of staff and financial resources, thus this is an average across states. We want to note though, that regardless of the size of the state's population of children in out-of-home care to whom ICWA applies, recordkeeping tasks such as training and modifications to IT systems will still need to occur because the state must be prepared to report the applicable AFCARS data elements should a child enter the reporting population.

Reporting burden: Extracting the information for AFCARS reporting and transmitting the information to ACF, which includes modifying, or developing a new data file for reporting.

Assumptions for Estimates

We made several assumptions when calculating the burden and costs:

- *Base Estimated Burden Hours:* ACF used the recordkeeping and reporting burden hours from the 2020 final rule as the base for estimating the burden hours for state title IV–E agencies resulting from the additional data elements proposed. The 2020 final rule estimated 17,076 Recordkeeping and 34 Reporting total annual burden hours for each title IV–E agency.
- *Number of children in out-of-home care:* To determine the number of children for which state title IV–E agencies will have to report the expanded ICWA-related data in the Out-of-Home Care Data File on average, ACF used the most recent FY 2021 AFCARS data available (report #29): 206,812 children entered in foster care during FY 2021. Of those, 4,622 children had a race of AI/AN reported in § 1355.44(b)(7). We used the number of children who entered foster care rather than the entire population of children in foster care because agencies will not have to collect and report all data elements on all children in foster care and using this number allows the estimate to accommodate those variances between individual child cases and circumstances.
- *Additional and Revised Data Elements for State Title IV–E Agencies:* The current Out-of-Home Care Data File contains 186 data points (see Appendix A of Technical Bulletin #20). ACF proposes to revise or add in the Out-Of-Home Care Data File approximately 45 data points related to state title IV–E agencies reporting the expanded ICWA-related information. This represents revisions to some of the current ICWA-related data elements to expand information to be reported in § 1355.44(b)(3) through (6), which is a 5 percent increase in data points for state title IV–E agencies to report for all children who enter foster care (10 new data points/186 current data points = 0.05); and proposed new data points to be added in § 1355.44(i), which is a 19 percent increase in data points for state title IV–E agencies to report for children to whom ICWA applies (35 new data points/186 current data points = 0.19). These percent increases in data points will be used in calculating the reporting and recordkeeping burden for state title IV–E agencies as a result of this NPRM. We understand from states during the implementation period of the 2020 final rule and state comments in 2018 and 2019 (see 84 FR 16573 and 85 FR 28411 respectively) that to report the new information related to ICWA, much work will need to be accomplished to examine paper or electronic case notes, court records, court orders, and other documents to locate the needed information and enter it into the case management system. We also understand that the burden associated with this bullet will vary across jurisdictions, depending on how robust the agency's electronic case management system is and the availability of documents.
- *Systems changes:* As of May 2023, 46 state title IV–E agencies have declared that they are implementing or intend to implement a Comprehensive Child Welfare Information Systems (CCWIS) (see 45 CFR 1355.50 *et seq.* for requirements). ACF recognizes that state title IV–E agencies will require revisions to electronic case management systems to meet the requirements proposed in this NPRM, regardless of CCWIS status. As more title IV–E agencies build CCWIS, ACF anticipates it will lead to more efficiency in reporting, however, we understood from previous AFCARS

rulemakings that the bulk of the information that informs ICWA-related data elements is located in state agency paper files or court documents.

• *Labor rate:* ACF assumes that there will be a mix of the following positions working to meet both the one-time and annual requirements of this proposed rule. We understand that approximately half of the state title IV–E agencies will utilize a contract to implement IT/case management systems changes to comply with an eventual final rule based on state advance planning documents approved by ACF. To inform this estimate, we also reviewed 2022 Bureau of Labor Statistics data for job roles in categories of information technology (IT) and computer programming, administrative, management, caseworkers, subject matter experts, and legal staff and used the average hourly wage for each job role. We used the job roles for social services and legal staff who may be employed by the child welfare agency and systems/engineer staff who may be employed by the agency or retained by a contract to build or revise case management systems. The wages are described below, and by averaging them, we get a labor rate of $92.

○ Office and Administrative Support Occupations (43–0000) (*e.g.,* administrative assistants, data entry, legal secretaries, government program eligibility interviewers, information and record clerks) at $21.90, Social and Community Service Managers (11–9151) at $38.13, Community and Social Service Operations (21–0000) (*e.g.,* Social Workers, Child and Family Social Workers, Counselors, Social Service Specialists) at $26.81, Social Workers (21–1020) at $28.58, Child, Family, and School Social Workers (21–2021) at $27.25, and Paralegals and Legal Assistants (23–2011) at $30.21. Computer Information and Systems Managers (11–3021) at $83.49, Computer and Mathematical Occupations (15–0000) (*e.g.,* computer and information analysts, computer programmers, and database and systems administrators) at $51.99, Information Security Analysts (15–1212) at $57.63, Computer Hardware Engineers (17–2061) at $67.71, Database Administrators (15–1242) at $49.29, Database Architects (15–1243) at $65.65, and Computer Programmers (15–1251) at $49.42. The average labor rate for these wages is $46 and to account for associated overhead costs, ACF doubled this rate, which is $92.

Calculations for Estimates

Recordkeeping Burden Estimate for State Title IV–E Agencies: Adding the burden hours estimated in the bullets below produced a total of 48,183 recordkeeping hours annually, as summarized below.

• Searching data sources, gathering information, and entering the information into the case management system for children who enter foster care, ACF estimates that this would take on average 44,875 hours annually. The 2020 final rule estimated these tasks to be 4.02 hours annually for each child who entered foster care for all 2020 final rule data points. For this NPRM, the expanded ICWA related information proposed to be added in:

○ Section 1355.44(b)(3) through (6) is a 5 percent increase in data points to report for all children who enter foster care (4.02 × 0.05 = 0.20 hours). These data points apply to all children who enter foster care (0.20 hours × 206,812 children = 41,362 hours).

○ Section 1355.44(i) is a 19 percent increase in data points to report for children to whom ICWA applies (4.02 × 0.19 = 0.76 hours). We are using a child's reported race as AI/AN as a proxy for a child to whom ICWA applies (0.76 hours × 4,622 children = 3,513 hours).

○ The total estimate of searching/gathering/entering information into the case management system is 48,194 annual burden hours (41,362 + 3,513 = 44,875).

• Developing or modifying standard operating procedures and IT systems to collect, validate, and verify the information and adjust existing ways to comply with the AFCARS requirements, and testing is estimated at 1,608 hours annually. The 2020 final rule estimated 6,700 hours for these tasks for all 2020 final rule data points. For this NPRM, the expanded ICWA-related information proposed to be added in:

○ Section 1355.44(b)(3) through (6) is a 5 percent increase in data points to report for all children who enter foster care (6,700 × 0.05 = 335 hours).

○ Section 1355.44(i) is a 19 percent increase in data points to report for children to whom ICWA applies (6,700 × 0.19 = 1,273 annual hours).

• The total estimate of modifying IT systems and adjust existing ways to comply with the NPRM is 1,621 annual burden hours (335 + 1,273 = 1,608). Administrative tasks associated with training personnel on the NPRM requirements (*e.g.,* reviewing instructions, developing training and manuals) and training personnel on the requirements of this NPRM, we estimate will take on average 1,700 annual burden hours. We understand that training hours will vary depending on the size of the agency's workforce needing training, the current training conducted regarding ICWA, therefore ACF assumes that implementing the data elements proposed here will be incorporated in ongoing training efforts. The 2020 final rule estimated 7,086 hours for all 2020 final rule data points. For this NPRM, the information proposed to be added in:

○ Section 1355.44(b)(3) through (6) is a 5 percent increase in data points to report for all children who enter foster care (7,086 × 0.05 = 354 hours).

○ Section 1355.44(i) is a 19 percent increase in data points to report for children to whom ICWA applies (7,086 × 0.19 = 1,346 hours).

○ The total estimate of administrative tasks associated with training personnel to comply with the NPRM is 1,714 annual burden hours (354 + 1,346 = 1,700).

Thus, the total recordkeeping burden estimate is 44,875 searching and gathering information + 1,608 developing or modifying IT systems + 1,700 administrative tasks = 48,183 hours.

Reporting Burden Estimate for State Title IV–E Agencies: We estimate that extracting the additional ICWA-related information for AFCARS reporting and transmitting the information to ACF would take on average eight hours annually. The 2020 final rule estimated reporting would take 34 hours annually extracting and reporting information for all 2020 final rule data points. For this NPRM, the expanded ICWA-related information proposed to be added in:

• Section 1355.44(b)(3) through (6) is a 5 percent increase in data points to report for all children who enter foster care (34 × 0.05 = 2 hours).

• Section 1355.44(i) is a 19 percent increase in data points to report for children to whom ICWA applies (34 × 0.19 = 6 hours).

• The total estimate of reporting the expanded ICWA related information to comply with the NPRM is eight annual burden hours (2 + 6 = 8).

Collection—AFCARS for State Title IV–E Agencies	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours for NPRM
Recordkeeping	52	2	463.30	48,183
Reporting	52	2	0.08	8
Total				48,191

Annualized Cost to the Federal Government

Federal reimbursement under title IV–E will be available for a portion of the costs that state title IV–E agencies will incur because of the revisions proposed in this NPRM and actual costs will vary, depending on each agency's cost allocation, information system, and other factors. If this proposed regulatory action becomes final, ACF estimates that it would cost the Federal government approximately $2,216,786. For this estimate, we used the 50 percent FFP rate and because the FFP rate used in these estimates is 50 percent, we estimate the costs for Federal and non-Federal to be the same.

Collection—AFCARS	Total annual burden hours	Average hourly labor rate	Total cost	Estimate federal costs (50% FFP)
State Title IV–E Agencies				
Recordkeeping	48,183	$92	$4,432,836	$2,216,418
Reporting	8	92	736	368
Total			4,433,572	2,216,786

In the above estimates, ACF acknowledges the following: (1) ACF has used average figures for state title IV–E agencies of very different sizes and of which, some may have larger populations of children served than other agencies, and (2) these are rough estimates based on the information available to ACF. We welcome comments on the burden and costs of this NPRM in accordance with section IV of this NPRM.

OMB is required to make a decision concerning the collection of information contained in this regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations. Written comments to OMB or the proposed information collection should be sent directly to the following: Office of Management and Budget, either by fax to 202–395–6974 or by email to *OIRA_submission@omb.eop.gov.* Please mark faxes and emails to the attention of the desk officer for ACF.

VII. Tribal Consultation Statement

Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments,* requires agencies to consult with Indian tribes when regulations have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Similarly, ACF's Tribal Consultation Policy says that consultation is triggered for a new rule adoption that significantly affects tribes, meaning the new rule adoption has substantial direct effects on one on more Indian Tribes, on the amount or duration of ACF program funding, on the delivery of ACF programs or services to one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This proposed rule does not meet either standard for consultation. Executive Order 13175 does not apply to this NPRM because it does not impose any burden or cost on tribal title IV–E agencies, nor does it impact the relationship or distribution of power between the Federal Government and Indian Tribes. ICWA does not apply to tribal title IV–E agencies, therefore, they do not have to report the data elements proposed in this NPRM. However, we have received tribal input on proposing ICWA-related data elements. Prior to publication of this NPRM, the Department addressed collecting ICWA-related information in AFCARS at the Secretary's Tribal Advisory Council (STAC) meetings in 2022. In September 2022, ACF updated the STAC of ACF's intention to revise AFCARS to propose ICWA-related data elements similar to what was in the 2016 final rule. The members of the STAC have consistently expressed support for restoring ICWA-related data elements to AFCARS. We look forward to engaging in consultation with tribes during the comment period of this NPRM and to receiving their comments on this proposal.

Jeff Hild, Acting Assistant Secretary of the Administration for Children & Families, approved this document on February 9, 2024.

List of Subjects in 45 CFR Part 1355

Administrative costs, Adoption Assistance, Child welfare, Fiscal requirements (title IV–E), Grant programs—social programs, Statewide information systems.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Dated: February 14, 2024.

Xavier Becerra,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, ACF proposes to amend 45 CFR part 1355 as follows:

PART 1355—GENERAL

■ 1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.;* 42 U.S.C. 1302.

■ 2. Amend § 1355.43 by revising paragraphs (b)(1) and (2) and removing paragraph (b)(3) to read as follows:

§ 1355.43 Data reporting requirements.

* * * * *

(b) *Out-of-home care data file.* A title IV–E agency must report the information required in § 1355.44 pertaining to each child in the out-of-home care reporting population, in accordance with the following:

(1) The title IV–E agency must report the most recent information for the applicable data elements in § 1355.44(a), (b), and (c).

(2) The title IV–E agency must report the most recent information and all historical information for the applicable data elements in § 1355.44(d) through (i).

* * * * *

■ 3. Amend § 1355.44 by revising paragraphs (b)(3) through (6), and adding paragraph (i) to read as follows:

§ 1355.44 Out-of-home care data file elements.

* * * * *

(b) * * *

(3) *Researching reason to know a child is an ''Indian Child'' as defined in the Indian Child Welfare Act (ICWA).* For state title IV–E agencies only: Indicate whether the state title IV–E agency researched whether there is reason to know that the child is an Indian child as defined in ICWA. Complete each paragraph (b)(3)(i) through (vi) of this section.

(i) Indicate whether the state title IV–E agency inquired with the child's biological or adoptive mother. Indicate ''yes,'' ''no'' or ''the biological or adoptive mother is deceased.''

(ii) Indicate whether the state title IV–E agency inquired with the child's biological or adoptive father. Indicate ''yes,'' ''no,'' or ''the biological or adoptive father is deceased.''

(iii) Indicate whether the state title IV–E agency inquired with the child's Indian custodian if the child has one. Indicate ''yes,'' ''no,'' or ''child does not have an Indian custodian.''

(iv) Indicate whether the state title IV–E agency inquired with the child's extended family. Indicate ''yes'' or ''no.''

(v) Indicate whether the state title IV–E agency inquired with the child. Indicate ''yes'' or ''no.''

(vi) Indicate whether the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village. Indicate ''yes'' or ''no.''

(4) *Child's tribal membership and reason to know.* For state title IV–E agencies only:

(i) Indicate whether the child is a member of or eligible for membership in a federally recognized Indian tribe. Indicate ''yes,'' ''no,'' or ''unknown''.

(ii) If the state title IV–E agency indicated ''yes'' in paragraph (b)(4)(i) of this section, indicate all federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s).

(iii) Indicate whether the state title IV–E agency knows or has reason to know, that the child is an Indian child as defined in ICWA. Indicate ''yes'' or ''no.'' If the state title IV–E agency indicates ''yes,'' then it must complete paragraph (b)(4)(iv). If the state title IV–E agency indicates ''no,'' then it must leave paragraph (b)(4)(iv) blank.

(iv) Indicate the date that the state title IV–E agency first discovered the information indicating the child is or may be an Indian child as defined in ICWA.

(5) *Notification.* For state title IV–E agencies only:

(i) Indicate whether the Indian child's tribe(s) was sent legal notice prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a). Indicate ''yes'' or ''no.'' If the state title IV–E agency indicates ''yes,'' then it must complete paragraph (b)(5)(ii). If the state title IV–E agency indicates ''no,'' then it must leave paragraph (b)(5)(ii) blank.

(ii) Indicate the Indian tribe(s) that were sent notice as required in ICWA at 25 U.S.C. 1912(a).

(iii) Indicate whether the Indian child's parent or Indian custodian was sent legal notice prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a). Indicate ''yes'' or ''no.''

(6) *Application of ICWA.*

(i) Indicate whether a court determined that ICWA applies or that the court is applying ICWA because it knows or has reason to know a child is an Indian child as defined in ICWA in accordance with 25 CFR 23.107(b)(2). Indicate ''yes, ICWA applies,'' ''no, ICWA does not apply,'' or ''no court determination.'' If the state title IV–E agency indicates ''yes, ICWA applies,'' then it must complete paragraphs (b)(6)(ii) and (iii) and paragraph (i) of this section; otherwise leave blank.

(ii) Indicate the date that the court determined that ICWA applies or determined to apply ICWA in accordance with 25 CFR 23.107(b)(2).

(iii) Indicate the Indian tribe that the court determined is the Indian child's tribe for ICWA purposes.

* * * * *

(i) *Data elements related to ICWA.* Reporting information in paragraph (i) is for state title IV–E agencies only. Report information in paragraph (i) only if the state title IV–E agency indicated ''yes, ICWA applies'' in paragraph (b)(6)(i) of this section. Otherwise, the state title IV–E agency must leave paragraph (i) of this section blank.

(1) *Request to transfer to tribal court.*

(i) Indicate whether the child's case record indicated a request to transfer to tribal court for each removal date reported in paragraph (d)(1) of this section. Indicate ''yes'' or ''no.'' If the state title IV–E agency indicates ''yes,'' the state title IV–E agency must complete paragraph (ii) of this section. If the state title IV–E agency indicates ''no,'' the state title IV–E agency must leave paragraph (ii) of this section blank.

(ii) Indicate whether the child's case record indicated that there was a denial of the request to transfer to tribal court. Indicate ''yes'' or ''no.''

(2) *Involuntary termination/modification of parental rights under ICWA.* If the state title IV–E agency indicated ''involuntary'' in paragraph (c)(5) of this section, the state title IV–E agency must complete paragraphs (i)(2)(i) through (iii) of this section. Otherwise, the state title IV–E agency must leave paragraphs (i)(2)(i) through (iii) of this section blank.

(i) Indicate whether the state court found beyond a reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f). Indicate ''yes'' or ''no.''

(ii) Indicate whether the court decision to involuntarily terminate parental rights included the testimony of one or more qualified expert witnesses in accordance with 25 U.S.C. 1912(f). Indicate ''yes'' or ''no.''

(iii) Indicate whether, prior to terminating parental rights, the court concluded that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d). Indicate ''yes'' or ''no.''

(3) *Voluntary termination/modification of parental rights under ICWA.* If the state title IV–E agency indicated ''voluntary'' in paragraph (c)(5) of this section, indicate whether the consent to termination of parental or Indian custodian rights was:

(i) Executed in writing. Indicate ''yes'' or ''no.''

(ii) Recorded before a court of competent jurisdiction. Indicate ''yes'' or ''no.''

(iii) Accompanied with a certification by the court that the terms and consequences of consent were explained on the record in detail and were fully understood by the parent or Indian custodian in accordance with 25 CFR 23.125(a) and (c). Indicate ''yes'' or ''no.''

(4) *Removals under ICWA.* For each removal date reported in paragraph (d)(1) of this section:

(i) Indicate whether the court order for foster care placement was made as a result of clear and convincing evidence that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e) and 25 CFR 23.121(a). Indicate ''yes'' or ''no.''

(ii) Indicate whether the evidence presented for foster care placement as indicated in paragraph (i)(4)(i) of this section included the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e) and 25 CFR 23.121(a). Indicate ''yes'' or ''no.''

(iii) Indicate whether the evidence presented for foster care placement as indicated in paragraph (i)(4)(i) indicates that prior to each removal reported in paragraph (d)(1) of this section that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d). Indicate ''yes'' or ''no.''

(5) *Available ICWA foster care and pre-adoptive placement preferences.* Indicate which foster care or pre-adoptive placements, (which are reported in paragraph (e)(1) of this section and meet the placement preferences of ICWA in 25 U.S.C. 1915(b) and (c)) were willing to accept placement for the child. Indicate in each paragraph (i)(5)(i) through (v) of this section ''yes,'' ''no,'' or ''not applicable.'' If the Indian child's tribe established a different order of preference by resolution in accordance with 25 U.S.C. 1915(c), the state title IV–E agency must complete paragraph (i)(5)(v) and leave paragraph (i)(5)(i) through (iv) blank.

(i) A member of the Indian child's extended family.

(ii) A foster home licensed, approved, or specified by the Indian child's tribe.

(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.

(iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(v) A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe.

(6) *Foster care and pre-adoptive placement preferences under ICWA.* Indicate which foster care or pre-adoptive placements, reported in paragraph (e)(1) of this section, meet the placement preferences of ICWA in 25 U.S.C. 1915(b) and (c) by indicating with whom the Indian child is placed. Indicate ''a member of the Indian child's extended family,'' ''a foster home licensed, approved, or specified by the Indian child's tribe,'' ''an Indian foster home licensed or approved by an authorized non-Indian licensing authority,'' ''an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs,'' ''a placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe'' or ''placement does not meet ICWA placement preferences.'' If the state IV–E agency indicated ''placement does not meet ICWA placement preferences,'' then the state IV–E agency must complete paragraph (i)(7). Otherwise, the state title IV–E agency must leave paragraph (i)(7) blank.

(7) *Good cause under ICWA, foster care.* Indicate whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA placement preferences in accordance with 25 U.S.C. 1915(b) or to depart from the placement preferences of the Indian child's tribe in accordance with 25 U.S.C. 1915(c). Indicate ''yes'' or ''no.'' If the state title IV–E agency indicated ''yes,'' then the state title IV–E agency must indicate the basis for good cause in paragraph (i)(8) of this section. If the state title IV–E agency indicated ''no,'' then the state title IV–E agency must leave paragraph (i)(8) blank.

(8) *Basis for good cause, foster care.* If the state title IV–E agency indicated ''yes'' to paragraph (i)(7), indicate the state court's basis for determining good cause to depart from ICWA placement preferences by indicating ''yes'' or ''no'' in each paragraph (i)(8)(i) through (v) of this section:

(i) Request of one or both of the Indian child's parents.

(ii) Request of the Indian child.

(iii) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA at 25 U.S.C. 1915 but none has been located.

(iv) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

(v) The presence of a sibling attachment that can be maintained only through a particular placement.

(9) *Active efforts.* Indicate whether the state title IV–E agency made active efforts to prevent the breakup of the Indian family in accordance with 25 U.S.C 1912(d) and 25 CFR 23.2. Indicate ''yes'' or ''no.''

(10) *Available ICWA adoptive placements.* If the state title IV–E agency indicated the child exited to adoption in paragraph (g)(3) of this section, indicate which adoptive placements that meet the placement preferences in ICWA at 25 U.S.C. 1915(a) and (c) were willing to accept placement. Indicate in each paragraph (i)(10)(i) through (iv) of this section ''yes,'' ''no,'' or ''not applicable.'' If the Indian child's tribe established a different order of preference by resolution in accordance with 25 U.S.C. 1915(c), the state title IV–E agency must complete paragraph (i)(10)(iv) and leave paragraph (i)(10)(i) through (iii) blank.

(i) A member of the Indian child's extended family.

(ii) Other members of the Indian child's tribe.

(iii) Other Indian families.

(iv) A placement that complies with the order of preference placements established by an Indian child's tribe.

(11) *Adoption placement preferences under ICWA.* If the state title IV–E agency indicated the child exited to adoption in paragraph (g)(3) of this section, indicate whether the adoptive placement meets the adoptive placement preferences of ICWA in 25 U.S.C. 1915(a) and (c) by indicating with whom the Indian child is placed. Indicate ''a member of the Indian child's extended family,'' ''other members of the Indian child's tribe,'' ''other Indian families,'' ''a placement that complies with the order of preference for adoptive placements established by an Indian child's tribe,'' or ''placement does not meet ICWA placement preferences.'' If the state IV–E agency indicated ''placement does not meet ICWA placement preferences,'' then the state IV–E agency must complete paragraph (i)(12); otherwise, leave paragraph (i)(12) blank.

(12) *Good cause under ICWA, adoption.* If the state title IV–E agency indicated ''placement does not meet ICWA placement preferences'' in paragraph (i)(11), indicate whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA adoptive placement preferences under 25 U.S.C. 1915(a) or to depart from the adoptive placement preferences of the Indian child's tribe

under 25 U.S.C. 1915(c). Indicate ''yes'' or ''no.'' If the state title IV–E agency indicated ''yes,'' then the state title IV–E agency must indicate the basis for good cause in paragraph (i)(13) of this section. If the state title IV–E agency indicated ''no,'' then the state title IV–E agency must leave paragraph (i)(13) blank.

(13) *Basis for good cause, adoption.* If the state title IV–E agency indicated ''yes'' in paragraph (i)(16), indicate the state court's basis for determining good cause to depart from ICWA adoptive placement preferences by indicating ''yes'' or ''no'' in each paragraph (i)(13)(i) through (v) of this section.

(i) Request of one or both of the child's parents.

(ii) Request of the Indian child.

(iii) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the adoptive placement preferences in ICWA at 25 U.S.C. 1915 but none has been located.

(iv) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the adoptive placement preferences live.

(v) The presence of a sibling attachment that can be maintained only through a particular adoptive placement.

[FR Doc. 2024–03373 Filed 2–22–24; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 240213–0046]

RIN 0648–BM66

Atlantic Highly Migratory Species; Bluefin Tuna General Category Effort Controls and Related Regulations

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing to codify a schedule of restricted-fishing days (RFDs) for the 2024 fishing year and subsequent fishing years; reestablish a General category default retention limit for large medium or giant bluefin tuna (BFT) on open days; and make clarifications to the BFT dealer regulations and the definition of a bluefin statistical document (BSD) tag. This proposed action is necessary to increase the likelihood of pacing General category landings to extend fishing opportunities through a greater portion of the General category time period subquotas. Lastly, this proposed action would clarify existing regulations to ensure better understanding and compliance by General category quota participants.

DATES: Written comments may be submitted via *https://www.regulations.gov* and must be received by March 25, 2024. Comments may also be submitted at a public hearing or webinar. NMFS will hold a public hearing via conference call and webinar for this proposed rule on March 19, 2024, from 2 p.m. to 4 p.m., Eastern Time. Information for registering and accessing the webinar can be found at *https://www.fisheries.noaa.gov/action/proposed-rule-set-general-category-effort-controls-and-clarify-related-atlantic-bluefin-tuna.* Requests for sign language interpretation or other auxiliary aids should be directed to Larry Redd, Jr., (see **FOR FURTHER INFORMATION CONTACT** section) at least 7 days prior to the meeting. The public is reminded that NMFS expects participants at conference calls and webinars to conduct themselves appropriately. At the beginning of each conference call and webinar, the moderator will explain how the conference call and webinar will be conducted and how and when participants can provide comments. NMFS will structure the conference call and webinar so that all members of the public will be able to comment. Participants are expected to respect the ground rules, and those that do not may be asked to leave the conference calls and webinars.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2024–0021, by electronic submission. Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and type ''NOAA–NMFS–2024–0021'' in the Search box (*note:* copying and pasting the FDMS Docket Number directly from this document may not yield search results). Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. Written comments sent by any other method, to any other address or individual, or received after the close of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Copies of this proposed rule and supporting documents are available from the HMS Management Division website at *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species* or by contacting Larry Redd, Jr., or Erianna Hammond (see **FOR FURTHER INFORMATION CONTACT** section).

FOR FURTHER INFORMATION CONTACT: Larry Redd, Jr., *larry.redd@noaa.gov,* or Erianna Hammond, *erianna.hammond@noaa.gov,* at 301–427–8503.

SUPPLEMENTARY INFORMATION:

Background

BFT fisheries are managed under the 2006 Consolidated HMS Fishery Management Plan (FMP) and its amendments pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) and consistent with the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*). HMS implementing regulations are at 50 CFR part 635. Section 635.23 describes the daily retention limits for BFT including retention limits on RFDs. Section 635.27 divides the U.S. BFT quota, established by the United States and other members of the International Commission for the Conservation of Atlantic Tunas (ICCAT), among the various domestic fishing categories per the allocations established in the FMP and its amendments. NMFS is required under the Magnuson-Stevens Act at 16 U.S.C. 1854(g)(1)(D) to provide U.S. fishing vessels with a reasonable opportunity to harvest quotas under relevant international fishery agreements such as the ICCAT Convention, which is implemented domestically pursuant to ATCA.

The BFT fishery is a quota-managed fishery, and the annual U.S. BFT quota is established by binding recommendations of ICCAT. The U.S. BFT quota established through that process is implemented domestically through rulemaking and allocated among six quota categories (General, Angling, Harpoon, Longline, Trap, and Reserve). This proposed rule considers actions specific to the General category quota and General category quota participants, which include Atlantic Tunas General category permitted vessels and HMS Charter/Headboat permitted vessels when fishing commercially. As described in § 635.27(a), the overall baseline U.S. annual quota is 1,316.14 metric tons (mt). The General category baseline quota is 710.7 mt which is suballocated into time period subquotas as follows: January through March, 5.3 percent (37.7 mt); June through August, 50 percent (355.4 mt); September, 26.5 percent (188.3 mt); October through November, 13 percent (92.4 mt); and December, 5.2 percent (37 mt) (§ 635.27(a)(1)(i)(A) through (E)).

BFT General Category RFDs

NMFS originally established regulatory authority to set so-called ''no-fishing'' days for BFT in the General category fishery in 1995 (60 FR 38505, July 27, 1995). In that final rule, NMFS described no-fishing days as an effort control that could be used to extend the General category fishing season, prevent overharvest of quota in any period, and improve distribution of fishing opportunities without increasing BFT mortality. The regulation provided that scheduled no-fishing days would be published in the **Federal Register** for a comment period of 30 days, and waiver of such days would be filed with the **Federal Register** a minimum of 5 days in advance of the scheduled no-fishing days if NMFS determined that the effort control would impede landing of the monthly quotas. *Id.* at 38506. In 1996, NMFS began using the term ''RFD'' rather than ''no-fishing days'' (61 FR 30183, June 14, 1996). From 1995 through 2007, NMFS set RFDs on annual basis. NMFS stopped scheduling RFDs in 2008, as General category landings over that timeframe were lower compared to the late 1990s and the General category fishery did not need to be closed.

Due to increased BFT landings rates in the General category in 2019 and 2020 and numerous requests from members of the Atlantic HMS Advisory Panel, General category quota participants, and Atlantic tunas dealers, NMFS proposed to schedule RFDs on all Tuesdays, Fridays, and Saturdays from July 20 through November 30, 2021 (86 FR 25992, May 12, 2021). Due to administrative timing issues related to publication in the **Federal Register**, NMFS established RFDs on all Tuesdays, Fridays, and Saturdays from September 3 through November 30, 2021 (86 FR 43421, August 9, 2021). Because the use of RFDs in 2021 succeeded in extending fishing opportunities through a greater portion of the relevant time periods and the fishing year overall consistent with management objectives for the fishery, NMFS finalized an RFD schedule for the 2022 fishing year of all Tuesdays, Fridays, and Saturdays from July 1 through November 30, 2022 (87 FR 33056, June 1, 2022). In 2023, NMFS proposed the same weekly schedule for the July through November timeframe, along with extending RFDs to the winter fishery (*i.e.,* the December and January through March time periods). Based on public comment and a review of average daily catch rates in previous fishing years, NMFS determined that finalizing an RFD schedule for the December 2023 or January through March 2024 time periods was unwarranted at that time. Thus, NMFS finalized an RFD schedule of all Tuesdays, Fridays, and Saturdays from July 1 to November 30, 2023 (88 FR 33839, May 25, 2023).

BFT General Category Retention Limits

NMFS established a default daily retention limit for large medium and giant BFT of one fish per vessel in 1995 (60 FR 38505, July 27, 1995). To provide for maximum utilization of the quota, NMFS had the flexibility to increase or decrease the large medium and giant BFT daily retention limit over a range of zero (on RFDs) to a maximum of three per vessel via an inseason action. In 2011, NMFS adjusted the upper limit of this range to five fish per vessel to increase opportunities to harvest the General category quota while maintaining the default retention limit of one fish per vessel (76 FR 74003, December 30, 2011). The default retention limit was maintained through 2018, when NMFS published a final rule that made editorial corrections amending the regulations for HMS (83 FR 33148, July 17, 2018). In that action, NMFS inadvertently removed regulatory text stating the default retention limit on non-RFD fishing days. To correct this technical error, with this action NMFS proposes to again establish default General category retention limits on non-RFDs.

Proposed RFD and Retention Limit Measures

The purpose of this proposed action is to modify the process of scheduling RFDs and reestablish General category default daily retention limits for large medium or giant BFT on open days. As effort controls, both RFDs and daily retention limits are meant to extend General category fishing opportunities through a greater portion of the General category time period subquotas, prevent overharvest of quota in any period, and improve distribution of fishing opportunities without increasing BFT mortality. NMFS has prepared a draft Environmental Assessment (EA), Regulatory Impact Review (RIR), and an Initial Regulatory Flexibility Analysis (IRFA) that present and analyze the anticipated environmental, social, and economic impacts of each alternative considered for this proposed rule. A brief summary of the alternatives considered is provided below. Additional information regarding this action and BFT management overall can be found in the FMP and its amendments, the annual HMS Stock Assessment and Fishery Evaluation Reports, and online at *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species.*

Under Alternative B, which NMFS is considering as four sub-alternatives (B1 is the preferred alternative), NMFS would modify the process for setting an RFD schedule. Under these alternatives, instead of conducting an annual rulemaking to set an annual RFD schedule, NMFS would set a default RFD schedule for specific General category time periods and days for the 2024 fishing year and subsequent years. If the scheduled RFDs are codified, NMFS may remove them or establish additional RFDs, as appropriate, through further rulemaking. In recent years, NMFS has noticed that the number of BFT landed but unsold by General category quota participants have increased in association with high rates of landings. Codifying RFDs would provide General category quota participants and dealers advanced time (*i.e.,* more than a month) to plan and coordinate activities for the expected time periods with high BFT landings rates, potentially decreasing the amount of BFT that are landed but unsold. Under the preferred alternative for an RFD schedule (Alternative B1), NMFS would codify a 3-day RFD schedule for every Tuesday, Friday, and Saturday from July 1 through November 30. NMFS has used this RFD schedule since 2022 to correspond with the time periods when catch rates have been historically high in the General category often resulting in premature closures of the fishery. The preferred RFD schedule would allow for two consecutive 2-day periods each week (Sunday–Monday; Wednesday–Thursday). This schedule would increase the efficient utilization of the BFT resource. It would allow dealers to plan to move BFT product through the market and therefore reduce the amount of General category BFT landed but unsold. Additionally, codifying this schedule could allow for some commercial fishing activity each weekend (*i.e.,* on Sunday). Providing the opportunity for the time periods to last as long as possible would likely increase General category participation by commercial fishermen and provide access to fishing grounds while BFT are available. Furthermore, because this schedule would allow for at least 1 day of fishing on a weekend, which is when many tournaments operate, this specific RFD schedule would allow General category quota participants the opportunity to participate in at least 1 day of fishing tournaments.

NMFS may waive these scheduled RFDs for the specific time periods and days on which they apply by adjusting the daily BFT retention limit from zero up to five after considering the criteria at § 635.27(a)(7). Considerations include, among other things, review of dealer reports, daily landing trends, and the availability of BFT on fishing grounds. NMFS would announce any such waiver by filing a retention limit adjustment with the Office of the Federal Register for publication. NMFS also may waive previously designated RFDs effective upon closure of the General category fishery so that persons aboard vessels permitted in the General category may conduct only tag-and-release fishing for BFT under § 635.26(a).

Under the preferred alternative for a General category daily retention limit (Alternative D3), NMFS would establish a General category daily retention limit of three large medium or giant BFT per vessel on open days in June and one large medium or giant BFT per vessel on open days for all other months in time periods where the fishery is open (*i.e.,* January through March and July through December; note that the General category BFT fishery is not open during the months of April and May). In recent years, NMFS has increased the daily retention limit to three BFT in June when landing rates are low and then decreased the daily retention limit to one BFT when landing rates increased. This alternative would allow the continuation of a three-fish retention limit during the month of June when landing rates are low, thus providing some benefit to those General category quota participants that could retain more than one BFT during a period in which NMFS typically has increased the retention limit.

These preferred alternatives would help General category quota participants, tournament operators, and dealers with fishery-related planning (*e.g.,* fishers' travel to fishing grounds or engage in other fishing endeavors) by providing an advance schedule of open and closed days and the applicable retention limits when the fishery is open. Furthermore, the preferred alternatives would provide an administrative cost savings as the Agency would publish fewer **Federal Register** actions setting RFD schedules on an annual basis and inseason retention limits adjustments for the General category fishery. Overall, these preferred alternatives meet the goals and objectives of this action and are expected to have neutral to minor beneficial ecological, social, and economic impacts.

In addition to the proposed measures, in the draft EA for this action, NMFS analyzed a status-quo alternative (Alternative A) that would maintain the recent practice of NMFS conducting annual rulemaking to set a schedule of RFDs for upcoming fishing years. NMFS does not prefer the no action alternative as administrative timing issues could occur related to final publication of an RFD schedule (similar to the 2021 RFD rulemaking) resulting in a later start of RFDs. Furthermore, Alternative A would not provide the same benefit to General category quota participants, tournament operators, and dealers in terms of being able to plan for RFDs. The draft EA for this action also describes the impacts of three other RFD schedules: a 3-day-per-week RFD schedule for every Thursday, Friday, and Saturday from July 1 through November 30 (Alternative B2); a 3-day-per-week RFD schedule for every Friday, Saturday, and Sunday from July 1 through November 30 (Alternative B3); and a 4-day (or more)-per-week RFD schedule from July 1 through November 30 (Alternative B4). Although Alternatives B2, B3, and B4 could pace landings just as or more effectively than the preferred alternative, implementing any of these alternatives is unlikely to allow adequate time for fish products to move through the market. Consecutive RFDs could result in market gluts leading to an influx of BFT product (*i.e.,* consecutive fishable days per week could lead to an oversupply of BFT that are landed and unable to be sold). These market gluts as a result could continue the recent trend of BFT being landed by General category quota participants but not sold to dealers.

The draft EA also describes the impacts of eliminating RFDs (Alternative C). NMFS does not prefer this alternative as it would not meet the objectives of this rulemaking inasmuch as it would result in shorter time periods when fishing is allowed and thus reduced fishing opportunity.

Lastly, the draft EA describes the impacts of two other alternatives for General category default daily retention limits as follows: maintain the current regulations at § 635.23(a)(3), which do not establish a default retention limit on open days (*i.e.,* non-RFDs) when the General category is open (Alternative D1); and establish a General category default daily retention limit of one large medium or giant BFT (*i.e.,* one fish measuring 73 inches (185 cm) curved fork length or greater) per vessel on open days when the General category is open, for all General category time periods, or unless adjusted with an inseason action, if warranted (Alternative D2). NMFS does not prefer Alternatives D1 and D2 because General category quota participants may be limited by either not knowing the retention limit until publication of an action or by having a one-fish retention limit which may slightly adversely impact those fishermen who might be able to land and retain more than one BFT during the month of June when NMFS typically increases the retention limit.

Proposed Regulatory Clarification of Dealer Activities on RFDs

Dealer reporting regulations apply to all dealers who first receive HMS products (§ 635.5(b)). Under § 635.2, ''first receive'' means to take possession for commercial purposes of any HMS or any part thereof by purchasing, trading or bartering for it from the fishing vessel owner or operator once it is offloaded, except when such possession is solely for transport. A BFT dealer or a dealer's agent must affix a dealer tag to each BFT purchased or received from a U.S. vessel immediately upon offloading the BFT (§ 635.5(b)(2)(ii)). As defined under § 635.2, a dealer tag is a numbered, flexible, self-locking ribbon issued by NMFS to a dealer for the identification of BFT sold to a permitted dealer. A dealer tag is not transferable and is usable only by the dealer to whom it is issued. *Id.* Dealer tags may not be reused once affixed to a tuna or recorded on a package, container, or report. *Id.* The dealer tag must remain on the fish until it is cut into portions. *Id.* If the BFT or BFT parts subsequently are packaged for transport for domestic commercial use or for export, the number of the dealer tag or the BSD tag must be written legibly and indelibly on the outside of any package containing the tuna. *Id.* Such tag number also must be recorded on any document accompanying the shipment of BFT for commercial use or export. *Id.*

With the recent use of RFDs, NMFS has received questions about dealer requirements relative to RFDs (*e.g.,* timing of transfer and sale to a dealer, timing of affixing a dealer tag). NMFS is also aware of situations in which permitted dealers provide an individual with dealer tags on open days and RFDs in an attempt to allow the individual to act as a dealer's agent for the purposes of tagging a commercially landed BFT when a dealer is unavailable to first receive BFT on that day. To address these ongoing questions and concerns and assist with enforcement of RFDs, NMFS is proposing clarifications to the regulations as outlined below.

Currently, on an RFD, Atlantic Tunas General category permitted vessels may not fish for (including catch-and-release or tag-and-release fishing), possess, retain, land, or sell BFT (§ 635.23(a)(2)). HMS Charter/Headboat permitted vessels with a commercial sale endorsement also are subject to these restrictions that preclude fishing commercially for BFT or selling the BFT under the General category restrictions and retention limits, but such vessels may still fish for, possess, retain, or land BFT when fishing recreationally under applicable HMS Angling category rules (§ 635.23(c)(2)). NMFS is not proposing changes to these restrictions that apply on RFDs.

Accordingly, regardless of when a BFT is landed by a General category permitted vessel or an HMS Charter/Headboat permitted vessel with a commercial sale endorsement fishing commercially for BFT under the General category restrictions and retention limits, BFT that is intended for sale must be in the possession of a permitted dealer no later than 2400 local time the day prior to an RFD (*i.e.,* the open day before an RFD). Any commercially landed BFT that is in the possession of a General category permit holder or an HMS Charter/Headboat permit holder with a commercial sale endorsement operating under the commercial restrictions and regulations at 0000 local time on an RFD is in violation of the RFD regulations at §§ 635.2 and 635.23(a). Atlantic Tunas General category and HMS Charter/Headboat permit holders that intend to sell BFT must land and transfer the BFT to a permitted dealer or dealer's agent no later than 2400 local time the day prior to an RFD. If the permit holder is unable to sell or otherwise transfer the BFT to a permitted dealer before 2400, the permit holder must follow the restrictions applicable to landed but not sold BFT specified at § 635.5(a)(3). Such permit holders may not be in possession of a BFT after 0000 local time on an RFD. NMFS is proposing changes to §§ 635.23(a) and 635.31(a) to incorporate these clarifications. To remain in compliance, NMFS encourages fishermen and dealers to plan ahead and make arrangements to land, tag, and sell BFT before midnight when the following day is an RFD. No BFT may be possessed, landed, tagged, or sold on an RFD, even if the BFT was harvested on an open day but the vessel returned to port too late to meet a dealer.

NMFS is also proposing modifications to the applicable dealer regulations in section § 635.5(b) to clarify that, on an RFD, a dealer or dealer's agent may not purchase or place a dealer tag on a BFT that is on or has been offloaded from an Atlantic Tunas General category or HMS Charter/Headboat category permitted vessel, regardless of when the fish was landed. Similarly, NMFS proposes in section § 635.5(b)(2)(ii)(A) that a dealer or dealer's agent must affix a dealer tag to each BFT purchased or first received from a U.S. vessel immediately upon offloading the BFT. On an RFD, a dealer or dealer's agent may continue to first receive, place dealer tags on, or purchase BFT from vessels with other Atlantic Tunas permits (*i.e.,* Harpoon, Longline, Trap) (§ 635.4(d)(1)). NMFS is also proposing to clarify that a dealer's agent is a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are received; and fills out dealer reports as required under § 635.5. This interpretation of a dealer's agent is consistent with the description of a dealer proxy under § 635.8(b)(4). Finally, NMFS is clarifying the meaning of ''BSD'' in the definition of a BSD tag at § 635.2 to be ''bluefin statistical document.'' The effects of these changes are primarily administrative and no environmental or economic effects are anticipated.

Classification

Pursuant to section 304(g) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the 2006 Consolidated HMS FMP and its amendments, other provisions of the Magnuson-Stevens Act, ATCA, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Although the agency has concluded that the proposed rule will not have a significant economic impact on a substantial number of small entities, in the interest of transparency an IRFA was prepared consistent with the standards in section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES** section).

Section 603(b)(1) of the RFA requires agencies to describe the reasons why the action is being considered. The purpose of this proposed rulemaking is, consistent with the objectives of the 2006 Consolidated HMS FMP and its amendments, the Magnuson-Stevens Act, ATCA, and other applicable law, to modify the process of scheduling RFDs and reestablish a General category default daily retention limit for large medium or giant BFT on open days. As effort controls, both RFDs and daily retention limits are meant to extend General category fishing opportunities through a greater portion of the General category time period subquotas, prevent overharvest of quota in any period, and improve distribution of fishing opportunities without increasing BFT mortality. Lastly, this action would clarify existing HMS dealer regulations and the definition of a BSD tag to improve the understanding of vessel and dealer restrictions and requirements for participants in the General category BFT fishery.

Section 603(b)(2) of the RFA requires agencies to state the objectives of, and legal basis for, the proposed action. The objective of this proposed rulemaking to simplify and clarify the regulatory process regarding RFDs. RFDs increase the likelihood of pacing General category landings to extend fishing opportunities through a greater portion of the General category time period subquotas. Additionally, this proposed action would clarify the General category retention limit on open days for better understanding by General category quota participants and clarify the existing dealer requirements to ensure better compliance by dealers and dealers' agents when operating on an RFD. The legal basis for the proposed rule is the Magnuson-Stevens Act.

Section 603(b)(3) of the RFA requires agencies to provide an estimate of the number of small entities to which the rule would apply. NMFS established a small business size standard of $11 million in annual gross receipts for all businesses in the commercial fishing industry, North American Industry Classification System (NAICS 11411), for RFA compliance purposes. The Small Business Administration (SBA) has established size standards for all other major industry sectors in the United States, including the scenic and sightseeing transportation (water) sector (NAICS code 487210), which includes for-hire (charter/party boat) fishing entities. The SBA has defined a small entity under the scenic and sightseeing transportation (water) sector as one with average annual receipts (revenue) of less than $14 million. NMFS considers all HMS permit holders, both commercial and for-hire, to be small entities because they had average annual receipts of less than their respective sector's standard of $11 million and $14 million. As of October 2022, there are 2,630 General category permit holders and 4,175 HMS Charter/Headboat permit holders, of which 1,873 hold HMS Charter/Headboat permits with a commercial sale endorsement.

Section 603(b)(4) of the RFA requires agencies to describe any new reporting, record-keeping, and other compliance requirements. This proposed rule does not contain any new collection of information, reporting, or record-keeping requirements. This proposed rule would modify the process of scheduling RFDs, set a schedule of RFDs for 2024 fishing year and subsequent fishing years, reestablish a General category default retention limit for BFT on open days (*i.e.,* non-RFDs), and make modifications to the HMS dealer regulations to clarify dealer and dealer agent activities on RFDs.

Under section 603(b)(5) of the RFA, agencies must identify, to the extent practicable, relevant Federal rules which duplicate, overlap, or conflict with the proposed action. Fishermen, dealers, and managers in these fisheries must comply with a number of international agreements, domestic laws, and other fishery management measures. These include, but are not limited to, the Magnuson-Stevens Act, ATCA, the High Seas Fishing Compliance Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, the Paperwork Reduction Act, and the Coastal Zone Management Act. This proposed action has been determined not to duplicate, overlap, or conflict with any Federal rules.

Under section 603(c) of the RFA, agencies must describe any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Specifically, the RFA (5 U.S.C. 603(c)(1) through (4)) lists four general categories of significant alternatives to assist an agency in the development of significant alternatives. These categories of alternatives are: (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule, or any part thereof, for small entities.

Regarding the first, second, and fourth categories, NMFS cannot establish differing compliance or reporting requirements for small entities or exempt small entities from coverage of the rule or parts of it because all of the businesses impacted by this rule are considered small entities, and thus the requirements are already designed for small entities. Regarding the third category, NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking. As described below, NMFS analyzed several different alternatives in this proposed rulemaking and provides rationales for identifying the preferred alternatives to achieve the desired objectives. NMFS did not develop alternatives for the regulatory clarifications of dealer activities on RFDs. The effects of these changes are primarily administrative and no environmental or economic effects are anticipated.

The alternatives considered and analyzed are described below. The IRFA assumes that each vessel will have similar catch and gross revenues to show the relative impact of the proposed action on vessels.

Under Alternative A, the status-quo alternative, NMFS would maintain the status quo and, as needed, would conduct annual rulemaking for RFDs. The average annual revenue for BFT landed in the General category is approximately $9.9 million based on the average ex-vessel price from 2018 through 2022 and adjusted for inflation using the GDP Deflator. Overall, RFDs do not modify the General category quota and are designed to extend fishing opportunities through a greater proportion of the time periods in which they apply by spreading fishing effort out over time. To the extent that the ex-vessel revenue for a BFT sold by a General or HMS Charter/Headboat permitted vessel (with a commercial endorsement) may be higher when a lower volume of domestically caught BFT is on the market at one time, the use of RFDs may result in some short-term increase in BFT prices, and the value of BFT for the applicable General category time periods could increase. These increases in price are unlikely to impact the overall average annual revenue. NMFS expects this status quo alternative would have neutral economic impacts as it does not expect this alternative to have new economic impacts on small entities participating in the fishery.

Under Alternative B, which NMFS is considering as four sub-alternatives (B1 is the preferred alternative), NMFS would modify the process for setting an RFD schedule. Under this alternative, NMFS would no longer conduct an annual rulemaking to set an RFD schedule but would codify the General category time periods and days in which RFDs would be applied. NMFS may waive these scheduled RFDs for the specific time periods and days on which they apply by adjusting the daily BFT retention limit from zero up to five after considering the criteria at § 635.27(a)(7). NMFS also may waive previously designated RFDs effective upon closure of the General category fishery so that persons aboard vessels permitted in the General category may conduct only tag-and-release fishing for BFT under § 635.26(a). Codification of RFDs would provide greater certainty and predictability than annual RFD rulemaking, providing some positive economic impacts to General category participants and dealers in terms of business planning. As stated above, the average annual revenue for BFT landed in the General category is approximately $9.9 million based on the average ex-vessel price from 2018 through 2022 and adjusted for inflation using the GDP Deflator. To the extent that the ex-vessel revenue for a BFT sold by a General or HMS Charter/Headboat permitted vessel with a commercial endorsement may be higher when a lower volume of domestically caught BFT is on the market at one time, the use of RFDs may result in some short-term increase in BFT prices, and the value of BFT for the applicable General category time periods could increase.

As part of Alternative B, NMFS is considering four sub alternatives specifying different days of the week when RFDs would take place to the RFD schedule for 2024 and subsequent years. In general, three of the sub alternatives (B1, B2, B3) have similar economic impacts because they establish the same number of RFDs and RFDs do not modify the General category quota and are designed to extend fishing opportunities through a greater proportion of the time periods in which they apply by spreading fishing effort out over time. To the extent that the ex-vessel revenue for a BFT sold by a General or HMS Charter/Headboat permitted vessel with a commercial endorsement may be higher when a lower volume of domestically caught BFT is on the market at one time, the use of RFDs may result in some short-term increase in BFT prices, and the value of the General category time period subquotas could increase.

Under Alternative B1, the preferred alternative, NMFS would codify a 3-day-per-week RFD schedule for every Tuesday, Friday, and Saturday from July 1 through November 30. This sub alternative could have neutral to minor beneficial economic impacts on small entities participating in the fishery beyond those currently occurring because of the ability to plan provided by the schedule of RFDs, but these short-term increases in price are unlikely to impact the overall average annual revenue.

Under Alternative B2, NMFS would codify a 3-day-per-week RFD schedule for every Thursday, Friday, and Saturday from July 1 through November 30. This sub alternative could have neutral to minor adverse economic impacts on small entities participating in the fishery as four consecutive landings days could increase the influx of BFT products into the market resulting in a short-term decrease in ex-vessel prices and revenues for General category participants. This short-term decrease in BFT prices are unlikely to impact the overall average annual revenue.

Under Alternative B3, NMFS would codify a 3-day-per-week RFD schedule for every Friday, Saturday, and Sunday from July 1 through November 30. This sub-alternative could have neutral to minor adverse economic impacts on small entities participating in the fishery as RFDs for an entire weekend could negatively impact General category participants who can only commercially fish on the weekends. Many participants are known to work in other sectors on weekdays and are only available to fish part-time on weekends. Additionally allowing four consecutive landing days could increase the influx of BFT products into the market resulting in a short-term decrease in ex-vessel prices and revenues for General category participants. This short-term decrease in BFT prices are unlikely to impact the overall average annual revenue.

Under Alternative B4, NMFS would codify a 4-day (or more)-per-week RFD schedule. This sub alternative could have minor adverse to adverse economic impacts on small entities participating in the General category fishery as four or more RFDs could, rather than extending fishing opportunities, actually limit opportunities for General category participants to land the quota and subquotas resulting in derby-like conditions. This derby-like effect could lead to an influx of BFT products into the market that could result in a decrease in ex-vessel prices and revenues for General category participants, which may negatively impact overall average revenue. In addition, variable weather conditions where General category participants may be unable to take advantage of more limited open days may lead to an underharvest of the General category quota and subquotas, and underutilization of the available fishery resource.

Under Alternative C, NMFS would remove RFDs from the existing HMS regulations and no longer set RFDs for the General category. As stated earlier in this document, the goal of RFDs are to extend General category fishing opportunities through a greater portion of the General category time periods. Without RFDs, high catch rates early in each time period would prompt NMFS to prematurely close the General category because the quota has been reached, even though fish may still be available on fishing grounds. This premature closure would mean commercial fishermen operating under the General category could not fish for, possess, retain, or sell commercial sized fish. To the extent that the ex-vessel revenue for a BFT sold by a General or HMS Charter/Headboat permitted vessel (with a commercial endorsement) may be higher when a lower volume of domestically caught BFT is on the market at one time, the use of RFDs may result in some short-term increase in BFT prices, and the value of the General category time period subquotas could increase. This alternative could have neutral to minor adverse economic impacts on small entities participating in the fishery. General category participants would likely land the subquotas over an extremely short time period increasing the influx of BFT products into the market, potentially resulting not only in an earlier closure of the fishery but also a slight decrease in ex-vessel prices and revenues for General category participants which may negatively impact overall average revenue.

Under Alternative D1, the status-quo alternative, NMFS would maintain the current regulations at § 635.23(a)(3) which do not establish a default retention limit on open days (*i.e.,* non-RFDs) when the General category is open. Under this alterative NMFS may set the General category default daily retention limit for large medium or giant BFT over a range of zero (on RFDs) to five BFT per vessel for each time period in an action published in the **Federal Register**. The daily retention limit would apply to General category permitted vessels and HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT. Overall, the use of retention limits would likely have neutral to minor beneficial economic impacts on small entities participating in the General category fishery as they could extend the length of the General category time periods when BFT can be landed, providing additional fishing opportunities while also reducing the influx of BFT products into the market which could result in a short-term increase in ex-vessel prices for General category participants. This short-term increase in BFT prices are unlikely to impact the overall average annual revenue. NMFS expects the status-quo alternative to have neutral economic impacts as it does not change existing management.

Under Alternative D2, NMFS would establish a General category default daily retention limit of one large medium or giant BFT per vessel on days when the General category is open. The daily retention limit would apply to General category permitted vessels and HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT. Retention limits would likely have neutral to minor beneficial economic impacts on small entities participating in the General category fishery as they could extend the length of the General category time periods when BFT can be landed, providing additional fishing opportunities while also reducing the influx of BFT products into the market which could result in a short-term increase in ex-vessel prices for General category participants. However, since the current practice in recent years is to set a daily retention limit of three large medium or giant BFT per vessel on days when the General category is open, starting June 1 through June 30, a default of one BFT could potentially constrain the revenue of vessels that might have been able to land two or three BFT on open days from June 1 through June 30. Although this alternative may have a short-term minor adverse impact on a limited number of individuals and their revenues (likely resulting in a short-term decrease in ex-vessel prices), NMFS expects that the overall average annual revenue would unlikely be impacted.

Under Alternative D3, the preferred alternative, NMFS would establish a General category daily retention limit of three large medium or giant BFT per vessel on open days in June and one large medium or giant BFT on days during all other months when the fishery is open (*i.e.,* January through March and July through December; the General category BFT fishery is not open during the months of April and May) unless adjusted with an inseason action. The daily retention limit would apply to General category permitted vessels and HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT. Retention limits would likely have neutral to minor beneficial economic impacts on small entities participating in the General category fishery as retention limits could extend the length of the General category time periods when BFT can be landed, providing additional fishing opportunities while also reducing the influx of BFT products into the market which could result in an increase in a short-term increase ex-vessel prices for General category participants. Implementation of these default retention limits would align with current management practices and provide additional fishing opportunities in all respective time periods. Codifying the current retention limits management practices would potentially reduce some uncertainty regarding future retention limits for General category participants and dealers and thus lead to some positive economic impacts associated with their improved business planning. NMFS expects that the overall average annual revenue would be unlikely to be impacted.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Statistics, Treaties.

Dated: February 15, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 635 as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.2, revise the definition for ''BSD tag'' to read as follows:

§ 635.2 Definitions.

* * * * *

Bluefin statistical document (BSD) tag means a numbered tag affixed to a BFT issued by any country in conjunction with a catch statistics information program and recorded on a BSD.

* * * * *

■ 3. In § 635.5, revise paragraph (b)(2)(ii)(A) to read as follows:

§ 635.5 Recordkeeping and reporting.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(A) *Affixing dealer tags.* A dealer or a dealer's agent must affix a dealer tag to each BFT purchased or first received from a U.S. vessel immediately upon offloading the BFT. A dealer's agent is a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are received; and fills out dealer reports as required under § 635.5. If a vessel is placed on a trailer, the dealer or dealer's agent must affix the dealer tag to the BFT immediately upon the vessel being removed from the water. The dealer tag must be affixed to the BFT between the fifth dorsal finlet and the caudal keel. Regardless of when the BFT was landed, on an RFD (as specified at § 635.23(a)), no dealer or dealer's agent shall purchase, first receive, or affix a dealer tag to a BFT that is on or from a vessel that has an Atlantic Tunas General category permit or HMS Charter/Headboat permit with a commercial sale endorsement.

* * * * *

■ 4. In § 635.23, revise paragraphs (a) and (c)(3) to read as follows:

§ 635.23 Retention limits for bluefin tuna.

* * * * *

(a) *General category.*

(1) No school, large school, or small medium size class BFT may be possessed, retained, landed, or sold on or from a vessel that has an Atlantic Tunas General category permit.

(2) The following default daily retention limits apply to vessels that have an Atlantic Tunas General category permit or HMS Charter/Headboat permit with a commercial sale endorsement fishing under the General category restrictions and retention limits when the General category is open and the day is not an RFD and the retention limit has not been adjusted per paragraph (a)(3) of this section.

(i) January 1 through March 31—one large medium or giant BFT, per vessel per day;

(ii) June 1 through June 30—three large medium or giant BFT per vessel per day; and

(iii) July 1 through December 30—one large medium or giant BFT per vessel per day.

(3) To provide for maximum utilization of the quota for BFT, NMFS may adjust the daily retention limit of large medium or giant BFT over a range from zero (on RFDs) to a maximum of five per vessel per the inseason criteria provided under § 635.27(a)(7).

(4) Regardless of the length of trip, no person may land, possess, or retain more than the daily retention limit in effect for that day. When the applicable retention limit for large medium or giant BFT has been reached, no person aboard such vessels may continue to fish, and the vessel must immediately proceed to port.

(5) From July 1 through November 30 of each year, every Tuesday, Friday, and Saturday is an RFD unless waived per paragraph (a)(7) of this section. On an RFD, no person who has been issued an Atlantic Tunas General category permit or issued an HMS Charter/Headboat permit and fishing commercially may fish for, possess, retain, land, or sell a BFT of any size class; or catch and release or tag and release, as specified under § 635.26(a), a BFT of any size class.

(6) NMFS may remove or establish additional designated RFDs, as appropriate, following public comment via publication in the **Federal Register**.

(7) Designated RFDs may be waived in the following circumstances.

(i) If the General category fishery is closed under § 635.28(a), any remaining RFDs for the relevant time period(s) are waived so that persons aboard vessels issued an Atlantic Tunas General category permit may conduct tag-and-release for BFT under § 635.26(a).

(ii) If, based on the criteria at § 635.27(a)(7), NMFS determines that RFDs are not necessary, NMFS may waive RFDs by increasing the daily retention limit per paragraph (a)(3) for a specific time period(s) via publication in the **Federal Register**.

* * * * *

(c) * * *

(3) When fishing other than in the Gulf of Mexico when the General

category fishery is open and no RFD is in effect, a person aboard a vessel that has been issued an HMS Charter/Headboat permit with a commercial sale endorsement may fish under either the General category restrictions and retention limits as specified in paragraphs (a)(1) through (2) and paragraphs (4) through (5) of this section or the Angling category restrictions and retention limits as specified in paragraphs (b)(1) through (3) of this section. The size category of the first BFT retained will determine whether the General category or Angling category restrictions and retention limits apply to the vessel that day.

* * * * *

■ 5. In § 635.31, revise paragraph (a)(1) and add paragraph (a)(2)(iii) to read as follows:

§ 635.31 Restrictions on sale and purchase.

(a) * * *

(1) A person who owns or operates a vessel from which an Atlantic tuna is landed or offloaded may sell such Atlantic tuna only if that vessel has a valid HMS Charter/Headboat permit with a commercial sale endorsement; a valid Atlantic Tunas General, Harpoon, Longline, or Trap category permit; or a valid HMS Commercial Caribbean Small Boat permit issued under this part and the appropriate category has not been closed as specified at § 635.28(a). No person may sell a BFT smaller than the large medium size class. No large medium or giant BFT may be sold if caught by a person aboard a vessel with an Atlantic HMS Charter/Headboat permit fishing in the Gulf of Mexico at any time or outside the Gulf of Mexico when the General category fishery has been closed (see § 635.23(c)). A person may sell Atlantic BFT only to a dealer that has a valid permit for purchasing Atlantic tunas issued under this part. A person may not sell or purchase Atlantic tunas harvested with speargun fishing gear. A person issued an Atlantic Tunas General category permit or HMS Charter/Headboat permit with a commercial sale endorsement must land, sell or transfer a BFT to a dealer that has a valid permit for purchasing Atlantic tunas no later than 2400 local time the day prior to an RFD, as specified at § 635.23(a). If that person is unable to sell or otherwise transfer the BFT to a dealer who has a dealer permit for Atlantic tunas no later than 2400, the person must follow the restrictions applicable to landed but not sold BFT specified at § 635.5(a)(3). In no case shall such person possess a BFT on an RFD.

(2) * * *

(iii) Dealers may not first receive a BFT from a vessel that has a valid Atlantic Tunas General permit or HMS Charter/Headboat permit with a commercial sale endorsement after 0000 local time on an RFD, as specified at § 635.23(a).

* * * * *

■ 6. In § 635.71, revise paragraphs (b)(13) and (29) to read as follows:

§ 635.71 Prohibitions

* * * * *

(b) * * *

(13) As a vessel with an Atlantic Tunas General category permit, fail to immediately cease fishing and immediately return to port after catching the applicable limit of large medium or giant bluefin tuna on a commercial fishing day, as specified in § 635.23(a)(4).

* * * * *

(29) As a dealer or dealer's agent, purchase, first receive, or affix a dealer tag to a BFT that is on or from a vessel that has been issued an Atlantic Tunas General category permit or HMS Charter/Headboat permit with a commercial sale endorsement, as specified in § 635.5(b)(2)(ii)(A) after 0000 local time on an RFD.

* * * * *

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 240214–0048]

RIN 0648–BM83

Fisheries of the Northeastern United States; 2024 and 2025 Summer Flounder and Scup, and 2024 Black Sea Bass Recreational Management Measures

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes Federal management measures for the summer flounder and black sea bass recreational fisheries. The implementing regulations for these fisheries require NMFS to publish recreational measures for the fishing year and to provide an opportunity for public comment. The intent of this action is to set management measures that allow the recreational fisheries to achieve, but not exceed, the recreational harvest targets and thereby prevent overfishing.

DATES: Comments must be received by March 11, 2024.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2024–0020 by the following method:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and type NOAA–NMFS–2024–0020 in the Search box (*note:* copying and pasting the FDMS Docket Number directly from this document may not yield search results). Click on the "Comment" icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Emily Keiley, Fishery Policy Analyst, (978) 281–9116, or *Emily.Keiley@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission) cooperatively manage summer flounder, scup, and black sea bass. The Council and the Commission's Management Boards meet jointly each year to recommend recreational management measures. For summer flounder and black sea bass, NMFS must implement coastwide measures or approve conservation-equivalent measures per 50 CFR 648.102(d) and 648.142(d), as soon as possible following the Council and Commission's recommendation. This action proposes establishing conservation equivalency (*i.e.,* waiving Federal recreational management measures) for both species in 2024 and for summer flounder in 2025. For scup, no adjustments to the Federal recreational management measures are proposed.

Recreational Management Measures Process

Framework Adjustment 17 to the Summer Flounder and Black Sea Bass Fishery Management Plan (FMP) and Framework Adjustment 6 to the Bluefish FMP (March 9, 2023, 88 FR 14499), referred to as the Percent Change Approach, established a new process for determining when recreational management measures (*i.e.,* possession limits, size limits, and season) should be changed and by what magnitude. The Percent Change Approach uses two factors to determine if management measures could remain status quo, could be liberalized, or must be restricted: (1) a comparison of a confidence interval (CI) around an estimate of expected harvest under status quo measures to the average recreational harvest limit (RHL) for the upcoming 2 years; and (2) biomass compared to the target level, as defined by the most recent stock assessment. These two factors also determine the appropriate degree of change, defined as a percentage change in expected harvest. Changes to recreational management measures to achieve the required percent change are evaluated by the Monitoring Committee, which consists of representatives from the Commission, the Council, state marine fishery agencies from Massachusetts to North Carolina, and NMFS. The FMP limits the choices for the types of measures to: (1) minimum and/or maximum fish size; (2) per-angler possession limit; and (3) fishing season. A description of the application of this process for each species is provided below.

The Council and the Summer Flounder, Scup and Black Sea Bass (Board) then consider the Monitoring Committee's recommendations and any public comment in making their recommendations. The Council forwards its recommendations to NMFS for review. The Commission similarly adopts recommendations for the states. NMFS is required to review the Council's recommendations to ensure that they are consistent with the targets specified for summer flounder, scup, and black sea bass in the FMP and all applicable laws and Executive Orders before ultimately implementing measures for Federal waters. Commission measures are final at the time they are adopted.

2024 and 2025 Scup Recreational Management Measures

Application of the Percent Change Approach and the bio-economic model used to evaluate recreational behavior and catch resulted in a recommended 10-percent reduction in recreational scup harvest.

According to the 2023 management stock assessment (using data through 2022), scup is not overfished, and overfishing is not occurring. Scup biomass is 246 percent of the biomass target, which puts scup in the ''very high'' (*i.e.,* biomass greater than 150 percent of the target level) biomass category in the Percent Change Approach.

The Recreational Demand Model was used to generate an estimate of expected 2024–2025 harvest under status quo (*i.e.,* 2023) measures, with an associated 80-percent confidence interval. The median coastwide projected 2024–2025 harvest under 2023 measures is 15.29 million pounds (lb) (6,935 metric ton (mt)), with an 80-percent confidence interval of 14.07–16.29 million lb (6,382–7,389 mt). The average 2024–2025 scup recreational harvest limit (RHL) of 12.51 million lb (5,674 mt) is below the lower bound of the confidence interval around expected harvest.

TABLE 1—ESTIMATED SCUP HARVEST, ASSOCIATED CONFIDENCE INTERVAL (CI), 2024–2025 AVERAGE RHL, STOCK SIZE CATEGORY, AND RESULTING PERCENT CHANGE RECOMMENDED

Estimated harvest under status quo measure	80-Percent confidence interval	Average 2024–2025 RHL	Stock size category	Recommended percent change
15.29 million lb (6,935 mt) ..	14.07–16.29 million lb (6,382–7,389 mt)	12.51 million lb (5,674 mt)	Very High	10-Percent Reduction.

In 2023, recreational management measures were implemented to achieve a 10-percent reduction in scup harvest. Preliminary harvest estimates through wave 5 suggest that harvest was approximately 37 percent lower in 2023 than the 2022 harvest through wave 5.

The current Federal recreational scup management measures are a 10-inch (25.4-centimeter (cm)) minimum fish size, a 50-fish per person possession limit, and a year-round open season. State measures are similar but vary slightly due to differences in scup availability. We are proposing no changes to the Federal recreational scup management measures for 2024 or 2025. Recreational scup harvest in Federal waters accounts for approximately 5 percent of the total recreational harvest. Because the majority of recreational scup harvest occurs in state waters, the Council and Commission determined that changes to state-waters measures would be the most effective way to achieve the required 10-percent reduction. The current Federal measures, in conjunction with changes to state-waters measures, are projected to achieve the needed 10-percent harvest reduction. The state and Federal measures will remain in place through 2025. Recreational scup measures will be reevaluated prior to the 2026 fishing year.

Summer Flounder and Black Sea Bass Conservation Equivalency

Under conservation equivalency, Federal recreational measures are waived and federally permitted party/charter vessels and all recreational vessels fishing in Federal waters are subject to the recreational fishing measures implemented by the state in which they land. This approach allows for more customized measures at a state or regional level that are likely to meet the needs of anglers in each area, compared to coastwide measures that may be advantageous to anglers in some areas and unnecessarily restrictive in others. The combination of state or regional measures must be ''equivalent'' in terms of conservation to a set of ''non-preferred coastwide measures,'' which are recommended by the Council and the Board.

The Council and Board recommend that either state- or region-specific recreational measures be developed (*i.e.,* conservation equivalency) or that coastwide management measures be implemented. Even when the Council and Board recommend conservation equivalency, the Council must specify a set of non-preferred coastwide measures that would apply if conservation equivalency is not approved for use in Federal waters.

When conservation equivalency is recommended, and following confirmation by the Commission that the proposed state or regional measures developed through its technical and policy review processes achieve conservation equivalency, NMFS waives the permit condition found at 50 CFR 648.4(b) that requires Federal permit holders to comply with the more restrictive management measures when state and Federal measures differ. In such a situation, federally permitted summer flounder and black sea bass charter/party permit holders and individuals fishing for summer flounder and black sea bass in the exclusive economic zone (EEZ) are subject to the recreational fishing measures implemented by the state in which they land, rather than the coastwide measures.

In addition, the Council and the Board must recommend precautionary default measures when recommending conservation equivalency. The Commission would require adoption of the precautionary default measures by any state that either does not submit a management proposal to the Commission's Technical Committee or that submits measures that are not conservationally equivalent to the coastwide measures.

The development of conservation-equivalency measures happens both at the Commission and individual state level. The selection of appropriate data and analytical techniques for technical review of potential state conservation-equivalent measures, and the process by which the Commission evaluates and recommends proposed conservation-equivalent measures, are wholly a function of the Commission and its individual member states. Individuals seeking information regarding the process to develop specific state or regional measures, or on the Commission process for technical evaluation of proposed measures, should contact the marine fisheries agency in the state of interest, the Commission, or both.

Once the states and regions select their final 2024 and 2025 summer flounder and 2024 black sea bass management measures through their respective development, analytical, and review processes and submit them to the Commission, the Commission will conduct further review and evaluation of the submitted proposals. The Commission will notify NMFS as to which proposals have been approved or disapproved. NMFS has no overarching authority in the development of state or Commission management measures but is an equal participant along with all the member states in the review process. NMFS neither approves nor implements individual states' measures but retains the final authority either to approve or to disapprove the use of conservation equivalency in place of the coastwide measures in Federal waters. The final combination of state and regional measures will be detailed in a letter from the Commission to the Greater Atlantic Regional Fisheries Office certifying that the combination of state and regional measures has met the conservation objectives under Addendum XXXII to the Commission's Interstate FMP. NMFS will publish its determination on 2024 and 2025 conservational equivalency as a final rule in the **Federal Register** following review of the Commission's determination and any other public comment on this proposed rule.

2024 and 2025 Summer Flounder Recreational Management Measures

This action proposes adopting conservation equivalency for summer flounder in 2024 and 2025. The non-preferred coastwide measures approved by the Council and Board are: (1) an 18.5-inch (46.99-cm) minimum fish size; (2) a 3-fish per person possession limit; and (3) an open season from May 8–September 30. These coastwide measures will be waived for 2024 and 2025 if conservation equivalency is approved through this action. However, the coastwide measures become the default management measures the year after conservation equivalency expires (in this case, 2026) until the joint process establishes either coastwide or conservation-equivalency measures for the next year.

The 2024 and 2025 precautionary default measures recommended by the Council and Board are identical to those in place for 2021 through 2023: (1) a 20.0-inch (50.8-cm) minimum fish size; (2) a 2-fish per person possession limit; and (3) an open season of July 1–August 31. If a state or region does not submit a conservationally equivalent proposal, or submits a proposal for management measures that do not meet the required level of conservation, the Commission will require the state or region to implement the precautionary default measures.

Application of the Percent Change Approach and the bio-economic model used to evaluate recreational behavior and summer flounder catch results in a required 28-percent reduction in summer flounder harvest.

The Recreational Demand Model was used to generate an estimate of expected 2024–2025 harvest under status quo (*i.e.,* 2023) measures, with an associated 80-percent confidence interval. Results suggest that under status quo (*i.e.,* 2023) measures, the median projected harvest in 2024–2025 would be 8.88 million lb (4,027 mt), with an 80-percent confidence interval of 8.10 to 9.48 million lb (3,674–4,300 mt). The 2024–2025 RHL of 6.35 million lb (2,880 mt) is less than the lower bound of this confidence interval (*i.e.,* harvest is expected to be higher than the RHL).

According to the 2023 management track stock assessment (using data through 2022), summer flounder is below the target stock size (*i.e.,* estimated at 83 percent of the spawning stock biomass target). This puts summer flounder in the ''low'' stock size category for the Percent Change Approach. This results in a required percent change in harvest equal to the difference between the harvest estimate and the 2-year average RHL, not to exceed 40 percent. For summer flounder, a 28-percent reduction is required based on the percent difference between the projected harvest of 8.88 million lb (4,027 mt) and the RHL of 6.35 million lb (2,880 mt). The resulting 2024–2025 harvest target is equal to the RHL at 6.35 million lb (2,880 mt).

TABLE 2—ESTIMATED 2024–2025 SUMMER FLOUNDER HARVEST, ASSOCIATED CONFIDENCE INTERVAL (CI), RHL, STOCK SIZE CATEGORY, AND RESULTING PERCENT CHANGE RECOMMENDED

Estimated harvest under status quo measures *	80-Percent confidence interval	2023 RHL	Stock size category	Recommended percent change
8.88 million lb (4,027 mt)	8.10–9.48 million lb (3,674–4,300 mt)	6.35 million lb (2,880 mt)	Low	28-percent Reduction.

2024 Black Sea Bass Recreational Management Measures

This action proposes the continued adoption of conservation equivalency for black sea bass in 2024. The non-preferred coastwide and precautionary default measures would be the same in 2024 as they were in 2023.

The non-preferred coastwide measures for 2024 include: (1) a 15-inch (38.1-cm) minimum size; (2) a 5-fish possession limit; and (3) a May 15–September 8 open season. The precautionary default measures would be implemented in any state or region that failed to develop adequate measures to constrain landings as required by the conservation-equivalency guidelines. The precautionary default measures in 2024 include: (1) a 16-inch (40.64-cm) minimum size; (2) a 2-fish possession limit; and (3) a June 1–August 31 open season.

Under the Percent Change Approach, recreational measures are intended to be reevaluated every other year, in conjunction with the assessment cycle. The Percent Change Approach uses the biomass from the assessment to partially inform what percent change is required. However, NMFS did not get a new black sea bass stock assessment this year as originally anticipated. A new management track assessment will be available later in 2024, and that will be used to inform 2025 specifications and potential adjustments to recreational management measures. In the absence of a new assessment this year, the Monitoring Committee, Council, and Board recommended maintaining the current 2023 measures through 2024, such that 2024 is treated as ''year two'' of the management measures. Treating 2024 as the second year in the recreational management cycle and aligning the evaluation of management measures with new assessment information is consistent with the intent of the Percent Change Approach, specifically, to create more stability in measures, and better align management measures with stock status.

Regulatory Text Correction

The definition of a recreational fishing vessel currently references the recreational scup fishery; however, the definition applies to all recreational fisheries. This action corrects this definition, removing the reference to the scup fishery.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS finds that a 15-day comment period for this action provides a reasonable opportunity for public participation in this action pursuant to the Administrative Procedure Act section 553(c) (5 U.S.C. 553(c)), while also ensuring that the final recreational management measures are in place before the majority of recreational state fisheries open. NMFS could not publish this proposed rule at an earlier date. The recreational management measure setting process begins after the Council and Board set the annual specifications. The Council's Monitoring Committee evaluate the needed changes in recreational harvest and develop recommendations for coastwide management measures for the Council and Board to consider. At the December 12–14, 2023, meeting the Council and Board voted on recommended recreational management measures. Council staff then prepared and submitted those recommendations to NMFS on January 16, 2024. The proposed rule was submitted to the Department of Commerce Office of General Council on February 8, 2024. Given the time needed to review the recommendations and prepare the Federal rulemaking, this is the earliest this rule could be published.

Additionally, stakeholder and industry groups have been involved with the development of this action and have participated in public meetings throughout the past year. Generally, stakeholders are supportive of the use of conservation equivalency because it allows states, and regions, more flexibility to set measures, instead of one set of coastwide measures that apply to all. A prolonged comment period and subsequent potential delay in implementation past the start of the recreational fishing season would be contrary to the public interest, as it could create confusion both in the recreational fisheries regarding the management measures, and with state agencies as they prepare and finalize their recreational management measures.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Council conducted an evaluation of the potential socioeconomic impacts of the proposed measures.

Entities affected by this action include recreational for-hire operations holding Federal party/charter permits for summer flounder, black sea bass, or both species. Individual anglers and for-hire vessels that are only permitted to operate in state waters are not considered ''small entities'' under the Regulatory Flexibility Act (RFA) and thus economic impacts on private recreational anglers are not discussed here.

Vessel ownership data [1] were used to identify all individuals who own fishing vessels. Vessels were then grouped according to common owners. The resulting groupings were then treated as entities, or affiliates, for purposes of identifying small and large businesses that may be regulated by this action. A business primarily engaged in fishing is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates) and has combined annual receipts not in excess of $11 million, for all its affiliated operations worldwide.

A total of 482 affiliates had a Federal party/charter permit for summer flounder, black sea bass, or both species during 2018–2022. All 482 affiliates were categorized as small businesses based on their average 2018–2022 revenues for any species. It is not possible to determine what proportion of their revenues came from fishing for an individual species. Nevertheless, given the popularity of summer flounder and black sea bass as recreational species, revenues generated from these species are likely important for many of these affiliates at certain times of the year.

These 482 small businesses had average total annual revenues of $130,921 during 2020–2022. Their average revenues from recreational for-hire fishing (for a variety of species) were $107,429. Average annual revenues from for-hire fishing ranged from less than $10,000 for 195 affiliates to over $1,000,000 for 8 affiliates. On average, recreational fishing accounted for 85 percent of the total revenues for these 482 small businesses. The contribution of summer flounder and black sea bass to these revenues is unknown.

[1] Affiliate data for 2018–2022 were provided by the NMFS Northeast Fisheries Science Center Social Sciences Branch. This is the latest affiliate data set available for analysis.

For-hire revenues are impacted by a variety of factors, including regulations and demand for for-hire trips for summer flounder, black sea bass, and other potential target species, as well as weather, the economy, and other factors. The restrictions proposed for summer flounder to achieve a 28-percent reduction in harvest could result in a decrease in for-hire trips, decreased for-hire revenues, and overall slight-negative impacts to recreational for-hire businesses, assuming all other factors that impact revenues remain unchanged. These impacts would be greater in magnitude for the for-hire businesses that depend more heavily on this species. Given that the state/regional measures for black sea bass are expected to remain unchanged from 2023, no impacts from the proposed action are expected. No changes to Federal recreational scup measures are proposed, therefore no impacts from the proposed Federal action are expected.

Because this rule will not have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: February 15, 2024.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.2, revise the definition of ‘‘Recreational fishing vessel,’’ to read as follows:

§ 648.2 Definitions.

* * * * *

Recreational fishing vessel, means any vessel from which no fishing other than recreational fishing is conducted. Charter and party boats are considered recreational fishing vessels for purposes of minimum size, season, and possession limit requirements.

* * * * *

■ 3. In § 648.104, revise paragraph (b) to read as follows:

§ 648.104 Summer flounder size requirements.

* * * * *

(b) *Party/charter permitted vessels and recreational fishery participants.* The minimum size for summer flounder is 18.5-inches (46.99-cm) total length for all vessels that do not qualify for a summer flounder moratorium permit under § 648.4(a)(3), and charter boats holding a summer flounder moratorium permit if fishing with more than three crew members, or party boats holding a summer flounder moratorium permit if fishing with passengers for hire or carrying more than five crew members, unless otherwise specified in the conservation-equivalency regulations at § 648.107. If conservation equivalency is not in effect in any given year, possession of smaller (or larger, if applicable) summer flounder harvested from state waters is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area, provided they follow the provisions at § 648.111 and abide by state regulations.

* * * * *

■ 4. In § 648.105, revise introductory paragraph to read as follows:

§ 648.105 Summer flounder recreational fishing season.

No person may fish for summer flounder in the EEZ from October 1 to May 7 unless that person is the owner or operator of a fishing vessel issued a commercial summer flounder moratorium permit, or is issued a summer flounder dealer permit, or unless otherwise specified in the conservation-equivalency measures at § 648.107. Persons aboard a commercial vessel that is not eligible for a summer flounder moratorium permit are subject to this recreational fishing season. This time period may be adjusted pursuant to the procedures in § 648.102. Possession of summer flounder harvested from state waters during this time is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area, provided they follow the provisions at § 648.111 and abide by state regulations.

■ 5. In § 648.106, revise paragraph (a) to read as follows:

§ 648.106 Summer flounder possession restrictions.

(a) *Party/charter and recreational possession limits.* No person shall possess more than three summer flounder in, or harvested from, the EEZ, per trip unless that person is the owner or operator of a fishing vessel issued a summer flounder moratorium permit, or is issued a summer flounder dealer permit, or unless otherwise specified in the conservation-equivalency measures at § 648.107. Persons aboard a commercial vessel that is not eligible for a summer flounder moratorium permit are subject to this possession limit. The owner, operator, and crew of a charter or party boat issued a summer flounder moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.102. Possession of summer flounder harvested from state waters above this possession limit is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area, provided they follow the provisions at § 648.111 and abide by state regulations.

* * * * *

■ 6. In § 648.107, revise (a) introductory paragraph to read as follows:

§ 648.107 Conservation-equivalent measures for the summer flounder fishery.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by the states of Maine through North Carolina for 2024 and 2025 are the conservation equivalent of the season, size limits, and possession limit prescribed in §§ 648.104(b), 648.105, and 648.106. This determination is based on a recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission.

* * * * *

■ 7. In § 648.151, revise (a) introductory paragraph to read as follows:

§ 648.151 Black sea bass conservation equivalency.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by the states of Maine through North Carolina for 2024 are the conservation equivalent of the season, size limits, and possession limit prescribed in §§ 648.146, 648.147(b), and 648.145(a). This determination is based on a recommendation from the Black Sea Bass Board of the Atlantic States Marine Fisheries Commission.

* * * * *

[FR Doc. 2024–03507 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 89, No. 37

Friday, February 23, 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 and other forms of information technology.

Comments regarding this information collection received by March 25, 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.

Forest Service

Title: National Woodland Owner Survey.

OMB Control Number: 0596–0078.

Summary of Collection: The main authority for this collection is the Forest and Rangeland Renewable Resources Planning Act of 1974. The Act states that the Forest Service is tasked with ''assessing the Nation's renewable resources'' and this ''must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests.'' A ''comprehensive assessment'' and a statement that ''the majority of the Nation's forests and rangeland is under private, State, and local governmental management and the Nation's major capacity to produce goods and services is based on these nonfederally managed renewable resources, the Federal Government should be a catalyst to encourage and assist these owners in the efficient long-term use and improvement of these lands and their renewable resources consistent with the principles of sustained yield multiple use''. The USDA Forest Service interprets the above provisions to call for studies aimed at understanding land ownership patterns and the attitudes and behaviors of owners and manager. A survey of owners and managers was deemed appropriate for meeting this mandate. This was reaffirmed in the 2014 Farm Bill which included a statement directing the Forest Inventory and Analysis program, which implements the National Woodland Owner Survey, to provide an ''increased understanding . . . of the over 10,000,000 family forest owners, their demographics, and the barriers to forest stewardship.''

Need and Use of the Information: Data from the National Woodland Owner Survey will be used by federal and state forestry agencies, academics, private consultants, landowners, non-governmental organizations, and other groups interested in understanding the owners and managers of forestland in the United States. This information will be used to describe ownership patterns in national reports, such as Forest Resources of the United States, 2017, and it will be included in many state-level forest resource reports. Federal and state agencies use this information to design, implement, and monitor forestry assistance programs, such as the USDA Forest Service's Forest Stewardship Program. Forestry consultants, non-governmental organizations, and the forest industry use this information to make strategic planning decisions, such as where to site new biomass processing facilities, what services to offer, or where to concentrate conservation efforts. Extension agents and other educators use the information to design educational materials and programs. University and other researchers use the data for a myriad of reasons, ranging from assessments of minority landowners to factors influencing participation rates.

Description of Respondents: Individuals or households; Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 5,630.

Frequency of Responses: Reporting: Annual.

Total Burden Hours: 4,270.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2024–03748 Filed 2–22–24; 8:45 am]

BILLING CODE 3411–15–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 25, 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.

Food and Nutrition Service

Title: Supplemental Nutrition Assistance Program (SNAP) Forms: Applications, Periodic Reporting and Notices.

OMB Control Number: 0584–0064.

Summary of Collection: The Food and Nutrition Act of 2008 (the Act), requires verification of household eligibility for SNAP benefits, confirm household eligibility throughout participation in the program, and ensure that households receive the correct benefit amount. State agencies are responsible for determining the eligibility of applicant households and issuing benefits to those households entitled to benefits under the Act.

The Federal regulations for implementing these procedures are contained in Title 7 of the Code of Federal Regulations (CFR) in 7 CFR part 271, 7 CFR part 272, and 7 CFR part 273. Part 271 contains general information and definitions, Part 272 contains requirements for participating State agencies, and Part 273 contains procedures for the certification of eligible households.

SNAP Applications, Periodic Reporting and Notices: The information collected by State agencies and electively provided by households upon initial application and then recertification (an application to continue participation in the program after an initial period of eligibility) includes (PII), as well as information about various household circumstances, such as household size and income. Applications are available in electronic and paper format. Once electively provided by households, State agencies must verify application information provided to determine their SNAP eligibility and benefit amounts, and then conduct an interview with the applicant household. Interviews are conducted in person or over the telephone. The information requirements for recertification are similar. Households with regular earned income are generally required to recertify every 12 months, although the recertification period can be as little as one month, or as long as two years, based on their circumstances.

As part of the initial application and recertification process, State agencies are required to issue certain notices to households. This include notices when an application is denied, if an application is missing information, if a household misses their interview, if household benefits will soon expire, if household benefits will change, and when household benefits officially change. Notices provided by State agencies can be issued electronically or by paper.

Following initial certification or recertification, households are required to notify (FNS) of any changes to their household status on a quarterly basis, monthly basis, or whenever a change occurs based on the reporting options chosen by their State agency, in order to maintain SNAP benefits and eligibility. Most State agencies also use simplified or periodic reporting, which requires households to report only certain changes to their status during the certification period. All reporting requirements can be completed electronically or by paper.

Retention and Custody of Records. Under recordkeeping requirements, State agencies must maintain records to ascertain whether the program is administered in compliance with Federal statutes and regulations. State agencies must maintain case records of households participating in SNAP for a period of three years from the date of origin. In addition, State agencies must also maintain the ability to search household case records in order to prevent individuals from receiving benefits in more than one household, and to prevent households from receiving benefits in more than one jurisdiction (commonly referred to as ''duplicate participation''). Records can be maintained using automated retrieval systems rather than paper records.

SNAP regulations (7 CFR 273.21) provide for a one month or two-month reporting option to determine SNAP eligibility and benefits of the affected households. This requires households and State agencies to conduct reporting more frequently than a quarterly basis. This monthly collection is necessary to ensure the integrity of the program and to meet regulatory requirements. FNS notes that while all State agencies have the option to use monthly reporting, only one State uses this reporting system, and the number of households subject to this reporting system within the State is small.

Need and Use of the Information: To determine initial and continued eligibility for SNAP, applicants must provide, and State agencies must verify, various information on household members, such as age, income, resources, allowable deductions, and Social Security Numbers (SSNs). This information must be collected to ensure households are eligible for SNAP, receive the correct benefit, and maintain eligibility for the program. This information collection is mandatory for State agencies that administer SNAP, as they are responsible for accepting applications from, and determining eligibility for, individuals and households that apply for SNAP. While a response is voluntary for households that apply for SNAP, it is required in order for them to obtain or maintain SNAP benefits from their State agency.

Description of Respondents: State, Local, Tribal Government, Individuals, Households.

Number of Respondents: 21,623,495.

Frequency of Responses: Recordkeeping; Reporting: Occasionally; Annually.

Total Burden Hours: 142,800,634.27.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–03749 Filed 2–22–24; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request; Correction

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 25, 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.

National Agricultural Statistics Service

Title: Agricultural Surveys Program.

OMB Control Number: 0535–0213.

Summary of Collection: The Department of Agriculture published a document in the **Federal Register** on February 16, 2024, 89 FR 12302, concerning a request for comments for the substantive change request on the Information Collection ''Agricultural Surveys Program'' OMB control number 0535–0213. In this FRN, it was stated Comments regarding these information collections are best assured of having their full effect if received by March 18, 2024. Written comments and recommendations for the proposed information collection should be submitted, identified by docket number 0535–0213, within 30 days of the publication of this notice by any of the following methods:

• *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.

• *E-fax:* 855–838–6382.

• *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

That statement needs to be corrected to state, ''Comments regarding these information collections are best assured of having their full effect if received by March 18, 2024. 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.

National Agricultural Statistics Service

Title: Agricultural Resource Management Phases 1 & 2 and Chemical Use Surveys.

OMB Control Number: 0535–0218.

Summary of Collection: The Department of Agriculture published a document in the **Federal Register** on February 16, 2024, 89 FR 12302, concerning a request for comments for the substantive change request on the Information Collection ''Agricultural Resource Management Phases 1 & 2 and Chemical Use Surveys'' OMB control number 0535–0218. In this FRN, it was stated Comments regarding these information collections are best assured of having their full effect if received by March 18, 2024. Written comments and recommendations for the proposed information collection should be submitted, identified by docket number 0535–0218, within 30 days of the publication of this notice by any of the following methods:

• *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.

• *E-fax:* 855–838–6382.

• *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

That statement needs to be corrected to state, ''Comments regarding these information collections are best assured of having their full effect if received by March 18, 2024. 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.

National Agricultural Statistics Service

Title: Water Use Survey.

OMB Control Number: 0535–0262.

Summary of Collection: The Department of Agriculture published a document in the **Federal Register** on February 16, 2024, 89 FR 12302, concerning a request for comments for the substantive change request on the Information Collection ''Water Use Survey'' OMB control number 0535–0262. In this FRN, it was stated Comments regarding these information collections are best assured of having their full effect if received by March 18, 2024. Written comments and recommendations for the proposed information collection should be submitted, identified by docket number 0535–0262, within 30 days of the publication of this notice by any of the following methods:

• *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.

• *E-fax:* 855–838–6382.

• *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

That statement needs to be corrected to state, ''Comments regarding these information collections are best assured of having their full effect if received by March 18, 2024. 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.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2024–03745 Filed 2–22–24; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request; Correction

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 25, 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.

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National Agricultural Statistics Service

Title: Conservation Practice Adoption Motivations Survey—Substantive Change.

OMB Control Number: 0535–0272.

Summary of Collection: The Department of Agriculture published a document in the **Federal Register** on February 6, 2024, 89 FR 8142 concerning a request for comments for the substantive change request on the Information Collection ''Conservation Practice Adoption Motivations Survey'' OMB control number 0535–0272. In this FRN, it was stated Comments regarding these information collections are best assured of having their full effect if received by March 7, 2024. Written comments and recommendations for the proposed information collection should be submitted, identified by docket number 0535–0272, within 30 days of the publication of this notice by any of the following methods:

- *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *E-fax:* 855–838–6382.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

That statement needs to be corrected to state, ''Comments regarding these information collections are best assured of having their full effect if received by March 7, 2024. 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.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2024–03739 Filed 2–22–24; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

[Docket ID FSA–2023–0023]

Revised Loan Volume Requirements for the Preferred Lender Program and the Certified Lender Program

AGENCY: Farm Service Agency, USDA.

ACTION: Notice of eligibility criteria.

SUMMARY: The Farm Service Agency (FSA) announces the revised loan volume eligibility criteria for existing lenders participating in the Preferred Lender Program (PLP) for FSA guaranteed loans or who have recently participated in PLP but lost that status due to loan volume requirements and wish to reapply. Due to decreased loan demand, many former PLP lenders, who would have otherwise been expected to have renewed their PLP status, have been unable to qualify for the renewal of their status in PLP within the past 5 years due solely to loan volume requirements. This document applies lower loan volume eligibility criteria to PLP lenders who renew their PLP status and to former PLP lenders who reapply for PLP status after losing that status because they were unable to renew due solely to decreased loan volume within the 5 years immediately preceding the date of this notice. FSA also announces the revised loan volume eligibility criteria for all lenders participating in the Certified Lender Program (CLP) for FSA guaranteed loans due to the same decreased loan demand discussed previously. This document applies less restrictive loan volume eligibility criteria to all lenders currently participating in the CLP program and lenders applying to participate in the CLP program.

DATES: *Applicable date:* February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Matthew T. Henderson; telephone: (202) 720–5847; email: *matthew.henderson2@usda.gov.* Individuals who require alternative means for communication should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Background

FSA's PLP provides qualifying lenders additional authorities and streamlined procedures under the FSA guaranteed farm loan programs. In accordance with the criteria specified in 7 CFR 762.106(c)(3), lenders who participate in the PLP must meet minimum loan volume thresholds that are established by FSA and published in a notice in the **Federal Register**. On May 5, 1999 (64 FR 24132), FSA established the current PLP loan volume threshold of 20 FSA guaranteed loans closed in the past 5 years. Also, 7 CFR 762.106(c)(1) states that lenders who participate in the PLP must meet all requirements of CLP. The CLP loan volume threshold was established on February 12, 1999 (64 FR 7404). The notice stated that lenders participating in the CLP must have closed a total of at least 10 FSA guaranteed loans and at least 5 of those FSA guaranteed loans must have been closed in the past 2 years. This resulted in the requirements of 20 loans in the past 5 years and 5 loans in the past 2 years for lenders to meet the loan volume requirements in 7 CFR 762.106(c)(1) and (3) to obtain PLP status.

FSA regulations in 7 CFR 762.106(f)(1) specify that the maximum term for PLP status cannot exceed 5 years and 7 CFR 762.106(f)(3) specifies that lenders must continue to meet FSA's eligibility requirements in order to renew their status.

Due to decreases in overall farm lending,[1] including FSA guaranteed loans, many existing PLP lenders have been unable to qualify for the renewal of their status in the PLP within the past 5 years. In most cases, the lenders whose status was not renewed were well-established PLP lenders that participated in the program for 10 years or longer with minimal to no losses. This results in experienced lenders reverting to either CLP status or Standard Eligible Lender (SEL) status. Individual guaranteed loan applications submitted under the SEL or CLP status require more supporting documentation from lenders, which takes more time for FSA to review. In turn, this results in delays for producers to receive their loan funds.

With this notice, FSA is amending the threshold required for existing PLP lenders to renew their status and for former PLP lenders whose status was not renewed due solely to a lack of loan volume within the past 5 years preceding the publication of this notice when reapplying for PLP status. This notice revises this PLP renewal threshold to 10 FSA guaranteed loans closed in the past 5 years. PLP lenders whose status was not renewed due solely to a lack of loan volume within the 5 years immediately preceding the date of this notice must re-apply for PLP status within 180 days from the publication of this notice in order to be evaluated under the revised loan volume criteria. Lenders who have never previously held PLP status, lenders who lost their PLP status more than 5 years ago, or lenders who lost their PLP status at any time for a reason other than solely a lack of loan volume must continue to meet the existing requirements of 20 loans closed in the past 5 years.

This action will allow more experienced PLP lenders to retain their status in periods of decreased application volume which will result in faster application turnaround times for both lenders and FSA staff when reviewing individual guaranteed loan applications from those lenders. Faster turnaround times ensure that producers receive their loan funds in a timely manner. Also, limiting the lower threshold of 10 FSA guaranteed loans closed in the past 5 years only to PLP lenders renewing their status and to those lenders who recently lost their PLP status ensures that it applies only to lenders with an established knowledge of FSA guaranteed loan policies, who stay abreast of any recent policy changes, as opposed to newer lender applicants who may be less experienced with FSA's guaranteed loan program requirements. Lenders who have never previously held PLP status have not yet demonstrated proficiency under the limited FSA supervision of PLP, so it is appropriate that they must still meet the higher threshold of 20 loans closed in the past 5 years to initially obtain the PLP status.

FSA's CLP provides lenders with less experience than PLP lenders the opportunity to operate under a partially streamlined origination and servicing process for FSA guaranteed loans. In accordance with the criteria specified in 7 CFR 762.106(b)(4), lenders who participate in CLP must meet minimum loan volume thresholds that are established by FSA and published in a notice in the **Federal Register**. The CLP loan volume threshold was established on February 12, 1999 (64 FR 7404). The notice stated that lenders participating in CLP must have closed a total of at least 10 FSA guaranteed loans and at least 5 of those FSA guaranteed loans must have been closed in the past 2 years.

Due to the previously cited decreases in farm lending, including FSA guaranteed loans, many existing CLP and PLP lenders have been unable to qualify for the renewal of their respective statuses in the past 5 years. In addition, FSA has found that the inconsistency in the timeframes for the loan volume requirements (currently 5 years for PLP and 2 years for CLP) has created confusion and misunderstanding for both lenders and FSA staff.

Therefore, with this notice, FSA is also amending the threshold required for existing CLP lenders to renew their status and for new lenders to qualify for CLP status. This notice revises that CLP loan volume threshold to 10 FSA guaranteed loans closed in the past 5 years. Since guaranteed loan applications submitted by CLP lenders have more strict documentation requirements than those from PLP lenders, it is appropriate that the loan volume threshold for initially obtaining CLP status is lower than that for PLP. Additionally, since the new CLP threshold of 10 loans closed in the past 5 years is more lenient than the current requirement of 5 loans closed in the past 2 years, FSA does not see a need for a different threshold for renewal of CLP status. The following table summarizes the new loan volume requirements for both the CLP and PLP programs:

Scenario	Required number of loans closed in the past 5 years
New lenders applying for CLP status	10
Existing CLP lenders renewing their status	10
New lenders applying for PLP status	20
Existing PLP lenders renewing their status (and former PLP lenders reapplying for PLP status after losing that status solely due to decreased loan volume within the 5 years preceding publication of this notice)	10

Note: Former PLP lenders reapplying for PLP status must do so within 180 days of publication of this notice for this lower threshold to apply.

Paperwork Reduction Act Requirements

In compliance with the Paperwork Reduction Act (44 U.S.C. 3501–3520), the approved information collection under OMB control number 0560–0155 does not change and have any new information collection requirements.

Environmental Review

The environmental impacts have been considered in a manner consistent with the provisions of the National

[1] See Smaller Operating Loans Slow Lending Activity—Federal Reserve Bank of Kansas City (kansascityfed.org) at *https://www.kansascityfed.org/agriculture/agfinance-updates/smaller-operating-loans-slow-lending-activity/*.

Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulation for compliance with NEPA (7 CFR part 799). The changes announced in this notice deal with the status of the guaranteed lender. Each of the underlying proposals submitted by guaranteed lenders of any status will continue to be fully considered under NEPA prior to the government guaranteeing any loans for any activities, including Categorical Exclusions, Environmental Assessments, or Environmental Impact Statements.

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Assistance Listing [2] (formerly referred to as the Catalog of Federal Domestic Assistance), to which this document applies is 10.406—Farm Operating Loans and 10.407—Farm Ownership Loans.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible agency or the USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Zach Ducheneaux,

Administrator, Farm Service Agency.

[FR Doc. 2024–03687 Filed 2–22–24; 8:45 am]

BILLING CODE 3411–E2–P

[2] See *https://sam.gov/content/assistance-listings.*

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Black Hills National Forest Advisory Board will hold a public meeting according to the details shown below. The Board is authorized under the Forest and Rangeland Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, the Federal Lands Recreation Enhancement Act, and operates in compliance with the Federal Advisory Committee Act (FACA). The purpose of the Board is to provide advice and recommendations on a broad range of forest issues such as forest plan revisions or amendments, forest health including fire, insect and disease, travel management, forest monitoring and evaluation, recreation fees, and site-specific projects having forest-wide implications.

DATES: An in-person meeting will be held on March 20, 2024, 1 p.m.–4:30 p.m. mountain standard time (MST).

Written and Oral Comments: Anyone wishing to provide in-person oral comments must pre-register by 11:59 p.m. MST on March 15, 2024. Written public comments will be accepted by 11:59 p.m. MST on March 15, 2024. Comments submitted after this date will be provided to the Forest Service, but the Board may not have adequate time to consider those comments prior to the meeting.

All board meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting will be held in person, at the U.S. Forest Service, Mystic Ranger District Office, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702. Board information and meeting details can be found at the following website: *https://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees* or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written Comments: Written comments must be sent by email to *scott.j.jacobson@usda.gov or* via mail (*i.e.,* postmarked) to Scott Jacobson, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702. The Forest Service strongly prefers comments be submitted electronically.

Oral Comments: Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. MST, March 15, 2024, and speakers can only register for one speaking slot. Oral comments must be sent by email to *scott.j.jacobson@usda.gov* or via mail (*i.e.,* postmarked) to Scott Jacobson, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702.

FOR FURTHER INFORMATION CONTACT: Shawn Cochran, Designated Federal Officer (DFO), by phone at 605–673–9201, or email at *shawn.cochran@usda.gov,* or Scott Jacobson, Committee Coordinator, at 605–440–1409 or email at *scott.j.jacobson@usda.gov.*

SUPPLEMENTARY INFORMATION: The meeting agenda will include:

1. Length of Stay on Forest discussion;
2. Mitchell Dam Project; and
3. Forest Plan Revision update.

The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Written comments may be submitted to the Forest Service up to 7 days after the meeting date listed under **DATES**.

Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, by or before the deadline, for all questions related to the meeting. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

Meeting Accommodations: The meeting location is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section or contact USDA's TARGET Center at (202) 720–2600 (voice and TTY) or USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Board. To ensure that the recommendations of the Board have taken into account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: February 15, 2024.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2024–03679 Filed 2–22–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Land Between the Lakes Advisory Board

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Land Between the Lakes Advisory Board will hold a public meeting according to the details shown below. The Board is authorized under the Charter for the Land Between the Lakes Advisory Board and operates in compliance with the Federal Advisory Committee Act (FACA). The purpose of the Board is to advise the Secretary of Agriculture on means of promoting public participation for the land and resource management plan for the Recreation Area; of providing environmental education; of developing an annual work plan for recreation and environment education areas in the Recreation Area, including the heritage program, with the nonappropriated amounts in the Land Between the Lakes Management Fund; of providing an annual forest management and harvest plan for the Recreation Area; and to establish the Land Between the Lakes Management Fund.

DATES: An in-person and virtual meeting will be held on March 27, 2024, 9 a.m.–4 p.m., central daylight time (CDT).

Written and Oral Comments: Anyone wishing to provide in-person oral comments must pre-register by 11:59 p.m. (CDT) on March 19, 2024. Written public comments will be accepted up to 11:59 p.m. (CDT) on March 19, 2024. Comments submitted after this date will be provided to the Forest Service, but the Board may not have adequate time to consider those comments prior to the meeting.

All board meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting will be held in-person at the Land Between the Lakes National Recreation Area Administration Building located at 100 Van Morgan Drive, Golden Pond, Kentucky 42211. The public may also join virtually via Microsoft Teams at: *https://landbetweenthelakes.us/about/working-together/advisory-board/* or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written Comments: Written comments must be sent by email to *SM.FS.LBL_AdBoard@usda.gov* or via mail (*i.e.,* postmarked) to Land Between the Lakes National Recreation Area, Attention: Christine Bombard, 100 Van Morgan Drive, Golden Pond, Kentucky 42211. The Forest Service strongly prefers comments be submitted electronically.

Oral Comments: Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. CDT, March 19, 2024, and speakers can only register for one speaking slot. Oral comments must be sent by email to *SM.FS.LBL_AdBoard@usda.gov* or via mail (*i.e.,* postmarked) to Land Between the Lakes National Recreation Area, Attention: Christine Bombard, 100 Van Morgan Drive, Golden Pond, Kentucky 42211.

FOR FURTHER INFORMATION CONTACT: Jim McCoy, Designated Federal Officer (DFO), by phone at 270–924–2001 or email at *SM.FS.LBL_AdBoard@usda.gov* or Christine Bombard, Board Coordinator, at 270–924–2002 or email at *SM.FS.LBL_AdBoard@usda.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Discuss natural resource management;
2. Discuss recreation; and
3. Discuss environmental education.

The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Written comments may be submitted to the Forest Service up to 7 days after the meeting date listed under **DATES**.

Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, by or before the deadline, for all questions related to the meeting. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

Meeting Accommodations: The meeting location is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section, or contact USDA's TARGET Center at (202) 720–2600 (voice and TTY) or USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Board. To ensure that the recommendations of the Board have taken into account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: February 15, 2024.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2024–03680 Filed 2–22–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request Revision and Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Hemp Production and Disposition Inquiry. Revision to burden hours will be needed due to changes in the size of the target population, sampling design, number of mailings, and/or questionnaire length.

DATES: Comments on this notice must be received by April 23, 2024 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0270, by any of the following methods:

- *Email: OMBofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *eFax:* (855) 838–6382.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph L. Parsons, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333. Copies of this information collection and related instructions can be obtained without charge from Richard Hopper, NASS—OMB Clearance Officer, at (202) 720–2206 or at *ombofficer@nass.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Hemp Production and Disposition Inquiry.

OMB Control Number: 0535–0270.

Expiration Date of Approval: August 31, 2024.

Type of Request: Intent to Seek Approval to Revise and Extend an Information Collection for 3 years.

Abstract: The primary objective of the National Agricultural Statistics Service is to prepare and issue State and national estimates of crop and livestock production, disposition, and prices. The 2018 Farm Bill requires USDA to promulgate regulations and guidelines to establish and administer a program for the production of hemp in the United States.

As defined in the 2018 Farm Bill, the term ''hemp'' means the plant species Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Delta-9 tetrahydrocannabinol, or THC, is the primary intoxicating component of cannabis. Cannabis with a THC level exceeding 0.3 percent is considered marijuana, which remains classified as a schedule I controlled substance regulated by the Drug Enforcement Administration (DEA) under the Controlled Substances Act (CSA).

Under the Agricultural Act of 2014 (2014 Farm Bill), Public Law 113–79, State departments of agriculture and institutions of higher education were permitted to produce hemp as part of a pilot program for research purposes. The authority for hemp production provided in the 2014 Farm Bill was extended by the 2018 Farm Bill, which was signed into law on December 20, 2018.

Hemp is a commodity that can be used for numerous industrial and horticultural purposes including fabric, paper, construction materials, food products, cosmetics, production of cannabinoids (such as cannabidiol or CBD), and other products.

In determining the type of data that would need to be collected and the frequency of the data collections, NASS management attended a joint meeting with representatives from the USDA's Economic Research Service (ERS), Farm Service Agency (FSA), Risk Management Agency (RMA), Agricultural Marketing Service (AMS), and the Office of the Secretary.

Authority: The data will be collected under the authority of the Domestic Hemp Production Program, which is mandated by the Agriculture Improvement Act of 2018 (2018 Farm Bill). In addition, the data will be collected under the authority of Title 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501, *et seq.*), and Office of Management and Budget regulations at 5 CFR part 1320.

All NASS employees and NASS contractors must also fully comply with all provisions of the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2018, Title III of Public Law 115–435, codified in 44 U.S.C. Ch. 35. CIPSEA supports NASS's pledge of confidentiality to all respondents and facilitates the agency's efforts to reduce burden by supporting statistical activities of collaborative agencies through designation of NASS agents, subject to the limitations and penalties described in CIPSEA. NASS uses the information only for statistical purposes and publishes only tabulated total data.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 15 minutes per response. Publicity materials and instruction sheets will account for 5 minutes of additional burden per respondent.

Respondents: Farmers and Ranchers.

Estimated Number of Respondents: 8,025.

Estimated Total Annual Burden on Respondents: 2,600 hours.

Comments: Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) 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) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological, or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, February 20, 2024.

Joseph L. Parsons,

Associate Administrator.

[FR Doc. 2024–03746 Filed 2–22–24; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–55–2023]

Foreign-Trade Zone (FTZ) 127; Authorization of Production Activity; Trucast LLC; (Turbine Wheels); Newberry, South Carolina

On October 20, 2023, Trucast LLC submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 127G, in Newberry, South Carolina.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (88 FR 73826–73827, October 27, 2023). On February 20, 2024, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: February 20, 2024.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024–03682 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–845, A–533–873, A–475–838, A–570–058, A–580–892, A–441–801, C–533–874, C–570–059]

Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From Germany, India, Italy, the People's Republic of China, the Republic of Korea, and Switzerland: Continuation of Antidumping Duty Orders and Countervailing Duty Orders

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) orders on certain cold-drawn mechanical tubing of carbon and alloy steel (cold-drawn mechanical tubing) from the Federal Republic of Germany (Germany), India, Italy, the People's Republic of China (China), the Republic of Korea (Korea), and Switzerland, and the countervailing duty (CVD) orders on cold-drawn mechanical tubing from India and China would likely lead to a continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of these AD and CVD orders.

DATES: Applicable February 14, 2024.

FOR FURTHER INFORMATION CONTACT: Emily Halle or Brendan Quinn, AD/CVD Operations, Office V and Office III, respectively, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0176 or (202) 482–2923, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2018, Commerce published in the **Federal Register** the CVD orders on cold-drawn mechanical tubing from India and China, and on June 11, 2018, Commerce published in the **Federal Register** and the AD orders on cold-drawn mechanical tubing from Germany, India, Italy, China, Korea, and Switzerland.[1] On January 3, 2023, the ITC instituted,[2] and Commerce initiated,[3] the first sunset review of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its reviews, Commerce determined that revocation of the *Orders* would likely lead to continuation or recurrence of dumping and/or countervailable subsidies, and therefore, notified the ITC of the magnitude of the margins of dumping and net countervailable subsidy rates likely to prevail should the *Orders* be revoked.[4]

On February 14, 2024, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Orders

The scope of the *Orders* covers cold-drawn mechanical tubing of circular cross-section, 304.8 mm or more in length, in actual outside diameters less than 331 mm, and regardless of wall thickness, surface finish, end finish or industry specification. The subject cold-drawn mechanical tubing is a tubular product with a circular cross-sectional shape that has been cold-drawn or otherwise cold-finished after the initial tube formation in a manner that involves a change in the diameter or wall thickness of the tubing, or both. The subject cold-drawn mechanical tubing may be produced from either welded (*e.g.,* electric resistance welded, continuous welded, *etc.*) or seamless

[1] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China and India: Countervailing Duty Orders,* 83 FR 4637 (February 1, 2018); *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China, the Federal Republic of Germany, India, Italy, the Republic of Korea, and Switzerland: Antidumping Duty Orders; and Amended Final Determinations of Sales at Less Than Fair Value for the People's Republic of China and Switzerland,* 83 FR 26962 (June 11, 2018) (collectively, *Orders*).

[2] *See Cold-Drawn Mechanical Tubing from China, Germany, India, Italy, South Korea, and Switzerland; Institution of Five-Year Reviews,* 88 FR 114 (January 1, 2023).

[3] *See Initiation of Five-Year (Sunset) Review,* 88 FR 63, 64 (January 3, 2023).

[4] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China, the Federal Republic of Germany, India, Italy, the Republic of Korea, and Switzerland: Final Results of the Expedited First Sunset Review of the Antidumping Duty Orders,* 88 FR 16587 (March 20, 2023); *see also Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Final Results of Expedited First Sunset Review of Antidumping Duty Order,* 88 FR 19612 (April 3, 2023) (while the title of this **Federal Register** notice indicates the AD order, this **Federal Register** notices is in fact for the CVD order); and *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order,* 88 FR 24386 (April 20, 2023).

[5] *See Cold-Drawn Mechanical Tubing from China, Germany, India, Italy, South Korea, and Switzerland,* 89 FR 11315 (February 14, 2024).

(*e.g.,* pierced, pilgered or extruded, *etc.*) carbon or alloy steel tubular products. It may also be heat treated after cold working. Such heat treatments may include, but are not limited to, annealing, normalizing, quenching and tempering, stress relieving or finish annealing. Typical cold-drawing methods for subject merchandise include, but are not limited to, drawing over mandrel, rod drawing, plug drawing, sink drawing and similar processes that involve reducing the outside diameter of the tubing with a die or similar device, whether or not controlling the inside diameter of the tubing with an internal support device such as a mandrel, rod, plug or similar device. Other cold-finishing operations that may be used to produce subject merchandise include cold-rolling and cold-sizing the tubing.

Subject cold-drawn mechanical tubing is typically certified to meet industry specifications for cold-drawn tubing including but not limited to:

(1) American Society for Testing and Materials (ASTM) or American Society of Mechanical Engineers (ASME) specifications ASTM A–512, ASTM A–513 Type 3 (ASME SA513 Type 3), ASTM A–513 Type 4 (ASME SA513 Type 4), ASTM A–513 Type 5 (ASME SA513 Type 5), ASTM A–513 Type 6 (ASME SA513 Type 6), ASTM A–519 (cold-finished);

(2) SAE International (Society of Automotive Engineers) specifications SAE J524, SAE J525, SAE J2833, SAE J2614, SAE J2467, SAE J2435, SAE J2613;

(3) Aerospace Material Specification (AMS) AMS T–6736 (AMS 6736), AMS 6371, AMS 5050, AMS 5075, AMS 5062, AMS 6360, AMS 6361, AMS 6362, AMS 6371, AMS 6372, AMS 6374, AMS 6381, AMS 6415;

(4) United States Military Standards (MIL) MIL–T–5066 and MIL–T–6736;

(5) foreign standards equivalent to one of the previously listed ASTM, ASME, SAE, AMS or MIL specifications including but not limited to:

(a) German Institute for Standardization (DIN) specifications DIN 2391–2, DIN 2393–2, DIN 2394–2);

(b) European Standards (EN) EN 10305–1, EN 10305–2, EN 10305–4, EN 10305–6 and European national variations on those standards (*e.g.,* British Standard (BS EN), Irish Standard (IS EN) and German Standard (DIN EN) variations, *etc.*);

(c) Japanese Industrial Standard (JIS) JIS G 3441 and JIS G 3445; and

(6) proprietary standards that are based on one of the above-listed standards.

The subject cold-drawn mechanical tubing may also be dual or multiple certified to more than one standard. Pipe that is multiple certified as cold-drawn mechanical tubing and to other specifications not covered by this scope, is also covered by the scope of these *Orders* when it meets the physical description set forth above.

Steel products included in the scope of these *Orders* are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

For purposes of these scopes, the place of cold-drawing determines the country of origin of the subject merchandise. Subject merchandise that is subject to minor working in a third country that occurs after drawing in one of the subject countries including, but not limited to, heat treatment, cutting to length, straightening, nondestructive testing, deburring or chamfering, remains within the scope of the *Orders.*

All products that meet the written physical description are within the scope of the *Orders* unless specifically excluded or covered by the scope of an existing order. Merchandise that meets the physical description of cold-drawn mechanical tubing above is within the scope of the *Orders* even if it is also dual or multiple certified to an otherwise excluded specification listed below. The following products are outside of, and/or specifically excluded from, the scope of these *Orders:*

(1) Cold-drawn stainless steel tubing, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(2) products certified to one or more of the ASTM, ASME or American Petroleum Institute (API) specifications listed below:

ASTM A–53;
ASTM A–106;
ASTM A–179 (ASME SA 179);
ASTM A–192 (ASME SA 192);
ASTM A–209 (ASME SA 209);
ASTM A–210 (ASME SA 210);
ASTM A–213 (ASME SA 213);
ASTM A–334 (ASME SA 334);
ASTM A–423 (ASME SA 423);
ASTM A–498;
ASTM A–496 (ASME SA 496);
ASTM A–199;
ASTM A–500;
ASTM A–556;
ASTM A–565;
API 5L; and
API 5CT

except that any cold-drawn tubing product certified to one of the above excluded specifications will not be excluded from these scopes if it is also dual- or multiple-certified to any other specification that otherwise would fall within the scope of these *Orders.*

The products subject to these *Orders* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.31.3000, 7304.31.6050, 7304.51.1000, 7304.51.5005, 7304.51.5060, 7306.30.5015, 7306.30.5020, 7306.50.5030. Subject merchandise may also enter under numbers 7306.30.1000 and 7306.50.1000. The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of these *Orders* is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to a continuation or a recurrence of dumping and/or countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be February 14, 2024. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year review of the *Orders* no later than 30 days prior to the fifth anniversary of the date of the last determination by the ITC.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return, destruction, or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

These five-year sunset reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: February 16, 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. 2024–03684 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

[A–580–881]

Certain Cold-Rolled Steel Flat Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) finds that certain producers/exporters of cold-rolled steel flat products (cold-rolled steel) from the Republic of Korea (Korea) subject to this administrative review made sales of subject merchandise at less than normal value during the period of review (POR), September 1, 2021, through August 31, 2022.

DATES: Applicable February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Caroline Carroll, 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) 482–4948.

SUPPLEMENTARY INFORMATION:

Background

On October 5, 2023, Commerce published the *Preliminary Results.*[1] On January 3, 2024, we extended the deadline for these final results to no later than February 16, 2024.[2] For a complete description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[3] 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[4]

The product covered by the *Order* is cold-rolled steel from Korea. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of the Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum.[5] A list of the issues which parties raised, and to which we respond in the Issues and Decision Memorandum, is attached 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 System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the margin calculations for Hyundai Steel Company (Hyundai) and POSCO/POSCO International Corporation (collectively, POSCO).[6]

Rate for Respondents Not Selected for Individual Examination

Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the weighted-average dumping margin for respondents that were not individually examined in an administrative review. Section 735(c)(5)(A) of the Act provides that the all-others rate should be calculated by weight averaging the weighted-average dumping margins determined for individually examined respondents, excluding rates that are zero, *de minimis,* or based entirely on facts available.

The final weighted-average dumping margins calculated for Hyundai and POSCO are not zero, *de minimis,* or based entirely on facts available. Therefore, consistent with section 735(c)(5)(A) of the Act, we calculated a weighted-average dumping margin for KG Dongbu Steel Co., Ltd. (Dongbu) using the calculated rates of the mandatory respondents, Hyundai and POSCO, which are not zero or *de minimis,* or determined entirely on the basis of facts available.[7]

Final Results of Review

As a result of this review, we determine the following estimated weighted-average dumping margins for the period September 1, 2021, through August 31, 2022:

Producer or exporter	Weighted-average dumping margin (percent)
Hyundai Steel Company	0.88
POSCO/POSCO International Corporation	2.70
KG Dongbu Steel Co., Ltd	2.13

Disclosure

Commerce intends to disclose to interested parties the calculations performed for Hyundai and POSCO in connection with these final results of review within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Assessment Rate

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

Because Hyundai and POSCO reported the entered value of their U.S. sales, we calculated importer-specific *ad valorem* assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales to the total entered value of such sales.[8] Where an importer–specific *ad valorem* assessment rate is zero or *de minimis,* or a respondent's weighted-average dumping margin is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[9]

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[1] *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 69116 (October 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Extension of Deadline for Final Results of 2021–2022 Antidumping Duty Administrative Review,'' dated January 3, 2024.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Certain Cold-Rolled Steel Flat Products from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Certain Cold Rolled Steel Flat Products from Brazil, India, the Republic of Korea, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Brazil and the United Kingdom and Antidumping Duty Orders,* 81 FR 64432 (September 20, 2016) (*Order*).

[5] *Id.*

[6] For a full description of changes, *see* Issues and Decision Memorandum.

[7] *See* Memorandum ''Calculation of the Review-Specific Average Rate for the Final Results,'' dated concurrently with this notice.

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

[9] *See* 19 CFR 351.212(c)(2).

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by Hyundai or POSCO for which the reviewed companies did not know that the merchandise they sold to the intermediary (*i.e.,* a reseller, trading company, or exporter) was destined for the United States.[10] In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[11]

For Dongbu, the company that was not selected for individual examination, we assigned an assessment rate based on the weighted average of the cash deposit rates calculated for Hyundai and POSCO, excluding any which are zero, *de minimis,* or determined entirely on the basis of facts available.[12]

Cash Deposit Instructions

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on, or after, the date of publication of this notice in the **Federal Register**, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies listed above will be equal to the weighted-average dumping margin established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated or reviewed companies not covered in this review, the cash deposit rate will continue to be the company-specific cash deposit rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, then the cash deposit rate will be the rate established for the most recent segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 20.33 percent, the all-others rate established in the LTFV investigation.[13] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

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

Notification of Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 16, 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

I. Summary
II. Background
III. Changes Since the *Preliminary Results*
IV. Discussion of the Issues
- Comment 1: Comparing Hyundai's Home Market Sales of Non-Prime Merchandise to U.S. Sales of Prime Merchandise
- Comment 2: Whether Commerce Should Apply its Quarterly Cost Methodology to Hyundai
- Comment 3: Whether to Include Hyundai's Home Market and U.S. Billing Adjustments in its Margin Calculation
- Comment 4: Whether to Increase U.S. Price by the Amount of Countervailing Duties Imposed to Offset Hyundai's Export Subsidy
- Comment 5: Ministerial Errors in POSCO's Margin Calculation

V. Recommendation

[FR Doc. 2024–03741 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–DS–P

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

[11] *See Order,* 81 FR at 64434.

[12] *See* section 735(c)(5)(A) of the Act.

[13] *See Order,* 81 FR at 64434.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–839]

Steel Propane Cylinders From Thailand: Final Results of Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) finds that Sahamitr Pressure Container Plc. (also known as Sahamitr Pressure Container Public Company Limited) (SMPC) made sales of subject merchandise in the United States at prices below normal value during the period of review (POR) August 1, 2021, through July 31, 2022.

DATES: Applicable February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Samuel Brummitt, 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) 482–7851.

SUPPLEMENTARY INFORMATION:

Background

On September 6, 2023, Commerce published the preliminary results of the 2021–2022 administrative review of the antidumping duty order on steel propane cylinders from Thailand and invited interested parties to comment.[1] On December 12, 2023, we extended the deadline for these final results to February 16, 2024.[2] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3]

Commerce conducted this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [4]

The merchandise covered by this *Order* is steel propane cylinders from

[1] *See Steel Propane Cylinders from Thailand: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 60921 (September 6, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated December 12, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Steel Propane Cylinders from Thailand; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Steel Propane Cylinders from the People's Republic of China and Thailand: Amended Final

Thailand. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised, and to which we responded in the Issues and Decision Memorandum, is attached as an 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 a review of the record and comments received from interested parties, we made certain adjustments to the margin calculations for these final results, as detailed in the Issues and Decision Memorandum.

Final Results of Review

As a result of this administrative review, Commerce determines that the following weighted-average dumping margin exists for the period August 1, 2021, through July 31, 2022:

Exporter/producer	Weighted-average dumping margin (percent)
Sahamitr Pressure Container Plc	2.17

Disclosure

Commerce intends to disclose the calculations performed to interested parties for these final results within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, 19 CFR 351.213, and 19 CFR 351.212(b), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review. Pursuant to 19 CFR 351.212(b)(1), where the respondent reported the entered value of its U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where the respondent did not report entered value, we calculated a per-unit assessment rate for each importer by dividing the total amount of dumping calculated for the examined sales made to that importer by the total quantity associated with those sales. To determine whether an importer-specific, per-unit assessment rate is *de minimis,* in accordance with 19 CFR 351.106(c)(2), we also calculated an importer-specific *ad valorem* ratio based on estimated entered values. Where the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Commerce's ''reseller policy'' will apply to entries of subject merchandise during the POR produced by SMPC for which the reviewed company did not know that the merchandise it sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[5]

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). The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise under review and for future cash deposits of estimated antidumping duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for SMPC will be equal to the weighted-average dumping margin that is established in the final results of this review (except if that rate is *de minimis,* in which situation the cash deposit rate will be zero); (2) for merchandise exported by a company not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer has been covered in a prior complete segment of this proceeding, the cash deposit rate will be the company-specific rate established in the completed segment for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers and exporters will continue to be 10.77 percent *ad valorem,*[6] the all-others rate established in the less-than-fair-value investigation. 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 the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

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

Determination of Sales at Less Than Fair Value and Antidumping Duty Orders, 84 FR 41703 (August 15, 2019) (*Order*).

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

[6] *See Steel Propane Cylinders from Thailand: Final Determination of Sales at Less Than Fair Value,* 84 FR 29168, 29169 (June 21, 2019).

requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: February 16, 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

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
Comment 1: Whether Commerce Should Remove Certain Non-Propane Cylinders from SMPC's Home Market Sales Database
Comment 2: Whether to Revise the Capping of U.S. Freight Revenue
Comment 3: Differential Pricing Analysis
VI. Recommendation

[FR Doc. 2024–03740 Filed 2–22–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–823]

Utility Scale Wind Towers From Spain: Rescission 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) is rescinding the administrative review of the antidumping duty (AD) order on utility scale wind towers (wind towers) from Spain for the period of review (POR) August 1, 2022, through July 31, 2023.

DATES: Applicable February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Christopher Maciuba, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0413.

SUPPLEMENTARY INFORMATION:

Background

On August 26, 2020, Commerce published in the **Federal Register** the AD order on wind towers from Spain.[1] On August 2, 2023, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the AD order on wind towers from Spain.[2] On August 31, 2022, the Wind Tower Trade Coalition (the petitioner) submitted a timely request that Commerce conduct an administrative review.[3]

On October 18, 2023, Commerce published in the **Federal Register** a notice of initiation of administrative review with respect to imports of wind towers from Spain in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i).[4] This review covers subject merchandise exported and/or produced by Acciona Energia, Acciona Windpower S.A., Industrial Barranquesa, S.A., Gamesa Energy Transmission S.A., GE Renewable Energy, GRI Renewable Industries S.L., Haizea Wind Group, Iberdrola, S.A., Iberdrola Renovables Energia S.A., Nordex SE, Nordex Energy Spain S.A., Siemens Gamesa Renewable Energy Inc., Vestas Eolica S.A.U., Vestas Eolica, S.A., Vestas Manufacturing Spain S.L.U., Vestas Control Systems Spain S.L.U., Vestas Wind Systems A/S, and Windar Renovables, S.A.[5] On October 24, 2023, we placed on the record U.S. Customs and Border Protection (CBP) data for entries of wind towers from Spain during the POR, showing no reviewable POR entries and invited interested parties to comment.[6]

On October 31, 2023, the petitioner filed comments with respect to the CBP data.[7] On November 17, 2023, Acciona Generación Renovable, S.A. (formerly Acciona Energia, S.A.) (Acciona) submitted a no-shipment certification, indicating that it had no exports or sales of subject merchandise to the United States during the POR.[8]

On December 7, 2023, Commerce notified all interested parties of its intent to rescind the instant review because there were no reviewable, suspended entries of subject merchandise by any of the companies subject to this review during the POR and invited interested parties to comment.[9] We did not receive any comments.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), it is Commerce's practice to rescind an administrative review of an AD order when there are no reviewable entries of subject merchandise during the POR for which liquidation is suspended.[10] Normally, upon completion of an administrative review, the suspended entries are liquidated at the AD assessment rate calculated for the review period.[11] Therefore, for an administrative review to be conducted, there must be a reviewable, suspended entry that Commerce can instruct CBP to liquidate at the AD assessment rate calculated for the review period.[12] As noted above, there were no entries of subject merchandise for the companies subject to this review during the POR. Accordingly, in the absence of suspended entries of subject merchandise during the POR, we are hereby rescinding this administrative review, in its entirety, in accordance with 19 CFR 351.213(d)(3).

Assessment

Commerce will instruct CBP to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

[1] *See Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Antidumping Duty Orders,* 85 FR 52546 (August 26, 2020) (*Order*), corrected in *Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Notice of Correction to the Antidumping Duty Orders,* 85 FR 56213 (September 11, 2020).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 88 FR 50840 (August 2, 2023).

[3] *See* Petitioner's Letter, ''Request for Administrative Review,'' dated August 31, 2023.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 71829 (October 18, 2023).

[5] *Id.,* 88 FR at 71832.

[6] *See* Memorandum, ''Release of Customs and Border Protection Data Query,'' dated October 24, 2023.

[7] *See* Petitioner's Letter, ''Comments on CBP Data and Respondent Selection'' dated October 31, 2023.

[8] *See* Acciona's Letter, ''No Shipment Certification,'' dated November 17, 2023.

[9] *See* Memorandum, ''Notice of Intent to Rescind Review,'' dated December 7, 2023.

[10] *See, e.g., Dioctyl Terephthalate from the Republic of Korea: Rescission of Antidumping Administrative Review; 2021–2022,* 88 FR 24758 (April 24, 2023); *see also Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany: Recission of Antidumping Administrative Review; 2020–2021,* 88 FR 4154 (January 24, 2023).

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

[12] *See* 19 CFR 351.213(d)(3).

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO, in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: February 16, 2024.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–03742 Filed 2–22–24; 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; Alaska Halibut Fisheries: Charter

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 28, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration (NOAA), Commerce.

Title: Alaska Halibut Fisheries: Charter.

OMB Control Number: 0648–0575.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 560.

Average Hours per Response: Application for Annual Registration of CHPs: 15 minutes; Application for Military CHP: 30 minutes; Application for Transfer of CHP: 2 hours; Application for Transfer (Lease) Between IFQ and GAF: 1.5 hours; GAF Landing Report: 5 minutes; GAF Permit Log: 2 minutes; ADF&G Saltwater Sport Fishing Charter Trip Logbook: 4 minutes; and Appeals: 4 hours.

Total Annual Burden Hours: 3,876 hours.

Needs and Uses: The National Marine Fisheries Service (NMFS), Alaska Region, is requesting extension of a currently approved information collection for the Pacific halibut charter fishery off Alaska.

Management of and regulations for Pacific halibut (*Hippoglossus stenolepis*) in Alaska are developed on the international, Federal, and state levels by the International Pacific Halibut Commission (IPHC), the North Pacific Fishery Management Council, the NMFS Alaska Region, and the State of Alaska Department of Fish and Game (ADF&G). The IPHC and NMFS manage fishing for Pacific halibut through regulations established under authority of the Convention between the United States Halibut Fishery of the Northern Pacific Ocean and Bering Sea, the Northern Pacific Halibut Act of 1982 (16 U.S.C. 773), and section 303(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

NMFS manages the charter halibut fishery off Alaska under the Charter Halibut Limited Access Program (CHLAP; 75 FR 554, January 5, 2010) and the Pacific Halibut Catch Sharing Plan (CSP; 78 FR 75844, December 12, 2013). This information collection is necessary for NMFS to manage and administer the charter halibut fishery under the CHLAP and the CSP. Regulations that implement this information collection are at 50 CFR 300 subpart E and 50 CFR 679.5(l)(7). Information on the CHLAP and the CSP is on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/alaska/resources-fishing/sport-halibut-fishing-alaska.*

The CHLAP established new Federal Charter Halibut Permits (CHPs) for operators in the sport charter halibut fishery in IPHC regulatory Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). All charter halibut vessel operators in Areas 2C and 3A with clients on board must have a valid CHP on board during every charter vessel fishing trip. As the period to obtain a CHP, other than a military CHP or community CHP, ended in 2010, CHPs may now only be obtained through transfer. This information collection contains the applications used to annually register CHPs, to apply for new military CHPs, and to transfer CHPs. The application for a community CHP is approved under OMB Control Number 0648–0665. Information collected by these applications includes permit holder information or applicant information, and depending on the form, may include CHP identification, CHP ownership information and affiliation, a survey question on the use of the CHP, and transaction information for transfer of a CHP.

The CSP authorizes annual transfers of commercial halibut individual fishing quota (IFQ) as guided angler fish (GAF) to qualified CHP holders for harvest by charter vessel anglers in Area 2C or 3A. GAF enables CHP holders to lease a limited amount of IFQ from commercial quota shareholders to allow charter vessel anglers to harvest halibut in addition to, or instead of, the halibut harvested under the daily bag limit for charter anglers.

This information collection includes the application used to transfer Area 2C or 3A commercial halibut IFQ to a CHP holder for use as GAF or for the CHP holder to return unused GAF to the IFQ permit holder from which it was obtained. Information collected by this application includes permit holder information, IFQ permit information, CHP information, GAF permit information, and transaction information. NMFS, on approving the transfer of IFQ to GAF, issues a GAF permit, which authorizes the holder to allow charter vessel anglers to retain GAF halibut caught in the IPHC regulatory area specified on the permit.

This information collection also includes the GAF landing report and the GAF permit log. The GAF landing report is submitted by GAF permit holders and collects information on each GAF halibut retained by an angler on a charter vessel fishing trip in Area 2C or 3A. The GAF permit log is printed on the back of each GAF permit and is used by the permit holder to record the GAF landing report confirmation number and information on GAF halibut after a trip in which GAF halibut were retained.

If a GAF permit holder is unable to submit the GAF landings report electronically due to hardware, software, or internet failure for a period longer than the required reporting time, or a correction must be made to information already submitted, the permit holder must contact NOAA OLE by telephone. This information collection is revised to include a form for the non-electronic (manual) GAF landing report. This form will help streamline the submission of manual landing information for GAF permit holders and NOAA Office for Law Enforcement, and help ensure the correct information is submitted on time. The time and cost burden for the manual GAF landing report form remains the same as the previous estimates for the GAF landing report because the estimates allow for differences needed to complete and submit the report.

This information collection includes the logbook reporting requirements for the charter halibut fishery. The charter halibut sector in Areas 2C and 3A is managed to charter catch limits established under the CSP. Charter operators are required to record all halibut caught and kept by charter vessel anglers in the ADF&G Saltwater Charter Logbook. Logbook reporting is the basis for estimating annual charter harvests of halibut relative to the charter catch limits.

Affected Public: Individuals or households; Business or other for-profit organizations.

Frequency: Annually; As needed.

Respondent's Obligation: Required to Obtain or Retain Benefits, Mandatory.

Legal Authority: The Northern Pacific Halibut Act of 1982 (16 U.S.C. 773c); Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

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 0648–0575.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–03747 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD698]

Pacific Island Pelagic Fisheries; False Killer Whale Take Reduction Plan; New Trigger Value for Southern Exclusion Zone Closure

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

ACTION: Notice.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) of 1972, and the False Killer Whale Take Reduction Plan, NMFS is publishing a new trigger value for the Southern Exclusion Zone (SEZ) closure. The new trigger is three observed mortality or serious injuries of false killer whales incidental to the deep-set longline fishery within the U.S. Exclusive Economic Zone.

FOR FURTHER INFORMATION CONTACT: Elena Duke, NMFS Pacific Islands Region, (808) 725–5134, *elena.duke@noaa.gov;* or Kristy Long, NMFS Office of Protected Resources, (301) 427–8402, *Kristy.Long@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 118(f) of the MMPA, on December 31, 2012, NMFS implemented the False Killer Whale Take Reduction Plan (Plan). The Plan establishes a framework to reduce the level of incidental mortality and serious injury (M/SI) of the Hawaii pelagic and Hawaii insular stocks of false killer whales in the Hawaii longline fisheries (77 FR 71260; November 29, 2012).

In accordance with the Plan, NMFS issued regulations to establish the SEZ (50 CFR 229.37(d)(2)). These regulations require NMFS to close the SEZ to deep-set longline fishing when a certain number (trigger) of false killer whale M/SI are observed in the deep-set longline fishery in the U.S. Exclusive Economic Zone (EEZ). As described in the Plan regulations, the SEZ is bounded on the east at 154°30′ W longitude, on the west at 165° W longitude, on the north by the boundaries of the Main Hawaiian Islands Longline Fishing Prohibited Area and Papahānaumokuākea Marine National Monument, and on the south by the EEZ boundary (see fig. 1). The SEZ trigger is defined in § 229.37(e)(2) as the larger of either of these 2 values: (i) 2 observed M/SI of false killer whales within the EEZ around Hawaii, or (ii) the smallest number of observed false killer whale M/SI that, when extrapolated based on the percentage observer coverage in the deep-set longline fishery for that year, exceeds the Hawaii pelagic false killer whale stock's potential biological removal (PBR). For the first year of the Plan's implementation, NMFS established the trigger value as 2 observed false killer whale M/SI by the deep-set longline fishery within the EEZ around Hawaii (77 FR 71259, November 29, 2012), based on the PBR level of 9.1 for the Hawaii pelagic stock of false killer whales, as calculated in the draft 2012 Stock Assessment Report (SAR) (Carretta *et al.,* 2012). The Plan specifies the trigger value (2) will remain valid until NMFS publishes a new trigger value in the **Federal Register** (§ 229.37(e)(1)). NMFS published a new trigger value on December 15, 2020 following a change in the abundance estimate, which changed the trigger value from 2 to 4 observed M/SI of false killer whales (85 FR 81184, December 15, 2020).

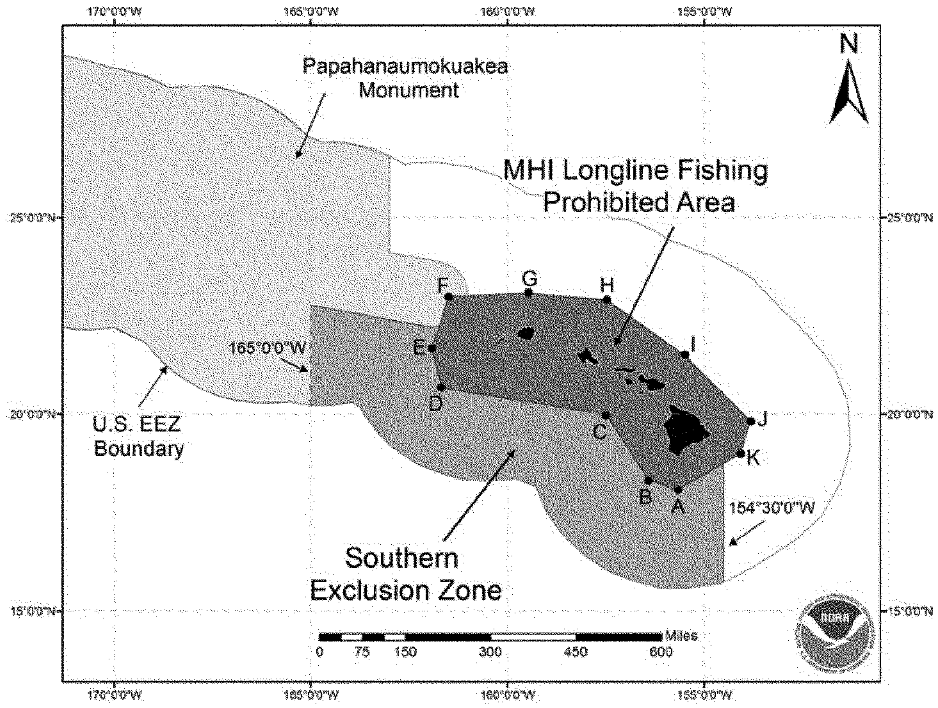

Figure 1. Southern Exclusion Zone.

NMFS set the annual observer coverage rate in the Hawaii deep-set longline fishery for 2024 at 13.5 percent. Observer coverage was previously set at 20 percent, but has been reduced due to increased program costs and available funding for the observer program. The abundance estimate for the Hawaii pelagic stock of false killer whales is 2,086 (CV = 0.35) individuals in the Hawaii EEZ. The minimum population abundance (N_{min}), used for calculating PBR, is 1,567 animals within the EEZ around Hawaii.[1] The PBR published in the final 2022 SAR for this stock within the EEZ is calculated as 16 pelagic false killer whales (Carretta *et al.,* 2023). Based on the current published PBR of 16 whales for the Hawaii pelagic stock of false killer whales within the EEZ, and the 2024 annual observer coverage (13.5 percent), the trigger value is calculated as 3 observed M/SI of false killer whales. This value is smaller than the currently published trigger value because of the decrease in the observer coverage rate. Therefore, NMFS sets the trigger value for SEZ closure at three observed false killer whale M/SI in the deep-set longline fishery in the EEZ around Hawaii.

[1] At a March 2023 False Killer Whale Take Reduction Team meeting, NMFS introduced a False Killer Whale Management Area that included areas inside and outside the EEZ around Hawaii with a PBR calculated to be 33 pelagic false killer whales. The False Killer Whale Management Area and associated PBR are not yet available for current management use. NMFS is using the PBR (16) from the 2022 final SAR to revise the SEZ trigger.

Information on the Plan is available on the internet at the following address: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/false-killer-whale-take-reduction.* Copies of reference materials may also be obtained from the NMFS Pacific Islands Regional Office, Protected Resources Division, 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

This notice serves as a notification to fishermen, the fishing industry, and the general public that the SEZ closure trigger value is three observed false killer whale M/SI in the deep-set longline fishery in the EEZ around Hawaii.

References

Carretta, J.V., E. Oleson, D.W. Weller, A.R. Lang, K.A. Forney, J. Baker, B. Hanson, K Martien, M.M. Muto, M.S. Lowry, J. Barlow, D. Lynch, L. Carswell, R.L. Brownell Jr., D.K. Mattila, and M.C. Hill. 2012. U.S. Pacific Marine Mammal Stock Assessments: 2012. NOAA Technical Memorandum NOAA–TM–NMFS–SWFSC–504. 378p.

Carretta, J.W., E.M. Oleson, K.A. Forney, M.M. Muto, D.W. Weller, A.R. Lang, J. Baker, B. Hanson, A.J. Orr, J. Barlow, J.E. Moore, and R.L. Brownell. 2023. U.S. Pacific Marine Mammal Stock Assessments: 2022. U.S. Department of Commerce. NOAA Technical Memorandum NMFS–SWFSC–684. 409 p.

Authority: 16 U.S.C. 1361 *et seq.*

Dated: February 16, 2024.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2024–03664 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Request for Public Comment on Interagency Marine Debris Coordinating Committee Recommendations

AGENCY: National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of request for comments.

SUMMARY: NOAA's Marine Debris Program, on behalf of the Interagency Marine Debris Coordinating Committee (IMDCC), is soliciting public comments regarding draft recommendations to address marine debris. The IMDCC is required to submit a biennial report to Congress that includes the status of implementation of any recommendations and strategies of the Committee. These recommendations will replace the recommendations first published by the IMDCC in 2008.

DATES: Comments must be received on or before March 25, 2024, 11:59 p.m. Eastern Time (ET).

ADDRESSES: Comments may be submitted via email to *yael.seid-green@noaa.gov. Instructions:* All comments received are a part of the public record. All personal identifying information (name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. Comments that are not related to the IMDCC recommendations, or that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

FOR FURTHER INFORMATION CONTACT: Ya'el Seid-Green, Executive Secretariat, IMDCC, Marine Debris Program; Phone 240–622–5910; Email *yael.seid-green@noaa.gov* or visit the IMDCC website at *https://marinedebris.noaa.gov/our-work/IMDCC.*

SUPPLEMENTARY INFORMATION:

Background

The Marine Debris Act establishes the IMDCC. 33 U.S.C. 1954. The IMDCC is a multi-agency body responsible for coordinating a comprehensive program of marine debris research and activities among Federal agencies, in cooperation and coordination with non-governmental organizations, industry, academia, States, Tribes, and other nations, as appropriate. Representatives meet to share information, assess and promote best management practices, and coordinate the Federal Government's efforts to address marine debris. NOAA serves as the Chairperson of the IMDCC.

Why develop the recommendations?

The IMDCC is required to submit a biennial report to Congress that includes the status of implementation of any recommendations and strategies of the Committee and an analysis of their effectiveness. 33 U.S.C. 1954(e). In its first report to Congress, in 2008, the IMDCC published recommendations for addressing marine debris. The 25 recommendations were organized into four themes and eight subthemes. The goal of the recommendations was to ''guide the Federal government's strategies with respect to the problems of persistent marine debris (IMDCC 2008)''. They were ''designed to be broad in scope, with the intention that federal agencies work collaboratively through the IMDCC to develop more detailed priorities and an action plan (*ibid*)''. The 2008 report can be accessed at *https://marinedebris.noaa.gov/sites/default/files/publications-files/imdccreport_2008.pdf.*

A report from the Government Accountability Office (GAO) in September 2019 (GAO–19–653) highlighted that the biennial reports did not include an analysis of the effectiveness of the IMDCC's recommendations and strategies. The GAO recommended that the IMDCC develop and implement a process to analyze the effectiveness of the recommendations and strategies, and include the results in its biennial reports.

However, it is difficult to analyze the effectiveness of the 2008 recommendations based on their scope and age. In addition, several new agencies have joined as members of the IMDCC, and the recommendations do not reflect the full scope of current IMDCC member agency activities. As a result, the IMDCC has developed an entirely new set of draft recommendations through a collaborative process. Once finalized, the new recommendations will be included in the Fiscal Year 2022–2023 IMDCC Biennial Report to Congress.

The Recommendations

The new draft recommendations attempt to identify and express what the IMDCC sees as priorities for reducing the impacts of marine debris, aligning with the purposes and policies articulated in the Marine Debris Act and based on current authorities and activities of the IMDCC member agencies. The recommendations are designed to be broad in scope and are written to maintain relevance for several years. Not all IMDCC member agencies have activities that are relevant to each recommendation. The recommendations are divided into seven categories. The number of recommendations in each category varies.

International Activities

Recommendation #1: The IMDCC member agencies should strengthen the capacity of local actors in foreign nations to prevent marine debris; mitigate waste that may contribute to marine debris; and capture, clean up, and remove waste that may contribute to marine debris and existing marine debris in the environment.

Recommendation #2: The IMDCC member agencies should participate in and support international efforts to address marine debris.

Prevention

Recommendation #1: The IMDCC member agencies should work to reduce the federal contribution of materials that may contribute to marine debris in their operations.

Recommendation #2: The IMDCC member agencies should conduct and support external efforts to prevent marine debris and mitigate waste that may contribute to marine debris, incorporating principles of environmental justice and focusing on disadvantaged communities.

Recommendation #3: The IMDCC member agencies should conduct and support efforts to prevent and mitigate abandoned, lost, or otherwise discarded fishing gear.

Capture, Clean Up, and Removal

Recommendation #1: The IMDCC member agencies should conduct and support efforts to capture, clean up, and remove waste that may contribute to marine debris and existing marine debris in the environment, incorporating principles of environmental justice and focusing on disadvantaged communities.

Outreach and Education

Recommendation #1: The IMDCC member agencies should conduct and support public awareness and education efforts to inform communities and the general public about marine debris, incorporating principles of environmental justice and focusing on disadvantaged communities.

Recommendation #2: The IMDCC member agencies should conduct and support efforts to engage members of the public in science and data collection efforts to learn about marine debris, incorporating principles of environmental justice and focusing on disadvantaged communities.

Coordination

Recommendation #1: The IMDCC member agencies should conduct and support outreach to partners to improve coordination across jurisdictions to more effectively prevent, remove, inform people about, research, and monitor marine debris.

Research and Monitoring

Recommendation #1: The IMDCC member agencies should conduct and support research to improve understanding of marine debris sources, abundance, distribution, transport, degradation, and the social, environmental, and economic impacts of marine debris.

Recommendation #2: The IMDCC member agencies should collaborate with partners on congruent and harmonized data collection, as appropriate.

Recommendation #3: The IMDCC member agencies should conduct and support efforts to develop and apply technologies (*e.g.,* modeling or remote sensing) that support a more robust understanding of the status of marine debris, prevent marine debris, or address the impacts of marine debris.

Recommendation #4: The IMDCC member agencies should conduct and support efforts to monitor marine debris to better understand marine debris sources, fate, and transport.

Enforcement

Recommendation #1: The IMDCC member agencies, as appropriate, should issue notices of non-compliance to correct violations of federal law and either address violations through agency administrative processes or, when violations warrant, refer violations of federal law for civil or criminal enforcement action.

How Comments Will Be Addressed

NOAA's Marine Debris Program, on behalf of the IMDCC, invites comments, feedback, and recommendations on the draft recommendations. Following the comment period, the feedback provided will be reviewed and the recommendations will be updated as necessary. The final recommendations will be included in the Fiscal Year 2022–2023 IMDCC Biennial Report to Congress and in a stand-alone report. An appendix will be added to the stand-alone report describing how comments from the public comment period were incorporated into the recommendations. This report will be posted to *https://marinedebris.noaa.gov/our-work/IMDCC.*

The recommendations do not imply approval for any specific action, although they may inform future federal budget development. All activities included in the recommendations are subject to budgetary constraints, interagency processes, stakeholder input and other approvals, including the weighing of priorities and available resources by the Administration in formulating its annual budget and by Congress in legislating appropriations. In some cases, implementing the recommendations may require a sustained, multi-year effort by federal, state, tribal and community partners. The recommendations are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Scott Lundgren,

Director, Office of Response and Restoration, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2024–03678 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–JS–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Commerce Spectrum Management Advisory Committee

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice; reopening of application window for Advisory Committee nominations.

SUMMARY: Through this Notice, the National Telecommunications and Information Administration (NTIA) is reopening an application window for nominations to the Commerce Spectrum Management Advisory Committee (CSMAC). On December 27, 2023, NTIA published a Notice seeking nominations to the CSMAC with a deadline of January 31, 2024, for submissions. In reopening this application window, NTIA seeks to expand the pool of applicants and best ensure that the composition of the committee reflects balanced points of view.

DATES: Applications must be postmarked or electronically transmitted to the address below on or before March 4, 2024.

ADDRESSES: Persons may submit applications to Antonio Richardson, Designated Federal Officer, by email (preferred) to *arichardson@ntia.gov* or by U.S. mail or commercial delivery service to Office of Spectrum Management, National Telecommunications and Information Administration, 1401 Constitution Avenue NW, Room 4600, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Antonio Richardson at (202) 482–4156 or *arichardson@ntia.gov.*

SUPPLEMENTARY INFORMATION: The CSMAC was established and chartered by the Department of Commerce under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and pursuant to section 105(b) of the National Telecommunications and Information Administration Organization Act, as amended, 47 U.S.C. 904(b). The committee will continue as provided in Executive Order 14109, effective September 29, 2023. The Department of Commerce re-chartered the CSMAC on November 21, 2023, for a two-year period. More information about the CSMAC may be found at *http://www.ntia.doc.gov/category/csmac.* On December 27, 2023, NTIA published a Notice in the **Federal Register** seeking nominations for appointment to the CSMAC. *See* Commerce Spectrum Management Advisory Committee; Call for nominations to serve on Advisory Committee, 88 FR 89408 (December 27, 2023), *available at https://www.ntia.gov/federal-register-notice/2024/call-applications-serve-department-commerce-spectrum-management.* The original application deadline was January 31, 2024.

Through this Notice, NTIA is reopening the application window for 10 days to expand the pool of applicants and best ensure that the composition of the committee reflects balanced points of view (*e.g.,* past professional or academic accomplishments, industry sector representation, and educational background). All other requirements for appointment to the CSMAC appear in the **SUPPLEMENTARY INFORMATION** section of the December 27, 2023, Notice.

Sean T. Conway,

Deputy Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2024–03663 Filed 2–22–24; 8:45 am]

BILLING CODE 3510–10–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete product(s) and service(s) from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Comments must be received on or before: March 24, 2024.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R.

Jurkowski, Telephone: (703) 785–6404 or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following product(s) and service(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s): 4240–00–SAM–0024—Hearing Protection, Over-the-Head Earmuff, NRR 20db
Designated Source of Supply: Access: Supports for Living Inc., Middletown, NY
Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA
NSN(s)—Product Name(s):
4330–01–189–1007—Filter-Separator, Liquid Fuel
2540–01–377–3125—Arm, Windshield Wiper, HMMW Vehicle, 20″L
Designated Source of Supply: Georgia Industries for the Blind, Bainbridge, GA
Contracting Activity: DLA LAND AND MARITIME, COLUMBUS, OH
NSN(s)—Product Name(s): 7520–01–585–0980—Planner, Non-Dated, Flexible, 30/60 Day, Erasable, 48″ x 32″
Designated Source of Supply: Chicago Lighthouse Industries, Chicago, IL
Contracting Activity: GSA/FAS FURNITURE SYSTEMS MGT DIV, PHILADELPHIA, PA
NSN(s)—Product Name(s):
8340–01–600–4807—Individual Reversible Field Tarpaulin, 92.5″x82.5″, Camouflage Face with Foilage Green Back
8340–01–600–4809—Individual Reversible Field Tarpaulin, 92.5″x82.5″, Camouflage Face with Desert Sand Back
Designated Source of Supply: ORC Industries, Inc., La Crosse, WI
Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA
NSN(s)—Product Name(s):
8340–01–600–4807—Individual Reversible Field Tarpaulin, 92.5″x82.5″, Camouflage Face with Foilage Green Back
8340–01–600–4809—Individual Reversible Field Tarpaulin, 92.5″x82.5″, Camouflage Face with Desert Sand Back
Designated Source of Supply: Huntsville Rehabilitation Foundation, Inc., Huntsville, AL
Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

Service(s)

Service Type: Laundry Service
Mandatory for: Department of the Navy, Naval Hospital Pensacola, 6000 West Highway 98 Pensacola, FL
Designated Source of Supply: Wiregrass Rehabilitation Center, Inc., Dothan, AL
Contracting Activity: DEPT OF THE NAVY, NAVSUP FLT LOG CTR JACKSONVILLE

Michael R. Jurkowski,
Acting Director, Business Operations.

[FR Doc. 2024–03692 Filed 2–22–24; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes product(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* March 24, 2024.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 785–6404 or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 12/22/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the product(s) and service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service(s) to the Government.
2. The action will result in authorizing small entities to furnish the service(s) to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service(s) are added to the Procurement List:

Service(s)

Service Type: Grounds Maintenance/Vegetation Control
Mandatory for: National Park Service, Chesapeake and Ohio Canal National Historical Park, Palisades Maintenance District, Potomac, MD
Designated Source of Supply: Portco, Inc., Portsmouth, VA
Contracting Activity: NATIONAL PARK SERVICE, NATIONAL PARK SERVICE

Deletions

On 1/19/2024 (83 FR), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the product(s) to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(s) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

7105–00–269–8463—Chair, Metal Folding
7105–00–663–8475—Chair, Metal Padded Folding

Contracting Activity: GSA/FAS FURNITURE SYSTEMS MGT DIV, PHILADELPHIA, PA

NSN(s)—Product Name(s): 8465–01–481–4448—Cover, Field-Pack, Camouflage, White

Designated Source of Supply: Human Technologies Corporation, Utica, NY

Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2024–03693 Filed 2–22–24; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

Credit Union Advisory Council Meeting

AGENCY: Consumer Financial Protection Bureau.

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Credit Union Advisory Council (CUAC or Council) of the Consumer Financial Protection Bureau (CFPB or Bureau). The notice also describes the functions of the Council.

DATES: The meeting date is Friday, March 8, 2024, from approximately 1 p.m. to 3:15 p.m., eastern time. This meeting will be held virtually and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

FOR FURTHER INFORMATION CONTACT: Kim George, Outreach and Engagement Associate, Advisory Board and Councils, External Affairs Division, at 202–450–8617, or email: *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 2 of the CUAC charter provides that pursuant to the executive and administrative powers conferred on the CFPB by section 1012 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Director of the CFPB renews the discretionary Credit Union Advisory Council under agency authority in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10.

Section 3 of the CUAC charter states that the purpose of the CUAC is to advise the CFPB in the exercise of its functions under the Federal consumer financial laws as they pertain to credit unions with total assets of $10 billion or less.

II. Agenda

The CUAC will discuss broad policy matters related to the Bureau's Unified Regulatory Agenda and general scope of authority.

If you require any additional reasonable accommodation(s) in order to attend this event, please contact the Reasonable Accommodations team at *CFPB_ReasonableAccommodations@cfpb.gov,* 48 business hours prior to the start of this event.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CUAC members for consideration. Individuals who wish to join this meeting must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_1FaFNLqgPl2fjhA.*

III. Availability

The Council's agenda will be made available to the public on Thursday, March 7, 2024, via *consumerfinance.gov.*

A recording and summary of this combined meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

Jocelyn Sutton,

Deputy Chief of Staff, Consumer Financial Protection Bureau.

[FR Doc. 2024–03623 Filed 2–22–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

Negotiation of a Reciprocal Defense Procurement Agreement With the Republic of Korea

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for public comments.

SUMMARY: On behalf of the U.S. Government, DoD is contemplating negotiating and concluding a new Reciprocal Defense Procurement Agreement with the Republic of Korea. DoD is requesting industry feedback regarding its experience in public defense procurements conducted by or on behalf of the Ministry of National Defense or Armed Forces.

DATES: Comments must be received March 25, 2024.

ADDRESSES: Submit comments by email to *jeffrey.c.grover.civ@mail.mil.*

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Grover, telephone +1–703–380–9783.

SUPPLEMENTARY INFORMATION: DoD has concluded Reciprocal Defense Procurement (RDP) Agreements with 28 qualifying countries, as defined in the Defense Federal Acquisition Regulation Supplement (DFARS) 225.003, at the level of the Secretary of Defense and his counterpart. The purpose of an RDP Agreement is to promote rationalization, standardization, interchangeability, and interoperability of conventional defense equipment with allies and other friendly governments. These Agreements provide a framework for ongoing communication regarding market access and procurement matters that enhance effective defense cooperation.

RDP Agreements generally include language by which the Parties agree that their defense procurements will be conducted in accordance with certain implementing procedures. These procedures relate to—

• Publication of notices of proposed purchases;

• The content and availability of solicitations for proposed purchases;

• Notification to each unsuccessful offeror;

• Feedback, upon request, to unsuccessful offerors concerning the reasons they were not allowed to participate in a procurement or were not awarded a contract; and

• Provision for the hearing and review of complaints arising in connection with any phase of the procurement process to ensure that, to the extent possible, complaints are equitably and expeditiously resolved.

Based on the Agreement, each country affords the other country certain benefits on a reciprocal basis consistent with national laws and regulations. The benefits that the United States accords to the products of qualifying countries include—

• Offers of qualifying country end products are evaluated without applying the price differentials otherwise required by the Buy American statute and the Balance of Payments Program;

• The chemical warfare protection clothing restrictions in 10 U.S.C. 4862 and the specialty metals restriction in 10 U.S.C. 4863 do not apply to products manufactured in a qualifying country; and

• Customs, taxes, and duties are waived for qualifying country end products and components of defense procurements.

If DoD (for the U.S. Government) concludes a new RDP Agreement with the Republic of Korea and DoD executes a blanket public interest determination, as intended, the Republic of Korea will be listed as one of the qualifying countries at DFARS 225.872–1(a).

While DoD is evaluating Republic of Korea laws and regulations in this area, DoD would benefit from U.S. industry's experience in participating in Republic of Korea public defense procurements. DoD is, therefore, asking U.S. firms that have participated or attempted to participate in procurements by or on behalf of the Republic of Korea Ministry of National Defense and Armed Forces to let DoD know if the procurements were conducted with transparency, integrity, fairness, and due process in accordance with published procedures, and if not, the nature of the problems encountered.

DoD is also interested in comments relating to the degree of reciprocity that exists between the United States and the Republic of Korea when it comes to the openness of defense procurements to offers of products from the other country. Further, DoD would like to understand the degree to which U.S. industry feels that it would have equal and proportional access to the Republic of Korea defense market as the Republic of Korea would have under an RDP Agreement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–03705 Filed 2–22–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2023–0039; OMB Control Number 0704–0341]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Part 239, Acquisition of Information Technology

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance the following proposed revision and extension of a collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 25, 2024.

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

You may also submit comments, identified by docket number and title, by the following method: Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tucker Lucas, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dodinformation-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 239, Acquisition of Information Technology, and associated clause at DFARS 252.239–7000; OMB Control Number 0704–0341.

Type of Request: Revision and extension of a currently approved collection.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Number of Respondents: 1,880.

Responses per Respondent: Approximately 8.6.

Annual Responses: 16,172.

Average Burden per Response: Approximately 0.5 hour.

Annual Burden Hours: 8,086.

Needs and Uses: This requirement provides for the collection of information from contractors regarding security of information technology. Contracting officers and other DoD personnel use the information to ensure that information technology is protected. The clause at DFARS 252.239–7000, Protection Against Compromising Emanations, requires that the contractor provide, upon request of the contracting officer, documentation that information technology used or provided under the contract meets appropriate information assurance requirements.

The requirement at DFARS 239.7408, which requires the contracting officer to obtain a detailed special construction proposal from a common carrier that submits a proposal or quotation that has special construction requirements related to the performance of basic telecommunications services, is being removed from this collection. Approximately three offerors are required to submit a special construction proposal each year, which does not require OMB approval under the Paperwork Reduction Act because it does not meet the threshold of ten or more members of the public being affected within any 12-month period.

DoD Clearance Officer: Mr. Tucker Lucas. Requests for copies of the information collection proposal should be sent to Mr. Lucas at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–03734 Filed 2–22–24; 8:45 am]

BILLING CODE 6820–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2023–0041; OMB Control Number 0704–0390]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS) Part 229, Taxes

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance the following proposed extension of a collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 25, 2024.

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

You may also submit comments, identified by docket number and title, by the following method: Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tucker Lucas, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dodinformation-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 229, Taxes, and related clause at DFARS 252.229–7010; OMB Control Number 0704–0390.

Type of Request: Extension.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Number of Respondents: 10.

Responses per Respondent: 2.1, approximately.

Annual Responses: 21.

Average Burden per Response: 4 hours.

Annual Burden Hours: 84.

Needs and Uses: DoD uses this information to determine if DoD contractors in the United Kingdom have attempted to obtain relief from customs duty on vehicle fuels in accordance with contract requirements. The clause at DFARS 252.229–7010, Relief from Customs Duty on Fuel (United Kingdom), is prescribed at DFARS 229.402–70(j) for use in solicitations issued and contracts awarded in the United Kingdom that require the use of fuels (gasoline or diesel) and lubricants in taxis or vehicles other than passenger vehicles. The clause requires the contractor to provide the contracting officer with evidence that the contractor has initiated an attempt to obtain relief from customs duty on fuels and lubricants, as permitted by an agreement between the United States and the United Kingdom.

DoD Clearance Officer: Mr. Tucker Lucas. Requests for copies of the information collection proposal should be sent to Mr. Lucas at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–03735 Filed 2–22–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2023–0040; OMB Control Number 0704–0259]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Part 216, Types of Contracts

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance, the following proposed extension of a collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 25, 2024.

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

You may also submit comments, identified by docket number and title, by the following method: Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tucker Lucas, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dodinformation-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title and OMB Control Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 216, Types of Contracts, and associated clauses at Part 252.216; OMB Control Number 0704–0259.

Type of Request: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit and not-for profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Number of Respondents: 111.

Responses per Respondent: Approximately 5.46.

Annual Responses: 606.

Average Burden per Response: 4 hours.

Annual Burden Hours: 2,424.

Needs and Uses: The clauses at DFARS 252.216–7000, Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products; DFARS 252.216–7001, Economic Price Adjustment—Nonstandard Steel Items; and DFARS 252.216–7003, Economic Price Adjustment—Wage Rates or Material Prices Controlled by a Foreign Government, require contractors with fixed-price economic price adjustment contracts to submit information to the contracting officer regarding changes in established material prices or wage rates. The contracting officer uses this information to make appropriate adjustments to contract prices.

DoD Clearance Officer: Mr. Tucker Lucas. Requests for copies of the information collection proposal should be sent to Mr. Lucas at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–03733 Filed 2–22–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Inland Waterways Users Board Meeting Notice

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

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the Federal advisory committee meeting of the U.S. Army Corps of Engineers, Inland Waterways Users Board (Board). This meeting is open to the public. For additional information about the Board, please visit the committee's website at *https://www.iwr.usace.army.mil/Missions/Navigation/Inland-Waterways-Users-Board/.*

DATES: The Army Corps of Engineers, Inland Waterways Users Board will conduct a meeting from 9 a.m. to 2 p.m. EDT on April 11, 2024.

ADDRESSES: The Inland Waterways Users Board meeting will be conducted at the Hilton Springfield Hotel, 6550 Loisdale Road, Springfield, Virginia 22150, 703–971–8900. The online virtual portion of the Inland Waterways Users Board meeting can be accessed at *https://usace1.webex.com/meet/ndc.nav,* Public Call-in: USA Toll-Free 844–800–2712, USA Caller Paid/International Toll: 1–669–234–1177 Access Code: 199 117 3596, Security Code 1234.

FOR FURTHER INFORMATION CONTACT: Mr. Paul D. Clouse, the Designated Federal Officer (DFO) for the committee, in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–NDC, 7701 Telegraph Road, Casey Building (Room H221), Alexandria, VA 22315–3868; by telephone at 202–768–3157; and by email at *Paul.D.Clouse@usace.army.mil.* Alternatively, contact Mr. Steven D. Riley, an Alternate Designated Federal Officer (ADFO), in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–NDC, 7701 Telegraph Road, Casey Building, Alexandria, VA 22315–3868; by telephone at 703–659–3097; and by email at *Steven.D.Riley@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This committee meeting is being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), section 552b of title 5, U.S.C. (commonly known as the ''Government in the Sunshine Act''), and sections 102–3.140 and 102–3.150 of title 41, Code of Federal Regulations (CFR).

Purpose of the Meeting: The Board is chartered to provide independent advice and recommendations to the Secretary of the Army on construction and rehabilitation project investments on the commercial navigation features of the inland waterways system of the United States. At this meeting, the Board will receive briefings and presentations regarding the investments, projects, and status of the inland waterways system of the United States and conduct discussions and deliberations on those matters. The Board is interested in written and verbal comments from the public relevant to these purposes.

Agenda: At this meeting the agenda will include an update on the Users Board Annual Report for 2023; the status of the Inland Waterways Trust Fund (IWTF); Fiscal Year 2024 funding for Navigation and the 2025 President's Budget for Navigation; Recap of the 2023 Low Water event; update on the 2025 Capital Investment Strategy; update on Demopolis Lock and Dam; updates of inland waterways modernization projects for Chickamauga Lock and the Kentucky Lock Addition on the Tennessee River, McClellan-Kerr Arkansas River Navigation System (MKARNS) Three Rivers, Arkansas, the Gulf Intracoastal Waterway (GIWW) Brazos River Floodgates and Colorado River Locks, Mississippi River-Illinois Waterway Navigation and Ecosystem Sustainability Program (NESP) Lock 25 and LaGrange Lock, Monongahela River Locks and Dams 2, 3 and 4 Replacements, and the Upper Ohio River Montgomery Lock.

Availability of Materials for the Meeting. A copy of the agenda or any updates to the agenda for the April 11, 2024, meeting will be available. The final version will be available at the meeting. All materials will be posted to the website for the meeting.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.1 65, and subject to the availability of space, this meeting is open to the public. Registration of members of the public who wish to participate in the meeting will begin at 8:30 a.m. on the day of the meeting. Participation is on a first-to-arrive basis. Any interested person may participate in the meeting, file written comments or statements with the committee, or make verbal comments during the public meeting, at the times, and in the manner, permitted by the committee, as set forth below.

Special Accommodations: Individuals requiring any special accommodations related to the public meeting or seeking additional information about the procedures, should contact Mr. Paul Clouse, the committee DFO, or Mr. Steven Riley, an ADFO, at the email addresses or telephone numbers listed in the **FOR FURTHER INFORMATION CONTACT** section, at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Written Comments or Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the Board about its mission and/or the topics to be addressed in this public meeting. Written comments or statements should be submitted to Mr. Clouse, the committee DFO, or Mr. Riley, a committee ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section in the following formats: Adobe Acrobat or Microsoft Word. The comment or statement must include the author's name, title, affiliation, address, and daytime telephone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the committee DFO or ADFO at least five (5) business days prior to the meeting so that they may be made available to the Board for its consideration prior to the meeting. Written comments or statements received after this date may not be provided to the Board until its next meeting. Please note that because the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection.

Verbal Comments: Members of the public will be permitted to make verbal comments during the public meeting only at the time and in the manner allowed herein. If a member of the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three business (3) days in advance to the committee DFO or ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section. The committee DFO and ADFO will log each request to make a comment, in the order received, and determine whether the subject matter of each comment is relevant to the Board's mission and/or the topics to be addressed in this public meeting. A 15-minute period near the end of the meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described above, will be allotted no more than three (3) minutes during this period, and will be invited to speak in the order in which their requests were received by the DFO and ADFO.

Thomas P. Smith,

Chief, Operations and Regulatory Division, Directorate of Civil Works, U.S. Army Corp of Engineers.

[FR Doc. 2024–03730 Filed 2–22–24; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Fulbright-Hays Faculty Research Abroad (FRA) Fellowship Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications (NIA) for fiscal year (FY) 2024 for the Fulbright-Hays Faculty Research Abroad (FRA) Fellowship Program, Assistance Listing Number 84.019A. This notice relates to the approved information collection under OMB control number 1840–0005.

DATES:

Applications Available: February 23, 2024.

Deadline for Transmittal of Applications: April 23, 2024.

Preapplication Webinar and Applicant Resources: The Department will hold a preapplication meeting via webinar for prospective applicants. Detailed information regarding this webinar will be provided on the Fulbright-Hays FRA website at *https://www2.ed.gov/programs/iegpsfra/applicant.html.* For additional information about the Department's discretionary grant process, please review the overview and resources at *www2.ed.gov/fund/grant/about/grantmaking/index.html.* The resources will be especially helpful for individuals who are exploring the Department's funding opportunities for the first time.

ADDRESSES: The addresses pertinent to this competition—including the addresses for obtaining and submitting an application—can be found under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Dr. Pamela J. Maimer, U.S. Department of Education, 400 Maryland Avenue SW, Washington, DC 20202. Telephone: (202) 453–6891. Email: *FRA@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 Fulbright-Hays FRA Fellowship Program provides grants to colleges and universities to fund fellowships for faculty members seeking to improve their area studies and foreign language skills by conducting research abroad. The program is designed to contribute to the development and improvement of the study of modern foreign languages and area studies in the United States.

Priorities: This notice contains one absolute priority and three competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the absolute priority and Competitive Preference Priorities 1 and 2 are from the regulations for this program (34 CFR 663.21(d)). Competitive Preference Priority 3 is from the Secretary's Notice of Final Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

Absolute Priority: For FY 2024, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Specific Geographic Regions of the World.

A research project that focuses on one or more of the following geographic areas: Africa, East Asia, Southeast Asia and the Pacific Islands, South Asia, the Near East, Central and Eastern Europe and Eurasia, and the Western Hemisphere (excluding the United States and its territories).

Competitive Preference Priorities: For FY 2024, the following priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional 1 point to an application that meets Competitive Preference Priority 1; an additional 2 points to an application that meets Competitive Preference Priority 2; and an additional 3 points to an application that meets Competitive Preference Priority 3, for a maximum of 6 additional points.

These priorities are:

Competitive Preference Priority 1—Focus on Less Commonly Taught Languages (1 point).

A research project that focuses on any modern foreign language except French, German, or Spanish.

Competitive Preference Priority 2—Thematic Focus on Academic Fields (2 points).

A research project conducted in modern foreign languages and area studies with an academic focus on any of the following academic fields: science (including climate change), technology, engineering (including infrastructure studies), mathematics, computer science, education (comparative or international), international development, political science, public health (including epidemiology), or economics.

Competitive Preference Priority 3—Promoting Equity in Student Access to Educational Resources and Opportunities (3 points).

Projects implemented by one or more of the following entities:

(1) Community colleges (as defined in this notice).

(2) Historically Black Colleges and Universities (as defined in this notice).

(3) Tribal College or University (as defined in this notice).

(4) Minority-serving institutions (as defined in this notice).

Definitions: The following definitions are from the Supplemental Priorities.

Community college means ''junior or community college'' as defined in section 312(f) of the Higher Education Act of 1965, as amended (HEA).

Historically Black Colleges and Universities means colleges and universities that meet the criteria set out in 34 CFR 608.2.

Minority-serving institution means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the Higher Education Act of 1965 (HEA).

Tribal College or University has the meaning ascribed it in section 316(b)(3) of the HEA.

Program Authority: 22 U.S.C. 2452(b)(6).

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, 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. (d) The regulations for this program in 34 CFR part 663.21. (e) The Supplemental Priorities.

Note: The open licensing requirement in 2 CFR 3474.20 does not apply to this program.

II. Award Information

Type of Award: Discretionary grants redistributed as fellowships to individual beneficiaries.

Estimated Available Funds: The Administration has requested $10,311,000 for the Fulbright-Hays Overseas programs in FY 2024. We intend to use an estimated $750,000 for the FRA 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.

Estimated Range of Awards: $25,000–$40,000.

Estimated Average Size of Awards: $30,000.

Estimated Number of Awards: 25.

Note: The Department is not bound by any estimates in this notice.

Project Period: The institutional project period is 18 months. Faculty may request funding for a period of no less than 3 months and no more than 12 months.

III. Eligibility Information

1. a. *Eligible Applicants:* Institutions of higher education (IHEs). Eligible faculty members at the IHE submit their individual research narratives and application forms to their home IHE representative, who compiles all research narratives from faculty and incorporates them into the grant application package that the institution submits electronically through the Department's G6 system on behalf of all applicant faculty.

b. *Individuals Eligible to Receive a Fellowship:* A faculty member is eligible to receive a fellowship if the individual—is a citizen or national of the United States, or is a permanent resident of the United States; is employed by an IHE; has been engaged in teaching relevant to their foreign language or area studies specialization for the two years immediately preceding the date of the award; proposes research relevant to their modern foreign language or area studies specialization, which is not dissertation research for a doctoral degree; and possesses sufficient foreign language skills to carry out the dissertation research project.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Administrative Cost Limitation:* In accordance with 34 CFR 663.30(d), the Secretary awards the institution an administrative allowance of $100 for each fellowship listed in the grant award document.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

IV. Application and Submission Information

1. *Address to Request Application Package:* Both IHEs and faculty applicants can obtain an application package via the internet or from the Education Publications Center (ED Pubs). To obtain a copy via the internet, use the following address: *www.G6.ed.gov.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a TDD or a TTY, call, toll free: 1–877–576–7734.

You can contact ED Pubs at its website, *www.EDPubs.gov,* or at its email address, *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program as follows: Assistance Listing Number 84.019A.

2. *Submission Dates and Times:* Submit applications for grants under the program electronically using *G6.ed.gov.* For information (including dates and times) about how to submit your application electronically, please refer to *Other Submission Requirements.*

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT**. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

3. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *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 10 pages and the bibliography to no more than two 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, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).
- 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; budget section, including the narrative budget justification; the assurance and certifications; or the one-page abstract, the resumes, the biography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *Unique Entity Identifier (UEI), Taxpayer Identification Number (TIN), and System for Award Management (SAM):* To do business with the Department, you must—

a. Have a UEI number and a TIN;

b. Register both your UEI number and TIN with SAM, the Government's primary registrant database;

c. Provide your UEI number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2 to 5 weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS/UEI number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can submit an application through G6.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS/UEI number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS/UEI number and TIN in SAM or updating your existing SAM account, please visit *https://sam.gov/content/help.*

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless an IHE qualifies for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Submit applications for grants under the Fulbright-Hays FRA Fellowship Program, Assistance Listing Number 84.019A, electronically using the G6 system, accessible through the

Department's G6 site at: *www.G6.ed.gov.* While completing the electronic application, both the IHE and the faculty applicant will be entering data online that will be saved into a database. Neither the IHE nor the faculty applicant may email an electronic copy of a grant application to us.

Please note the following:

• The process for submitting applications electronically under the Fulbright-Hays FRA Fellowship Program requires several steps. The following is a brief overview of the process; however, all applicants should review the detailed description of the application process in the application package. In summary, the major steps are:

(1) IHEs must email the name of the institution and the full name and email address of the project director to *FRA@ed.gov.* We suggest that applicant IHEs submit this information no later than 2 weeks prior to the application deadline date to ensure that they obtain access to G6 well before that date;

(2) Faculty applicants must complete their individual applications and submit them to their home IHE project director using G6;

(3) Persons providing references for individual faculty applicants must complete and submit reference forms to the IHE's project director, using G6; and

(4) The IHE's project director must officially submit the IHE's application, including all eligible individual faculty applications, reference forms, and other required forms, using G6.

• The IHE must complete the electronic submission of the grant application by 11:59:59 p.m., eastern time, on the application deadline date. G6 will not accept an application for this competition after 11:59:59 p.m., eastern time, on the application deadline date. Therefore, we strongly recommend that both the IHE and the faculty applicant begin the application process early and not wait until close to the application deadline date to prepare their applications. The table below shows the days and times that the G6 website will be available.

G6 HOURS OF OPERATION IN EASTERN TIME

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Unavailable from 03:00 p.m.–11:59 p.m.	Unavailable from 12:00 a.m.–06:00 a.m.	Available 24 hours ...	Unavailable from 09:00 p.m.–11:59 p.m.	Unavailable from 12:00 a.m.–06:00 a.m.	Available 24 hours ...	Available 24 hours.

• Faculty applicants will not receive additional points because they submit their applications in electronic format, nor will we penalize an IHE or faculty applicant if the applicant qualifies for an exception to the electronic submission requirement, as described elsewhere in this section, and submits an application in paper format.

• IHEs must upload all application documents electronically, including the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• Both IHEs and faculty applicants must upload the narrative sections and all other attachments to their application as files in a read-only flattened Portable Document Format (PDF), meaning any fillable documents must be saved and submitted as nonfillable PDF files. Do not upload any interactive or fillable PDF files. If you upload a file type other than a read-only, nonmodifiable PDF (*e.g.,* Word, Excel, WordPerfect) or submit a password-protected file, we will be unable to review that material. Please note that this will likely result in your application not being considered for funding. The Department will not convert material from other formats to PDF.

• Prior to submitting your electronic application, please redact any personally identifiable information (SSN, birthdate, etc.). You may wish to print a copy of your application package for your records.

• After the individual faculty applicant electronically submits their application to the IHE, the faculty applicant will receive an automatic acknowledgment from the G6 system. After the person designated to provide a reference submits the reference electronically to the Department on behalf of a faculty applicant, they will receive an electronic confirmation from the G6 system. After the applicant IHE submits its application, including all eligible individual faculty applications to the Department, the applicant IHE will also receive an automated acknowledgment from G6 that will include a unique PR/Award number for the IHE's application.

• Within 3 working days after submitting its electronic application, the applicant IHE must—

(1) Print the SF 424 from G6;

(2) Have the Authorizing Representative sign this form;

(3) Place the PR/Award number in the upper right-hand corner of the hard copy signature page of the SF 424; and

(4) Email the signed SF 424 to *FRA@ed.gov.*

• We may request that you provide hard copies with original signatures for other forms in the application at a later date.

Application Deadline Date Extension in Case of System Unavailability: If an IHE is prevented from electronically submitting its application on the application deadline date because the G6 system is unavailable, we will grant the IHE an extension until 11:59:59 p.m., Eastern Time, the following business day to enable the IHE to transmit its application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) The IHE is a registered user of the G6 system and the IHE has initiated an electronic application for this competition; and

(2) G6 is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 11:59 p.m., eastern time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting the IHE an extension. To request a time extension due to G6 unavailability or to confirm our acknowledgment of G6's unavailability, an IHE may contact either (1) the person listed under **FOR FURTHER INFORMATION CONTACT** or (2) the e-Grants help desk at 1–888–336–8930. If G6 is unavailable due to technical problems with the system and the application deadline is extended, an email will be sent to all registered users who have initiated a G6 application. The deadline date extensions described in this section apply only to the unavailability of the G6 system.

b. *Submission of Paper Applications.* We discourage paper applications, but if electronic submission is not possible (*e.g.,* you do not have access to the internet), (1) you must provide a prior written notification that you intend to submit a paper application and (2) your paper application must be postmarked by the application deadline date.

The prior written notification may be submitted by email or by mail to the person listed under **FOR FURTHER INFORMATION CONTACT**. If you submit your notification by email, it must be received by the Department no later than 14 calendar days before the application deadline date. If you mail your notification to the Department, it must be postmarked no later than 14 calendar days before the application deadline date.

If you submit a paper application, you must have, and include on your application, a DUNS/UEI number and mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, OFO/G6 Functional Application Team, Mail Stop 5C231, Attention: 84.019A, 400 Maryland Avenue SW, Washington, DC 20202–4260.

The IHE must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date.

Note for Mail Delivery of Paper Applications: If you mail your application to the Department—

(1) You must indicate on the envelope and in Item 11 of the SF 424 the ALN, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The G6 Functional Application Team will notify you of the Department's receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the regulations for this program in 34 CFR 663.21 and are as follows:

(a) *Quality of proposed project (70 points).* The Secretary reviews each application to determine the quality of the research project proposed by the applicant. The Secretary considers—

(1) The statement of the major hypotheses to be tested or questions to be examined, and the description and justification of the research methods to be used (20 points);

(2) The relationship of the research to the literature on the topic and to major theoretical issues in the field, and the project's importance in terms of the concerns of the discipline (10 points);

(3) The preliminary research already completed or plans for research prior to going overseas, and the kinds, quality and availability of data for the research in the host country or countries (10 points);

(4) The justification for overseas field research, and preparations to establish appropriate and sufficient research contacts and affiliations abroad (10 points);

(5) The applicant's plans to share the results of the research in progress with scholars and officials of the host country or countries and the American scholarly community (5 points); and

(6) The objectives of the project regarding the sponsoring institution's plans for developing or strengthening, or both, curricula in modern foreign languages and area studies (15 points).

(b) *Qualifications of the applicant (30 points).* The Secretary reviews each application to determine the qualifications of the applicant. In coordination with any priorities established under paragraph (d) of this section, the Secretary considers one or more of the following—

(1) The overall strength of applicant's academic record (teaching, research, contributions, professional association activities) (10 points);

(2) The applicant's excellence as a teacher or researcher, or both, in his or her area or areas of specialization (5 points);

(3) The applicant's proficiency in one or more of the languages (other than English) of the host country or countries of research (5 points);

(4) The extent to which the applicant's academic record demonstrates steps taken to further improve advanced language proficiency to overcome any anticipated language barriers relative to the proposed research project (5 points); and

(5) The applicant's ability to conduct research in a foreign cultural context, as evidenced by the applicant's previous overseas experience, or documentation provided by the sponsoring institution, or both (5 points).

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).

For FY 2024, faculty applications are divided into seven categories based on the world area focus of their research projects, as described in the absolute priority listed in this notice. Foreign language and area studies experts on discrete world area-based panels will evaluate the faculty applications. Each panel reviews, scores, and ranks its assigned applications separately from the applications assigned to the other world area panels. At the conclusion of the panel review process, however, all faculty applications will be ranked together from the highest to lowest score for funding recommendation purposes.

If there are applications on the rank order slate with the same average score, the Fulbright Foreign Scholarship Board's policy governing veteran's preference will be used in the tiebreaker and selection process. Veteran's preference will be used first to determine which application to recommend for funding. This means that in instances where two or more applications have the same average score on the rank order slate, and there are insufficient funds to support all of the equally ranked applications, the veteran's application will be given preference.

For applications that have tied average scores but are not subject to the veteran's preference, the Department will use the average score assigned on the Technical Review Forms for the ''Quality of the proposed project'' selection criterion. If a tie still exists, the average score for selection criterion (a)(1) under ''Quality of proposed project'' (20 points) will be used as the tiebreaker. A final tiebreaker, should it become necessary, will use the average score assigned for the ''Qualifications of the applicant'' selection criterion.

3. *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.

4. *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.

5. *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 the IHE's U.S. Representative and U.S. Senators and send the IHE a Grant Award Notification (GAN). We may also notify the IHE informally.

If a faculty application is not evaluated or not selected for funding, we notify the IHE.

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 its binding commitments under the grant.

3. *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. 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.*

4. *Performance Measure:* For the purpose of Department reporting under 34 CFR 75.110, the Department will use the following performance measure:

FRA Measure: The percentage of Fulbright-Hays FRA fellows who increased their foreign language scores in speaking, reading, or writing by at least one proficiency level.

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.

Nasser H. Paydar,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2024–03156 Filed 2–22–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, March 21, 2024; 5:30 p.m.–7 p.m. CDT.

ADDRESSES: West Kentucky Community and Technical College, Emerging Technology Center, Room 215, 5100 Alben Barkley Drive, Paducah, Kentucky 42001.

FOR FURTHER INFORMATION CONTACT: Robert ''Buz'' Smith, Federal Coordinator, by Phone: (270) 441–6821 or Email: *Robert.Smith@pppo.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

• Review of Agenda
• Administrative Activities
• Public Comment Period

Public Participation: The meeting is open to the public. The EM SSAB, Paducah, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Robert ''Buz'' Smith as soon as possible in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Comments received by no later than 5 p.m. CDT on Monday, March 18, 2024 will be read aloud during the meeting. Comments will also be accepted after the meeting, by no later than 5 p.m. CDT on Friday, March 29, 2024. Please submit comments to Robert ''Buz'' Smith at the aforementioned email address. Please put ''Public Comment'' in the subject line. Individuals who wish to make oral statements pertaining to agenda items should contact Robert ''Buz'' Smith at the telephone number listed above. Requests must be received as soon as possible prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments. The EM SSAB, Paducah, will hear public comments pertaining to its scope (clean-up standards and environmental restoration; waste management and disposition; stabilization and disposition of non-stockpile nuclear materials; excess facilities; future land use and long-term stewardship; risk assessment and management; and clean-up science and technology activities). Comments outside of the scope may be submitted via written statement as directed above.

Minutes: Minutes will be available by writing or calling Eric Roberts, Board Support Manager, Emerging Technology Center, Room 221, 4810 Alben Barkley Drive, Paducah, KY 42001; Phone: (270) 554–3004. Minutes will also be available at the following website: *https://www.energy.gov/pppo/pgdp-cab/listings/meeting-materials.*

Signing Authority: This document of the Department of Energy was signed on February 16, 2024, by David Borak, Deputy Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on February 20, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–03685 Filed 2–22–24; 8:45 am]

BILLING CODE 6450–01–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: RP24–403–000.
Applicants: National Fuel Gas Supply Corporation.
Description: Compliance filing: Fuel Tracker Filing GT&C Sec 41 (2024) to be effective 4/1/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5026.
Comment Date: 5 p.m. ET 2/28/24.

Docket Numbers: RP24–404–000.
Applicants: Empire Pipeline, Inc.
Description: 4(d) Rate Filing: Empire Fuel Tracker Per GT&C 23.3 (2024) to be effective 4/1/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5046.
Comment Date: 5 p.m. ET 2/28/24.

Docket Numbers: RP24–405–000.
Applicants: MountainWest Overthrust Pipeline, LLC.
Description: 4(d) Rate Filing: Statement of Negotiated Rates V19, TSA No. 6345 Correction to be effective 3/18/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5058.
Comment Date: 5 p.m. ET 2/28/24.

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

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

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

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

Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03701 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–1243–000]

Honeysuckle Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Honeysuckle Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 11, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *https://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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Dated: February 20, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03704 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL24–67–000]

Viridon New York Inc.; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On February 16, 2024, the Commission issued an order in Docket No. EL24–67–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation to determine whether Viridon New York Inc.'s Formula Rate is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Viridon New York Inc.,* 186 FERC ¶ 61,125 (2024).

The refund effective date in Docket No. EL24–67–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL24–67–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2023), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. From FERC's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. 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 FERC'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 ''eFile'' link at *http://www.ferc.gov.* 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.

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Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03699 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL24–68–000]

Richland-Stryker Generation LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On February 16, 2024, the Commission issued an order in Docket No. EL24–68–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation to determine whether Richland-Stryker Generation LLC's Rate Schedule is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Richland-Stryker Generation LLC,* 186 FERC ¶ 61,128 (2024).

The refund effective date in Docket No. EL24–68–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL24–68–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2023), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. From FERC's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. 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 FERC'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.*

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Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03698 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL24–66–000]

Viridon Southwest LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On February 16, 2024, the Commission issued an order in Docket No. EL24–66–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation to determine whether Viridon Southwest LLC's Formula Rate is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Viridon Southwest LLC,* 186 FERC ¶ 61,123 (2024).

The refund effective date in Docket No. EL24–66–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL24–66–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2023), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. From FERC's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. 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 FERC'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.*

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Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03700 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–7954–002]

McClain, Mark; Notice of Filing

Take notice that on February 13, 2024, Mark McClain submitted for filing, application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d (b) and Part 45.8 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR part 45.8.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission 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.

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Comment Date: 5 p.m. eastern time on March 5, 2024.

Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03697 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24–73–000.
Applicants: Welcome Solar, LLC, Welcome Solar II, LLC, and Welcome Solar III, LLC v. PJM Interconnection, L.L.C.
Description: Complaint of Welcome Solar, LLC, Welcome Solar II, LLC, and Welcome Solar III, LLC v. PJM Interconnection, L.L.C.
Filed Date: 2/14/24.
Accession Number: 20240214–5128.
Comment Date: 5 p.m. ET 2/28/24.

Docket Numbers: EL24–74–000.
Applicants: Municipal Energy Agency of Nebraska and the Colorado Cities of Aspen, et al. v. Public Service Company of Colorado.
Description: Complaint of Municipal Energy Agency of Nebraska and the Colorado Cities of Aspen, et al. v. Public Service Company of Colorado.
Filed Date: 2/16/24.
Accession Number: 20240216–5047.
Comment Date: 5 p.m. ET 3/7/24.

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

Docket Numbers: ER23–1144–001.
Applicants: Southwestern Public Service Company.
Description: Southwestern Public Service Company submits tariff filing per 35.19a(b): Refund Report_Attachment 4 Partial Requirements Agreement to be effective N/A.
Filed Date: 2/15/24.
Accession Number: 20240215–5270.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER23–2686–001.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2024–02–16 EDAM/DAME Tariff Amendment Compliance Filing to be effective 12/21/2023.
Filed Date: 2/16/24.
Accession Number: 20240216–5123.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–99–002.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Compliance Filing Related to Capacity Modeling Enhancements ER24–99 to be effective 12/12/2023.
Filed Date: 2/16/24.
Accession Number: 20240216–5106.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1259–000.
Applicants: Occidental Power Marketing, L.P.
Description: 205(d) Rate Filing: Occidental Power Marketing Amended Tariff Filing to be effective 2/16/2024.
Filed Date: 2/15/24.
Accession Number: 20240215–5238.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER24–1260–000.
Applicants: Avista Corporation.
Description: 205(d) Rate Filing: Avista Corp Rate Schedule No. 59 to be effective 2/12/2024.
Filed Date: 2/15/24.
Accession Number: 20240215–5241.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER24–1261–000.
Applicants: Occidental Power Services, Inc.
Description: 205(d) Rate Filing: Occidental Power Services Inc. Amended Tariff Filing to be effective 2/16/2024.
Filed Date: 2/15/24.
Accession Number: 20240215–5243.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER24–1262–000.
Applicants: Occidental Chemical Corporation.
Description: 205(d) Rate Filing: Occidental Chemical Corporation Amended Tariff Filing to be effective 2/16/2024.
Filed Date: 2/15/24.
Accession Number: 20240215–5247.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER24–1263–000.
Applicants: OTCF, LLC.
Description: 205(d) Rate Filing: OTCF, LLC Amended Tariff Changes to be effective 2/16/2024.
Filed Date: 2/15/24.
Accession Number: 20240215–5248.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER24–1264–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Tariff Amendment: Notice of Cancellation of Service Agreement FERC No. 886 to be effective 4/15/2024.
Filed Date: 2/15/24.
Accession Number: 20240215–5250.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER24–1265–000.
Applicants: Southwestern Public Service Company.
Description: Tariff Amendment: SPS–WILD–E&P Agrmt-697–0.1.0 NOC to be effective 2/16/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5000.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1266–000.
Applicants: Rush Solar Project II, LLC.
Description: Rush Solar Project II, LLC submits Request of for Prospective Tariff Waiver and Expedited Action.
Filed Date: 2/15/24.
Accession Number: 20240215–5290.
Comment Date: 5 p.m. ET 3/7/24.

Docket Numbers: ER24–1267–000.
Applicants: Public Service Company of Colorado.
Description: 205(d) Rate Filing: 2024–02–16—Removal Of Texas HB 4150 from SPS Trans Formula to be effective 1/1/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5062.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1268–000.
Applicants: The Dayton Power and Light Company, PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: The Dayton Power and Light Company submits tariff filing per 35.13(a)(2)(iii: AES Ohio submits revisions to Attachment H–15A to be effective 4/17/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5072.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1269–000.
Applicants: PacifiCorp.
Description: 205(d) Rate Filing: Certificate of Concurrence to NWE 3rd Amnd and Rstd Interconnection Agmt (AMPS) to be effective 1/12/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5107.
Comment Date: 5 p.m. ET 3/8/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number. Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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

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Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03703 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–114–000.
Applicants: Catalyze Bronx Bassett Ave Microgrid, LLC.
Description: Catalyze Bronx Bassett Ave Microgrid, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 2/16/24.
Accession Number: 20240216–5130.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: EG24–115–000.
Applicants: Yuma Solar Energy LLC.
Description: Yuma Solar Energy LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 2/16/24.
Accession Number: 20240216–5196.
Comment Date: 5 p.m. ET 3/8/24.

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

Docket Numbers: ER22–2339–002.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Third Compliance Filing in Response to Order No. 881 to be effective 7/12/2025.
Filed Date: 2/16/24.
Accession Number: 20240216–5195.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–762–000; ER24–764–000.
Applicants: GB Arthur Kill Storage LLC, Elevate Renewables F7, LLC.
Description: Supplement to December 27, 2024 Elevate Renewables F7, LLC, et al. tariff filing.
Filed Date: 2/16/24.
Accession Number: 20240216–5163.
Comment Date: 5 p.m. ET 2/26/24.

Docket Numbers: ER24–1270–000.
Applicants: Prescott Wind Energy LLC.
Description: Baseline eTariff Filing: Application for Market-Based Sales Authorization to be effective 3/15/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5140.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1271–000.
Applicants: Alton Post Office Solar, LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 4/17/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5146.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1272–000.
Applicants: Foxglove Solar Project, LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 4/17/2024.
Filed Date: 2/16/24.
Accession Number: 20240216–5147.
Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1274–000.

Applicants: Oleander Power Project, Limited Partnership.

Description: § 205(d) Rate Filing: Oleander Power Project Fourth Amendment to the PPA with Seminole to be effective 1/1/2025.

Filed Date: 2/16/24.

Accession Number: 20240216–5190.

Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1275–000.

Applicants: Aron Energy Prepay 34 LLC.

Description: Baseline eTariff Filing: Baseline new to be effective 4/17/2024.

Filed Date: 2/16/24.

Accession Number: 20240216–5199.

Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1276–000.

Applicants: Aron Energy Prepay 35 LLC.

Description: Baseline eTariff Filing: Baseline new to be effective 4/17/2024.

Filed Date: 2/16/24.

Accession Number: 20240216–5204.

Comment Date: 5 p.m. ET 3/8/24.

Docket Numbers: ER24–1277–000.

Applicants: Aron Energy Prepay 36 LLC.

Description: Baseline eTariff Filing: Baseline new to be effective 4/17/2024.

Filed Date: 2/16/24.

Accession Number: 20240216–5213.

Comment Date: 5 p.m. ET 3/8/24.

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

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

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Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03702 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15337–000]

Lock 47 Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On December 22, 2023, Lock 47 Hydro, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of hydropower on the Lehigh River in Northampton County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Chain Dam Hydroelectric Project would consist of the following: (1) an existing 700-foot-long, 20-foot-high concrete gravity dam (*i.e.,* Chain Dam); (2) an existing impoundment having a surface area of 300 acres and a storage capacity of 1,197 acre-feet at an elevation of 192 feet mean sea level; (3) two new 24-foot-wide by 87-foot-long turbine bays each housing two identical turbine-generator units; (4) four new identical turbine-generator units each with a rated capacity of 498 kilowatts (kW) for a total capacity of 1,992 kW; (5) a new 2,900-foot-long underground transmission line extending from the turbine-generator units to an existing utility pole on Lehigh Drive; and (6) appurtenant facilities. The proposed project would have an average annual generation of 10,500 megawatt-hours.

Applicant Contact: Michael C. Kerr, Lock 47 Hydro, LLC, 100 Cummings Center, Suite 415C, Beverly, MA 01915; phone: (978) 360–2547.

FERC Contact: Monir Chowdhury; phone: (202) 502–6736.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/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 Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's website at *https://elibrary.ferc.gov/eLibrary/search.* Enter the docket number (P–15337) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: February 16, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–03696 Filed 2–22–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0074; FRL–11422–01–OCSPP]

Cancellation Order for Certain Pesticide Registrations and Amendments To Terminate Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations and amendments to terminate uses, voluntarily requested by the registrants, and accepted by the Agency, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows a July 28, 2023, **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 3 of Unit II, to voluntarily cancel and amend to terminate uses of all these product registrations. In the July 28, 2023, notice, EPA indicated that it would issue an order implementing the cancellations and amendments to terminate uses, unless the Agency received substantive comments within the 30-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the notice. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations and amendments to terminate uses. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: This order is effective February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Christopher Green, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2707; email address: *green.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2023–0074, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

II. What action is the Agency taking?

This notice announces the cancellations and amendments to terminate uses, as requested by registrants, of products registered under FIFRA section 3 (7 U.S.C. 136a). These registrations are listed in sequence by registration number in Tables 1, 1A, 1B and 2 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

Registration No.	Company No.	Product name	Active ingredients
9688–168	9688	Chemsico RTU Herbicide G II	Glyphosate-isopropylammonium (103601/38641-94-0)—(1.92%).
9688–169	9688	Chemsico RTU Herbicide G 1	Glyphosate-isopropylammonium (103601/38641-94-0)—(.96%).
9688–177	9688	Chemsico Concentrate Herbicide G 1	Glyphosate-isopropylammonium (103601/38641-94-0)—(18%).
9688–178	9688	Chemsico Concentrate Herbicide G II	Glyphosate-isopropylammonium (103601/38641-94-0)—(41%).
9688–189	9688	Chemsico Concentrate Herbicide G III	Glyphosate-isopropylammonium (103601/38641-94-0)—(25%).
34704–1150	34704	LPI.A004	Trinexapac-ethyl (112602/95266-40-3)—(12%).
87373–117	87373	ARG Mancozeb MUP	Mancozeb (014504/8018-01-7)—(86.2%).
CA–040002	54555	Dormex	Cyanamide (014002/420-04-2)—(50%).
OR–100015	2749	Shield Emulsifiable Concentrate	Chlorpropham (018301/101-21-3)—(36%).

TABLE 1A—PRODUCT CANCELLATIONS

Registration No.	Company No.	Product name	Active ingredients
264–334	264	Sevin Brand RP2 Carbaryl Insecticide	Carbaryl (056801/63-25-2)—(22.5%).
264–335	264	Sevin Brand RP4 Carbaryl Insecticide	Carbaryl (056801/63-25-2)—(43%).
264–429	264	Sevin Brand Granular Carbaryl Insecticide	Carbaryl (056801/63-25-2)—(7%).
432–982	432	Sevin Brand 97.5% Insecticide	Carbaryl (056801/63-25-2)—(97.5%).
432–1209	432	R & M Garden Dust 5%	Carbaryl (056801/63-25-2)—(5%).
432–1210	432	R & M Garden Dust 10%	Carbaryl (056801/63-25-2)—(10%).
432–1211	432	CP Carbaryl Insecticide Spray—RTU	Carbaryl (056801/63-25-2)—(.126%).
432–1212	432	Sevin Grub Killer Granules (2% Sevin)	Carbaryl (056801/63-25-2)—(2%).
432–1227	432	Sevin SL Carbaryl Insecticide	Carbaryl (056801/63-25-2)—(43%).

TABLE 1A—PRODUCT CANCELLATIONS—Continued

Registration No.	Company No.	Product name	Active ingredients
432–1511	432	Sevin 4MC Manufacturing Use Concentrate Insecticide	Carbaryl (056801/63-25-2)—(43%).
432–1525	432	Sevin Brand Carbaryl Technical	Carbaryl (056801/63-25-2)—(99.45%).

The registrants of the products listed in Table 1A of Unit II, requested 18 months after cancellation to sell existing stocks.

TABLE 1B—PRODUCT CANCELLATIONS

Registration No.	Company No.	Product name	Active ingredients
61483–2	61483	Dura-Treet 40 Wood Preserver	Pentachlorophenol (063001/87-86-5)—(34%).
61483–3	61483	KMG–B Penta OL Technical Penta	Pentachlorophenol (063001/87-86-5)—(86%).
61483–94	61483	KMG–B Penta OL Penta Blocks	Pentachlorophenol (063001/87-86-5)—(86%).
97080–10	97080	Stella-Jones Penta	Pentachlorophenol (063001/87-86-5)—(86%).

The registrants of the products listed in Table 1B of Unit II, requested an effective date of cancellation of February 29, 2024, for the products listed in Table 1B of Unit II.

TABLE 2—PRODUCT REGISTRATION AMENDMENTS TO TERMINATE USES

Registration No.	Company No.	Product name	Active ingredient	Uses to be terminated
67690–2	67690	A-Rest Solution	Ancymidol (108601/12771-68-5)—(.0264%).	Interior scape.
94730–3	94730	Bifenthrin Technical	Bifenthrin (128825/82657-04-3)—(98.37%).	Termiticide and Soil Contact Non-Fumigation Treatment, Wood Treatment and Protection, Christmas trees, Conifer Seed Orchards, Nonbearing Fruit and Nut Trees, Greenhouse Grown Ornamental Trees, Shrubs, Plants, Flowers, Outdoor Insect Control, Indoor Insect Control, Residential Lawns, Ornamental Plants, Trees, Shrubs, and Vines (Woody), Turfgrass (including golf courses), Sod Farms & Food Handling Establishments: Places other than private residences in which food is held, processed, prepared, or served.

Table 3 of this unit includes the names and addresses of record for all registrants of the products in Tables 1, 1A, 1B and 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed above.

TABLE 3—REGISTRANTS OF CANCELLED AND/OR AMENDED PRODUCTS

EPA company no.	Company name and address
264	Bayer CropScience, LP, Agent Name: Bayer CropScience, LLC, 801 Pennsylvania Avenue, Suite 900, Washington, DC 20004.
432	Bayer Environmental Science, A Division of Bayer CropScience, LP, 700 Chesterfield Parkway West, Chesterfield, MO 63017.
9688	Chemsico, A Division of United Industries Corp., P.O. Box 142642, St. Louis, MO 63114–0642.
2749	Aceto Life Sciences, LLC, 4 Tri Harbor Court, Port Washington, NY 11050–4661.
34704	Loveland Products, Inc., P.O. Box 1286, Greeley, CO 80632–1286.
54555	Alzchem Trostberg GmbH, Agent Name: Alzchem, LLC, 11390 Old Roswell Road, St. 124, Alpharetta, GA 30009.
61483	KMG-Bernuth, Inc., 300 Throckmorton, Suite 1900, Fort Worth, TX 76102.
67690	Sepro Corporation, 11550 N Meridian Street, Suite 600, Carmel, IN 46032.
87373	Argite, LLC, Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332.
94730	Generic Crop Science, LLC, 1887 Whitney Mesa Drive, #9740, Henderson, NV 89014–2069.
97080	Arbor Preservative Systems, LLC, Agent Name: Lewis & Harrison, 2461 South Clark Street, Suite 710, Arlington, VA 22202.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the July 28, 2023, **Federal Register** notice announcing the Agency's receipt of the requests for voluntary cancellations and amendments to terminate uses of products listed in Tables 1, 1A, 1B and 2 of Unit II.

IV. Cancellation Order

Pursuant to FIFRA section 6(f) (7 U.S.C. 136d(f)(1)), EPA hereby approves the requested cancellations and amendments to terminate uses of certain pesticide registrations identified in Tables 1, 1A, 1B and 2 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Tables 1, 1A and 2 of Unit II, are canceled and/or amended to terminate the affected uses as of the date of this order. The product registrations identified in Table 1B are cancelled as of February 29, 2024. Any distribution, sale, or use of existing stocks of the products identified in this order in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI, will be a violation of FIFRA.

V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** of July 28, 2023 (88 FR 48842) (FRL–10886–01–OCSPP). The comment period closed on August 28, 2023.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States, and which were packaged, labeled, and released for shipment prior to the effective date of the action. The existing stocks provisions for the products subject to this order are as follows:

A. For: 264–334; 264–335; 264–429; 432–982; 432–1209; 432–1210; 432–1211; 432–1212; 432–1227; 432–1511; and 432–1525

For 264–334; 264–335; 264–429; 432–982; 432–1209; 432–1210; 432–1211; 432–1212; 432–1227; 432–1511; and 432–1525, listed in Table 1A of Unit II, the registrants requested a period of 18 months after the effective date of the cancellation to sell and distribute existing stocks of products, which will be the date of publication of the cancellation order in the **Federal Register**. Registrants are permitted to sell or distribute products listed in Table 1A, until August 25, 2025. Thereafter, registrants will be prohibited from selling or distributing the products identified in Table 1A of Unit II, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

B. For: 61483–2; 61483–3; 61483–94; and 97080–10

For 61483–2; 61483–3; 61483–94; and 97080–10, listed in Table 1B of Unit II, the registrants requested an effective date of cancellation of February 29, 2024. The Notice of Receipt of Requests for Voluntary Cancellations from July 28, 2023, incorrectly stated that pentachlorophenol registrants would be able to sell and distribute existing stocks for 1 year after the effective date of the cancellation and that non-registrant distributors and end-users would be permitted to continue to sell, distribute and use pentachlorophenol products until supplies are exhausted. However, due to the unreasonable adverse effects identified during the registration review of pentachlorophenol, EPA determined that registrants and non-registrants must cease sale and distribution of pentachlorophenol products simultaneously with the cancellation of those products. Therefore, as of February 29, 2024, all sale and distribution of the products identified in Table 1B of Unit II, is prohibited, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

EPA is permitting end-users to continue to use existing stocks of pentachlorophenol products, as long as that use is consistent with labeling on the existing stocks, until February 28, 2027, after which all use is prohibited, even if not all existing stocks are exhausted by this time. Therefore, after February 28, 2027, all use of the products identified in Table 1B of Unit II, is prohibited.

This timeline is consistent with the final registration review decision for pentachlorophenol, which prohibits the sale or distribution of these products upon cancellation (February 29, 2024) and allows for an additional three years for use of existing stocks of pentachlorophenol product (until February 28, 2027). Documents pertaining to the registration review of pentachlorophenol can be found in *https://www.regulations.gov* in Docket ID EPA–HQ–OPP–2014–0653.

Section 6(a)(1) of FIFRA gives EPA the discretion to permit the continued sale and use of existing stocks of a pesticide whose registration is cancelled where doing so is determined to be consistent with the purposes of FIFRA 7 U.S.C. 136d(a)(1). In the case of the pentachlorophenol registrations subject to this order, allowing for continued use or sale after the dates discussed in the previous paragraph would not be consistent with FIFRA; therefore, EPA is not allowing for continued sale, distribution, or use of pentachlorophenol products after the dates listed above.

C. For: Products Listed in Tables 1 and 2

For the products listed in Table 1 of Unit II, the registrants may continue to sell and distribute existing stocks of products listed in Table 1 until February 24, 2025, which is 1 year after publication of this cancellation order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1 of Unit II, except for export in accordance with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

Now that EPA has approved product labels reflecting the requested amendments to terminate uses, registrants are permitted to sell or distribute products listed in Table 2 of Unit II, under the previously approved labeling until August 25, 2025, a period of 18-months after publication of the cancellation order in this **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the terminated uses identified in Table 2 of Unit II, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of the products listed in Tables 1 and 2 until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the respective products.

Authority: 7 U.S.C. 136 *et seq.*

Dated: February 6, 2024.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2024–03729 Filed 2–22–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–112]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed February 12, 2024 10 a.m. EST Through February 16, 2024 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.*

EIS No. 20240029, Draft, GSA, AK, Alcan Land Port of Entry Expansion and Modernization Draft Environmental Impact Statement Alcan, Alaska, Comment Period Ends: 04/11/2024, Contact: Aaron Evanson 206–445–5876.

EIS No. 20240030, Final, NRCS, PRO, ADOPTION—PROGRAMMATIC—Habitat Restoration Activities Implemented throughout the Coastal United States, Review Period Ends: 03/25/2024, Contact: Angela Trahan 337–291–3142.

The Natural Resource Conservation Service (NRCS) has adopted the National Oceanic and Atmospheric Administration's Final EIS No. 20150171 filed 06/11/2015 with the Environmental Protection Agency. The NRCS was not a cooperating agency on this project. Therefore, republication of the document is necessary under Section 1506.3(b)(1) of the CEQ regulations.

EIS No. 20240031, Final, TVA, TN, Kingston Fossil Plant Retirement, Review Period Ends: 03/25/2024, Contact: Chevales Williams 423–751–7316.

Dated: February 20, 2024.

Julie Smith,

Acting Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2024–03690 Filed 2–22–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0614; FRL–11723–01–OAR]

Technical Documentation for the Framework for Evaluating Damages and Impacts (FrEDI)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of document availability and request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a 30-day public comment period for the draft document titled, ''Technical Documentation for the Framework for Evaluating Damages and Impacts (FrEDI)'' (EPA 430–R–24–001). This document provides technical documentation of a Framework used to analyze future climate change-related impacts to the United States, projected to occur across multiple impact sector categories, geographic regions, and populations, under any custom temperature scenario. This approach serves as an alternative or complement to traditional scenario-based approaches in order to improve communication of results, comparability between studies, and flexibility to facilitate scenario analysis. The draft technical documentation will also be subject to external peer review. Prior to finalizing the draft document, EPA intends to carefully consider all comments received from the public and from external peer reviewers. This draft document is not final as described in EPA's information quality guidelines and does not represent and should not be construed to represent Agency policy or views. The draft document is available via the internet on EPA's web page at *https://www.epa.gov/cira/2024-draft-fredi-td.*

DATES: To ensure your comments are considered for the final version of the document, please submit your comments by March 25, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2023–0614, to the Federal 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). EPA may publish any comment received to its public docket, submitted, 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 *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Martinich, Environmental Protection Agency, Office of Air and Radiation, Office of Atmospheric Protection, Climate Change Division, (202) 343–9871, *cira@epa.gov.*

SUPPLEMENTARY INFORMATION: Characterizing the future risks of climate change is a key goal of climate impacts analysis. The Framework for Evaluating Damages and Impacts (FrEDI) is a reduced form approach, implemented as an R package, that synthesizes data from existing peer-reviewed literature to project the distributional impacts of climate change to the U.S. through the end of the century. This framework relies on sectoral damages derived from existing peer-reviewed studies, which are further organized into an 'impact by degree' analytical framework for use within FrEDI. Results from the FrEDI R package can then be used to inform analyses of climate change impacts to the U.S. to better understand and communicate the distributional impacts of climate change over time, and across various sectors, regions, and populations. The speed and flexibility of this framework also enables assessment of how projected climate change impacts may change in the future due to various adaptation or emission mitigation scenarios. FrEDI therefore fills an important gap in U.S. climate change impact assessments by synthesizing climate impact information from a broad range of peer-reviewed studies, while also having the flexibility to assess future U.S. impacts under any custom scenario.

Sharyn Lie,

Director, Climate Change Division.

[FR Doc. 2024–02625 Filed 2–22–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Request for Comment on an Exposure Draft Titled Omnibus Technical Release Amendments

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has released for public comment an exposure draft of a proposed Technical Release titled *Omnibus Technical Release Amendments: Conforming Amendments to Technical Releases 10, 16, 20, 21.* Respondents are encouraged to comment on any part of the exposure draft.

DATES: Written comments are requested by April 15, 2024.

ADDRESSES: The exposure draft is available on the FASAB website at *https://www.fasab.gov/documents-for-comment/.* Copies can be obtained by contacting FASAB at (202) 512–7350. Comments should be sent to *fasab@fasab.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Monica R. Valentine, Executive Director, 441 G Street NW, Suite 1155, Washington, DC 20548, or call (202) 512–7350.

Authority: 31 U.S.C. 3511(d); Federal Advisory Committee Act, 5 U.S.C. 1001–1014.

Dated: February 15, 2024.

Monica R. Valentine,

Executive Director.

[FR Doc. 2024–03662 Filed 2–22–24; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL ELECTION COMMISSION

[Notice 2024–06]

Filing Dates for the New York Special Election in the 26th Congressional District

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for special election.

SUMMARY: New York has scheduled a special election on April 30, 2024, to fill the U.S. House of Representatives seat in the 26th Congressional District vacated by Rep. Brian Higgins. Committees required to file reports in connection with the Special General Election on April 30, 2024, shall file a 12-day Pre-General and a 30-Day Post-General Report.

ADDRESSES: 1050 First Street NE, Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, (202) 694–1100 or (800) 424–9530, *info@fec.gov.*

SUPPLEMENTARY INFORMATION:

Principal Campaign Committees

All principal campaign committees of candidates who participate in the New York Special General Election shall file a 12-day Pre-General Report on April 18, 2024, and a 30-day Post-General Report on May 30, 2024. (See chart below for the closing date for each report.)

Note that these reports are in addition to the campaign committee's regular quarterly filings. (See chart below for the closing date for each report).

Unauthorized Committees (PACs and Party Committees)

Political committees not filing monthly are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the New York Special General Election by the close of books for the applicable report(s). (See chart below for the closing date for each report.)

Committees filing monthly that make contributions or expenditures in connection with the New York Special General Election will continue to file according to the monthly reporting schedule.

Additional disclosure information for the New York special election may be found on the FEC website at *https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/.*

Disclosure of Lobbyist Bundling Activity

Principal campaign committees, party committees and leadership PACs that are otherwise required to file reports in connection with the special election must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of $22,700 during the special election reporting periods. (See chart below for closing date of each period.) 11 CFR 104.22(a)(5)(v), (b), 110.17(e)(2), (f).

CALENDAR OF REPORTING DATES FOR NEW YORK SPECIAL ELECTION

Report	Close of books [1]	Reg./cert. & overnight mailing deadline	Filing deadline
Political Committees Involved in the Special General (04/30/2024) Must File:			
April Quarterly	--- WAIVED ---		
Pre-General	04/10/2024	04/15/2024	04/18/2024
Post-General	05/20/2024	05/30/2024	05/30/2024
July Quarterly	06/30/2024	07/15/2024	07/15/2024

[1] The reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered as a political committee up through the close of books for the first report due.

Dated: February 20, 2024.

On behalf of the Commission.

Sean J. Cooksey,

Chairman, Federal Election Commission.

[FR Doc. 2024–03751 Filed 2–22–24; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS24–05]

Appraisal Subcommittee; Notice of Adoption of Revised Grants Handbook

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of adoption of Revised Grants Handbook.

SUMMARY: The Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council (FFIEC) is providing notice of its adoption of the Revised Grants Handbook (Handbook). The Handbook is the official repository of the policies and procedures for the administration of grants made by the ASC as authorized by Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (Title XI). The ASC adopted the Handbook in the open session ASC Special Meeting held January 17, 2024. This Handbook supersedes the Handbook that the ASC adopted on December 12, 2019.

FOR FURTHER INFORMATION CONTACT: Rae Frederique, Grants Director, at *regeane@asc.gov,* ASC, 1325 G Street NW, Suite 500, Washington, DC 20005.

SUPPLEMENTARY INFORMATION: The ASC is authorized to grant funds to the Appraisal Foundation under Title XI, section 1109(b)(4). The ASC may ''make grants in such amounts as it deems appropriate to the Appraisal Foundation, to help defray those costs of the foundation relating to the activities of its Appraisal Standards and Appraiser Qualification Boards.'' [1] The ASC is also authorized to grant funds to State appraiser certifying and licensing agencies under Title XI section 1109 (b)(5), which provides that the ASC may ''make grants to State appraiser certifying and licensing agencies, in accordance with policies to be developed by the [ASC], to support the efforts of such agencies to comply with [Title XI] . . . .'' [2]

The Handbook as adopted by the ASC is available to the public and can be found at: *https://www.asc.gov/sites/default/files/2024-01/2024.01.17%20ASC%20Handbook%20Ver.2.pdf* on the ASC's website (*www.asc.gov*).

* * * * *

By the Appraisal Subcommittee.

James R. Park,

Executive Director.

[FR Doc. 2024–03666 Filed 2–22–24; 8:45 am]

BILLING CODE 6700–01–P

[1] Title XI § 1109 (b)(4), 12 U.S.C. 3338(b)(4).

[2] Title XI § 1109 (b)(5), 12 U.S.C. 3338(b)(5).

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 201418.

Agreement Name: Hyundai Glovis/Grimaldi North Europe Space Charter Agreement.

Parties: Hyundai Glovis Co., Ltd; Grimaldi Deep Sea S.P.A. and Grimaldi Euromed S.P.A.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The agreement authorizes Grimaldi to charter space to Hyundai Glovis in the trade from Baltimore, MD to Zeebrugge, Belgium.

Proposed Effective Date: 2/12/2024.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/86545.

Agreement No.: 201419.

Agreement Name: WHL/ONE Vessel Sharing Agreement.

Parties: Ocean Network Express Pte. Ltd; Wan Hai Lines Ltd. and Wan Hai Lines (Singapore) PTE. Ltd.

Filing Party: Joshua Stein; Cozen O'Connor.

Synopsis: The Agreement authorizes Wan Hai Lines Ltd., Wan Hai Lines (Singapore) PTE Ltd., and Ocean Network Express Pte. Ltd. to operate shared services and to allow each other to charter slots on their vessels on the trade between China, Taiwan, Vietnam on the one hand and ports on the United States West Coast on the other hand.

Proposed Effective Date: 2/14/2024.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/86546.

Dated: February 20, 2024.

Carl Savoy,

Federal Register Alternate Liaison Officer, Federal Maritime Commission.

[FR Doc. 2024–03727 Filed 2–22–24; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Federal Trade Commission (FTC or Commission) is seeking public comment on its proposal to extend for an additional three years the Office of Management and Budget clearance for its Energy Labeling Rule (the Rule). The current clearance expires on February 29, 2024.

DATES: Comments must be filed by March 25, 2024.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. 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. The *reginfo.gov* web link is a United States Government website produced by the Office of Management and Budget (OMB) and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, Attorney, Division of Enforcement, Federal Trade Commission, Room CC–9528, 600 Pennsylvania Avenue NW, Washington, DC 20580, (202) 326–2889.

SUPPLEMENTARY INFORMATION:

Title: Energy Labeling Rule.

OMB Control Number: 3084–0069.

Type of Review: Extension without change of currently approved collection.

Estimated Annual Hours Burden: 821,651 [which is derived from 693,320 hours (testing) + 2,646 hours (reporting) + 807 hours (recordkeeping) + 112,272 hours (labeling) + 6,800 hours (retail and online catalog disclosures) +5,806 hours (online label posting)].

Estimated annual labor cost burden: $24,690,012 in labor costs [which is derived from $22,255,572 (testing) + $50,195 (reporting) + $15,309 (recordkeeping) + $2,129,800 (labeling) + $128,996 (online and catalog disclosures) + $110,140 (online label posting)].

Estimated annual non-labor cost burden: $3,000,000.

Request for Comment

On December 5, 2023, the FTC sought public comment on the information collection requirements associated with the Rule. 88 FR 84330. One comment only stated, ''Good,'' but added nothing further. No other germane comments were received. Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule.

Your comment—including your name and your state—will be placed on the public record of this proceeding. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Josephine Liu,

Assistant General Counsel for Legal Counsel.

[FR Doc. 2024–03726 Filed 2–22–24; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–102 and 105]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by *March 25, 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.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* CLIA Budget Workload Reports; *Use:* The Clinical Laboratory Improvement Amendments of 1988 (CLIA), Public Law 100–578 were enacted on October 31, 1988. Provisions of this law mandated by Congress require entities (with few exceptions) that test human specimens be subject to Federal regulation and have in effect a certificate issued by the Department of Health and Human Services. CLIA mandates that fees must be paid by each laboratory to obtain or renew a certificate and for the cost of compliance determination if applicable. The certificate issuance fees will be set by CMS at levels sufficient to recover the full costs of administering the operational provisions of CLIA, including approval and monitoring of proficiency testing programs and accrediting bodies and implementing Federal requirements. Fees will also be collected by CMS to cover the costs of inspecting non-accredited laboratories and validating accrediting laboratories based on the lab's volume and scope of testing. Currently, CMS contracts with 50 State agencies to conduct surveys of all participating health care facilities. As part of their contract, CMS reimburses the State agencies for the reasonable cost of conducting surveys. This information collection gathers the information necessary to reimburse State agencies for a reasonable cost. *Form Number:* CMS–102 and CMS–105

(OMB control number: 0938–0599); *Frequency:* Yearly, quarterly, and semi-annually; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 50; *Total Annual Responses:* 50; *Total Annual Hours:* 34. (For policy questions regarding this collection contact Eric Powell at 312–886–0791.)

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–03675 Filed 2–22–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10164 A/B]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by April 23, 2024.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10164 A/B Medicare Electronic Data Interchange (EDI) Registration and Electronic Data Interchange Enrollment Form

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. Type of Information Collection Request: Reinstatement with change of a previously approved collection; *Title of Information Collection:* Medicare Electronic Data Interchange (EDI) Registration and Electronic Data Interchange Enrollment Form; *Use:* The purpose of this collection is to obtain information that will be subsequently used during transaction exchange for identification of Medicare providers/suppliers and authorization of requested electronic data interchange (EDI) functions. The EDI Registration Form and the Medicare Enrollment Forms are completed by Medicare providers/suppliers and submitted to CMS Medicare Administrative Contractors (MACs). Authorization is needed for providers/suppliers to send/receive Health Insurance Portability and Accountability Act (HIPAA) standard transactions directly (or through a designated 3rd party) to/from Medicare contractors. Medicare contractors will use the information for initial set-up and maintenance of the access privileges. CMS has allowed each MAC to create their own organization specific forms given they are comparable in terms of content of forms 10164A and 10164B, to transmit data files electronically between themselves and their trading partners. The Standards for Electronic Transactions final rule, 45 CFR part 162 subpart K § 162.1101 through subpart R § 162.1802, (hereinafter referred to as ''Transactions Rule'') published August 17, 2000, adopted standards for health care transactions and code sets. Subsequent to the Transactions Rule, CMS–0003–P and CMS–0005–P proposed modifications to the adopted standards essential to permit initial implementation of the standards throughout the entire healthcare industry. Currently, MACs have a process in place to enroll providers for electronic billing and other EDI transactions. In support of the HIPAA Transactions Rule, the purpose of this Paperwork Reduction Act (PRA) request is to establish a prescribed amount of data that must be submitted by providers/suppliers that is sufficient to address all HIPAA transactions. *Form Number:* CMS–10164 A/B (OMB control number: 0938–0983); *Frequency:* Once; *Affected Public:* Private and Business or other for-profits; *Number of Respondents:* 1,181,209; *Number of Responses:* 1,181,209; *Total Annual Hours:* 393,706. (For policy questions regarding this collection contact

Charlene Parks at (410)-786–8684 or *Charlene.Parks@cms.hhs.gov*).

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–03676 Filed 2–22–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2113]

Taylor McLaren: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) debarring Taylor McLaren 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. McLaren was convicted of one felony count under Federal law for conspiracy to smuggle goods into the United States. The factual basis supporting Mr. McLaren's conviction, as described below, is conduct relating to the importation into the United States of a drug or controlled substance. Mr. McLaren 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 January 8, 2024 (30 days after receipt of the notice), Mr. McLaren had not responded. Mr. McLaren'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 23, 2024.

ADDRESSES: Any application by Mr. McLaren 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–2113. 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 March 2, 2023, Mr. McLaren was convicted as defined in section 306(l)(1) of the FD&C Act, in the U.S. District Court for Western District of Michigan when the court accepted his plea of guilty and 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.

The underlying facts supporting the conviction are as follows: As contained in the indictment and plea agreement from his case, filed on March 1, 2022, and August 22, 2022, respectively, Brendon Gagne owned and operated *www.ExpressPCT.com*, which sold misbranded prescription drugs, obtained from overseas suppliers, and sold to customers in the United States without requiring a prescription. Mr. McLaren was recruited by Brendon Gagne to receive, repackage, and reship prescription drugs Mr. McLaren received from co-conspirators outside of the United States that were purchased by customers on the website *www.ExpressPCT.com*. In Mr. McLaren's plea agreement, he acknowledged he knew that receiving and reshipping prescription drugs in this manner was illegal. Later on, Mr. McLaren recruited at least one other person to be involved in the scheme by also receiving misbranded prescription drugs from overseas suppliers.

As a result of this conviction, FDA sent Mr. McLaren, by certified mail, on November 30, 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. McLaren'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. McLaren's offense and concluded that the offense warranted the imposition of a 5-year period of debarment.

The proposal informed Mr. McLaren 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. McLaren received the proposal and notice of opportunity for a hearing on December 9, 2023. Mr. McLaren 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. Taylor McLaren 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. McLaren 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. McLaren is a prohibited act.

Dated: February 16, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–03650 Filed 2–22–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Scientific Registry of Transplant Recipients Information Collection Effort for Potential Donors for Living Organ Donation OMB No. 0906–0034—Extension

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

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. The initial notice was published on November 17, 2023, with a 60-day comment period. No comments were received. OMB will accept comments from the public during the 30-day comment period for this notice. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than March 25, 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 Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Joella Roland, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 443–3983.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Scientific Registry of Transplant Recipients Information Collection Effort for Potential Donors for Living Organ Donation, OMB No. 0906–0034—Extension.

Abstract: The Scientific Registry of Transplant Recipients (SRTR) is administered under contract with HRSA, an agency within HHS. HHS is authorized to establish and maintain mechanisms to evaluate the long-term effects associated with living organ donations (42 U.S.C. 273a) and is required to submit to Congress an annual report on the long-term health effects of living donation (42 U.S.C. 273b). The Organ Procurement and Transplantation Network final rule, 42 CFR part 121.11(b)(2), requires organ procurement organizations and transplant hospitals, "as specified from time to time by the Secretary," to submit to the SRTR, as appropriate, information regarding "donors of organs" and "other information that the Secretary deems appropriate."

In 2018, a pilot living donor registry was implemented by the SRTR, and each participating transplant program registered all potential candidates for living donation who provided informed consent to enroll. In 2019, an updated version of the data collection instrument was approved, followed by the latest data collection forms which were approved on February 26, 2021. These data collection modifications were intended to improve the quality of the data and reduce the administrative burden for respondents. This **Federal Register** notice requests an extension of the last approved data collection forms (February 2021) with no changes to the total estimated annualized burden hours.

A 60-day notice published in the **Federal Register** on November 17, 2023, vol. 88, No. 221; pp. 80318–19. There were no public comments.

Need and Proposed Use of the Information: The transplant programs submit health information collected at the time of donation evaluation through a secure web-based data collection tool developed by the SRTR contractor. The SRTR contractor maintains contact with registry participants and collects data on long-term health outcomes through surveys. The data collection includes outcomes of evaluation, including reasons for non-donation. The living donor registry is an ongoing effort, and the goal is to continue to collect data on living organ donor transplant programs in the United States over time. Monitoring and reporting of long-term health outcomes of living organ donors post-donation will continue to provide useful information to transplant programs for their future donor selection process and to aid potential living organ donors in their decision to pursue living donation.

Likely Respondents: Potential and actual living donors, transplant programs, medical and scientific organizations, and public organizations, including patient advocacy groups.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Potential Living Donor Registration Form	[a] 16	[c] 112	[c] 1,792	[e] 0.27	484
Potential Living Donor Follow-up Form	[b] 754	1	[d] 754	[f] 0.50	377
Reasons Did Not Donate Form (Liver or Kidney)	[a] 16	[c] 106	[c] 1,696	[g] 0.23	390
Total	[a] 786		4,242		1,251

[a] Number of respondents is based on the current number of transplant programs and is likely to increase as additional programs decide to participate.
[b] Number of living donor candidates that submitted follow-up forms in 2019.
[c] Derived from the number of forms submitted by transplant programs in 2019.
[d] Total number of Living Donor Collective follow-up forms submitted by living donor candidates in 2019.
[e] Based on a 2019 survey of transplant programs submitting data to the Living Donor Collective.
[f] Based on internal testing and user feedback.
[g] Based on discussion and interviews with staff at participating transplant programs in 2019–2020.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2024–03759 Filed 2–22–24; 8:45 am]

BILLING CODE 4165–15–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; Allergy, Immunology, and Transplantation Research Committee (AITC) Special Emphasis Panel.

Date: March 18, 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 3G31B, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: James T. Snyder, 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 3G31B, Rockville, MD 20852, (240) 669–5060, *james.snyder@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 16, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–03669 Filed 2–22–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Center for Scientific Review Advisory Council.

This will be held in-person and will be open to the public as indicated below. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should register at: *https://public.csr.nih.gov/AboutCSR/Organization/CSRAdvisoryCouncil/Registration.*

The meeting can be viewed remotely via the NIH Videocasting website: *https://videocast.nih.gov/watch=54186.*

Name of Committee: Center for Scientific Review Advisory Council.

Date: March 25, 2024.

Time: 9:30 a.m. to 3:30 p.m.

Agenda: Provide advice to the Director, Center for Scientific Review (CSR), on matters related to planning, execution, conduct, support, review, evaluation, and receipt and referral of grant applications at CSR.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Conference Room 160–A, Bethesda, MD 20892.

Contact Person: Bruce Reed, Ph.D., Deputy Director, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–9159, *reedbr@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. In the interest of security, NIH has stringent procedures for entrance into NIH federal property. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *https://public.csr.nih.gov/AboutCSR/Organization/CSRAdvisoryCouncil,* where an agenda and any additional information for the meeting will be posted when available.

(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 16, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–03671 Filed 2–22–24; 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 Support for Research Excellence—First Independent Research (SuRE-First) Award (R16—Clinical Trial Not Allowed).

Date: March 21, 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 3G21A, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Shiv A. Prasad, 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 3G21A, Rockville, MD 20852, National Institutes of Health, NIAID, Rockville, MD 20892, *shiv.prasad@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 16, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–03670 Filed 2–22–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; 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 Nursing Research Special Emphasis Panel: NINR R25 Applications ZNR1 REV N(06) Review Meeting.

Date: March 12, 2024.

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

Agenda: To review and evaluate grant applications.

Place: National Institute of Nursing, 6700B Rockledge Drive, 4th Floor, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nisan Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Branch, NIDCR, NIH, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892, 301–451–2405, *nisan.bhattacharyya@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: February 16, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–03668 Filed 2–22–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

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

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

Name of Committee: Center for Scientific Review Special Emphasis Panel; AREA/REAP: Musculoskeletal, Skin and Oral Sciences.

Date: March 14, 2024.

Time: 9:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Richard Ingraham, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4116, MSC 7814, Bethesda, MD 20892, (301) 496–8551, *ingrahamrh@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Musculoskeletal, Skin and Oral Sciences.

Date: March 14–15, 2024.

Time: 1:30 p.m. to 8:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Richard Ingraham, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4116, MSC 7814, Bethesda, MD 20892, (301) 496–8551, *ingrahamrh@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Drug Discovery and Development.

Date: March 18, 2024.

Time: 8:00 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: Sergei Ruvinov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7806, Bethesda, MD 20892, 301–435–1180, *ruvinser@csr.nih.gov.*

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; HIV Immunopathogenesis and Vaccine Development Study Section.

Date: March 18–19, 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: Philip Owens, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., Bethesda, MD 20892, (301) 594–7394, *owensp2@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: The Cancer Biotherapeutics Development (CBD).

Date: March 18–19, 2024.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave. NW, Washington, DC 20037.

Contact Person: Laurie Ann Shuman Moss, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 867–5309, *laurie.shumanmoss@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Cancer Immunology and Immunotherapy I.

Date: March 18–19, 2024.

Time: 9:30 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: Ola Mae Zack Howard, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7806, Bethesda, MD 20892, 301–451–4467, *howardz@mail.nih.gov.*

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; HIV Molecular Virology, Cell Biology, and Drug Development Study Section.

Date: March 18–19, 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: Kenneth A. Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 16, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–03672 Filed 2–22–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Privacy Act of 1974; System of Records

AGENCY: National Institutes of Health (NIH), Department of Health and Human Services.

ACTION: Rescindment of a system of records notice.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the Department of Health and Human Services (HHS), through the National Institutes of Health (NIH), is rescinding a system of records titled ‘‘Administration: Senior Staff, HHS/NIH/NIAID,’’ system number 09–25–0087. The records are no longer needed for agency business, so are no longer retrieved by names or other personal identifiers. Because of this, the records no longer qualify as a Privacy Act system of records, and it is appropriate to rescind the system of records.

DATES: In accordance with 5 U.S.C. 552a(e)(4), this notice is applicable upon publication.

ADDRESSES: The public may submit written comments on this notice, by mail or email, to Dustin Close, Office of Management Assessment, National Institutes of Health, 6705 Rockledge Drive, Suite 601, Bethesda, MD 20892, or email *privacy@mail.nih.gov.*

FOR FURTHER INFORMATION CONTACT: General questions about the system of records may be submitted to Dustin Close, Office of Management Assessment, National Institutes of Health, 6705 Rockledge Drive, Suite 601, Bethesda, MD 20892, telephone 301–496–4606, email *privacy@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: HHS/NIH is rescinding a system of records, titled ‘‘Administration: Senior Staff, HHS/NIH/NIAID,’’ system number 09–25–0087. The records consist of paper files containing biographical information about key professional employees and consultants that was used for public announcements and press releases about National Institute of Allergy and Infectious Diseases (NIAID) research. The records have not been used since 2013 and are no longer needed for agency business, so are no longer retrieved by personal identifier. For these reasons, the records no longer qualify as a Privacy Act system of records. Because they have historical value, they will be transferred to the Office of NIH History and Stetten Museum for continued preservation, as authorized by National Archives and Records Administration-approved records disposition schedule 11–203 (disposition authority DAA–GRS–2016–0005–0003), after removing any sensitive information.

For the foregoing reasons, the below system of records is hereby rescinded:

SYSTEM NAME AND NUMBER:

Administration: Senior Staff, HHS/NIH/NIAID, 09–25–0087.

HISTORY:

67 FR 60742 (Sept. 26, 2002), 83 FR 6591 (Feb. 14, 2018).

Alfred C. Johnson,

Deputy Director for Management, National Institutes of Health.

[FR Doc. 2024–03757 Filed 2–22–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2024–0049]

Issuance of Maritime Security (MARSEC) Directive 105–4; Cyber Risk Management Actions for Ship-to-Shore Cranes Manufactured by People's Republic of China Companies

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the availability of Maritime Security (MARSEC) Directive 105–4, which provides cyber risk management actions for owners or operators of ship-to-shore (STS) cranes manufactured by People's Republic of China (PRC) companies (PRC-manufactured STS cranes). The directive contains security-sensitive information and, therefore, cannot be made available to the general public. Owners or operators of PRC-manufactured STS cranes should immediately contact their local Coast Guard Captain of the Port (COTP) or District Commander for a copy of MARSEC Directive 105–4.

DATES: MARSEC Directive 105–4 is available on February 21, 2024.

FOR FURTHER INFORMATION CONTACT: For information about this document call or email Brandon Link, Commander, U.S.

Coast Guard, Office of Port and Facility Compliance; telephone 202–372–1107, email *Brandon.M.Link@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Background and Purpose

MARSEC Directive 105–4 provides cyber risk management actions for owners or operators of PRC-manufactured STS cranes. Owners or operators of PRC-manufactured STS cranes should immediately contact their local COTP or cognizant District Commander for a copy of MARSEC Directive 105–4.

The Maritime Transportation Security Act's implementing regulations in 33 CFR parts 101–105 are designed to protect the maritime elements of the national transportation system. Under 33 CFR 101.405, the Coast Guard may set forth additional security measures to respond to a threat assessment or to a specific threat against those maritime elements. In addition, per 33 CFR 6.14–1, the Commandant ''may prescribe such conditions and restrictions relating to the safety of waterfront facilities and vessels in port as the Commandant finds to be necessary under existing circumstances.''

PRC-manufactured STS cranes make up the largest share of the global ship-to-shore crane market and account for nearly 80% of the STS cranes at U.S. ports. By design, these cranes may be controlled, serviced, and programmed from remote locations, and those features potentially leave PRC-manufactured STS cranes vulnerable to exploitation, threatening the maritime elements of the national transportation system.

As such, additional measures are necessary to prevent a Transportation Security Incident in the national transportation system due to the prevalence of PRC-manufactured STS cranes in the U.S., threat intelligence related to the PRC's interest in disrupting U.S. critical infrastructure, and the built-in vulnerabilities for remote access and control of these STS cranes.

Procedural

COTPs and District Commanders can access all MARSEC directives on Homeport by logging in and going to Missions > Maritime Security > Domestic Ports and Waterway Security > Policy. Owners and operators of PRC-manufactured cranes must contact their local COTP or cognizant District Commander to acquire a copy of MARSEC Directive 105–4. COTPs or cognizant District Commanders may provide this MARSEC Directive to appropriate owners and operators in accordance with SSI handling procedures.

Pursuant to 33 CFR 101.405, we consulted with the Department of State, Department of Defense, Department of Transportation/Maritime Administration, Department of Homeland Security, Transportation Security Administration, Cybersecurity and Infrastructure Security Agency, and National Maritime Intelligence-Integration Office.

All MARSEC Directives issued pursuant to 33 CFR 101.405 are marked as SSI in accordance with 49 CFR part 1520. COTPs and District Commanders will require individuals requesting a MARSEC Directive to prove that they meet the standards for a ''covered person'' under 49 CFR 1520.7, have a ''need to know'' the information, as defined in 49 CFR 1520.11, and that they will safeguard the SSI in MARSEC Directive 105–4 as required in 49 CFR 1520.9.

This notice is issued under authority of 33 CFR 6.14–1 and 101.405(a)(2) and 5 U.S.C. 552(a).

Dated: February 21, 2024.

Amy M. Beach,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2024–03822 Filed 2–21–24; 11:15 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2412]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before May 23, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2412, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Auglaize County, Ohio and Incorporated Areas Project: 20–05–0015S Preliminary Date: June 23, 2023	
City of Saint Marys	City Hall, 101 East Spring Street, Saint Marys, OH 45885.
City of Wapakoneta	City Hall, 701 Parlette Court, Wapakoneta, OH 45895.
Unincorporated Areas of Auglaize County	Auglaize County Engineer's Office, 1014 South Blackhoof Street, Wapakoneta, OH 45895.
Village of Buckland	Administration Building, 105 North Main Street, Buckland, OH 45819.
Village of Minster	Administration Building, 5 West 4th Street, Minster, OH 45865.
Village of New Bremen	Village Office, 214 North Washington Street, New Bremen, OH 45869.
Village of New Knoxville	Municipal Building, 101 South Main Street, New Knoxville, OH 45871.
Nelson County, Virginia (All Jurisdictions) Project: 20–03–0034S Preliminary Date: June 30, 2023	
Unincorporated Areas of Nelson County	Nelson County Planning and Zoning Department, 80 Front Street, Lovingston, VA 22949.

[FR Doc. 2024–03723 Filed 2–22–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2410]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before May 23, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2410, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf*.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Douglas County, Nevada and Incorporated Areas Project: 12–09–0403S Preliminary Date: November 08, 2023	
Unincorporated Areas of Douglas County	Minden Inn—Douglas County Offices, 1594 Esmeralda Avenue, Minden, NV 89423.
Washoe Tribe of Nevada and California	Washoe Tribal Administrative Offices, 919 US Highway 395 North, Gardnerville, NV 89410.

[FR Doc. 2024–03724 Filed 2–22–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2308]

Proposed Flood Hazard Determinations for Rock County, Minnesota and Incorporated Areas

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice; withdrawal.

SUMMARY: The Federal Emergency Management Agency (FEMA) is withdrawing its proposed notice concerning proposed flood hazard determinations, which may include the addition or modification of any Base Flood Elevation, base flood depth, Special Flood Hazard Area boundary or zone designation, or regulatory floodway (herein after referred to as proposed flood hazard determinations) on the Flood Insurance Rate Maps and, where applicable, in the supporting Flood Insurance Study reports for Rock County, Minnesota and Incorporated Areas.

DATES: This withdrawal is effective February 23, 2024.

ADDRESSES: You may submit comments, identified by Docket No. FEMA–B–2308, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: On February 23, 2023, FEMA published a proposed notice at 88 FR 11457, proposing flood hazard determinations for Rock County, Minnesota and Incorporated Areas. FEMA is withdrawing the proposed notice.

Authority: 42 U.S.C. 4104; 44 CFR 67.4.

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2024–03725 Filed 2–22–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

[Docket ID FEMA–2014–0022]

Technical Mapping Advisory Council

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Request for applicants for appointment.

SUMMARY: The Federal Emergency Management Agency (FEMA) is requesting qualified individuals interested in serving on the Technical Mapping Advisory Council (TMAC) apply for appointment. The TMAC, as established in the Biggert-Waters Flood Insurance Reform Act of 2012, makes recommendations to the FEMA

Administrator on how to improve, in a cost-effective manner, the accuracy, general quality, ease of use, distribution, and dissemination of Flood Insurance Rate Maps (FIRMs) and risk data; and to define performance metrics and milestones required to map flood risk areas effectively and efficiently in the United States. The appointments are for 3 years each, the terms of which start in spring/summer 2024. Applicants will be considered for any of the seven vacancies on the TMAC for which they are deemed to be qualified.

DATES: Applications will be accepted until 11:59 p.m. eastern standard time (EST) on Friday, April 19, 2024.

ADDRESSES: Membership applications should be submitted by one of the following methods:

- *Email: FEMA-TMAC@fema.dhs.gov.*
- *Mail:* FEMA, Federal Insurance and Mitigation Administration, Risk Management Directorate, Attn: Brian Koper, 400 C St. SW, Ste. 6NW–1412, Washington, DC 20472–3020.

FOR FURTHER INFORMATION CONTACT: Brian Koper, Designated Federal Officer for the TMAC, FEMA, Federal Insurance and Mitigation Administration, Risk Management Directorate, 400 C St. SW, Ste. 6NW–1412, Washington, DC 20472–3020, (202) 733–7859, *FEMA-TMAC@fema.dhs.gov.* The TMAC website is: *http://www.fema.gov/TMAC.*

SUPPLEMENTARY INFORMATION: The TMAC is an advisory committee established by the Biggert-Waters Flood Insurance Reform Act of 2012, 42 U.S.C. 4101a, in accordance with provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. ch. 10 (Pub. L. 117–286). The TMAC makes recommendations to FEMA on mapping-related issues and activities, including mapping standards and guidelines, performance metrics and milestones, map maintenance, interagency and intergovernmental coordination, map accuracy, and funding strategies. In addition, the TMAC submits an annual report to the FEMA Administrator that contains: (1) a description of the activities of the Council; (2) an evaluation of the status and performance of FIRMs and mapping activities to revise and update FIRMs; and (3) a summary of recommendations made by the Council to the FEMA Administrator. Members of the TMAC will be appointed based on their demonstrated knowledge and competence in areas such as surveying, cartography, remote sensing, geospatial information systems, or the technical aspects of preparing and using FIRMs. In order for FEMA to maximize the impact of the Council and the guidance it provides; the Council must be diverse with regard to professional and technical expertise. FEMA is committed to pursuing opportunities, consistent with applicable law, to compose a committee that reflects the diversity of the nation's people.

FEMA is requesting qualified individuals who are interested in serving on the TMAC to apply for an appointment. Applicants will be considered for appointment to seven vacancies on the TMAC, the terms of which start in spring/summer of 2024. Four of these seven vacancies, as described below, will be appointed to serve as a Special Government Employee (SGE) as defined in title 18 U.S.C. 202(a) to serve in their individual capacity, while the other three members of the TMAC will be appointed to serve as representative members. The candidates selected for appointment as a SGE will be subject to the Federal conflict of interest laws and standards of conduct regulations and required to file a New Entrant Confidential Disclosure Report (OGE 450). This form can be obtained by visiting the website of the Office of Government Ethics (*http://www.oge.gov*); please do not submit this form with your application. Qualified applicants will be considered for one or more of the following membership categories with vacancies:

(a) One member of a recognized professional engineering association or organization;

(b) One member of a recognized professional association or organization representing flood hazard determination firms;

(c) One representative of a recognized professional association or organization representing State geographic information;

(d) One representative of a State government agency that has entered into cooperating technical partnerships with the Administrator and has demonstrated the capability to produce FIRMs;

(e) One representative of a local government agency that has entered into cooperating technical partnerships with the Administrator and has demonstrated the capability to produce FIRMs;

(f) One member of a recognized risk management association or organization;

(g) One State mitigation officer.

Members of the TMAC serve terms of three years with an opportunity to serve additional terms in accordance with the TMAC By-Laws. There is no application form. However, applications must include the following information:

- Applicant's full name;
- Position(s) they would like to be considered for;
- Home and business phone numbers;
- Preferred email address;
- Home and business mailing addresses;
- Current position title and organization;
- Resume or curriculum vitae; and
- The membership category of interest (*e.g.,* member of a recognized professional association or organization representing flood hazard determination firms).

The TMAC meets as often as needed to fulfill its mission, but not less than twice a year. Members may be reimbursed for travel and per diem incurred in the performance of their duties as members of the TMAC. All travel for TMAC business must be approved in advance by the Designated Federal Officer.

The Department of Homeland Security (DHS) does not discriminate in employment on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a widely diverse candidate pool for all its recruitment actions. Current DHS and FEMA employees will not be considered for membership. Federally registered lobbyists will not be considered.

Nicholas A. Shufro,

Deputy Assistant Administrator, Risk Analysis, Planning & Information Directorate, Resilience, Federal Emergency Management Agency.

[FR Doc. 2024–03737 Filed 2–22–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0030; OMB No. 1660–0125]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; FEMA Preparedness Grants: Homeland Security Grant Program (HSGP)

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and

clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. FEMA 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 Homeland Security Grant Program (HSGP), which includes the State Homeland Security Program (SHSP), the Urban Area Security Initiative (UASI), and Operation Stonegarden (OPSG). This revision removes the OPSG Daily Activity Report (FEMA Form FF–207–FY–21–113 (formerly 089–0–27)) from the collection.

DATES: Comments must be submitted on or before March 25, 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.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Alexander Mrazik Jr., Branch Chief, FEMA's Grant Programs Directorate, Grant Operations Division, Preparedness Grants Division, Homeland Security Programs Branch, at (202) 786–9732 or *Alexander.MrazikJr@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency's (FEMA's) Homeland Security Grant Program (HSGP) supports state, local, tribal, and territorial governments efforts to prevent terrorism and prepare the Nation for the threats and hazards that pose the greatest risk to the security of the United States. The HSGP provides funding to implement investments that build, sustain, and deliver the 32 core capabilities essential to achieving the National Preparedness Goal of a secure and resilient Nation. The building, sustainment, and delivery of these core capabilities are not exclusive to any single level of government, organization, or community, but rather, require the combined effort of the whole community. The HSGP supports core capabilities across the five mission areas of Prevention, Protection, Mitigation, Response, and Recovery based on allowable costs. HSGP is comprised of three grant programs: State Homeland Security Program (SHSP), Urban Area Security Initiative (UASI), and Operation Stonegarden (OPSG). Together, these grant programs fund a range of activities, including planning, organization, equipment purchase, training, exercises, and management and administration across all core capabilities and mission areas. The authorizing authority of the HSGP is section 2002 of the Homeland Security Act of 2002 (Pub. L. 107–296) (*See* 6 U.S.C. 603–609, as amended).

This revision of the information collection removes the OPSG Daily Activity Report, FEMA Form FF–207–FY–21–113 (formerly 089–0–27) that was created at the behest of CBP to fulfill CBP's requirements under OPSG and is only used to collect information from the public by CBP. FEMA has previously included this instrument under this collection as a service to CBP, but including an instrument used by CBP under a collection granting FEMA the authority to collect information does not provide the proper service to CBP, FEMA or the public.

This proposed information collection previously published in the **Federal Register** on November 17, 2023, at 88 FR 80324 with a 60-day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: FEMA Preparedness Grants: Homeland Security Grant Program (HSGP).

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0125.

FEMA Forms: FEMA Form FF–207–FY–21–110 (formerly 089–1), Investment Justification for Homeland Security Grant Program (HSGP), State Homeland Security Program (SHSP) and Urban Area Security Initiative (UASI); FEMA Form FF–207–FY–21–111 (formerly 089–16), Operation Stonegarden (OPSG) Operations Order and Budget Template; FEMA Form FF–207–FY–21–112 (formerly 089–20), Operation Stonegarden (OPSG) Inventory of Operation Orders; FEMA Instruction FI–207–FY–24–100, Urban Area Working Group (UAWG) Overview/Structure (including Point-of-Contact (POC)); FEMA Instruction FI–207–FY–24–101, Operational Overtime Documentation; FEMA Instruction FI–207–FY–24–102, Multiyear Training and Exercise Plan; FEMA Instruction FI–207–FY–24–103, Urban Area Security Initiative (UASI) Governance Charter; FEMA Instruction FI–207–FY–24–104, Senior Advisory Committee (SAC) Charter; FEMA Instruction FI–207–FY–24–105, Urban Area Working Group (UAWG) Allocation Methodology; FEMA Instruction FI–207–FY–24–106, State Homeland Security Program (SHSP) and Urban Area Security Initiative (UASI) Pass-Through Requirements; FEMA Instruction FI–207–FY–24–107, Critical Emergency Supplies; and FEMA Instruction FI–207–FY–24–108, SAFECOM Compliance Letter.

Abstract: The Homeland Security Grant Program (HSGP) is an important tool among a comprehensive set of measures to help strengthen the Nation against risks associated with potential terrorist attacks. FEMA uses the information to evaluate applicants' familiarity with the national preparedness architecture and identify how elements of this architecture have been incorporated into planning, operations, and investments at the regional, state and local levels. The HSGP is a primary funding mechanism for building and sustaining national preparedness capabilities. The HSGP is comprised of three separate grant programs: the State Homeland Security Program (SHSP), the Urban Area Security Initiative (UASI), and Operation Stonegarden (OPSG). Together, these grants fund a range of preparedness activities, including planning, organization, equipment purchase, training, exercises, and management and administration costs.

Affected Public: State, local, or Tribal governments.

Estimated Number of Respondents: 709.

Estimated Number of Responses: 827.

Estimated Total Annual Burden Hours: 319,488.

Estimated Total Annual Respondent Cost: $26,821,018.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $1,628,369.

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. 2024–03695 Filed 2–22–24; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2413]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Florida:						
Lake	City of Mount Dora (24–04–0144P).	Patrick C. Comiskey, City of Mount Dora Manager, 510 North Baker Street, Mount Dora, FL 32757.	City Hall, 510 North Baker Street, Mount Dora, FL 32757.	*https://msc.fema.gov/portal/advanceSearch.*	May 16, 2024	120137
Lake	Unincorporated areas of Lake County (24–04–0144P).	Jennifer Barker, Lake County Manager, 315 West Main Street, Tavares, FL 32778.	Lake County Public Works Department, 323 North Sinclair Avenue, Tavares, FL 32778.	*https://msc.fema.gov/portal/advanceSearch.*	May 16, 2024	120421

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Miami-Dade	City of North Miami (23–04–3494P).	Rasha Cameau, City of North Miami Manager, 776 Northeast 125th Street, North Miami, FL 33161.	Building Department, 12340 Northeast 8th Avenue, North Miami, FL 33161.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 29, 2024	120655
Monroe	Village of Islamorada (24–04–0111P).	The Honorable Joseph Buddy Pinder III, Mayor, Village of Islamorada, 86800 Overseas Highway, Islamorada, FL 33036.	Building Department, 86800 Overseas Highway, Islamorada, FL 33036.	*https://msc.fema.gov/portal/advanceSearch.*	May 22, 2024	120424
Monroe	Village of Islamorada (24–04–0168P).	The Honorable Joseph Buddy Pinder III, Mayor, Village of Islamorada, 86800 Overseas Highway, Islamorada, FL 33036.	Building Department, 86800 Overseas Highway, Islamorada, FL 33036.	*https://msc.fema.gov/portal/advanceSearch.*	May 24, 2024	120424
Orange	Unincorporated areas of Orange County (23–04–2986P).	The Honorable Jerry L. Demings, Mayor, Orange County, 201 South Rosalind Avenue, 5th Floor, Orlando, FL 32801.	Orange County Public Works Department, Stormwater Management Division, 4200 South John Young Parkway, Orlando, FL 32839.	*https://msc.fema.gov/portal/advanceSearch.*	May 20, 2024	120179
Polk	City of Lakeland (23–04–4869P).	Shawn Sherrouse, City of Lakeland Manager, 228 South Massachusetts Avenue, Lakeland, FL 33801.	Public Works Division, 407 Fairway Avenue, Lakeland, FL 33801.	*https://msc.fema.gov/portal/advanceSearch.*	May 23, 2024	120267
Polk	Unincorporated areas of Polk County (23–04–4869P).	Bill Beasley, Polk County Manager, 330 West Church Street, Bartow, FL 33831.	Polk County Land Development Division, 330 West Church Street, Bartow, FL 33831.	*https://msc.fema.gov/portal/advanceSearch.*	May 23, 2024	120261
Georgia: DeKalb ...	City of Chamblee (23–04–3034P).	The Honorable Brian K. Mock, Mayor, City of Chamblee, 3518 Broad Street, Chamblee, GA 30341.	City Hall, 3518 Broad Street, Chamblee, GA 30341.	*https://msc.fema.gov/portal/advanceSearch.*	May 17, 2024	130066
Maine:						
Hancock	City of Ellsworth (22–01–0657P).	Glenn Moshier, Manager, City of Ellsworth, 1 City Hall Plaza, Ellsworth, ME 04605.	City Hall, 1 City Hall Plaza, Ellsworth, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230066
Hancock	City of Ellsworth (22–01–0658P).	Glenn Moshier, Manager, City of Ellsworth, 1 City Hall Plaza, Ellsworth, ME 04605.	City Hall, 1 City Hall Plaza, Ellsworth, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	Jul. 8, 2024	230066
Hancock	Town of Amherst (22–01–0873P).	Westley Ellington, Selectman, Town of Amherst, P.O. Box 40, Aurora, ME 04408.	Town Hall, 572 Airline Road, Aurora, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230272
Hancock	Town of Blue Hill (22–01–1014P).	Ellen Best, Chair, Town of Blue Hill Select Board, 18 Union Street, Blue Hill, ME 04614.	Town Hall, 18 Union Street, Blue Hill, ME 04614.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230274
Hancock	Town of Bucksport (22–01–1017P).	The Honorable Peter L. Stewart, Mayor, Town of Bucksport, 766 State Route 46, Bucksport, ME 04416.	Town Hall, 50 Main Street, Bucksport, ME 04416.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230065
Hancock	Town of Dedham (22–01–1013P).	Peter Merritt, Chair, Town of Dedham Selectmen, 2073 Main Road, Suite A, Dedham, ME 04429.	Town Hall, 2073 Main Road, Suite A, Dedham, ME 04429.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230279
Hancock	Town of Eastbrook (22–01–0871P).	Julie Curtis, First Selectman, Town of Eastbrook Board of Selectmen, 959 Eastbrook Road, Eastbrook, ME 04634.	Town Hall, 959 Eastbrook Road, Eastbrook, ME 04634.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230281
Hancock	Town of Franklin (22–01–1012P).	Dawn R. Carter, Chair, Town of Franklin Select Board, P.O. Box 206, Franklin, ME 04634.	Town Hall, 34 Main Street, Franklin, ME 04634.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230282
Hancock	Town of Gouldsboro (22–01–1019P).	Eve Wilkinson, Manager, Town of Gouldsboro, P.O. Box 68, Prospect Harbor, ME 04669.	Town Hall, 59 Main Street, Prospect Harbor, ME 04669.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230283

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Hancock	Town of Hancock (22–01–1012P).	John Bridges Jr., Chair, Town of Hancock Select Board, P.O. Box 68, Hancock, ME 04640.	Town Hall, 18 Point Road, Hancock, ME 04640.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230284
Hancock	Town of Mariaville (22–01–0872P).	Ross Edgecomb, Chair, Town of Mariaville Select Board, 1686 Mariaville Road, Mariaville, ME 04605.	Town Hall, 1686 Mariaville Road, Mariaville, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230286
Hancock	Town of Mariaville (22–01–0873P).	Ross Edgecomb, Chair, Town of Mariaville Select Board, 1686 Mariaville Road, Mariaville, ME 04605.	Town Hall, 1686 Mariaville Road, Mariaville, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230286
Hancock	Town of Orland (22–01–1018P).	Edward Rankin, Sr., Chair, Town of Orland Board of Selectmen, P.O. Box 67, Orland, ME 04472.	Town Hall, 25 School House Road, Orland, ME 04472.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230288
Hancock	Town of Osborn (22–01–0871P).	Greg Bassett, First Selectman, Town of Osborn Board of Selectmen, 197 Moose Hill Road, Osborn, ME 04605.	Town Hall, 197 Moose Hill Road, Osborn, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230595
Hancock	Town of Otis (22–01–1013P).	James Dunn, Selectman, Town of Otis Select Board, 132 Otis Road, Otis, ME 04605.	Town Hall, 132 Otis Road, Otis, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230289
Hancock	Town of Penobscot (22–01–1014P).	Harold Hatch, Chair, Town of Penobscot Select Board, P.O. Box 4, Penobscot, ME 04476.	Town Hall, 1 Southern Bay Road, Penobscot, ME 04476.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230290
Hancock	Town of Sullivan (22–01–1019P).	Ray Weintraub, Manager, Town of Sullivan, 1888 U.S. Highway 1, Sullivan, ME 04664.	Town Hall, 1888 U.S. Highway 1, Sullivan, ME 04664.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230295
Hancock	Town of Surry (22–01–0658P).	Mary Allen, Chair, Town of Surry Board of Selectmen, 741 North Bend Road, Surry, ME 04684.	Town Hall, 741 North Bend Road, Surry, ME 04684.	*https://msc.fema.gov/portal/advanceSearch.*	Jul. 8, 2024	230296
Hancock	Town of Surry (22–01–1014P).	Mary Allen, Chair, Town of Surry Board of Selectmen, 741 North Bend Road, Surry, ME 04684.	Town Hall, 741 North Bend Road, Surry, ME 04684.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230296
Hancock	Town of Waltham (22–01–0871P).	Stephen Jordan, First Selectman, Town of Waltham Board of Selectmen, 1520 Waltham Road, Waltham, ME 04605.	Waltham Municipal Building, 1520 Waltham Road, Waltham, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230301
Hancock	Town of Waltham (22–01–1010P).	Stephen Jordan, First Selectman, Town of Waltham Board of Selectmen, 1520 Waltham Road, Waltham, ME 04605.	Waltham Municipal Building, 1520 Waltham Road, Waltham, ME 04605.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230301
Hancock	Township of Fletcher's Landing (22–01–1012P).	Stacie R. Beyer, Executive Director, Maine Land Use Planning Commission, Township of Fletchers Landing, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	Land Use Planning Commission, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230458
Hancock	Township of T07 SD (22–01–1019P).	Stacie R. Beyer, Executive Director, Maine Land Use Planning Commission, Township of T07 SD, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	Land Use Planning Commission, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230598

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Hancock	Township of T09 SD (22–01–1012P).	Stacie R. Beyer, Executive Director, Maine Land Use Planning Commission, Township of T09 SD, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	Land Use Planning Commission, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230704
Hancock	Township of T10 SD (22–01–1019P).	Stacie R. Beyer, Executive Director, Maine Land Use Planning Commission, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	Land Use Planning Commission, Harlow Building, 4th Floor, 18 Elkins Lane, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230599
Hancock	Township of T32 MD (22–01–0873P).	Stacie Beyer, Land Use Planning Commission Director, Maine Department of Agriculture, Conservation & Forestry, 22 State House Station, 18 Elkins Lane, Augusta, ME 04333.	Land Use Planning Commission, 22 State House Station, 18 Elkins Lane, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	May 31, 2024	230706

[FR Doc. 2024–03722 Filed 2–22–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7080–N–11]

30-Day Notice of Proposed Information Collection: Quality Control Requirements for Direct Endorsement Lenders; OMB Control No.: 2502–0600

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* March 25, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov,* telephone (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on July 27, 2023 at 88 FR 48491.

A. Overview of Information Collection

Title of Information Collection: Quality Control Requirements for Direct Endorsement Lenders.

OMB Approval Number: 2502–0600.

Type of Request: Extension of currently approved collection.

Form Number: Not Applicable.

Description of the need for the information and proposed use: Per 24 CFR 202.8(a)(3), a Direct Endorsement (DE) lender that sponsors third party originators (TPOs) is, ''responsible to the Secretary for the actions of its third party originators or mortgagees in originating loans or mortgages, unless applicable law or regulation requires specific knowledge on the part of the party to be held responsible.'' As a result, DE lenders are responsible for conducting quality control reviews on TPO originations of FHA-insured mortgage loans and ensuring that their Quality Control Plans contain this oversight provision. This creates an information collection burden on DE lenders, since these institutions must also conduct quality control on loans they originate and underwrite. DE lenders must conduct quality control reviews on a sample of loans that they originate or underwrite, including loans originated by TPOs. For the purposes of this information collection, it is assumed that the number of loans reviewed by each DE lender will comply with the Sample Size Standard and Sample Composition Standard described in HUD Handbook 4000.1, Section V.A.3.a.

In addition, under 24 CFR 203.255(c) and (e), HUD conducts both pre- and post-endorsement reviews of loans submitted for FHA insurance by DE lenders. As part of those reviews, the Secretary is authorized to determine if there is any information indicating that any certification or required document is false, misleading, or constitutes fraud or misrepresentation on the part of any party, or that the mortgage fails to meet a statutory or regulatory requirement. In order to assist the Secretary with this directive, FHA requires that lenders self-report all findings of fraud and material misrepresentation, as well any material findings concerning the origination, underwriting, or servicing of the loan that the lender is unable to mitigate or otherwise resolve, per HUD Handbook 4000.1, Sections V.A.2.d. iv (A) and V.A.2.d.iv (B). The obligation to self-report these findings creates an additional information collection burden on DE lenders.

Respondents: Active Title II Direct Endorsement Lenders.

Estimated Number of Respondents: 3,187.

Estimated Number of Responses: 67,710.

Frequency of Response: Annually.

Average Hours per Response: .25.

Total Estimated Burden Hours: 16,927.50.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost per response	Annual cost
Quality control of Early Payment Defaults (EPDs)	1,463	26	38,038	.25	9,509.50	$53.22	$506,095.59
Quality control of loan originations	1,463	16	23,408	.25	5,852	53.22	311,443.44
Quality control through lender self-reports	261	24	6,264	.25	1,566	53.22	83,342.52

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) 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.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2024–03716 Filed 2–22–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7080–N–10]

30-Day Notice of Proposed Information Collection: HUD-Owned Real Estate Good Neighbor Next Door Program; OMB Control No.: 2502–0570

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* March 25, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 20, 2023 at 88 FR 64922.

A. Overview of Information Collection

Title of Information Collection: HUD-Owned Real Estate Good Neighbor Next Door Program.

OMB Approval Number: 2502–0570.

Type of Request: Revision of currently approved collection.

Form Numbers: HUD–9549, HUD–9549–A, HUD–9549–B, HUD–9549–C, HUD–9459–D, HUD–9549–E.

Description of the need for the information and proposed use: The information collected will be used to administer the Good Neighbor Next Door Sales Program including determining and documenting the eligibility to participate in the program. The forms are used in conjunction with the standard HUD Real Estate Owned sales contract and addenda found in OMB 2502–0306 *HUD-Owned Real Estate Sales Contract and Addendums (REO).* With each form, the Public Burden Statement is updated, and

Single Family will no longer collect purchaser Social Security Numbers on the subject forms as the information is captured in a separate collection.

Respondents: Individuals or Households; Federal, state, local or tribal governments; Not-for-profits institutions.

Estimated Number of Respondents: 392.00.

Estimated Number of Responses: 980.00.

Frequency of Response: 2.50.

Average Hours per Response: 0.08.

Total Estimated Burdens: 78.40.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) 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.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2024–03713 Filed 2–22–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM MT FRN MO#4500173844]

Notice of Realty Action: Proposed Amendment to an Existing Lease, Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) received an application from Navajo Transitional Energy Company (NTEC) to amend its existing lease pursuant to section 302 of the Federal Land Policy and Management Act (FLPMA) of 1976, as amended, and BLM regulations. The proposed lease amendment would allow surface use only, and no mineral extractions would be allowed on the subject lands. The annual rental for this lease is $115.47 per acre, and the lease would expire on April 22, 2032, with the option of renewal. This project is located southeast of Billings, Montana.

DATES: Interested parties may submit written comments regarding the proposed amendment on or before. April 8, 2024.

ADDRESSES: Written comments may be mailed, or hand delivered to BLM Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301. Comments may also be submitted electronically at *BLM_MT_MilesCity_FO@blm.gov.* The BLM will not consider comments received by telephone.

FOR FURTHER INFORMATION CONTACT: Beth Klempel, Assistant Field Manager, BLM Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301, telephone 406–233–2800, or email *bklempel@blm.gov.* For information regarding this case, refer to case file MTM 74913 and/or MTMT 106077659. 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 Beth Klempel. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The proposed lease amendment effects the following described lands:

Principal Meridian, Montana

T. 8 S., R. 39 E.,

Sec. 13, NE¼SE¼ that portion lying westerly of the west right-of way boundary of MTM–37463, and NE¼NW¼SE¼.

Sec. 35, W½NW¼NE¼SE¼, SW¼NE¼SE¼, W½SE¼SE¼, and SE¼SE¼SE¼.

The areas described aggregate 67 acres according to the official plat of the survey of the said lands on file with the BLM, as well as approximate GIS calculations.

The BLM is considering amending the existing lease, which currently includes 277.12 acres, to authorize an additional 67 acres, which would increase the total acreage to 344.12 acres. The additional acreage would allow for surface layback, establishing a highwall crest, topsoil and overburden stockpiles, and transportation and utility corridors. Layback on the area proposed by the lease amendment is a critical component in coal surface mine recovery to stabilize the wall as mining on the adjoining land progresses.

The BLM is considering offering the lease amendment noncompetitively to NTEC because the authorized officer has determined that: (1) these parcels are surrounded by land owned or controlled by NTEC; and (2) it is unlikely there would be interest in competitive bidding on these lands.

If the BLM approves the application to amend the lease, the reimbursement of costs and annual rental is the responsibility of the applicant in accordance with the provisions of 43 CFR 2920.6 and 2920.8, respectively. The lease amendment, as proposed in the application, is consistent with the 2015 Miles City Field Office Resource Management Plan.

Comments on the proposed lease amendment should be specific, confined to issues pertinent to the proposed action, and should explain the reason for any recommended revisions. Where possible, comments should include references with specific sections or paragraphs. The BLM is not obligated to consider or include comments received after the close of the comment period or comments delivered to an address other than the one listed above.

Comments, including names and street addresses of respondents, will be available for public review at the BLM Miles City Field Office address listed in **ADDRESSES** above. Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Any adverse comments regarding the proposed lease amendment will be reviewed by the BLM Montana State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part.

(Authority: 43 CFR 2920.4)

Eric D. Lepisto,

Miles City Field Manager.

[FR Doc. 2024–03721 Filed 2–22–24; 8:45 am]

BILLING CODE 4331–20–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_CO_FRN_MO4500174053]

Notice of Intent To Establish Recreation Fee Areas and Collect Fees on Public Lands in Chaffee and Fremont Counties, CO

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: Pursuant to the Federal Lands Recreation Enhancement Act (FLREA), the Bureau of Land Management (BLM), Royal Gorge Field Office intends to establish fee areas and to collect fees at Turtle Rock Campground, Burmac Camping Area, Shavano Camping Area, CR304 Camping Area, Browns Grotto Camping Area, Penrose Commons, Sand Gulch Campground, and The Bank Campground in Fremont and Chaffee counties, Colorado.

DATES: Comments on the proposed fee areas and fees must be received or postmarked by March 25, 2024 and must include the commenter's legible full name and address. Starting on August 23, 2024, the BLM will have the option to initiate fee collection at the sites listed in the **SUMMARY** section for overnight visitation unless the BLM publishes a **Federal Register** notice to the contrary. Comments received after the close of the comment period or delivered to an address other than the one listed in this notice may not be considered or included in the administrative record for the proposal.

ADDRESSES: Please email comments to *blm_rgfo_comments@blm.gov* or send by mail to BLM Royal Gorge Field Office at 3028 E Main Street, Canon City, CO 81212, Attn: Kalem Lenard. Documents concerning this fee change may be reviewed at the Royal Gorge Field Office or online at *https://www.blm.gov/programs/recreation/permits-and-fees/business-plans.*

FOR FURTHER INFORMATION CONTACT: Kalem Lenard, Assistant Field Manager, phone (719) 269–8500, email: *blm_rgfo_comments@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. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The BLM is committed to providing and receiving fair value for the use of developed recreation facilities and services in a manner that meets public-use demands, provides quality experiences, and protects important resources. The BLM's policy is to collect fees at specialized recreation sites or where the BLM provides facilities, equipment, or services at Federal expense, in connection with outdoor use. Pursuant to FLREA and the regulations at 43 CFR subpart 2933, the BLM may charge expanded amenity fees for overnight camping and group use, including reservation services, where specific amenities and services are provided.

FLREA directs the Secretary of the Interior to publish a 6-month advance notice in the **Federal Register** whenever new recreation fee areas are established. In accordance with BLM policy, the Business Plan for Royal Gorge Field Office Campgrounds (available at *https://www.blm.gov/programs/recreation/permits-and-fees/business-plans*) explains the fee collection process and how fees will be used at this site. Per FLREA guidelines, the Rocky Mountain Resource Advisory Council reviewed the proposal in November 2023 and voted unanimously to support the business plan and fee proposal. To meet increasing demand for services and maintenance and to address increased visitor use and costs of operation, the BLM proposes the following expanded amenity fees:

- $20 per night basic campsite fee and $40 per night group campsite fee at Turtle Rock Campground;
- $10 per night campsite fee for primitive campsites at Shavano, Burmac, Browns Grotto, County Road 304, and Penrose Commons camping areas; and
- $10 per night vehicle fee for overnight camping use in overflow camping areas with access to nearby campground facilities at Burmac, County Road 304, Penrose Commons, The Bank Campground, and Sand Gulch Campground.

The Royal Gorge Field Office Campground Business Plan used a market analysis and management expense estimates to determine the expanded amenity fees at these recreation sites. The BLM's public outreach process and analysis of the fee program are detailed in the Business Plan. These expanded amenity camping fees are consistent with other established fee sites in the region.

(Authority: 16 U.S.C. 6804(e))

Douglas J. Vilsack,

Colorado State Director.

[FR Doc. 2024–03731 Filed 2–22–24; 8:45 am]

BILLING CODE 4331–16–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037435; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: University of Minnesota Twin Cities, Minneapolis, MN; Minnesota Indian Affairs Council, St. Paul/Bemidji, MN; Science Museum of Minnesota, Saint Paul, MN; University of Colorado Museum (Boulder), Boulder, CO; Milwaukee Public Museum, Milwaukee, WI; Denver Art Museum, Denver, CO; Yale Peabody Museum, New Haven, CT; and Cleveland Museum of Art, Cleveland, OH

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of Minnesota Twin Cities (UMN); Minnesota Indian Affairs Council; Science Museum of Minnesota; University of Colorado Museum (Boulder); Milwaukee Public Museum; Denver Art Museum; Yale Peabody Museum; and Cleveland Museum of Art, hereafter the Collaborating Museums, have completed an inventory of associated funerary objects and have determined that there is a cultural affiliation between the associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the associated funerary objects in this notice may occur on or after March 25, 2024.

ADDRESSES: Alejandra Peña Gutiérrez, Weisman Art Museum, University of Minnesota, 333 East River Road, Minneapolis, MN 55455, telephone (612) 624–5934, email *apenagut@umn.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Collaborating Museums, and additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Based on the information available, 19 funerary objects have been reasonably identified as associated with human remains described on a previous notice submitted by the Collaborating Museums. The 19 associated funerary objects are bowls with painted decoration over white slip. These items were excavated from the Cameron Creek site in Grant County NM in 1923, 1927, and 1928 by multiple institutions in partnership including the University of Minnesota. While human remains were transported to the University of Minnesota, funerary items were divided among participating institutions, including the Santa Fe Museum (now the Museum of Indian Arts and Culture/Laboratory of Anthropology). The latter museum sold 20 bowls, including those listed here, to the Cleveland Museum of Art in 1930. The Cameron Creek site is identified by archaeologists as a Mimbres culture site.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is clearly identified by the information available about the associated funerary objects described in this notice.

Determinations

The Collaborating Museums have determined that:

• The 19 objects described in this notice are reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.

• There is a reasonable connection between the associated funerary objects described in this notice and the Hopi Tribe of Arizona; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Okhay Owingeh, New Mexico; Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Santo Domingo Pueblo; Ysleta del Sur Pueblo; and the Zuni Tribe of the Zuni Reservation, New Mexico.

Requests for Repatriation

Written requests for repatriation of the associated funerary objects in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the associated funerary objects in this notice to a requestor may occur on or after March 25, 2024. If competing requests for repatriation are received, the Collaborating Museums must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the associated funerary objects are considered a single request and not competing requests. The Collaborating Museums are responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 14, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03654 Filed 2–22–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037436; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Arkansas Archeological Survey, Fayetteville, AR

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Arkansas Archeological Survey has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from Little River County Arkansas.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 25, 2024.

ADDRESSES: Sarah Shepard, Arkansas Archeological Survey, 2475 N. Hatch Avenue, Fayetteville, AR 72704, telephone (479) 575–6552, email *nagpra@uark.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Arkansas Archeological Survey. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Arkansas Archeological Survey.

Consultation

A detailed assessment of the human remains was made by the FBI professional staff in consultation with representatives of the Caddo's Nation's Tribal Historic Preservation Office. A government-to-government tribal consultation meeting was held on November 8, 2023, in Shawnee, Oklahoma. Conversations between the ARAS and Caddo Nation continued after that period.

History and Description of the Remains

The Arkansas Archeological Survey (ARAS) received a transfer from the Federal Bureau of Investigation (FBI) on October 5, 2023, of human remains recovered from a seizure in Indiana.

At an unknown date, human remains representing, at minimum, one individual were removed Little River County Arkansas. This individual was removed from the Bowman site, a large prehistoric Caddo ceremonial center on the Red River (Little River County) in Southwestern Arkansas. Following removal, the human remains (a single cranium) were transported to Indiana, where they remained as part of a private collection of Native American antiquities and cultural heritage. In April 2014, the human remains were seized by the FBI as part of a criminal investigation. The human remains represent one young adult female that, according to the osteology report, ''18–25 yrs. age-at-death.'' No associated funerary objects are present.

Based upon the historical record, site analysis, evidence obtained through criminal investigation, osteological analysis, and tribal consultation, the ARAS believes that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Caddo Nation.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, ARAS has determined that:

• The human remains described in this notice represent the physical remains of one individual of Native American ancestry.

• There is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Caddo Nation of Oklahoma.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after March 25, 2024. If competing requests for repatriation are received, ARAS must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. ARAS is responsible for notifying the Caddo Nation that this notice has been published.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 14, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03648 Filed 2–22–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037432; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intended Disposition: U.S. Army Corps of Engineers, Nashville District, Nashville, TN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the U.S. Army Corps of Engineers, Nashville District intends to carry out the disposition of human remains removed from Federal lands to the lineal descendants, Indian Tribe, or Native Hawaiian organization with priority for disposition in this notice.

DATES: Disposition of the human remains or cultural items in this notice may occur on or after March 25, 2024. If no claim for disposition is received by February 24, 2025, the human remains or cultural items in this notice will become unclaimed human remains or cultural items.

ADDRESSES: Crystal Geiger, Archaeologist, U.S. Army Corps of Engineers, Nashville District, 110 9th Avenue South, Room A–405, Nashville, TN 37203, telephone (615) 736–2472, email *crystal.l.geiger@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the U.S. Army Corps of Engineers, Nashville District and additional information on the human remains or cultural items in this notice, including the results of consultation, can be found in the related records. The National Park Service is not responsible for the identifications in this notice.

Abstract of Information Available

Based on the information available, human remains representing, at least, one individual have been reasonably identified. No associated funerary objects are present. In October 2023 a local fisherman reported exposed skeletal remains located on U.S. Army Corps, Nashville District managed lands in Dover, Stewart County, TN. The Stewart County Deputy Sheriff and a representative from the Tennessee Bureau of Investigation (TBI) visited the site and the TBI took possession of the remains. The human remains collected by TBI were transferred to U.S. Army Corps, Nashville District custody on October 20, 2023, and are stored in a secure location. Given the stratigraphic location of the discovery, and nearby pre-contact period sites with similar graves, the human remains are determined to be Native American in origin.

Determinations

The U.S. Army Corps of Engineers, Nashville District has determined that:

• The human remains described in this notice represent the physical remains of one individual of Native American ancestry.

• The Cherokee Nation; Eastern Band of Cherokee Indians; The Chickasaw Nation; and the United Keetoowah Band of Cherokee Indians in Oklahoma have priority for disposition of the human remains or cultural item described in this notice.

Claims for Disposition

Written claims for disposition of the human remains or cultural items in this notice must be sent to the appropriate official identified in this notice under **ADDRESSES**. If no claim for disposition is received by February 24, 2025, the human remains or cultural items in this notice will become unclaimed human remains or cultural items. Claims for disposition may be submitted by:

1. Any lineal descendant, Indian Tribe, or Native Hawaiian organization identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that they have priority for disposition.

Disposition of the human remains or cultural items in this notice may occur on or after March 25, 2024. If competing claims for disposition are received, the U.S. Army Corps of Engineers, Nashville District must determine the most appropriate claimant prior to disposition. Requests for joint disposition of the human remains or cultural items are considered a single request and not competing requests. The U.S. Army Corps of Engineers, Nashville District is responsible for sending a copy of this notice to the lineal descendants, Indian Tribes, and Native

Hawaiian organizations identified in this notice and to any other consulting parties.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3002, and the implementing regulations, 43 CFR 10.7.

Dated: February 14, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03651 Filed 2–22–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037433; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: California State Department of Transportation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California State Department of Transportation (Caltrans) has completed an inventory of human remains and associated funerary objects and have determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes in this notice. The human remains and associated funerary objects were removed from Sacramento County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 25, 2024.

ADDRESSES: Dr. Lisa Bright, Branch Chief District 3, Cultural Resources (South), California State Department of Transportation, 703 B Street Marysville, CA 95901, telephone (530) 812–4569, email *Lisa.Bright@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Caltrans. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by California State University, Sacramento (Sacramento State) and Caltrans.

Description

In the spring of 1957 (approximately February/March) human remains representing, at minimum, six individuals were removed from CA–SAC–96 (Accession Number 81–299; also known as Allen/Allyn Mound). The 1957 excavations were carried out by Sacramento State College (now Sacramento State) under the direction of Norman Wilson on behalf of the California Division of Highways (now Caltrans). No excavation reports were written, and the collection remained uncatalogued until October 2023.

Occupation of the site is estimated to have occurred during the Late Phase 2, post 500 years before present based on bead and pendent size and shape although occupation could extend back as far as 1,000 years before present. The associated funerary objects removed from this site (83 catalog entries) include baked clay objects; modified bones, stones, and shells; historic materials; flaked and ground stones; faunal remains; burnt basketry; and beads. The human remains were not individually catalogued, and those that had been previously boxed separately were treated as lots. Bags of faunal remains were also treated as lots to minimize handling. An additional 18 objects are currently missing from the collection and Caltrans and Sacramento State continues to look for them. This count is based on handwritten index cards that were identified as associated with this collection. These 18 objects were not identified during the cataloging process.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, geographical, historical, oral traditional, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, Caltrans has determined that:

- The human remains described in this notice represent the physical remains of six individuals of Native American ancestry.
- The 83 catalog entries described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Buena Vista Rancheria of Me-Wuk Indians of California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Band of Miwuk Indians; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; and the Wilton Rancheria, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 25, 2024. If competing requests for repatriation are received, California State University, Sacramento must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. Caltrans is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

This notice was submitted after the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024) but in the older format. As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 14, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03652 Filed 2–22–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037434; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Field Museum, Chicago, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Field Museum has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the human remains in this notice may occur on or after March 25, 2024.

ADDRESSES: Helen Robbins, Repatriation Director, Field Museum, 1400 S Lake Shore Drive, Chicago, IL 60605, telephone (312) 665–7317, email *hrobbins@fieldmuseum.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Field Museum, and additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Based on the information available, human remains representing, at least, four individuals have been reasonably identified. No associated funerary objects are present. The human remains are hair clippings belonging to four individuals, identified with the tribal designations ''Klamath'' and ''Modoc'' (Field Museum catalog numbers 193211.7, 193212.4, 193216.10, and 193216.12). Field Museum staff believe they were collected under the direction of Franz Boas and Frederick Ward Putnam for the 1893 World's Columbian Exposition in Chicago. The hair clippings were accessioned into the Field Museum's collection in 1939. No information regarding the individual's name, sex, age, or geographic location has been found. There is no known presence of any potentially hazardous substances.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is clearly identified by the information available about the human remains describes in this notice.

Determinations

The Field Museum has determined that:

- The human remains described in this notice represent the physical remains of four individuals of Native American ancestry.
- There is a reasonable connection between the human remains described in this notice and the Klamath Tribes and the Modoc Nation.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after March 25, 2024. If competing requests for repatriation are received, the Field Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The Field Museum is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 14, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03653 Filed 2–22–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037437; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Arkansas Archeological Survey, Fayetteville, AR

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Arkansas Archeological Survey has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from unknown locations in the eastern Arkansas Mississippi River valley.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 25, 2024.

ADDRESSES: Sarah Shepard, Arkansas Archeological Survey, 2475 N. Hatch Avenue, Fayetteville, AR 72704, telephone (479) 575–6552, email *nagpra@uark.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Arkansas Archeological Survey. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Arkansas Archeological Survey.

Consultation

A detailed assessment of the human remains was made by the FBI professional staff in consultation with representatives of tribal partners between 2018 and 2023, and finally on November 8, 2023, in Shawnee, Oklahoma. Conversations between the ARAS, Osage Nation, and Quapaw Nation continued after that point. On December 4th, 2023, a decision was made for the Quapaw to move forward in affiliation with the human remains.

History and Description of the Remains

The Arkansas Archeological Survey (ARAS) received a transfer from the Federal Bureau of Investigation (FBI) on

October 5, 2023, of human remains recovered from a seizure in Indiana. At an unknown date, human remains representing, at minimum, six individuals were removed from unknown areas in the Eastern Arkansas Mississippi River Valley region. Following their removal, the human remains were transported to Indiana, where they remained as part of a private collection of Native American antiquities and cultural heritage. In April 2014, the human remains were seized by the FBI as part of a criminal investigation. The human remains represent six individuals. No associated funerary objects are present.

Based upon the historical record, site analysis, evidence obtained through criminal investigation, osteological analysis, and tribal consultation, the ARAS believes that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Quapaw Nation.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, ARAS has determined that:

- The human remains described in this notice represent the physical remains of six individuals of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Quapaw Nation.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after March 25, 2024. If competing requests for repatriation are received, ARAS must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. ARAS is responsible for notifying the Quapaw Nation that this notice has been published.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 14, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03649 Filed 2–22–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–D–COS–POL–37381; PPWODIREP0, PPMPSAS1Y.YP0000]

Notice of Cancellation and Rescheduling of the Public Meeting for the National Park System Advisory Board

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, as amended, the National Park Service (NPS) is hereby giving notice that the National Park System Advisory Board (Board) has rescheduled public meetings originally scheduled for March 7–8, 2024.

DATES: The Board will hold public meetings on Wednesday May 1, 2024, from 9:00 a.m. until 5:00 p.m. (EASTERN) and Thursday May 2, 2024, from 9:00 a.m. until 5:00 p.m. (EASTERN). Individuals who wish to participate must contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than April 26, 2024, to receive instructions for accessing the meeting. The meetings are open to the public.

ADDRESSES: The Board will meet at the Stuart Lee Udall Department of the Interior Building, 1849 C Street NW, Washington, DC 20240. Electronic submissions of materials or requests are to be sent to *monique_vanlandingham@partner.nps.gov.* The meeting will also be accessible virtually via webinar and audio conference technology.

FOR FURTHER INFORMATION CONTACT: (a) For information concerning attending the Board meeting or to request to address the Board, contact Monique VanLandingham, Office of Policy, National Park Service, telephone (202) 641–4467, or email *monique_vanlandingham@partner.nps.gov.* (b) To submit a written statement specific to, or request information about, any National Historic Landmark (NHL) matter listed below, or for information about the NHL Program or NHL designation process and the effects of designation, contact Lisa Davidson, Manager, NHL Program, email *lisa_davidson@nps.gov.* Written comments specific to any NHL matter listed below must be submitted by no later than April 26, 2024. (c) To submit a written statement specific to, or request information about, any National Natural Landmark (NNL) matter listed below, or for information about the NNL Program or NNL designation process and the effects of designation, contact Heather Eggleston, Manager, NNL Program, email *heather_eggleston@nps.gov.* Written comments specific to any NNL matter listed below must be submitted by no later than April 26, 2024. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Board has been established by authority of the Secretary of the Interior (Secretary) under 54 U.S.C. 100906 and is regulated by the Federal Advisory Committee Act.

Purpose of the Meeting: The Board will be briefed by NPS officials on the organization, programs, and priorities of the NPS, and will attend to housekeeping matters, including the potential establishment of committees. The Board will also receive NHL and NNL proposals for Board deliberation. There also will be an opportunity for public comment. The final agenda and briefing materials will be posted to the Board's website prior to the meeting at *https://www.nps.gov/resources/advisoryboard150.htm.*

The agenda may include the review of proposed actions regarding the NHL Program and NNL Program. Interested parties are encouraged to submit written comments and recommendations that will be presented to the Board. Interested parties also may attend the Board meeting and upon request may address the Board concerning an area's national significance.

A. National Historic Landmarks (NHL) Program

NHL Program matters will be considered, during which the Board may consider the following:

Nominations for NHL Designation

Commonwealth of the Northern Mariana Islands.

- LATTE QUARRY AT AS NIEVES, Rota, CNMI.

District of Columbia

- THE FURIES COLLECTIVE, Washington, DC.

Kentucky

- BIG BONE LICK SITE, Union, KY.

Nebraska

- KREGEL WINDMILL COMPANY FACTORY, Nebraska City, NE.

South Carolina

- CHARLESTON CIGAR FACTORY, Charleston, SC.

Proposed Amendments to Existing NHL Designations

Alaska

- SITKA NAVAL OPERATING BASE AND U.S. ARMY COASTAL DEFENSES (updated documentation), Sitka, AK.
- LADD FIELD (updated documentation), Fairbanks, AK.

Hawaiʻi

- PUʻUKOHOLĀ HEIAU (updated documentation, boundary change), Kawaihae, HI.

Michigan

- QUINCY MINING COMPANY HISTORIC DISTRICT (updated documentation, boundary change), Houghton County, MI.
- CALUMET HISTORIC DISTRICT (updated documentation, boundary change), Calumet, MI.

Missouri

- WATKINS MILL (updated documentation), Lawson, MO.

Texas

- FORT BROWN (updated documentation, boundary change), Brownsville, TX.

Virginia

- CEDAR CREEK BATTLEFIELD AND BELLE GROVE (updated documentation, boundary change), Middletown, VA.

Wyoming

- WYOMING STATE CAPITOL BUILDING AND GROUNDS (updated documentation), Cheyenne, WY.

Proposed Withdrawal of Existing Designations

North Carolina

- JOSEPHUS DANIELS HOUSE (WAKESTONE), Raleigh, NC.

South Carolina

- *USS CLAMAGORE* (former), Mount Pleasant, SC.

B. National Natural Landmarks (NNL) Program

NNL Program matters will be considered, during which the Board may consider the following:

Nomination for NNL Designation

Texas

- INDEPENDENCE CREEK PRESERVE, Terrell County, TX.

Interested persons may choose to make oral comments at the meeting during the designated time for this purpose. Depending on the number of people wishing to comment and the time available, the amount of time for oral comments may be limited. Interested parties should contact Monique VanLandingham (see **FOR FURTHER INFORMATION CONTACT**) for advance placement on the public speaker list for this meeting. Members of the public may also choose to submit written comments by emailing them to *monique_vanlandingham@partner.nps.gov.* Due to time constraints during the meeting, the Board is not able to read written public comments submitted into the record. All comments will be made part of the public record and will be electronically distributed to all Board members. Detailed minutes of the meeting will be available for public inspection within 90 days of the meeting.

Meeting Accessibility/Special Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Ch. 10.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2024–03755 Filed 2–22–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1322]

Bulk Manufacturer of Controlled Substances Application: Siemens Healthcare Diagnostics Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Siemens Healthcare Diagnostics Inc. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before April 23, 2024. Such persons may also file a written request for a hearing on the application on or before April 23, 2024.

ADDRESSES: The Drug Enforcement Administration (DEA) requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on January 10, 2024, Siemens Healthcare Diagnostics Inc., 100 GBC Drive, Mailstop 108, Newark, Delaware 19702–2461 applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Ecgonine	9180	II

The company plans to produce the listed controlled substance in bulk to be used in the manufacture of the DEA exempt products. No other activities for this drug code is authorized for this registration.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03712 Filed 2–22–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1323]

Importer of Controlled Substances Application: Meridian Medical Technologies, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Meridian Medical Technologies, LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before March 25, 2024. Such persons may also file a written request for a hearing on the application on or before March 25, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on January 17, 2024, Meridian Medical Technologies, LLC, 2555 Hermelin Drive, Saint Louis, Missouri 63144, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Morphine	9300	II

The company plans to import the listed controlled substances for analytical purposely only. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03714 Filed 2–22–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1318]

Importer of Controlled Substances Application: Pall Life Sciences PR, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Pall Life Sciences PR, LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before March 25, 2024. Such persons may also file a written request for a hearing on the application on or before March 25, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on January 11, 2024, Pall Life Sciences PR, LLC, Road 194, Kilometer 0.4, Fajardo, Puerto Rico 00738, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Morphine	9300	II

The company plans to import the listed controlled substances for research purposes, drug testing, and analysis to support foreign regulatory compliance of finished dosage forms to foreign markets. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03683 Filed 2–22–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1326]

Importer of Controlled Substances Application: S&B Pharma LLC DBA Norac Pharma

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: S&B Pharma LLC DBA Norac Pharma has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before March 25, 2024. Such persons may also file a written request for a hearing on the application on or before March 25, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on January 10, 2024, S&B Pharma LLC DBA Norac Pharma, 405 South Motor Avenue, Azusa, California 91702, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
4-Anilino-N-phenethyl-4-piperidine (ANPP).	8333	II
Tapentadol	9780	II

The company plans to import intermediate forms of Tapentadol (9780) for further manufacturing prior to distribution to its customers. The company plans to import ANNP (8333) to bulk manufacture other controlled substances for distribution to its customers. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03718 Filed 2–22–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1319]

Bulk Manufacturer of Controlled Substances Application: Patheon API Services Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Patheon API Services Inc. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before April 23, 2024. Such persons may also file a written request for a hearing on the application on or before April 23, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on December 21, 2023, Patheon API Services Inc., 101 Technology Place, Florence, South Carolina 29501, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
Amphetamine	1100	II
Methadone	9250	II

The company plans to bulk manufacture the above controlled substances to support customers' clinical trials. No other activities for these drug codes are authorized for this registration.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03686 Filed 2–22–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1325]

Importer of Controlled Substances Application: Pfizer, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Pfizer, Inc. has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information

listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before March 25, 2024. Such persons may also file a written request for a hearing on the application on or before March 25, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on January 24, 2024, Pfizer, Inc. 45 Eastern Point Road, Groton, Connecticut 06340–5157, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Pentobarbital	2270	II

The company plans to import the listed controlled substances as finished dosage to support internal research purposes. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03709 Filed 2–22–24; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1321]

Importer of Controlled Substances Application: Janssen Pharmaceuticals Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Janssen Pharmaceuticals Inc. has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before March 25, 2024. Such persons may also file a written request for a hearing on the application on or before March 25, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on December 7, 2023, Janssen Pharmaceuticals Inc., 1440 Olympic Drive, Buildings 1–5 & 7–14, Athens, Georgia 30601–1645, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Methylphenidate	1724	II
Tapentadol	9780	II

The company plans to import intermediates classified under Tapentadol (9780) for further manufacturing to the controlled substance Tapentadol respectively, prior to distribution to customers. No other activity for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03689 Filed 2–22–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1327]

Bulk Manufacturer of Controlled Substances Application: S&B Pharma LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: S&B Pharma LLC has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before April 23, 2024. Such persons may also file a written request for a hearing on the application on or before April 23, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on February 6, 2024, S&B Pharma LLC, 405 South Motor Avenue, Azusa, California 91702, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
Amphetamine	1100	II
Methamphetamine	1105	II
Lisdexamfetamine	1205	II
Methylphenidate	1724	II
Pentobarbital	2270	II
4-Anilino-N-Phenethyl-4-Piperidine (ANPP).	8333	II
Tapentadol	9780	II
Fentanyl	9801	II

The company plans to bulk manufacture the listed controlled substances for the internal use intermediates for formulation and analytical development purposes or for sale to its customers. In reference to dug codes 7360 (Marihuana), and 7370 (Tetrahydrocannabinols), the company plans to bulk manufacture these drugs as synthetic. No other activities for these drug codes are authorized for this registration.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03719 Filed 2–22–24; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1320]

Importer of Controlled Substances Application: Patheon API Services, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Patheon API Services, Inc. has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before March 25, 2024. Such persons may also file a written request for a hearing on the application on or before March 25, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on December 21, 2023, Patheon API Services, Inc., 101 Technology Place, Florence, South Carolina 29501 applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
Amphetamine	1100	II
Methadone	9250	II

The company plans to import the listed controlled substances as reference standards for research and development as part of API Manufacturing. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2).

Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Marsha Ikner,

Acting Deputy Assistant Administrator.

[FR Doc. 2024–03688 Filed 2–22–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Proposed Reinstatement With Change of Information Collection Requirements; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor (DOL), 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. The program helps 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 Office of Federal Contract Compliance Programs (OFCCP) is soliciting comments concerning its proposal to obtain approval from the Office of Management and Budget (OMB) for a reinstatement with change of the Monthly Employment Utilization Report (CC–257). 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 or by accessing it at *www.regulations.gov.*

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 23, 2024.

ADDRESSES: You may submit comments by any of the following methods:

Electronic comments: The Federal eRulemaking portal at *www.regulations.gov.* Follow the instructions found on that website for submitting comments.

Mail, Hand Delivery, Courier: Addressed to Tina T. Williams, Acting Deputy Director of OFCCP and Director of Policy & Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. For faster submission, we encourage commenters to transmit their comment electronically via the *www.regulations.gov* website. Comments that are mailed to the address provided above must be postmarked before the close of the comment period. All submissions must include OFCCP's name for identification. Comments submitted in response to the notice, including any personal information provided, become a matter of public record and will be posted on *www.regulations.gov.* Comments will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Tina T. Williams, Acting Deputy Director of OFCCP and Director of Policy & Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 or toll free at 1–800–397–6251. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services. Copies of this notice may be obtained in alternative formats (large print, braille, audio recording) upon request by calling the numbers listed above.

SUPPLEMENTARY INFORMATION:

I. *Background:* OFCCP administers and enforces the three equal employment opportunity authorities listed below:

- Executive Order 11246, as amended (E.O. 11246);
- Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); and
- Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA).

These authorities prohibit employment discrimination by Federal contractors and subcontractors and require them to take affirmative action to ensure that equal employment opportunities are available regardless of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Additionally, Federal contractors and subcontractors are prohibited from discriminating against applicants and employees for asking about, discussing, or sharing information about their pay or, in certain circumstances, the pay of their co-workers.

E.O. 11246 applies to Federal contractors and subcontractors and to federally assisted construction contractors holding a Government contract in excess of $10,000, or Government contracts that have, or can reasonably be expected to have, an aggregate total value exceeding $10,000 in a 12-month period. E.O. 11246 also applies to government bills of lading, depositories of Federal funds in any amount, and to financial institutions that are issuing and paying agents for U.S. savings bonds.

Section 503 prohibits Federal contractors and subcontractors from discriminating in employment against individuals with disabilities. It also requires Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity for individuals with disabilities. The Section 503 requirements apply to businesses with a direct Federal construction contract of more than $15,000. If the construction contractor has at least 50 employees and a single contract of $50,000 or more, then it must also develop a Section 503 affirmative action program (AAP), as described in 41 CFR 60–741, subpart C.

VEVRAA prohibits Federal contractors and subcontractors from discriminating in employment against protected veterans. It also requires Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity for protected veterans. The VEVRAA requirements apply to businesses with a direct Federal construction contract of $150,000 or more. If the construction contractor has at least 50 employees and a single contract of $150,000 or more, then it must also develop a VEVRAA AAP, as described in 41 CFR 60–300, subpart C.

This information collection request (ICR) seeks a reinstatement with change of the Monthly Employment Utilization Report (CC–257). The CC–257 is a form that covered construction contractors previously submitted to OFCCP on a monthly basis and included information on employee work hours by race/ethnicity, gender, and trade in the covered area. With the proposed CC–257, construction contractors will provide information on employee work hours and employee count by race/ethnicity, gender, and trade in the covered area. With this information collection, OFCCP can strengthen its construction program by using the collected information to inform compliance assistance efforts and track the progress of contractor's outreach efforts and the agency's Megaproject Program. The collected information can also improve OFCCP's scheduling of compliance evaluations of covered construction contractors, as the reports will provide relevant information on which projects are currently active and current employee counts.

II. Review Focus: OFCCP is particularly interested in comments that:

- Evaluate the proposed reinstatement of the CC–257 and the proposed changes to the CC–257;
- 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.

III. Current Actions: OFCCP seeks the approval of this information collection in order to carry out its responsibility to enforce the nondiscrimination and affirmative action provisions of the three authorities it administers.

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Agency: Office of Federal Contract Compliance Programs.

Title: Monthly Employment Utilization Report.

OMB Number of Prior Collection: 1215–0163.

Agency Number: None.

Affected Public: Business or other for-profit entities.

Total Respondents: 9,982.

Total Annual Responses: 119,784.

Average Time per Response: 1.5 hours.

Estimated Total Burden Hours: 179,676 hours.

Frequency: Monthly.

Total Monetized Burden Cost: $13,700,054.

Total Burden Costs to Federal government: $1,390,997.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Tina T. Williams,

Acting Deputy Director of OFCCP and Director of Policy & Program Development, Office of Federal Contract Compliance Programs.

[FR Doc. 2024–03635 Filed 2–22–24; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Request for Assistance From the Department of Labor, Employee Benefits Security Administration

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-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 25, 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: The Department of Labor's Employee Benefits Security Administration (EBSA) maintains a program designed to provide education and technical assistance to participants and beneficiaries as well as to employers, plan sponsors, and service providers related to their health and retirement plan benefits. EBSA assists participants in understanding their rights, responsibilities, and benefits under employee benefit law and intervenes informally on their behalf with the plan sponsor in order to assist them in obtaining the health and retirement benefits to which they may have been inappropriately denied, which can avert the necessity for a formal investigation or a civil action. EBSA maintains a toll-free telephone number through which inquirers can reach Benefits Advisors in ten Regional Offices. EBSA has also made a request for assistance form available on its website for those wishing to obtain assistance in this manner. Contact with EBSA is entirely voluntary.

The collection of information is an intake form for assistance requests from the public. This information includes the plan type, broad categories of problem type, contact information for responsible parties, and a mechanism for the inquirer to attach relevant documents. Summary data from the existing intake form has also been used, in accordance with section 513 of ERISA, to respond to requests for information regarding employee benefit plans from members of Congress and governmental oversight entities, and to inform the policy formulation process. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 25, 2023 (88 FR 58312).

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–EBSA.

Title of Collection: Request for Assistance from the Department of Labor, Employee Benefits Security Administration.

OMB Control Number: 1210–0146.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 14,991.

Total Estimated Number of Responses: 14,991.

Total Estimated Annual Time Burden: 7,496 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024–03659 Filed 2–22–24; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0057]

Excavations Standard (Design of Cave-in Protection Systems); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Excavations Standard (Design of Cave-in Protection Systems).

DATES: Comments must be submitted (postmarked, sent, or received) by April 23, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the*https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the websites. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2011–0057) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of these requirements is to reduce employees' risk of death or serious injury while working in hazardous conditions due to cave-ins.

Paragraphs (b) and (c) of § 1926.652 (''Requirements for Protective Systems''; the ''Standard'') contain paperwork requirements that impose burden hours or costs on employers. These paragraphs require employers to use protective systems to prevent cave-ins during excavation work; these systems include sloping the side of the trench, benching the soil away from the excavation, or using a trench shielding system (such as a trench box). The Standard specifies allowable configurations and slopes for excavations and provides appendices to assist employers in designing protective systems. However, paragraphs (b)(3) and (4) of the Standard permit employers to design sloping or benching systems based on tabulated data (Option 3), or to use a design approved by a registered professional engineer (Option 4).

Under Option 3, employers must provide the tabulated data in a written form that also identifies the registered professional engineer who approved the data and the parameters used to select the sloping or benching system drawn from the data, as well as the limitations of the data (including the magnitude and configuration of slopes determined to be safe). The document must also provide any explanatory information necessary to select the correct benching system based on the data. Option 2 requires employers to develop a written design approved by a registered professional engineer. The design information must include the magnitude and configuration of the slopes determined to be safe, and the identity of the registered professional engineer who approved the design.

Paragraph (c)(2)(iii) allows employers to use manufacturer's tabulated data or to deviate from the data provided. The manufacturer's specification, recommendations, and limitations as well as the manufacturer's approval to deviate from these items shall be in writing. Paragraphs (c)(3) and (4) allow employers to design support systems, shield systems, and other protective systems based on tabulated data provided by a system manufacturer (Option 3) or obtained from other sources including a registered professional engineer and approved by a registered professional engineer (Option 4).

Each of these provisions requires employers to maintain a copy of the documents described in these options at the jobsite during construction. After construction is completed, employers may store the documents off-site provided they make them available to an OSHA compliance officer on request. These documents provide both the employer and the compliance officer with information needed to determine if the selection and design of the protective system are appropriate to the excavation work, thereby assuring workers of maximum protection against cave-ins.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Excavations Standard. The agency is requesting an adjustment decrease in burden hours from 40,041 hours to 22,697 hours, a difference of 17,344 hours. This decrease is due to the number of apartment and non-residential construction projects/sites from 5,720 to 3,243.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Excavations Standard (Design of Cave-in Protection Systems).

OMB Control Number: 1218–0137.

Affected Public: Business or other for-profits.

Number of Respondents: 1,144,081.

Number of Responses: 22,697.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 22,697.

Estimated Cost (Operation and Maintenance): $430,152.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0057). You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submission, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on February 15, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–03636 Filed 2–22–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0045]

Powered Industrial Trucks Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Powered Industrial Trucks Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by April 23, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the websites. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2009–0045) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it.

The purpose of these requirements is to address truck design, construction, and modification, as well as certification of training and evaluation for truck operators.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the

information collection requirements, including the validity of the methodology and assumptions used;

- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in Powered Industrial Trucks Standard. The agency is requesting an adjustment decrease from 450,022 hours to 437,198 hours, a difference of 12,824 hours. This decrease is due to the decrease in the number of powered industrial trucks from 1,276,055 to 1,239,687.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Powered Industrial Trucks Standard.

OMB Control Number: 1218–0242.

Affected Public: Business or other for-profits.

Number of Respondents: 1,859,532.

Number of Responses: 2,451,112.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 437,198.

Estimated Cost (Operation and Maintenance): $272.844.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR OSHA–2009–0045. You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submission, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on February 15, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–03638 Filed 2–22–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0028]

Grain Handling Facilities Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Grain Handling Facilities Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by April 23, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the websites. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2011–0028) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, the reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of these requirements is to reduce employees' risk of death or serious injury while working in grain handling facilities.

Paragraph (d) of the Standard requires the employer to develop and implement an emergency action plan so that employees will be aware of the appropriate actions to take in the event of an emergency.

Paragraph (e)(1) requires that employers provide training to employees at least annually and when changes in job assignment will expose them to new hazards. Paragraph (f)(1) requires the employer to issue a permit for all hot work. Under paragraph (f)(2) the permit shall certify that the requirements contained in 1910.272(a) have been implemented prior to beginning the hot work operations and shall be kept on file until completion of the hot work operation.

Paragraph (g)(1)(i) requires the employer to issue a permit for entering bins, silos, or tanks unless the employer or the employer's representative is present during the entire operation. The permit shall certify that the precautions contained in paragraph (g) have been implemented prior to employees entering bins, silos, or tanks and shall be kept on file until completion of the entry operations.

Paragraph (g)(1)(ii) requires that the employer de-energize, disconnect, lockout and tag, block off, or otherwise prevent operation of all mechanical, electrical, hydraulic, and pneumatic equipment that presents a danger to employees inside grain storage structures.

Paragraphs (i)(1) and (i)(2) require the employer to inform contractors performing work at the grain handling facility of known potential fire and explosion hazards related to the contractor's work and work area and to explain to the contractor the applicable provisions of the emergency action plan.

Paragraph (j)(1) requires the employer to develop and implement a written housekeeping program that establishes the frequency and method(s) determined to best reduce accumulations of fugitive grain dust on ledges, floors, equipment, and other exposed surfaces.

Under paragraph (m)(1), the employer is required to implement preventative maintenance procedures consisting of regularly scheduled inspections of at least the mechanical and safety control equipment associated with dryers, grain stream processing equipment, dust collection equipment including filter collectors, and bucket elevators. Paragraph (m)(3) requires a certification to be maintained for each inspection. Paragraph (m)(4) requires the employer to implement procedures for the use of tags and locks that will prevent the inadvertent application of energy or motion to the equipment being repaired, serviced, or adjusted.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Grain Handling Facilities Standard. The agency is requesting that the currently approved burden hours of 57,837 hours remain the same.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Grain Handling Facilities Standard.

OMB Control Number: 1218–0206.

Affected Public: Business or other for-profits.

Number of Respondents: 14,940.

Number of Responses: 1,105,635.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 57,837.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0028). You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on February 15, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–03637 Filed 2–22–24; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (24–013)]

NASA Biological and Physical Sciences Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces a meeting of the Biological and Physical Sciences Advisory Committee. This Committee reports to the Director, Biological and Physical Sciences Division, Science Mission Directorate, NASA Headquarters. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Thursday, April 25, 2024, 10 a.m.–6 p.m.; and Friday, April 26, 2024, 10 a.m.–3 p.m., Eastern Time.

ADDRESSES: Public attendance will be virtual only. See dial-in and Webex information below.

FOR FURTHER INFORMATION CONTACT: Mrs. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355, or *karshelia.kinard@nasa.gov.*

SUPPLEMENTARY INFORMATION: As noted above, this meeting is virtual and will take place by dial-in and via Webex. Any interested person must use a touch-tone phone to participate in this meeting. The Webex connectivity information for each day is provided below.

For audio, when you join the Webex event, you may use your computer or provide your phone number to receive a call back, otherwise, call the U.S. toll conference number listed for each day.

On Thursday, April 25, the event address for attendees is:

https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m335cac678e34d8b8eb3ff5a1f27dbcb8, the meeting number is 2828 144 7318, and meeting password is Bpac0425#

To join by telephone, the numbers are: 1–929–251–9612 or 1–415–527–5035. Access code: 2828 144 7318.

On Friday, April 26, the event address for attendees is:

https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m74037fe3d9ce9e8034783fd2f4f1965e, the meeting number is 2829 034 8376, and meeting password is Bpac0426#

To join by telephone, the numbers are: 1–929–251–9612 or 1–415–527–5035. Access code: 2829 034 8376.

The agenda for the meeting includes the following topics:

—Biological and Physical Sciences Division Overview
—Decadal Survey Update
—Updates on Space Biology, Physical Sciences, and Fundamental Physics

The agenda will be posted on the Biological and Physical Sciences Advisory Committee web page: *https://science.nasa.gov/researchers/nac/science-advisory-committees/bpac.*

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2024–03660 Filed 2–22–24; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

75th Meeting of the President's Committee on the Arts and the Humanities

AGENCY: Institute of Museum and Library Services (IMLS).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the President's Committee on the Arts and the Humanities will meet to carry out administrative functions and to consider preliminary recommendations for agency action.

Dates and Time: The meeting will be held on February 26th, 2024, at 1:00 p.m. EST until 3:00 p.m. EST.

Place: The meeting will convene in a virtual format.

FOR FURTHER INFORMATION CONTACT: Jasmine Jennings, Assistant General Counsel and Alternate Designated Federal Officer, Institute of Museum and Library Services, Suite 4000, 955 L'Enfant Plaza North SW, Washington, DC 20024; (202) 653–4653; *jjennings@imls.gov*

SUPPLEMENTARY INFORMATION: The President's Committee on the Arts and the Humanities is meeting pursuant Executive Order 14084 and the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. The 75th Meeting of the President's Committee on the Arts and Humanities will convene at 1:00 p.m. EST on February 26, 2023. This meeting will be an Executive Session (closed to the public and personnel).

Agenda: To carry out administrative functions and discuss proposed recommendations for agency action.

As identified above, the President's Committee on the Arts and the Humanities meeting will be closed to the public and personnel pursuant to subsection (c)(9) of section 552b of Title 5, United States Code, as amended. The closed session will consider information which if prematurely disclosed would be likely to significantly frustrate implementation of a proposed agency action.

Dated: February 9, 2024.

Brianna Ingram,

Paralegal Specialist.

[FR Doc. 2024–03118 Filed 2–22–24; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Marine Carbon Dioxide Removal Research Plan

AGENCY: National Science Foundation.

ACTION: Notice of request for information.

SUMMARY: The National Science Foundation (NSF), on behalf of the White House National Science and Technology Council (NSTC) Marine Carbon Dioxide Removal Fast-Track Action Committee (MCDR–FTAC), requests input from all interested parties to inform the development of an implementation plan to advance a key recommendation of the Ocean Climate Action Plan (OCAP) regarding marine carbon dioxide removal (CDR) research. Marine CDR refers to efforts to increase the amount of atmospheric carbon dioxide taken up by the ocean, adding to the large, natural ocean carbon reservoir. The deployment of safe and effective CDR approaches is increasingly regarded in scientific assessments as necessary in the near future to meet climate goals. The implementation plan, hereafter referred to as the Marine CDR Plan, will advance three actions to enable marine CDR research that are called for in the Ocean Climate Action Plan: establish a comprehensive Federal marine CDR research program; clarify permitting, regulatory, and other standards and policies, and establish guidelines for marine CDR research; and

establish a Marine CDR Initiative to enable public-private partnerships and establish mechanisms to strengthen interagency coordination and promote public awareness and engagement. Through this Request for Information (RFI), the MCDR–FTAC seeks input on each element of the Marine CDR Plan.

DATES: Responses are due by 11:59 p.m. eastern time on April 23, 2024. Submissions received after the deadline may not be taken into consideration.

ADDRESSES: Interested individuals and organizations should submit comments electronically to *Tricia.M.Light@ostp.eop.gov* and include ''Marine Carbon Dioxide Removal Research Plan'' in the subject line of the email. Email submissions should be machine-readable (PDF, Word) and should not be locked or password protected.

Instructions: Response to this RFI is voluntary. Each individual or organization is requested to submit only one response. Commenters can respond to one or many questions. Submissions are suggested to not exceed a total of five (5) pages in 12 point or larger font. Submissions should clearly indicate which questions are being addressed. Responses should include the name of the person(s) or organization(s) filing the response. Responses containing references, studies, research, and other empirical data that are not widely published should include copies of or electronic links to the referenced materials. Responses containing profanity, vulgarity, threats, or other inappropriate language or content will not be considered.

Please note that MCDR–FTAC agencies may post responses to this RFI, without change, on their websites. NSF, therefore, requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI. Please note that the U.S. Government will not pay for response preparation, or for the use of any information contained in the response.

FOR FURTHER INFORMATION CONTACT: For further information, please contact: Tricia Light, Office of Science & Technology Policy. Phone (202) 881–7242; email: *Tricia.M.Light@ostp.eop.gov.*

SUPPLEMENTARY INFORMATION:

Background

Climate change is an existential threat that is causing rising sea levels, melting glaciers and record-setting temperatures, as well as more extreme events, like severe flooding, heatwaves, serious droughts, costly storms, and widespread wildfires. The emissions of carbon dioxide that contribute to climate change are also acidifying the ocean. Rapid and deep reductions in global greenhouse gas emissions are essential to avoid potentially catastrophic consequences. However, reducing emissions alone may not be enough. Carbon dioxide emitted over the last 170 years has accumulated in the atmosphere to such an extent that ''large-scale deployment of carbon dioxide removal (CDR)'' approaches will also be needed to keep warming below 1.5 °C.[1] CDR is the process by which carbon dioxide is removed and stored away from the atmosphere. Potential CDR approaches include altering land management practices to increase carbon in soils and forests, coupling bioenergy with carbon capture and sequestration technologies, and a range of possible ocean-based approaches, including accelerating weathering to increase the flow into the sea of naturally occurring carbon dioxide-absorbing minerals and fertilizing certain regions of the ocean with iron to stimulate the growth of marine organisms that consume carbon.[2]

The United States Ocean Climate Action Plan (OCAP)[3] recognizes the ocean as a powerful tool to address the climate crisis. The ocean is one of the largest natural reservoirs of carbon on Earth. It already removes much of the carbon dioxide that people produce, and it may have the potential to do much more.[4] It may be possible through marine CDR approaches to safely enhance the natural capacity of the ocean to absorb carbon dioxide through a variety of physical, geochemical, and biological processes. Some of these approaches may even have other beneficial effects, such as locally reducing ocean acidity, which is also caused by carbon dioxide emissions. A variety of potential marine CDR approaches are now under active investigation by Federal agencies, academia, industry, and non-governmental organizations. As of yet, however, no marine CDR methods are considered ready for full-scale deployment or commercial application. Significant questions remain, including how well marine CDR approaches will work and for how long, how much they will cost, and what other impacts—beneficial or adverse—they may have.[4] The OCAP calls for a substantial ramp up in marine CDR research investments to answer these questions and ensure that necessary field tests are appropriately regulated. In response, the National Science and Technology Council (NSTC), a Cabinet-level council and the principal means for the President to coordinate science and technology policies across the Federal Government (Executive Order 12881),[5] established the Marine Carbon Dioxide Removal Fast Track Action Committee (MCDR–FTAC).[6] The MCDR–FTAC provides guidance and direction to the NSTC through the Subcommittee on Ocean Science and Technology (SOST) regarding marine CDR research and policy.

To advance the marine CDR objectives of the OCAP, the MCDR–FTAC will develop a National Marine CDR Plan that will—

• *Establish a comprehensive Federal marine CDR research program.* The Marine CDR Plan will establish a comprehensive Federal marine CDR research program to accelerate the development of knowledge needed to determine: (1) the climate-mitigation potential of marine CDR approaches, including their efficacy, permanence, scalability, energy and other resource demands, and costs; (2) the ability of marine CDR approaches to provide co-benefits, such as mitigating ocean acidity; and (3) the potential for marine CDR to have adverse impacts on the marine environment, human health and communities, and other uses of the sea. The research program will build on available recommendations, such as those of the National Academies of Sciences, Engineering and Medicine, and include research in the natural, engineering, and social sciences. It will encompass theoretical, modeling, and

[1] *IPCC, 2018: Summary for Policymakers. In:* Global Warming of 1.5 °C. An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse has emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty *[Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–24. https://doi.org/10.1017/9781009157940.001*

[2] *National Research Council. 2015.* Climate Intervention: Carbon Dioxide Removal and Reliable Sequestration. *Washington, DC: The National Academies Press. https://doi.org/10.17226/18805.*

[3] *Ocean Climate Action Plan (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/Ocean-Climate-Action-Plan_Final.pdf.*

[4] *National Academies of Sciences, Engineering, and Medicine. (2022).* A Research Strategy for Ocean-based Carbon Dioxide Removal and Sequestration. *The National Academies Press. https://doi.org/10.17226/26278.*

[5] *Executive Order 12881: Establishment of the National Science and Technology Council (1993), https://www.govinfo.gov/content/pkg/WCPD-1993-11-29/pdf/WCPD-1993-11-29-Pg2450.pdf.*

[6] *Charter of the Marine Carbon Dioxide Removal Fast-Track Action Committee (2023), https://www.noaa.gov/sites/default/files/2023-10/mCDR_FTAC_charter_2023_09_19_approved.pdf.*

laboratory studies, and include at-scale tests in the field, ensuring that ocean observations are robust, sustained, and verifiable. The research program will support the effective regulation of marine CDR and inform decisions about the possible deployment and commercial application of marine CDR approaches in the future. It will identify the most urgent research priorities for Federal support and take into account related efforts by academia, industry, philanthropy, non-governmental organizations, and other governments.

• *Clarify permitting, regulatory, and other standards and policies, and establish guidelines for marine CDR research.* The Marine CDR Plan will identify relevant domestic and international regulatory frameworks and clarify how they apply to marine CDR research, including at-scale tests in the field. The guidelines will identify considerations for measuring, monitoring, reporting, and verifying (MMRV) marine CDR to support permitting and regulation and the development of standards for carbon accounting. The Marine CDR Plan will also identify any critical gaps in knowledge and capabilities necessary to effectively regulate marine CDR.

• *Establish a Marine CDR Initiative to enable public-private partnerships and establish mechanisms to strengthen interagency coordination and promote public awareness and engagement.* The Marine CDR Plan will establish a mechanism or mechanisms to: (1) strengthen the ability of Departments and Agencies across the Federal Government to collaborate on marine CDR research and regulation; (2) facilitate information sharing and stakeholder engagement, including with Indigenous communities and communities that may be affected by marine CDR; and (3) enable partnerships between the Federal Government and academia, industry, philanthropy, non-governmental organizations and other governments, including to fund research jointly, such as through a Marine CDR Initiative.

In developing these three actions in the Marine CDR Plan, the MCDR–FTAC will seek to harmonize and streamline existing Federal research efforts, the regulatory process, and public engagement and partnerships for marine CDR.

Questions To Inform Development of the Strategy

You may provide information for one or as many topics below as you choose. Clearly indicate in your submission which questions are being addressed. The MCDR–FTAC is seeking input from the public on the following:

1. How would a Marine CDR Plan affect you, your organization, or your community?

2. What questions or concerns do you have about the regulation of marine CDR, including marine CDR research? What tools or resources should the Federal Government provide to support the safety and effectiveness of marine CDR research, including testing at scale in the field? What knowledge exists, and what additional knowledge is needed to inform the safe and effective regulation of marine CDR research? What knowledge exists and what additional knowledge will be needed to inform decisions about the readiness of any marine CDR approach for full-scale deployment or commercial application?

3. Which marine CDR techniques or what aspects of marine CDR do you believe the Federal Government should prioritize for research? Are there particular marine CDR approaches that you believe are especially promising with regard to climate change mitigation, ocean acidification, or other benefits? Are there particular marine CDR approaches that you believe are particularly more or less risky with regard to the environment, public health and communities, or other uses of the sea?

4. What kinds of information about marine CDR would be most helpful for the Federal Government to make available to the public, research community, and other stakeholders? How should the government engage marine CDR stakeholders and the public, including Indigenous communities and communities that may be affected by marine CDR?

5. What are the most significant marine CDR efforts being undertaken by academia, industry, philanthropy, non-governmental organizations, and other governments that the Federal Government should be aware of? What factors should the Federal Government take into account when considering potential partnerships between these entities and the Federal Government? What are the biggest challenges that the Federal Government and potential partners may face in collaborating, and how could the Federal Government help overcome these challenges? What examples of partnerships are most relevant to potential marine CDR partnerships?

6. What else would you like the Federal Government to consider as it develops a Marine CDR Plan?

Dated: February 20, 2024.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2024–03758 Filed 2–22–24; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–390 and 50–391; NRC–2024–0035]

Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to Facility Operating License Nos. NPF–90 and NPF–96, issued on February 7, 1996, and October 22, 2015, respectively, and held by Tennessee Valley Authority (TVA, the licensee) for the operation of Watts Bar Nuclear Plant (Watts Bar), Units 1 and 2. The proposed amendments would revise the Watts Bar, Units 1 and 2, Technical Specification (TS) 4.2.1, ''Fuel Assemblies,'' and TS 5.9.6, ''Reactor Coolant System (RCS) Pressure and Temperature Limits Report (PTLR),'' to increase the maximum number of tritium producing burnable absorber rods (TPBARs) and to add supporting methodologies. The proposed amendments would also revise the Watts Bar Dual-Unit Updated Final Safety Analysis Report to modify the source term for design basis accident analyses. The NRC is issuing an environmental assessment (EA) and finding of no significant impact (FONSI) associated with the proposed amendments.

DATES: The EA and FONSI referenced in this document are available on February 23, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0035 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

• *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0035. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in the ''Availability of Documents'' section of this document.
- NRC's PDR: The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kimberly Green, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1627; email: *Kimberly.Green@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering issuance of amendments to Facility Operating License Nos. NPF–90 and NPF–96, issued to TVA, for the operation of Watts Bar, Units 1 and 2, located in Rhea County, Tennessee. Therefore, as required by section 51.21, ''Criteria for and identification of licensing and regulatory actions requiring environmental assessments,'' of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC performed an EA that analyzes the environmental impacts of the proposed licensing action and alternatives as appropriate. Based on the results of the EA that follows, and in accordance with 10 CFR 51.31(a), the NRC has determined not to prepare an environmental impact statement for the proposed licensing action and is issuing a FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would revise Watts Bar, Units 1 and 2, TS 4.2.1 to increase the limit on the maximum number of TPBARs that can be irradiated in the reactor core in an operating cycle from 1,792 to 2,496. The proposed action would also revise Watts Bar, Units 1 and 2, TS 5.9.6 to add supporting methodologies. Additionally, the proposed action would revise the Watts Bar Dual-Unit Updated Final Safety Analysis Report to modify the source term for design basis accident analyses to allow the core fission product inventory to be calculated using an updated version of the ORIGEN computer code.

The proposed action is in accordance with the licensee's application dated March 20, 2023 (ADAMS Accession No. ML23079A270).

Need for the Proposed Action

The U.S. Department of Energy (DOE) and TVA are cooperating in a program to produce tritium for the National Security Stockpile by irradiating TPBARs in the Watts Bar, Units 1 and 2, reactor cores. Tritium is produced when the neutrons produced by nuclear fission in the core are absorbed by the lithium target material of the TPBARs. A solid zirconium metal cladding covering the TPBARs (called a ''getter'') captures the tritium produced.

This proposed action is needed to support the DOE, National Nuclear Security Administration, National Security Stockpile, in accordance with Public Law (Pub. L.) 106–65. Section 3134 of Public Law 106–65 directs the Secretary of Energy to produce new tritium at Watts Bar. By letters dated July 29, 2016 (ADAMS Accession No. ML16159A057), and May 22, 2019 (ADAMS Accession No. ML18347B330), the NRC approved similar amendments to irradiate up to 1,792 TPBARs in the Watts Bar reactor cores. The EA and FONSI for those licensing actions, completed on June 23, 2016, and February 6, 2019, can be found in ADAMS under Accession Nos. ML16138A045 and ML18332A013, respectively.

Environmental Impacts of the Proposed Action

The NRC staff has assessed the potential environmental impacts from the proposed increase in the maximum number of TPBARs that can be irradiated in the Watts Bar reactor cores.

The non-radiological and radiological impacts on the environment that may result from the proposed action are summarized as follows.

Non-Radiological Impacts

The proposed action involves no new construction or modification of Watts Bar, Units 1 and 2, operational systems and would have no direct impact on land and water use or water quality, including terrestrial and aquatic biota. There would also be no change in the quality or quantity of non-radiological effluents and no need to modify the nuclear plant's National Pollutant Discharge Elimination System permit. The proposed action would have no effect on air pollutant emissions or ambient air quality. In addition, the proposed action would have no noticeable effect on socioeconomic and environmental justice conditions in the region, and no adverse effect on historic and cultural resources. Therefore, the proposed action would have no significant non-radiological effect on the quality of the human environment.

Radiological Impacts

All nuclear power plants, including Watts Bar, Units 1 and 2, release small amounts of radioactive material to the environment as liquid or gaseous effluents as part of normal operations. The NRC summarizes U.S. nuclear power plant effluent data on its public website [*https://www.nrc.gov/reading-rm/doc-collections/nuregs/contract/cr2907/index.html*]. These effluents are controlled, monitored, and reported per NRC requirements to ensure that doses to the public are known and within acceptable guidelines that are as low as is reasonably achievable (ALARA). The Watts Bar Offsite Dose Calculation Manual (ODCM), documented in the Watts Bar Nuclear Power Plant 2022, Annual Radioactive Effluent Release Report (ADAMS Accession No. ML23117A100), provides the limits and methods used by TVA to ensure compliance with requirements that apply to radioactive effluents. Watts Bar, Units 1 and 2, use waste treatment systems to collect, process, and recycle plant fluids that contain radioactive material and to dispose of gaseous and liquid effluents and solid wastes in a safe and controlled manner within NRC and U.S. Environmental Protection Agency radiation safety standards. Implementation of the proposed action would allow up to 2,496 TPBARs per cycle to be irradiated in the Watts Bar, Units 1 and 2, reactor cores. Increasing the number of TPBARs irradiated from 1,792 to 2,496 per reactor core could increase the quantities of radioactive material released from Watts Bar to the environment because some of the tritium that is produced permeates through the TPBAR cladding and is released into the reactor coolant system (RCS) fluid. Radioactive material in RCS fluid can be released as gaseous or liquid effluent. For the purposes of assessing the environmental impacts and the regulatory compliance of this proposed action for tritium production, TVA assumed a core load of 2,496 TPBARs with a permeation rate of 5.0 curies per TPBAR per year (Ci/TPBAR/year) of tritium and was able to demonstrate that liquid and gaseous effluents would be within applicable limits. The assumed permeation rate is conservative in that it bounds the observed and maximum TPBAR tritium permeation rates at Watts Bar, Units 1 and 2. Specifically, based on the licensee's experience with TPBARs dating back to 2004, the licensee has observed a permeation rate for tritium production of less than 3.5 Ci/TPBAR/year. Additionally, as provided in this document, the licensee demonstrated that other changes to the radioisotope inventory that can impact effluent levels would be minor and would not impact the licensee's ability to meet applicable limits. Therefore, while the quantity of tritium generated during plant operations would increase under the proposed action, radioactive effluents from Watts Bar would remain within applicable limits.

Radioactive Gaseous Effluents

The Watts Bar units maintain a gaseous waste management system (GWMS) that is designed to process and control the release of radioactive gaseous effluents into the environment in accordance with the requirements of 10 CFR 20.1301, ''Dose limits for individual members of the public,'' and to ensure consistency with the ALARA dose objectives set forth in appendix I, ''Numerical Guides for Design Objectives and Limiting Conditions for Operation to Meet the Criterion 'As Low as is Reasonably Achievable' for Radioactive Material in Light-Water-Cooled Nuclear Power Reactor Effluents,'' to 10 CFR part 50, ''Domestic Licensing of Production and Utilization Facilities.''

As stated in the license amendment request, TVA assumed a core load of 2,496 TPBARs with a permeation rate of 5.0 Ci/TPBAR/year of tritium, which is a conservative source term that bounds the observed and maximum TPBAR tritium permeation rate as seen from historic Watts Bar, Units 1 and 2, tritium production.

To determine whether the resultant gaseous effluents would fall within the requirements of 10 CFR 20.1301, TVA calculated the sum of the ratios of each isotope concentration (C) to its corresponding gaseous Effluent Concentration Limit (ECL, as listed in 10 CFR part 20, ''Standards for Protection against Radiation,'' appendix B, ''Annual Limits on Intake (ALIs) and Derived Air Concentrations (DACs) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sewerage,'' table 2, ''Effluent Concentration,'' column 1). Consistent with the requirements of 10 CFR 20.1302(b)(2)(i), a C/ECL sum of less than 1.0 indicates that the annual average effluent release is within the limits of 10 CFR 20.1301. Tables 4.11–6 and 4.11–7 of the license amendment request demonstrate that TVA's calculated C/ECL sums for gaseous effluent releases at the Watts Bar units from an assumed core load of 2,496 TPBARs for containment purge without filtration would be 0.458 (single unit) and with continuous filtration would be 0.402 (single unit). TVA's calculated C/ECL sums for gaseous effluent releases for both Watts Bar, Units 1 and 2 (dual-unit operation) for containment purge without filtration would be 0.915 and with continuous filtration would be 0.805. Therefore, the licensee demonstrated that the C/ECL ratios are less than 1.0 indicating that gaseous effluent releases from an assumed core load of 2,496 TPBARs would be within the limits of 10 CFR part 20.

To determine whether the gaseous effluent releases would be consistent with the ALARA dose objectives set forth in appendix I to 10 CFR part 50 (which are per-unit numbers), TVA calculated bounding public doses from the applicable plant effluent dose pathways with the tritium release attributable to TPBAR permeability. These doses were based on an assumed core load of 2,496 TPBARs and the methods and assumptions in the current Watts Bar ODCM. TVA calculated that the whole-body dose to a Maximally Exposed Individual from a single Watts Bar unit would be 0.60 millirem (mrem) (0.0060 millisievert (mSv)), which is much less than the whole-body dose objective in appendix I to 10 CFR part 50 of 5.00 mrem (0.05 mSv). TVA also calculated that the organ dose (bone) to the Maximally Exposed Individual from a single Watts Bar unit would be 11.30 mrem (0.113 mSv), which is less than the organ dose objective in appendix I to 10 CFR part 50 of 15.00 mrem (0.15 mSv).

Based on this information, TVA's analyses demonstrate that Watts Bar, Units 1 and 2, can be operated with the proposed maximum core loading of 2,496 TPBARs such that the current GWMS can maintain the gaseous effluents within the Effluent Concentration Limits listed in 10 CFR part 20, appendix B, to meet the dose limit requirements to members of the public in 10 CFR 20.1301, as well as to maintain doses to the public ALARA as per the dose objectives set forth in appendix I to 10 CFR part 50. Therefore, there would be no significant radiological effect on the quality of the human environment from gaseous effluents.

Radioactive Liquid Effluents

The Watts Bar units' liquid radioactive waste system (LRWS) is used to collect and process radioactive liquid wastes to reduce radioactivity and chemical concentrations to levels acceptable for discharge to the environment. The LRWS maintains sufficient processing capability so that liquid waste may be discharged to the environment below the regulatory limits of 10 CFR 20.1301 and consistent with the ALARA dose objectives in appendix I to 10 CFR part 50. The Watts Bar units share three large storage tanks in the LRWS, which includes a tritiated water storage tank with a capacity of 500,000 gallons. This storage tank supports managing large volume/high tritium concentrations in the RCS for both units. These storage tanks can be used for liquid effluent holdup, dilution, and timing of releases to ensure that regulatory requirements are met. The release of radioactive liquids from the LRWS only occurs after laboratory analysis of the storage tank contents. If the activity is found to be above ODCM limits, the liquid waste streams are returned to the system for further processing by a mobile demineralizer. If the activity is found to be below the ODCM limits, the liquid waste stream is pumped to a discharge pipe where it is monitored for radiation levels and flowrate before it enters the cooling tower blowdown line, where it can ultimately be discharged by permit into the Tennessee River.

To determine whether the liquid effluents from an assumed core load of 2,496 TPBARs would be within the requirements of 10 CFR 20.1301, TVA calculated the sum of the ratios of each isotope concentration (C) to its corresponding liquid Effluent Concentration Limit (ECL, as listed in 10 CFR part 20, appendix B, table 2, column 2). Consistent with the requirements of 10 CFR 20.1302(b)(2)(i), a C/ECL sum of less than 1.0 indicates that the annual average effluent release is within the limits of 10 CFR 20.1301. Tables 4.11–3 through 4.11–5 of the license amendment request show TVA's calculated C/ECL sums for liquid effluent releases from an assumed core load of 2,496 TPBARs. Table 4.11–3 indicates that extended effluent releases, without processing the liquid radioactive waste streams through the mobile demineralizer or allowing for sufficient dilution of the radioactive waste streams, would not meet the regulatory requirements of 10 CFR 20.1301. The calculated C/ECL for a single Watts Bar unit in this scenario is 5.28, which is greater than the maximum allowable C/ECL of 1.0. The operation of both Watts Bar, Units 1 and 2 in this scenario would yield a C/ECL of 10.6.

Table 4.11–4 of the license amendment request demonstrates that TVA's calculated C/ECL sum for liquid effluent releases for a single Watts Bar unit processed through the mobile demineralizer would be 0.471. The operation of both Watts Bar, Units 1 and 2 in this scenario would yield a C/ECL of 0.942. Table 4.11–5 demonstrates that TVA's calculated C/ECL for liquid effluents not processed through the mobile demineralizer, but sufficiently diluted before release, for a single Watts Bar unit would be 0.476. The operation of both Watts Bar, Units 1 and 2 in this scenario would yield a C/ECL of 0.952. Therefore, the licensee demonstrated that the C/ECL ratios are less than 1.0 indicating that liquid effluent releases from an assumed core load of 2,496 TPBARs would be within the limits of 10 CFR part 20.

To determine whether the liquid effluent releases would be consistent with the ALARA dose objectives set forth in appendix I to 10 CFR part 50, TVA calculated bounding public doses from the applicable plant effluent dose pathways with the tritium release attributable to TPBAR permeability. These doses were based on an assumed core load of 2,496 TPBARs and the methods and assumptions in the current Watts Bar ODCM. TVA calculated that the whole-body dose to a Maximally Exposed Individual from liquid effluents from a single Watts Bar unit would be 0.39 mrem (0.0039 mSv), which is much less than the whole-body dose objective in appendix I to 10 CFR part 50 of 3.00 mrem (0.03 mSv). TVA also calculated that the organ dose (liver) to the Maximally Exposed Individual from liquid effluents from a single Watts Bar unit would be 0.50 mrem (0.0050 mSv), which is much less than the organ dose objective in appendix I to 10 CFR part 50 of 10 mrem (0.10 mSv).

Based on this information, TVA's analyses demonstrate that by processing liquid radioactive waste streams through the demineralizer or allowing for proper dilution of the liquid radioactive waste streams, the current LRWS can maintain the liquid effluents within the Effluent Concentration Limits listed in 10 CFR part 20, appendix B, such that Watts Bar, Units 1 and 2, can be operated with the proposed maximum core loading of 2,496 TPBARs. Specifically, doses from liquid effluents would meet the requirements regarding members of the public in 10 CFR 20.1301, as well as maintain the public ALARA dose objectives set forth in appendix I to 10 CFR part 50. Therefore, there would be no significant radiological effect on the quality of the human environment from liquid effluents.

Solid Radioactive Wastes

Solid radioactive wastes generated by nuclear power plant operations at Watts Bar, Units 1 and 2, are processed, packaged, and stored onsite until they are shipped offsite for further processing or permanent disposal, or both. The storage areas have restricted access and shielding to reduce radiation rates to plant workers. Solid radioactive wastes are packaged and transported in compliance with the NRC's regulations in 10 CFR parts 20, 61, ''Licensing Requirements for Land Disposal of Radioactive Waste,'' and 71, ''Packaging and Transportation of Radioactive Material,'' and the U.S. Department of Transportation's regulations in 49 CFR parts 170 through 179.

The implementation of the proposed action of allowing an increase in the number of TPBARs irradiated from 1,792 to 2,496 per reactor core would increase the activity and volume of solid radioactive waste due to the irradiation of the TPBAR base plates and thimble plugs, which remain after TPBAR consolidation activities. As explained in a previous license amendment request, for the consolidation process, nuclear plant operators remove the irradiated TPBAR assemblies from the spent fuel assemblies, disassemble all the irradiated TPBARs for consolidation, and place them into consolidation canisters. The operators return the loaded consolidation canisters to the spent fuel racks, where they remain until removed from the site (ADAMS Accession No. ML17354B282). Offsite shipment and ultimate disposal would be conducted in accordance with agreements between TVA and the DOE. The disposal volume of the TPBAR base plates and thimble plugs is estimated to be 64 cubic feet (2.7 cubic meters) per year. This additional volume represents a slight increase in the Watts Bar, Units 1 and 2, annual estimated solid waste generation from approximately 32,854 cubic feet (930 cubic meters) per year to 32,918 cubic feet (933 cubic meters) per year. This projected increase in volume can be handled by the existing equipment and plant procedures that control radioactive solid waste handling without modification. The licensee estimated the TPBAR cycle scope of work to evaluate the doses that are expected to workers during the TPBAR consolidation process. The TPBAR cycle scope, estimated at 1,200 person-hours per cycle, includes pre-cycle preparation activities, post-cycle removal and handling activities, TPBAR consolidation and shipping activities, and the processing, packaging, and shipping of irradiated components. This work will occur in an estimated 0.33 mrem/hour radiation field. Therefore, while there would be an increase in solid radioactive waste associated with the implementation of the proposed action, the existing equipment and plant procedures that control radioactive solid waste handling would continue to be used to maintain doses to members of the public and plant workers within applicable dose limits. Therefore, based on this information, there would be no significant radiological effect on the quality of the human environment from solid radioactive waste management.

Spent Fuel Generation, Storage, and Handling

The number of spent fuel bundles would increase by approximately four to eight per cycle with the implementation of the proposed action. For Watts Bar, Units 1 and 2, spent fuel is currently stored in spent fuel pools on site and in an independent spent fuel storage installation. There would be adequate spent fuel storage available on site; therefore, based on this information, there would be no significant radiological effect on the quality of the human environment from spent fuel generation, storage, and handling.

Occupational Radiation Doses

At Watts Bar, Units 1 and 2, TVA maintains a radiation protection program to monitor radiation levels throughout the nuclear power plant to establish appropriate work controls, training, temporary shielding, and protective equipment requirements so that worker doses remain within the dose limits of 10 CFR part 20, subpart C, ''Occupational Dose Limits.'' The implementation of the proposed action would affect the quantities of radioactive material generated during plant operations since some tritium permeates through the TPBAR cladding and is released into the RCS, as previously described.

Separate from the environmental review for this EA, the NRC is reviewing the technical and safety analyses provided in TVA's license amendment request to ensure that the licensee continues to meet NRC regulatory requirements for occupational dose. The results of this safety review will be documented in a safety evaluation that will be made publicly available following the issuance of the EA. If the NRC's safety review determines that the irradiation of 2,496 TPBARs, per cycle, in Watts Bar, Units 1 and 2, complies with the NRC's regulations for occupational dose, then the proposed license amendments would not have a significant radiological effect on workers.

Design-Basis Accidents

Design-basis accidents are evaluated to ensure that Watts Bar, Units 1 and 2, can withstand the spectrum of postulated accidents without undue hazard to public health and safety and ensure the protection of the environment.

TVA's technical and safety analyses must meet the NRC's regulatory requirements for safe operation. The results of the NRC's safety review will be made publicly available following the issuance of the EA. If this safety review determines that the irradiation of 2,496 TPBARs, per cycle, in the Watts Bar, Units 1 and 2, cores comply with the NRC's regulations, and there is reasonable assurance that public health and safety will not be endangered, then the proposed license amendments would not have a significant radiological effect on the quality of the human environment from design-basis accidents.

Radiological Impacts Summary

Based on the radiological evaluations presented in this EA, except for the impacts associated with occupational radiation doses and design-basis accidents which are being reviewed separately, the implementation of the proposed action would not have a significant radiological effect on the quality of the human environment. If the NRC's safety review determines that 2,496 TPBARs, per cycle, can be safely irradiated in Watts Bar, Units 1 and 2, and there is reasonable assurance that public health and safety will not be endangered, then implementing the proposed license amendments would not have a significant radiological effect on workers and the quality of the human environment.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). Denial of the license amendment request would mean that TVA would be allowed to continue irradiating the current allowable number of TPBARs (*i.e.,* 1,792) for Watts Bar, Units 1 and 2. The environmental impacts of irradiating 1,792 TPBARs were previously considered and were determined to not have any significant radiological or non-radiological effect on the quality of the human environment. Therefore, the NRC concludes that denial of the license amendment request (*i.e.,* the ''no-action'' alternative) would result in no change in current environmental effe cts, and would be not significant. The impacts of the ''no-action'' alternative would be similar to the impacts of the proposed action.

Alternative Use of Resources

There are no unresolved conflicts concerning alternative uses of available resources under the proposed action.

Agencies and Persons Consulted

On November 7, 2023, the NRC staff consulted with the State of Tennessee, regarding the environmental impact of the proposed action. The state official had no comments on the EA and FONSI.

III. Finding of No Significant Impact

TVA requests that the NRC approve amendments that would revise the Watts Bar, Units 1 and 2, TS 4.2.1 and TS 5.9.6 to increase the maximum number of TPBARs and to add supporting methodologies. The proposed amendments would also revise the Watts Bar Dual-Unit Updated Final Safety Analysis Report to modify the source term for design basis accident analyses to allow the core fission product inventory to be calculated using an updated version of the ORIGEN computer code. Based on the review of available information, the NRC determined that the proposed action would not have any significant radiological or non-radiological environmental impacts. Also, the impacts of the ''no-action'' alternative would be similar to the impacts of the proposed action. The NRC also considered the information provided in the licensee's application and related TVA environmental documents.

This FONSI and related environmental documents are available for public inspection online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by email to *PDR.Resource@nrc.gov.*

IV. Availability of Documents

The documents identified in the following table are available to interested persons through ADAMS, as indicated.

Document description	ADAMS accession No./**Federal Register** citation
Application to Revise Watts Bar Nuclear Plant Units 1 and 2 Technical Specifications to Change the Number of Tritium Producing Burnable Absorber Rods (WBN–TS–21–02) and Proposed Revision to Reactor Vessel Surveillance Capsule Removal Schedule for Units 1 and 2, dated March 20, 2023.	ML23079A270
Watts Bar Nuclear Plant, Unit 1—Issuance of Amendment Regarding Revised Technical Specification 4.2.1 ''Fuel Assemblies'' to Increase the Maximum Number of Tritium Producing Burnable Absorber Rods (CAC No. MF6050), dated July 29, 2016.	ML16159A057
Watts Bar Nuclear Plant, Units 1 and 2—Issuance of Amendment Regarding Revision to Watts Bar Nuclear Plant, Unit 2, Technical Specification 4.2.1, ''Fuel Assemblies,'' and Watts Bar Nuclear Plant, Units 1 and 2, Technical Specifications Related to Fuel Storage (EPID L–2017–LLA–0427), dated May 22, 2019.	ML18347B330
Watts Bar Nuclear Plant, Unit 1, Environmental Assessment and Finding of No Significant Impact **Federal Register** notice related to License Amendment Request to Revise Technical Specification 4.2.1, ''Fuel Assemblies,'' dated June 23, 2016.	ML16138A045 81 FR 43656
Watts Bar Nuclear Plant, Units 1 and 2, Environmental Assessment and Finding of No Significant Impact **Federal Register** notice related to License Amendment Request to Revise Technical Specification 4.2.1, ''Fuel Assemblies,'' dated February 6, 2019.	ML18332A013 84 FR 3259

Document description	ADAMS accession No./**Federal Register** citation
Watts Bar Nuclear Power Plant, Units 1 and 2, 2022 Annual Radioactive Effluent Release Report, dated April 27, 2023	ML23117A100
Application to Revise Watts Bar Unit 2 Technical Specification 4.2.1, "Fuel Assemblies," and Watts Bar Units 1 and 2 Technical Specifications Related to Fuel Storage (WBN–TS–17–028), dated December 20, 2017.	ML17354B282

Dated: February 16, 2024.

For the Nuclear Regulatory Commission.

Kimberly J. Green,

Senior Project Manager, Licensing Projects Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2024–03665 Filed 2–22–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2024–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of February 26, March 4, 11, 18, 25, and April 1, 2024. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

PLACE: The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

STATUS: Public.

Members of the public may request to receive the information in these notices electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Betty.Thweatt@nrc.gov* or *Samantha.Miklaszewski@nrc.gov.*

MATTERS TO BE CONSIDERED:

Week of February 26, 2024

There are no meetings scheduled for the week of February 26, 2024.

Week of March 4, 2024—Tentative

There are no meetings scheduled for the week of March 4, 2024.

Week of March 11, 2024—Tentative

There are no meetings scheduled for the week of March 11, 2024.

Week of March 18, 2024—Tentative

There are no meetings scheduled for the week of March 18, 2024.

Week of March 25, 2024—Tentative

There are no meetings scheduled for the week of March 25, 2024.

Week of April 1, 2024—Tentative

There are no meetings scheduled for the week of April 1, 2024.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301–287–3591 or via email at *Wesley.Held@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: February 21, 2024.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2024–03909 Filed 2–21–24; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 16, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 191 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–193, CP2024–199.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–03658 Filed 2–22–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 14, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 190 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–191, CP2024–197.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–03657 Filed 2–22–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 12, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 188 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–189, CP2024–195.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–03655 Filed 2–22–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 12, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 189 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–190, CP2024–196.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–03656 Filed 2–22–24; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99550; File No. SR–CboeBYX–2024–006]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

February 16, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on February 9, 2024, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/BYX/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBYX–2023–010). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeBYX–2023–013. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeBYX–2023–014). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeBYX–2023–015. On December 12, 2023, Exchange filed the proposed fee change (SR–CboeBYX–2023–018). On December 12, 2023, the Exchange withdrew that filing and submitted SR–CboeBYX–2023–019. On February 9, 2024, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase over 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.

Additionally, the Exchange believes the proposed fee increase is reasonable in light of recent and anticipated connectivity-related upgrades and changes. For example, the Exchange recently performed switch hardware upgrades. Particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes contributes to increased determinism. Additionally, effective April 1, 2024, firms will be able to connect to a new data center (*i.e.,* Secaucus NY6 Data Center (''NY6'')), in addition the current data centers at NY4 and NY5. The Exchange is adding connectivity at NY6 in response to Customer demand and requests for additional space and capacity.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1⁄10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low

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[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83441 (June 14, 2018), 83 FR 28684 (June 20, 2018) (SR–CboeBYX–2018–006).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023),

barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 110 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has 103 members and Cboe BZX has 132 members. There is also no firm that is a Member of BYX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relate to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. For example, there are approximately 12 third parties who resell Exchange connectivity across the 7 Affiliated Exchanges, which are all accessible on the same network. These third-party resellers collectively maintain approximately 48 physical ports from the Exchange, but have collectively almost 200 unique customers downstream, connected through these multi-Exchange ports. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (*nasdaqtrader.com*); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[21] *See e.g., See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE

Continued

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''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.'' [23] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, 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.'' [26] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* 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-

Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

[26] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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'. . . .''.[27] Accordingly, the Exchange does not believe its proposed change imposes 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) of the Act [28] and paragraph (f) of Rule 19b–4 [29] 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 will 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–CboeBYX–2024–006 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–CboeBYX–2024–006. 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–CboeBYX–2024–006 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03640 Filed 2–22–24; 8:45 am]

BILLING CODE 8011–01–P

[27] *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–NYSEArca–2006–21)).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99552; File No. SR–CboeEDGX–2024–013]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

February 16, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 12, 2024, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (EDGX Options), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase over 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.

Additionally, the Exchange believes the proposed fee increase is reasonable in light of recent and anticipated connectivity-related upgrades and changes. For example, the Exchange recently performed switch hardware upgrades. Particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes contributes to increased determinism. Additionally, effective April 1, 2024, firms will be able to connect to a new data center (*i.e.,* Secaucus NY6 Data Center (''NY6'')), in addition the current data centers at NY4 and NY5. The Exchange is adding connectivity at NY6 in response to Customer demand and requests for additional space and capacity.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not

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[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–044). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–057. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGX–2023–62). On October 13, 2023, the Exchange withdrew that filing and on business date October 16, 2023 submitted SR–CboeEDGX–2023–065. On December 12, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–079. On December 20, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–081. On February 9, 2024, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port; *see also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83450 (June 15, 2018), 83 FR 28884 (June 21, 2018) (SR–CboeEDGX–2018–016).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See, e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port; *see also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 124 members that trade equities, Cboe BZX has 132 members that trade equities, Cboe EDGA has 103 members and Cboe BYX has 110 members. There is also no firm that is a Member of EDGX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gbps port (*i.e.,* use one single 10 Gbps port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentive the purchase of additional services and

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (nasdaqtrader.com); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or event at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. For example, there are approximately 12 third parties who resell Exchange connectivity across the 7 Affiliated Exchanges, which are all accessible on the same network. These third-party resellers collectively maintain approximately 48 physical ports from the Exchange, but have collectively almost 200 unique customers downstream, connected through these multi-Exchange ports. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitive rates, members and non-members (such as third-party resellers) alike may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange, which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this "national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed." [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules "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." [23] Likewise, the Act grants the Commission authority to amend or repeal "[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While

[21] *See, e.g.,* The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port; *see also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See also* 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote "fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets"); Order, 73 FR at 74781 ("The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.").

pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, 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.'' [26] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* 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'. . . .''.[27] Accordingly, the Exchange does not believe its proposed change imposes 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) of the Act [28] and paragraph (f) of Rule 19b–4 [29] 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 will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2024–013 on the subject line.

Paper Comments

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

All submissions should refer to file number SR–CboeEDGX–2024–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2024–013 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03642 Filed 2–22–24; 8:45 am]

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[26] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[27] *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–NYSEArca–2006–21)).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99556; File No. SR–MIAX–2024–09]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding the Open-Close Report Data

February 16, 2024.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 5, 2024, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the MIAX Options Exchange Fee Schedule (the ''Fee Schedule'') regarding the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/miax-options/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange offers a data product known as the Open-Close Report that is available for purchase by Exchange Members [3] and non-Members. The Open-Close Report is described under Exchange Rule 531(d)(1). The data contained in the Open-Close Report is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange now proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge.

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report. The End-of-Day version is a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer,[4] Non-Priority Customer, Firm, Broker-Dealer, and Market Maker [5]), side of the market (buy or sell), contract volume, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

The Intra-Day Open-Close Report provides similar information to that of the End-of-Day version but is produced and updated every 10 minutes during the trading day. Data is captured in ''snapshots'' taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period. Each update represents the aggregate data captured from the current ''snapshot'' and all previous ''snapshots.'' The Intra-Day Open-Close data provides a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer, Non-Priority Customer, Firm, Broker-Dealer, and Market Maker), side of the market (buy or sell), and transaction type (opening or closing). All volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Exchange Rule 100.

[5] *Id.*

The Exchange assesses a monthly fee of $600 per month for subscribing to the End-of-Day summary Open-Close Report and $2,000 per month for subscribing to the Intra-Day Open-Close Report. The Exchange also assesses a fee of $500 per request per month for ad-hoc requests for historical End-of-Day Open-Close data. An ad-hoc request for historical End-of-Day Open-Close data can be for any number of months beginning with June 2021 for which the data is available. The Exchange also assesses a fee of $1,000 per request per month for ad-hoc requests for historical Intra-Day Open-Close data. An ad-hoc request for historical Intra-Day Open-Close data can be for any number of months beginning with January 2013 for which the data is available.

The Exchange now proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge. This proposal is akin to a fee break for subscribers because it would decrease the cost to purchase a broader scope of Open-Close Report data from the Exchange by allowing Intra-Day subscribers to request End-of-Day data for no additional charge Specifically, the Exchange proposes to allow subscribers who purchase an Intra-Day monthly subscription to request an End-of-Day monthly subscription for no additional charge. Similarly, the Exchange proposes to also allow subscribers who purchase an Intra-Day Ad-hoc Request (historical data) to submit an End-of-Day Ad-hoc Request (historical data) for the same date or date range for no additional charge upon request. The Exchange proposes to codify these proposed changes under new footnotes a. and b. under Section 6 of its Fee Schedule.[6]

The Open-Close Report remains a completely voluntary product. The Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase it only if they voluntarily choose to do so. The Exchange notes that other exchanges offer a similar data product.[7]

[6] The Exchange also proposes to renumber existing footnotes ''*'' as ''c.'' and ''**''as ''d.'' to account for the new footnotes proposed herein. The Exchange does not proposes to amend the substance of these existing footnotes.

[7] *See, e.g.,* Cboe Options Fees Schedule, Livevol Fees, Open-Close Data; Nasdaq ISE, LLC (''ISE'') Options 7 Pricing Schedule, Section 10.A; Nasdaq PHLX, LLC (''PHLX'') Options 7 Pricing Schedule, Section 10, PHLX Options Trade Outline (''PHOTO''); Cboe EDGX Exchange, Inc. (''EDGX'') fee schedule *available at http://markets.cboe.com/us/options/membership/fee_schedule/edgx/; and*

Implementation Date

The proposed changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposed changes to its Fee Schedule concerning fees for the Open-Close Report is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(4) of the Act [11] in particular, in that it is an equitable allocation of dues, fees and other charges among its members and other recipients of Exchange data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, the Open-Close Report further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. The data product also promotes increased transparency through the dissemination of the Open-Close Report. Particularly, information regarding opening and closing activity across different option series during the trading day may indicate investor sentiment, which may allow market participants to make better informed trading decisions throughout the day. Subscribers to the data may also be able to enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes the Open-Close Report provides a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading and completely optional. Moreover, other exchanges offer a similar data product.[12]

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. As of January 30, 2024, based on publicly available information, no single options exchange has more than approximately 14–15% of the equity options market share and currently the Exchange represents only approximately 6.49% of the equity options market share for the month of January 2024.[13] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [14] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supra-competitive fees. In the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products.

The Exchange believes its proposal proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge promotes just and equitable principles of trade because it enables subscribers to request additional Open-Close data for no additional charge. The End-of-Day version is a volume summary of trading activity on the Exchange, and essentially contains the same data as is provided in the final Intra-Day version at the end of the trading day and it is, therefore, reasonable and equitable to provide that data to Intra-Day subscribers for no additional charge. The Exchange believes the proposal is reasonable as the Exchange is simply making additional Open-Close data available for no additional charge, and fees for the Open-Close Report continue to be both modest and similar to, or even lower than, the fees assessed by other exchanges that provide similar data products.[15] The Exchange is not aware that any other U.S. options exchange offers portions of their Open-Close Report data for no additional charge, including as proposed herein. Nonetheless, should it propose to assess fees in a different manner or at a significantly higher rate than established fees for similar data products of other exchanges would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. Like the Exchange's Open-Close Report, other exchanges offer similar data products that each provide insight into trading on those markets and may likewise aid in assessing investor sentiment. Although each of these similar Open-Close data products provide only proprietary trade data and not trade data from other exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.[16] Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only Open-Close data relating to trading activity on one or more of the other markets that provide similar data products. As such, if a market participant views another exchange's Open-Close data as more attractive than its proposed Open-Close Report, then such market participant can merely choose not to purchase the Exchange's Open-Close Report and instead purchase another exchange's Open-Close data product, which offer similar data points, albeit based on that other market's trading activity.

Lastly, the Exchange believes the proposal is not unfairly discriminatory as it would apply equally to all users who choose to purchase or receive such data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the

the Cboe BZX Exchange, Inc. (''BZX'') fee schedule *available at http://markets.cboe.com/us/options/membership/fee_schedule/bzx/.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] *See supra* note 7.

[13] *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[15] *See supra* note 7.

[16] The exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.

Exchange to enhance the value of a data product that is similar to those offered by other competitor options exchanges.[17] The Exchange proposes to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge to keep pace with evolving customer needs, and believes that providing such data to market participants that make requests for it will continue to contribute to robust competition among national securities exchanges. Multiple other U.S. options exchanges offer end-of-day and intra-day Open-Close report data with fees that are substantially similar to the Exchange's fees. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Furthermore, the Exchange operates in a highly competitive environment, and its ability to price Open-Close Report data is constrained by competition among exchanges that offer Open-Close report data to their customers. The Exchange notes that there are currently a number of similar products available to market participants and investors. Multiple other U.S. options exchanges offer Open-Close report data, which the Exchange must consider in its pricing discipline in order to compete for the market data.[18] The Exchange notes that this proposal is akin to a fee break for subscribers because it would decrease the cost to purchase a broader scope of Open-Close Report data from the Exchange by allowing Intra-Day subscribers to request End-of-Day data for no additional charge. Further, the Exchange is not aware that any other U.S. options exchange offers portions of their Open-Close Report data for no additional charge, including as proposed herein. Nonetheless, should the Exchange propose fees that are excessively higher than established fees for Open-Close Report data would simply serve to reduce demand for the Exchange's data product, which as discussed, market participants are under no obligation to utilize. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable data product and lower their prices for Open-Close Report data to better compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposal would apply uniformly to any market participant. The proposal allows any interested Member or non-Member to request Open-Close Report data based on their business needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[19] and Rule 19b–4(f)(2) [20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include file number SR–MIAX–2024–09 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–MIAX–2024–09. 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–MIAX–2024–09 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03646 Filed 2–22–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission Investor Advisory Committee will hold a public meeting on Thursday, March 7, 2024. The meeting will begin at 10:00 a.m. (ET) and will be open to the public.

PLACE: The meeting will be conducted in-person at 100 F Street NE, Washington, DC 20549 in the Multipurpose Room, and by remote

[17] *See supra* note 7.

[18] *Id.*

[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 240.19b–4(f)(2).

[21] 17 CFR 200.30–3(a)(12).

means. Members of the public may attend in-person, or watch the webcast of the meeting on the Commission's website at *www.sec.gov.*

STATUS: This Sunshine Act notice is being issued because a majority of the Commission may attend the meeting.

PUBLIC COMMENT: The public is invited to submit written statements to the Committee. Written statements should be received on or before March 6, 2024.

Written statements may be submitted by any of the following methods:

Electronic Statements

• Use the Commission's internet submission form (*https://www.sec.gov/rules/other.shtml*); or

• Send an email message to *rules-comments@sec.gov.* Please include File No. 265–28 on the subject line; or

Paper Electronic Statements

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

All submissions should refer to File No. 265–28. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method.

The Commission will post all statements on the Commission's website. Statements also will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Room 1503, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Operating conditions may limit access to the Commission's Public Reference Room. Do not include personal 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.

MATTERS TO BE CONSIDERED: The agenda for the meeting includes: welcome and opening remarks; approval of previous meeting minutes; a panel discussing the U.S. Securities and Exchange Commission's proposals to improve equity market structure; a panel examining the use of materiality as a disclosure standard—can the definition be improved to better serve investors; a discussion of a recommendation regarding digital engagement practices; subcommittee and working group reports; and a non-public administrative session.

CONTACT PERSON FOR MORE INFORMATION: For further information, please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

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

Dated: February 21, 2024.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–03810 Filed 2–21–24; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99551; File No. SR-CboeBZX–2024–016]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

February 16, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 9, 2024, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/BZX/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (BZX Options), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBZX–2023–046). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–067. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On October 2, 2023, the Exchange filed the proposed fee change (SR–CboeBZX–2023–080). On October 13, 2023, the Exchange withdrew that filing and on business date October 16, 2023 submitted SR–CboeBZX–2023–084. On December 12, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–103. On February 9, 2024, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) [9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase over 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.

Additionally, the Exchange believes the proposed fee increase is reasonable in light of recent and anticipated connectivity-related upgrades and changes. For example, the Exchange recently performed switch hardware upgrades. Particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes contributes to increased determinism. Additionally, effective April 1, 2024, firms will be able to connect to a new data center (*i.e.,* Secaucus NY6 Data Center (''NY6'')), in addition the current data centers at NY4 and NY5. The Exchange is adding connectivity at NY6 in response to Customer demand and requests for additional space and capacity.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83442 (June 14, 2018), 83 FR 28675 (June 20, 2018) (SR-CboeBZX–2018–037).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023),

barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 132 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has 103 members and Cboe BYX has 110 members. There is also no firm that is a Member of BZX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. For example, there are approximately 12 third parties who resell Exchange connectivity across the 7 Affiliated Exchanges, which are all accessible on the same network. These third-party resellers collectively maintain approximately 48 physical ports from the Exchange, but have collectively almost 200 unique customers downstream, connected through these multi-Exchange ports. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

available at *https://www.cboe.com/us/equities/market_statistics/*.

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (nasdaqtrader.com); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[21] *See e.g., See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE

Continued

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''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.'' [23] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, 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.'' [26] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* 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-

Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

[26] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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'. . . .''.[27] Accordingly, the Exchange does not believe its proposed change imposes 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) of the Act [28] and paragraph (f) of Rule 19b–4 [29] 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 will 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–CboeBZX–2024–016 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–CboeBZX–2024–016. 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–CboeBZX–2024–016 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03641 Filed 2–22–24; 8:45 am]

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[27] *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–NYSEArca–2006–21)).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99557; File No. SR–NASDAQ–2023–022]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To Create a New, Non-Trading Limited Underwriter Membership Class and Impose Related Requirements for Principal Underwriting Activity

February 16, 2024.

On July 12, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to create a new, non-trading limited underwriter membership class and impose related requirements for principal underwriting activity in connection with a company applying for initial listing on the exchange with a transaction involving an underwriter. The proposed rule change was published for comment in the **Federal Register** on July 31, 2023.[3]

On September 12, 2023, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On September 29, 2023, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act [6] to determine whether to disapprove the proposed rule change.[7] On September 29, 2023, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety.[8]

On January 22, 2024, the Exchange filed Amendment No. 2 to the proposed rule change which amended and replaced the proposed rule change, as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97985 (July 25, 2023), 88 FR 49508.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 98366, 88 FR 63999 (Sept. 18, 2023). The Commission designated October 29, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 98606, 88 FR 68894 (Oct. 4, 2023).

[8] Amendment No. 1 is available at *https://www.sec.goc/comments/sr-nasdaq-2023-022/srnasdaq2023022-267740-644342.pdf.*

modified by Amendment No. 1, in its entirety.[9] The proposed rule change, as modified by Amendment No. 2, is described in Items I and II below, which Items have been prepared by the Exchange.

On January 26, 2024, the Commission extended the time period for approving or disapproving the proposal to March 27, 2024.[10] The Commission has received no comment letters on the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of 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.

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 Exchange's Rules to create a new, limited membership class for those underwriters that are FINRA members seeking only to perform underwriting activity as the principal underwriter on the Exchange[11] (and not seeking access to trade via the Nasdaq Market Center) and require a company applying for initial listing in connection with a transaction involving an underwriter to have a principal underwriter[12] that is a member or limited member of Nasdaq.[13]

Specifically, the Exchange proposes to amend its General Rules to: (i) add a definition of ''Limited Underwriting Member'' to General 1, Section 1; and (ii) add a new, limited underwriting membership to General 3, Section 1031, as described below. The Exchange proposes to amend Equity 7, Section 10 to exempt Limited Underwriting Members from being assessed a trading rights fee. In addition, the Exchange proposes to amend Rule 5210 of the Listing Rules to impose a requirement that each Company applying for initial listing in connection with a transaction involving an underwriter have a principal underwriter that is a Member or Limited Underwriting Member.

Background

In the fall of 2022, Nasdaq observed instances of unusually high price spikes immediately following the pricing of certain initial public offerings (IPOs) on the Exchange and other national securities exchanges, mostly with respect to small-cap companies whose offerings were less than $25 million. In many instances, the IPO securities that were the subject of these extreme price spikes then experienced equally dramatic price declines to a level at or below the offering price. These extreme price spikes may occur in the opening trade on an exchange, or in continuous trading on the day of, or days immediately following, the listing.

Underwriters play a critical role as gatekeepers to the capital markets in connection with the trading of newly issued securities. Unusual price volatility following IPOs of certain small-cap issuers highlights the essential role underwriters play. Nasdaq relies on underwriters to select the selling syndicate and ensure that the shares are placed in a way that is reasonably designed to allow liquid trading, consistent with Nasdaq's listing requirements, and the successful introduction of the company to the marketplace. In a recent Equity Regulatory Alert,[14] Nasdaq highlighted the important role of underwriters as gatekeepers in the IPO process and the applicability of market rules and the federal securities laws. The Financial Industry Regulatory Authority (FINRA) and the New York Stock Exchange (NYSE) published similar alerts at the same time.[15] In Nasdaq's Equity Regulatory Alert, the Exchange also noted:

> Nasdaq members, as well as the members of other self-regulatory organizations, that underwrite IPOs, and that play other roles in the offering process, should expect a heightened focus when an IPO experiences unusual price movements. Nasdaq Regulation will continue to investigate to determine whether such members have complied with applicable rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors

[9] Amendment No. 2 is available at *https://www.sec.goc/comments/sr-nasdaq-2023-022/srnasdaq2023022-414859-982462.pdf.*

[10] *See* Securities Exchange Act Release No. 99433, 89 FR 6559 (Feb. 1, 2024).

[11] ''Principal underwriter'' will have the same definition used in Rule 405 promulgated under the Securities Act of 1933 (''Securities Act''): an underwriter in privity of contract with the issuer of the securities as to which he is underwriter. Such definition provides that the term ''issuer'' in the definition of ''principal underwriter'' has the meaning given in Sections 2(4) and 2(11) of the Securities Act. 17 CFR 230.405.

[12] The Exchange proposes to apply the requirements herein to a principal underwriter (defined as an underwriter in privity of contract with the issuer of the securities as to which he is underwriter) because the definition of principal underwriter points to the lead underwriter, who is generally responsible for organizing the offering, including tasks such as determining allocation of shares and the offering price, in conjunction with the issuer. Although offerings may require more than one underwriter, or a group of underwriters known as an underwriting syndicate, the Exchange proposes to focus on the lead underwriters given the substantial role they typically play in the offering process.

[13] This Amendment 2 modifies the Exhibit 5 by: (i) updating the numbering in Rule 5210 to account for recently added rule language; (ii) updating a related reference to Rule 5210 in General 3, Section 1031(b); (iii) excluding Section 1032 of General 3, a new provision, from the Rules the Exchange proposes to apply under General 3, Section 1031(c) for reasons described below; (iv) adds General 9, Section 21 to the Rules the Exchange proposes to apply under General 3, Section 1031(c) for reasons described below; and (v) updates existing Rule language in Equity 7, Section 10 due to recent changes in the Rule text. In addition, this Amendment 2 provides related updates and other clarifying updates to the narrative explanation herein and adds a statutory basis explanation for the imposition of fees. Amendment 1 modified the original filing to make several changes as it relates to Associated Persons, including: (i) removing a proposed exemption from registration for certain investment banking representatives associated solely with Limited Underwriting Members as the Exchange determined that such exemption was unnecessary because such representatives are not required to register as Associated Persons under current Rules; (ii) removing proposed rule language from proposed Rule 1032(a) about eligibility to become Associated Persons; (iii) removing General 4 from the list of Rules applicable to Limited Underwriting Members; and (iv) revising rule language to clarify that associated persons of Limited Underwriting Members shall at all times be properly qualified and registered under FINRA rules. In addition, Amendment 1 provided additional information about Nasdaq's rationale in not applying certain existing rules to Limited Underwriting Members.

[14] *https://www.nasdaqtrader.com/MicroNews.aspx?id=ERA2022-9.*

[15] *https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-interpretations/2022/NYSER_Reg_Memo_-_Regulatory_Scrutiny_in_Connection_with_IPOs_(2022.11.17_final).pdf; https://www.finra.org/rules-guidance/notices/22-25.*

and the public interest. Areas of focus will include suspected manipulation and, beyond manipulation, whether the members are complying with their obligation to observe high standards of commercial honor and just and equitable principles of trade pursuant to Nasdaq Rule General 9, Section 1(a). That rule sets forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace.[16]

Notwithstanding the important role of underwriters, Nasdaq does not currently require underwriters of companies that are going public on the Exchange to be Members of the Exchange. As such, Nasdaq does not have authority to require responses to investigative inquiries or to enforce its Rules directly against non-member underwriters.[17]

Nasdaq proposes creating a new, limited membership class and requiring underwriters involved in Nasdaq-listed IPOs to be Members or Limited Underwriting Members in order to serve as a principal underwriter of an IPO on the Exchange. By creating a new, limited membership class, Nasdaq would provide those firms seeking only to perform principal underwriting activity on the Exchange (and not seeking access to trade via the Nasdaq Market Center) the option of selecting a membership that is less burdensome (*i.e.,* to become a Limited Underwriting Member rather than a Member).[18]

Proposed Changes to Listing Rules

The proposed rule change primarily impacts membership rules and other non-listing rules, which would apply to the underwriters themselves. However, as part of the proposal, Nasdaq would impose a new requirement in its Listing Rules at Rule 5210(m), requiring each Company applying for initial listing in connection with a transaction involving an underwriter to have a principal underwriter that is a Member or Limited Underwriting Member of Nasdaq. In proposed Rule 5210(m), the Exchange would also specify that ''principal underwriter'' shall have the same definition used in Rule 405 promulgated under the Securities Act.[19] The rule would cross reference the definition of ''Limited Underwriting Member,'' which is proposed to be added at General 1, Section 1, and would define Limited Underwriting Member to mean a broker or dealer admitted to limited underwriting membership in Nasdaq.

Proposed Changes to General Rules

Within its General Rules, the Exchange proposes to amend General 1 (General Provisions) and General 3 (Membership and Access).

The Exchange proposes to add the definition of ''Limited Underwriting Member'' to General 1, Section 1 (Definitions). As noted above, the Exchange proposes to define Limited Underwriting Member to mean a broker or dealer admitted to limited underwriting membership in Nasdaq.

The Exchange proposes to add the new category of membership to General 3, Section 1031, within which the Exchange proposes to include information about persons eligible to become Limited Underwriting Members, Limited Underwriting Member access to the Exchange, and rules applicable to Limited Underwriting Members.

The Exchange would specify in General 3, Section 1031(a), that any registered broker or dealer shall be eligible for limited underwriting membership in the Exchange, except such registered brokers or dealers as are excluded under paragraph (b) of Rule 1002.[20] Proposed Rule 1031(a) is consistent with the existing rules for persons eligible to become Members in General 3, Rule 1002(a).

The Exchange proposes to state, in General 3, Section 1031(b) that (i) a limited underwriting membership provides no rights to transact on the Exchange and (ii) a limited underwriting membership is solely to allow a firm that is not otherwise a Member to serve as a principal underwriter for a Company seeking to list on the Exchange, pursuant to Rule 5210(m).

Nasdaq proposes applying a limited ruleset to this newly proposed limited membership class.[21] Specifically, the Exchange proposes to apply only the following rules to Limited Underwriting Members: General 1 (General Provisions); General 2 (Organization and Administration), with the exception of Sections 6(a) and 22; General 3 (Membership and Access), with the exception of Section 1032; General 5 (Discipline), with the exception of Rules 8211 and 9557; General 9 (Regulation), Sections 1, 20, and 21; and Equity 7, Section 10 (Pricing Schedule, Membership Fees). The Exchange would specify the aforementioned rules applicable to this new membership class in General 3, Section 1031(c)(1). With the proposal, the Exchange aims to apply only those rules it deems appropriate to a firm serving as a principal underwriter, including those rules it deems critical to such firms. Of course, a firm registering as a Limited Underwriting Member on Nasdaq would remain subject to all applicable rules of the Commission and any other Self-Regulatory Organization of which it is a member, including FINRA.

The Exchange acknowledges that there are additional, existing Rules that it could propose to apply to Limited Underwriting Members. However, the Exchange is proposing to apply only a narrow ruleset as the Exchange does not intend to create comprehensive rules to regulate underwriting activity. Rather, the Exchange proposes to apply a limited ruleset, primarily to provide the Exchange with the authority to require information directly from the Limited Underwriting Members and enhance its tools for oversight with respect to the role the underwriter plays in connection with a company listing on the Exchange, as described below. Limited Underwriting Members would be subject to FINRA's rules, including its rules that substantively regulate underwriting activity. Nasdaq would consider whether additional existing Rules that are not proposed in the limited ruleset for Limited Underwriting Members or new Rules are warranted as the Exchange gains more experience in applying the rules proposed herein. As the Exchange adopts new Rules over time, it also would consider whether to apply such Rules to Limited Underwriting Members.

[16] *Supra* note 14.

[17] Nasdaq does, however, have broad discretionary authority over the initial and continued listing of securities in Nasdaq and over Members of the Exchange in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. The Exchange may request information from companies that are going public on the Exchange and from Members who are permitted to trade on the Exchange. They are required to respond to those requests. The Exchange may also request information from non-Members, including non-Member underwriters, but they are not required to respond to these requests. As described further below, this proposal would provide the Exchange with authority to directly obtain information from Limited Underwriting Members, whether pre- or post-IPO.

[18] A revised Membership Application is attached [sic] as *Exhibit 3,* in which Nasdaq proposes to add a category for Limited Underwriting Members and clarify that Limited Underwriting Members are not subject to the requirement to provide an NSCC account number.

[19] *Supra* note 11.

[20] In relevant part, General 3, Section 1002(b) provides that, subject to certain exceptions, no registered broker or dealer shall be admitted to membership, and no Member shall be continued in membership, if such broker, dealer, or Member fails or ceases to satisfy the qualification requirements established by the Rules, or if such broker, dealer, or Member is or becomes subject to a statutory disqualification, or if such broker, dealer, or Member fails to file such forms as may be required in accordance with such process as the Exchange may prescribe.

[21] Members of the Exchange, unlike Limited Underwriting Members, are subject to all of the Exchange's Rules (which includes the limited ruleset applicable to the newly proposed limited membership class).

The Exchange proposes to apply General 1 to Limited Underwriting Members because General 1 provides defined terms that would be applicable to Limited Underwriting Members and, as explained above, the proposed rule change would also add a definition (''Limited Underwriting Member'') to General 1.

The Exchange proposes to apply General 2 (with the exception of Sections 6(a) and 22) to Limited Underwriting Members because General 2 relates to organization and administration including requirements surrounding fees, limitations on affiliations, and a requirement for an executive representative, among other obligations. The Exchange proposes to specifically exclude General 2, Sections 6(a) and Section 22. General 2, Section 6(a) states that General Equity and Options Rules and Equity Rules shall apply to all members and persons associated with a member, which is not accurate in the case of Limited Underwriting Members. General 2, Section 22 relates to Sponsored Participants and client access to the Nasdaq Market Center via a Member, which is not applicable to underwriting activity.

The Exchange also proposes to subject Limited Underwriting Members to General 3 (with the exception of Section 1032) because General 3 contains membership rules, including an obligation to follow specified procedures for applying to be a member, making changes to membership, or terminating membership. The Exchange proposes to specifically exclude General 3, Section 1032 because such section includes requirements related to Nasdaq Market Center Participant registration. This section is inapplicable to Limited Underwriting Members because they are not permitted to transact on the Nasdaq Market Center. As described herein, the proposed rule change would also add additional details regarding the limited underwriting membership to General 3, Rule 1031.

The Exchange believes it is critical to subject Limited Underwriting Members to General 5 (with the exception of Rules 8211 and 9557), which contains the Exchange's disciplinary rules.[22] Notably, General 5, Rule 8210 provides the Exchange with authority to require information from Exchange Members. The Exchange proposes to specifically exclude General 5, Rule 8211 and Rule 9557. Rule 8211 relates to members submission of trade data. Rule 9557 relates to procedures for regulating activities under General 9, Sections 40 and 41, which incorporate FINRA Rules 4110 and 4120, which relate to FINRA carrying or clearing members. Therefore, Rule 8211 and Rule 9557 are not relevant to underwriting activity.

The Exchange also believes it is important to subject Limited Underwriting Members to General 9, Section 1 which includes general standards by which Members must abide. Specifically, of importance, General 9, Section 1(a) requires Members to observe just and equitable principles of trade. General 9, Sections 20 and 21 require Members to establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable Nasdaq rules, and to identify principles who must establish, maintain, and enforce a system of supervisory control policies and procedures that, among other things, tests that the member's supervisory procedures are reasonably designed with respect to the activities of the member and its associated persons, to achieve compliance with applicable securities laws and regulations, and with applicable Nasdaq rules. The Exchange believes it is important to apply these provisions on supervision as it would provide the Exchange with authority to assess whether a Limited Underwriting Member has an adequate supervisory system and written supervisory procedures in place. With the exception of General 9, Section 1, Section 20, and Section 21, the Exchange does not propose to apply other sections of General 9 to Limited Underwriting Members at this time. Although the Exchange acknowledges that certain other sections of General 9 could be applied to underwriters, the Exchange is targeting limited inclusion of those Rules it deems critical. Further, many of the standards in General 9 are FINRA rules that are incorporated by reference into the Exchange's Rules. Limited Underwriting Members would therefore be subject to such FINRA rules by virtue of their FINRA membership.

Finally, the Exchange proposes to include Equity 7, Section 10 to Limited Underwriting Members because this section includes the membership and application fees applicable to Limited Underwriting Members. The Exchange proposes to avoid applying all those Exchange rules not specified in proposed General 3, Section 1031(c)(1) to Limited Underwriting Members in an effort to impose minimal burden on Limited Underwriting Members, while still allowing the Exchange to have regulatory authority over such members. Furthermore, the Exchange believes that the Exchange's rules that Limited Underwriting Members would not be subject to under the proposal primarily relate to trading activity and are, therefore, not relevant to the activities of Limited Underwriting Members. As noted above, Nasdaq would consider whether additional existing Rules that are not proposed in the limited ruleset for Limited Underwriting Members or new Rules are warranted as the Exchange gains more experience in applying the rules proposed herein.

The Exchange proposes to include language in General 3, Section 1031(c)(1) providing that, for purposes of interpreting and applying the rules to Limited Underwriting Members, references to ''Member,'' ''Members,'' or ''membership'' shall be functionally equivalent to ''Limited Underwriting Member,'' ''Limited Underwriting Members,'' or ''limited underwriting membership'' respectively. The Exchange also proposes to include a requirement, in General 3, Section 1031(c)(2), that Limited Underwriting Members shall at all times be members of FINRA and associated persons of Limited Underwriting Members shall at all times be properly qualified and registered under FINRA rules.[23]

Proposed Change to Equity Rules

The Exchange proposes to exempt Limited Underwriting Members from the trading rights fee of $1,250 per month that is normally charged to Members because such Limited Underwriting Members would not be eligible to trade on the Exchange. Accordingly, the Exchange proposes to add language to Equity 7, Section 10(a) to specify that Limited Underwriting Members would not be charged the monthly trading rights fee. Limited Underwriting Members would be

[22] General 5, Rule 8001 provides that the Exchange and FINRA are parties to the FINRA Regulatory Contract (often referred to as a Regulatory Services Agreement (''RSA'')) pursuant to which FINRA has agreed to perform certain functions described in the Exchange's Rules on behalf of the Exchange. The Exchange does not anticipate that the proposed rule change would have any material impact on the current RSA.

[23] Limited Underwriting Members would, therefore, be eligible to waive-in to Exchange membership, as provided for in General 3, Section 1013(b). Prospective Limited Underwriting Members would need to submit a membership application (*see supra* note 18) in which they would select ''Waive-In Membership'' for the application type and ''Limited Underwriting Member of NQX'' for the nature of intended activity. For ''waive-in'' applicants, the Exchange relies substantially upon FINRA's determination to approve the applicant for FINRA membership when the Exchange evaluates the applicant for Exchange membership.

subject to a $2,000 application fee (per Equity 7, Section 10(b)) and a $4,000 yearly membership fee (per Equity 7, Section 10(a)).

Excluded Rules

As noted above, Nasdaq acknowledges that additional Rules could theoretically be applied to Limited Underwriting Members. However, Nasdaq proposes to apply the limited ruleset for the reasons described above. In addition to the Rules discussed above, the Exchange has not proposed to apply the following Rules to Limited Underwriting Members at this time: General 4; General 6; General 7; General 8; Equity Rules (with the exception of Equity 7, Section 10); and Options Rules. General 4 requires certain categories of persons associated with members to register with the Exchange. Because these categories do not relate to underwriting, the Exchange does not propose to apply General 4 to Limited Underwriting Members. However, as noted above, the Exchange would require all Limited Underwriting Members to be FINRA members and associated persons of Limited Underwriting Members to be properly qualified and registered under FINRA rules. Limited Underwriting Members and their associated persons would be subject to FINRA's registration and qualification rules,[24] including, for example, requirements regarding relevant examinations for underwriting (Series 79, Investment Banking, IB) and supervision of underwriting (Series 79 plus Series 24, Investment Banking Principal). General 6 relates generally to FINRA arbitration rules to which the Limited Underwriting Members would be subject to directly by virtue of their FINRA membership. The Exchange does not propose to apply General 7 to Limited Underwriting Members because it governs consolidated audit trail compliance and would not apply to underwriting activity. General 8 governs connectivity to the Exchange and would not be relevant to Limited Underwriting Members given their lack of access to trade on the Exchange. Similarly, the Equities Rules and the Options Rules are generally not relevant to the activities of Limited Underwriting Members due to their lack of access to trade on the Exchange. Although Limited Underwriting Members could access the Exchange via other means, such as trading through another Member, Limited Underwriting Members would have no direct access to trade on the Exchange.

Implementation

The Exchange would designate the proposed changes to be operative 60 days after publication of the Commission's approval order of SR–NASDAQ–2023–022, as amended, in the **Federal Register**. This delay will allow time for firms involved with upcoming IPOs to become Limited Underwriting Members, if they choose, and for companies planning IPOs to select alternative underwriters if their current firm is not, and does not intend to become, a Member or Limited Underwriting Member.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[25] in general, and furthers the objectives of Section 6(b)(5) of the Act,[26] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by strengthening Nasdaq's ability to carry out its oversight responsibilities. It is also consistent with Section 6(b)(7) of the Act in that it provides for a fair procedure for prohibiting or limiting any person with respect to access to services offered by the Exchange or a Member thereof.[27] As discussed above, the proposal would create a new, limited membership class for those firms seeking only to perform activity as the principal underwriter of an IPO on the Exchange (and not seeking access to trade via the Nasdaq Market Center) and require a company applying for initial listing in connection with a transaction involving an underwriter to have a principal underwriter that is a member or limited member of Nasdaq. The Exchange would apply specified rules to Limited Underwriting Members, as explained above. Such rules include general provisions and standards, membership and access rules, organization and administration rules, registration requirements, disciplinary rules, and certain fees. Creating this new membership class and subjecting principal underwriters to such specified rules supports fair and orderly markets, which protects investors and the public interest, consistent with Section 6(b)(5) of the Act. Notably, the proposal would subject Limited Underwriting Members to Nasdaq's disciplinary rules, which provides Nasdaq authority to require information from such underwriters (per General 5, Rule 8210), as well as other general rules, including the requirement to observe just and equitable principles of trade (per General 9, Section 1(a)), the requirement to establish and maintain a system to supervise the activities of registered representatives and associated persons (per General 9, Section 20), and the requirement to test and verify that the system is reasonably designed (per General 9, Section 21). Nasdaq believes that imposing these Nasdaq rules, as well as the other rules included in proposed Rule 1031(c)(1), on principal underwriters will strengthen[28] Nasdaq's ability to carry out its oversight responsibilities and deter potential violative conduct, such as fraud or manipulation, thereby protecting investors and the public interest. Nasdaq also believes that it is appropriate and consistent with the protection of investors and the public interest that it not impose those rules excluded from proposed Rule 1031(c)(1) because these rules are not directly applicable to the activities a Limited Underwriting Members is permitted to conduct on the Exchange, and the firms will be subject to all applicable FINRA rules.

The Exchange also believes that the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers and dealers, consistent with Section 6(b)(5) of the Act.[29] The proposed changes to the Listing Rules will apply equally to all similarly situated companies applying for initial listing in connection with a transaction involving an underwriter on the Exchange and therefore, are not designed to permit unfair discrimination. The Exchange's proposal to subject Limited Underwriting Members to a limited set of rules and exclude certain rules applicable to Members is not designed to permit unfair discrimination between brokers and dealers because the limited underwriting membership does not confer the same benefits as a standard Exchange membership and does not warrant application of the same ruleset. All Limited Underwriting Members

[24] *See* FINRA Rules, Rule 1210 (Registration Requirements) and Rule 1220 (Registration Categories).

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] 15 U.S.C. 78f(b)(7).

[28] As noted above, the Exchange acknowledges that additional, existing Rules could apply to underwriters. The Exchange proposes to apply a limited ruleset to Limited Underwriting Members, consisting of those Rules it deems most critical. Today, underwriters are not required to be Members and therefore, non-member underwriters are not subject to any of the Exchange's Rules.

[29] 15 U.S.C. 78f(b)(5).

would be subject to the same specified rules.

Finally, Nasdaq believes that its proposal to impose certain fees on Limited Underwriting Members is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act, in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that its proposal to charge the $2,000 application fee and $4,000 yearly membership fee but not charge the $1,250 monthly trading rights fee is reasonable, equitable and not unfairly discriminatory. The Exchange would apply fees that are already in existence and the Exchange believes such fees reflect the value of services it provides its applicants and membership. By charging Limited Underwriting Members the same application and yearly membership fee as Members, the Exchange believes that it would be treating the membership equitably. Further, the Exchange believes it is reasonable and equitable to exempt Limited Underwriting Members from the monthly trading rights fee because such members would not have access to trade on the Exchange. The Exchange believes that the fee proposal is not designed to permit unfair discrimination between Exchange members because the fees would be applied equally to all similarly situated members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the proposed changes to the Listing Rules will apply equally to all similarly situated companies applying for initial listing in connection with a transaction involving an underwriter on the Exchange. Likewise, the proposed changes to the General and Equity Rules, including to the membership rules, will apply equally to all similarly situated Applicants and Members and they will confer no relative advantage or disadvantage upon any category of Exchange Applicant or Member. Although the Exchange proposes to subject Limited Underwriting Members to a limited set of rules, the limited underwriting membership does not confer the same benefits as a standard Exchange membership. Namely, a Limited Underwriting Member would not be permitted to transact on the Nasdaq Market Center. Therefore, applying a limited ruleset to Limited Underwriting Members is justified. All Limited Underwriting Members would be subject to the same specified rules, as noted above. Moreover, the Exchange does not expect that its proposal will have an adverse impact on competition among exchanges for members. The Exchange believes the proposed rule changes, overall, will strengthen the Exchange's ability to carry out its role and responsibilities as a self-regulatory organization and deter potential violative conduct. As such, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 2 to 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–NASDAQ–2023–022 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NASDAQ–2023–022. 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–NASDAQ–2023–022 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03647 Filed 2–22–24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99553; File No. SR–CboeEDGA–2024–006]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

February 16, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 9, 2024, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase over 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.

Additionally, the Exchange believes the proposed fee increase is reasonable in light of recent and anticipated connectivity-related upgrades and changes. For example, the Exchange recently performed switch hardware upgrades. Particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes contributes to increased determinism. Additionally, effective April 1, 2024, firms will be able to connect to a new data center (*i.e.,* Secaucus NY6 Data Center (''NY6'')), in addition the current data centers at NY4 and NY5. The Exchange is adding connectivity at NY6 in response to Customer demand and requests for additional space and capacity.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGA–2023–011). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGA–2023–015. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGA–2023–016). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGA–2023–017. On December 12 2023, the Exchange withdrew that filing and submitted SR–CboeEDGA–2023–022. On February 9, 2024, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83449 (June 15, 2018), 83 FR 28890 (June 21, 2018) (SR–CboeEDGA–2018–010).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the

Continued

Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which does not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 103 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe BYX has 110 members and Cboe BZX has 132 members. There is also no firm that is a Member of EDGA Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to

Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (*nasdaqtrader.com*); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gbps port (*i.e.,* use one single 10 Gbps port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. For example, there are approximately 12 third parties who resell Exchange connectivity across the 7 Affiliated Exchanges, which are all accessible on the same network. These third-party resellers collectively maintain approximately 48 physical ports from the Exchange, but have collectively almost 200 unique customers downstream, connected through these multi-Exchange ports. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''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.'' [23] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly,

[21] *See e.g., See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.*, all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, 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." [26] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, 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'. . . ." [27] Accordingly, the Exchange does not believe its proposed change imposes 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) of the Act [28] and paragraph (f) of Rule 19b–4 [29] 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 will 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–CboeEDGA–2024–006 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–CboeEDGA–2024–006. 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

[26] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[27] *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–NYSEArca–2006–21)).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

submissions should refer to file number SR–CboeEDGA–2024–006 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

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[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99554; File No. SR–PEARL–2024–08]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding the Open-Close Report Data

February 16, 2024.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 5, 2024, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the MIAX Pearl Options Exchange Fee Schedule (the ''Fee Schedule'') regarding the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/miax-options/rule-filings,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange offers a data product known as the Open-Close Report that is available for purchase by Exchange Members[3] and non-Members. The Open-Close Report is described under Exchange Rule 531(b)(1). The data contained in the Open-Close Report is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange now proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge.

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report. The End-of-Day version is a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer,[4] Non-Priority Customer, Firm, Broker-Dealer, and Market Maker[5]), side of the market (buy or sell), contract volume, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

The Intra-Day Open-Close Report provides similar information to that of the End-of-Day version but is produced and updated every 10 minutes during the trading day. Data is captured in ''snapshots'' taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period. Each update represents the aggregate data captured from the current ''snapshot'' and all previous ''snapshots.'' The Intra-Day Open-Close data provides a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer, Non-Priority Customer, Firm, Broker-Dealer, and Market Maker), side of the market (buy or sell), and transaction type (opening or closing). All volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

The Exchange assesses a monthly fee of $600 per month for subscribing to the End-of-Day summary Open-Close Report and $2,000 per month for subscribing to the Intra-Day Open-Close Report. The Exchange also assesses a fee of $500 per request per month for ad-hoc requests for historical End-of-Day Open-Close data. An ad-hoc request for historical End-of-Day Open-Close data can be for any number of months beginning with June 2021 for which the data is available. The Exchange also assesses a fee of $1,000 per request per month for ad-hoc requests for historical Intra-Day Open-Close data. An ad-hoc request for historical Intra-Day Open-Close data can be for any number of months beginning with March 2017 for which the data is available.

The Exchange now proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge. This proposal is akin to a fee break for subscribers because it would decrease the cost to purchase a broader scope of Open-Close Report data from the Exchange by allowing Intra-Day subscribers to request End-of-Day data for no additional charge Specifically, the Exchange proposes to allow subscribers who purchase an Intra-Day monthly subscription to request an End-of-Day monthly subscription for no additional charge. Similarly, the Exchange proposes to also allow subscribers who purchase an Intra-Day Ad-hoc Request (historical data) to submit an End-of-Day Ad-hoc Request (historical data) for the same date or date range for no additional charge upon request. The Exchange proposes to codify these proposed changes under new footnotes a. and b. under Section 6 of its Fee Schedule.[6]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Exchange Rule 100.

[5] *Id.*

[6] The Exchange also proposes to renumber existing footnotes ''*'' as ''c.'' and ''**''as ''d.'' to

Continued

The Open-Close Report remains a completely voluntary product. The Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase it only if they voluntarily choose to do so. The Exchange notes that other exchanges offer a similar data product.[7]

Implementation Date

The proposed changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposed changes to its Fee Schedule concerning fees for the Open-Close Report is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(4) of the Act [11] in particular, in that it is an equitable allocation of dues, fees and other charges among its members and other recipients of Exchange data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, the Open-Close Report further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. The data product also promotes increased transparency through the dissemination of the Open-Close Report. Particularly, information regarding opening and closing activity across different option series during the trading day may indicate investor sentiment, which may allow market participants to make better informed trading decisions throughout the day. Subscribers to the data may also be able to enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes the Open-Close Report provides a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading and completely optional. Moreover, other exchanges offer a similar data product.[12]

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. As of January 30, 2024, based on publicly available information, no single options exchange has more than approximately 14–15% of the equity options market share and currently the Exchange represents only approximately 5.40% of the equity options market share for the month of January 2024.[13] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [14] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supra-competitive fees. In the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products.

The Exchange believes its proposal proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge promotes just and equitable principles of trade because it enables subscribers to request additional Open-Close data for no additional charge. The End-of-Day version is a volume summary of trading activity on the Exchange, and essentially contains the same data as is provided in the final Intra-Day version at the end of the trading day and it is, therefore, reasonable and equitable to provide that data to Intra-Day subscribers for no additional charge. The Exchange believes the proposal is reasonable as the Exchange is simply making additional Open-Close data available for no additional charge, and fees for the Open-Close Report continue to be both modest and similar to, or even lower than, the fees assessed by other exchanges that provide similar data products.[15] The Exchange is not aware that any other U.S. options exchange offers portions of their Open-Close Report data for no additional charge, including as proposed herein. Nonetheless, should it propose to assess fees in a different manner or at a significantly higher rate than established fees for similar data products of other exchanges would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. Like the Exchange's Open-Close Report, other exchanges offer similar data products that each provide insight into trading on those markets and may likewise aid in assessing investor sentiment. Although each of these similar Open-Close data products provide only proprietary trade data and not trade data from other exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.[16] Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only Open-Close data relating to trading activity on one or more of the other markets that provide similar data products. As such, if a market participant views another exchange's Open-Close data as more attractive than its proposed Open-Close Report, then such market participant can merely choose not to purchase the Exchange's Open-Close Report and instead purchase another exchange's Open-Close data product, which offer

account for the new footnotes proposed herein. The Exchange does not proposes to amend the substance of these existing footnotes.

[7] *See, e.g.,* Cboe Options Fees Schedule, Livevol Fees, Open-Close Data; Nasdaq ISE, LLC (''ISE'') Options 7 Pricing Schedule, Section 10.A; Nasdaq PHLX, LLC (''PHLX'') Options 7 Pricing Schedule, Section 10, PHLX Options Trade Outline (''PHOTO''); Cboe EDGX Exchange, Inc. (''EDGX'') fee schedule *available at http://markets.cboe.com/us/options/membership/fee_schedule/edgx/; and* the Cboe BZX Exchange, Inc. (''BZX'') fee schedule *available at http://markets.cboe.com/us/options/membership/fee_schedule/bzx/.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] *See supra* note 7.

[13] *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[15] *See supra* note 7.

[16] The exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.

similar data points, albeit based on that other market's trading activity.

Lastly, the Exchange believes the proposal is not unfairly discriminatory as it would apply equally to all users who choose to purchase or receive such data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to enhance the value of a data product that is similar to those offered by other competitor options exchanges.[17] The Exchange proposes to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge to keep pace with evolving customer needs, and believes that providing such data to market participants that make requests for it will continue to contribute to robust competition among national securities exchanges. Multiple other U.S. options exchanges offer end-of-day and intra-day Open-Close report data with fees that are substantially similar to the Exchange's fees. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Furthermore, the Exchange operates in a highly competitive environment, and its ability to price Open-Close Report data is constrained by competition among exchanges that offer Open-Close report data to their customers. The Exchange notes that there are currently a number of similar products available to market participants and investors. Multiple other U.S. options exchanges offer Open-Close report data, which the Exchange must consider in its pricing discipline in order to compete for the market data.[18] The Exchange notes that this proposal is akin to a fee break for subscribers because it would decrease the cost to purchase a broader scope of Open-Close Report data from the Exchange by allowing Intra-Day subscribers to request End-of-Day data for no additional charge. Further, the Exchange is not aware that any other U.S. options exchange offers portions of their Open-Close Report data for no additional charge, including as proposed herein. Nonetheless, should the Exchange propose fees that are excessively higher than established fees for Open-Close Report data would simply serve to reduce demand for the Exchange's data product, which as discussed, market participants are under no obligation to utilize. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable data product and lower their prices for Open-Close Report data to better compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposal would apply uniformly to any market participant. The proposal allows any interested Member or non-Member to request Open-Close Report data based on their business needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[19] and Rule 19b–4(f)(2)[20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include file number SR–PEARL–2024–08 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–PEARL–2024–08. 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–PEARL–2024–08 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03644 Filed 2–22–24; 8:45 am]

BILLING CODE 8011–01–P

[17] *See supra* note 7.

[18] *Id.*

[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 240.19b–4(f)(2).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99555; File No. SR–EMERALD–2024–06]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding the Open-Close Report Data

February 16, 2024.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 5, 2024, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the MIAX Emerald Options Exchange Fee Schedule (the ''Fee Schedule'') regarding the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/miax-options/rule-filings,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange offers a data product known as the Open-Close Report that is available for purchase by Exchange Members [3] and non-Members. The Open-Close Report is described under Exchange Rule 531(d)(1). The data contained in the Open-Close Report is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange now proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge.

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report. The End-of-Day version is a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer,[4] Non-Priority Customer, Firm, Broker-Dealer, and Market Maker [5]), side of the market (buy or sell), contract volume, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

The Intra-Day Open-Close Report provides similar information to that of the End-of-Day version but is produced and updated every 10 minutes during the trading day. Data is captured in ''snapshots'' taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period. Each update represents the aggregate data captured from the current ''snapshot'' and all previous ''snapshots.'' The Intra-Day Open-Close data provides a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer, Non-Priority Customer, Firm, Broker-Dealer, and Market Maker), side of the market (buy or sell), and transaction type (opening or closing). All volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts).

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Exchange Rule 100.

[5] *Id.*

The Exchange assesses a monthly fee of $600 per month for subscribing to the End-of-Day summary Open-Close Report and $2,000 per month for subscribing to the Intra-Day Open-Close Report. The Exchange also assesses a fee of $500 per request per month for ad-hoc requests for historical End-of-Day Open-Close data. An ad-hoc request for historical End-of-Day Open-Close data can be for any number of months beginning with June 2021 for which the data is available. The Exchange also assesses a fee of $1,000 per request per month for ad-hoc requests for historical Intra-Day Open-Close data. An ad-hoc request for historical Intra-Day Open-Close data can be for any number of months beginning with March 2019 for which the data is available.

The Exchange now proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge. This proposal is akin to a fee break for subscribers because it would decrease the cost to purchase a broader scope of Open-Close Report data from the Exchange by allowing Intra-Day subscribers to request End-of-Day data for no additional charge. Specifically, the Exchange proposes to allow subscribers who purchase an Intra-Day monthly subscription to request an End-of-Day monthly subscription for no additional charge. Similarly, the Exchange proposes to also allow subscribers who purchase an Intra-Day Ad-hoc Request (historical data) to submit an End-of-Day Ad-hoc Request (historical data) for the same date or date range for no additional charge upon request. The Exchange proposes to codify these proposed changes under new footnotes a. and b. under Section 6 of its Fee Schedule.[6]

The Open-Close Report remains a completely voluntary product. The Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase it only if they voluntarily choose to do so. The Exchange notes that other exchanges offer a similar data product.[7]

[6] The Exchange also proposes to renumber existing footnotes ''*'' as ''c.'' and ''**'' as ''d.'' to account for the new footnotes proposed herein. The Exchange does not proposes to amend the substance of these existing footnotes.

[7] *See, e.g.,* Cboe Options Fees Schedule, Livevol Fees, Open-Close Data; Nasdaq ISE, LLC (''ISE'') Options 7 Pricing Schedule, Section 10.A; Nasdaq PHLX, LLC (''PHLX'') Options 7 Pricing Schedule, Section 10, PHLX Options Trade Outline (''PHOTO''); Cboe EDGX Exchange, Inc. (''EDGX'') fee schedule *available at http://markets.cboe.com/us/options/membership/fee_schedule/edgx/; and*

Implementation Date

The proposed changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposed changes to its Fee Schedule concerning fees for the Open-Close Report is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(4) of the Act [11] in particular, in that it is an equitable allocation of dues, fees and other charges among its members and other recipients of Exchange data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, the Open-Close Report further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. The data product also promotes increased transparency through the dissemination of the Open-Close Report. Particularly, information regarding opening and closing activity across different option series during the trading day may indicate investor sentiment, which may allow market participants to make better informed trading decisions throughout the day. Subscribers to the data may also be able to enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes the Open-Close Report provides a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading and completely optional. Moreover, other exchanges offer a similar data product.[12]

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. As of January 30, 2024, based on publicly available information, no single options exchange has more than approximately 14–15% of the equity options market share and currently the Exchange represents only approximately 3.59% of the equity options market share for the month of January 2024.[13] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [14] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supra-competitive fees. In the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products.

The Exchange believes its proposal proposes to amend fees for the Open-Close Report to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge promotes just and equitable principles of trade because it enables subscribers to request additional Open-Close data for no additional charge. The End-of-Day version is a volume summary of trading activity on the Exchange, and essentially contains the same data as is provided in the final Intra-Day version at the end of the trading day and it is, therefore, reasonable and equitable to provide that data to Intra-Day subscribers for no additional charge. The Exchange believes the proposal is reasonable as the Exchange is simply making additional Open-Close data available for no additional charge, and fees for the Open-Close Report continue to be both modest and similar to, or even lower than, the fees assessed by other exchanges that provide similar data products.[15] The Exchange is not aware that any other U.S. options exchange offers portions of their Open-Close Report data for no additional charge, including as proposed herein. Nonetheless, should it propose to assess fees in a different manner or at a significantly higher rate than established fees for similar data products of other exchanges would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. Like the Exchange's Open-Close Report, other exchanges offer similar data products that each provide insight into trading on those markets and may likewise aid in assessing investor sentiment. Although each of these similar Open-Close data products provide only proprietary trade data and not trade data from other exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.[16] Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only Open-Close data relating to trading activity on one or more of the other markets that provide similar data products. As such, if a market participant views another exchange's Open-Close data as more attractive than its proposed Open-Close Report, then such market participant can merely choose not to purchase the Exchange's Open-Close Report and instead purchase another exchange's Open-Close data product, which offer similar data points, albeit based on that other market's trading activity.

Lastly, the Exchange believes the proposal is not unfairly discriminatory as it would apply equally to all users who choose to purchase or receive such data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the

the Cboe BZX Exchange, Inc. (''BZX'') fee schedule *available at http://markets.cboe.com/us/options/membership/fee_schedule/bzx/.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] *See supra* note 7.

[13] *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[15] *See supra* note 7.

[16] The exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.

Exchange to enhance the value of a data product that is similar to those offered by other competitor options exchanges.[17] The Exchange proposes to allow subscribers who purchase Intra-Day Open Close data the ability to request End-of-Day Open-Close data for no additional charge to keep pace with evolving customer needs, and believes that providing such data to market participants that make requests for it will continue to contribute to robust competition among national securities exchanges. Multiple other U.S. options exchanges offer end-of-day and intra-day Open-Close report data with fees that are substantially similar to the Exchange's fees. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Furthermore, the Exchange operates in a highly competitive environment, and its ability to price Open-Close Report data is constrained by competition among exchanges that offer Open-Close report data to their customers. The Exchange notes that there are currently a number of similar products available to market participants and investors. Multiple other U.S. options exchanges offer Open-Close report data, which the Exchange must consider in its pricing discipline in order to compete for the market data.[18] The Exchange notes that this proposal is akin to a fee break for subscribers because it would decrease the cost to purchase a broader scope of Open-Close Report data from the Exchange by allowing Intra-Day subscribers to request End-of-Day data for no additional charge. Further, the Exchange is not aware that any other U.S. options exchange offers portions of their Open-Close Report data for no additional charge, including as proposed herein. Nonetheless, should the Exchange propose fees that are excessively higher than established fees for Open-Close Report data would simply serve to reduce demand for the Exchange's data product, which as discussed, market participants are under no obligation to utilize. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable data product and lower their prices for Open-Close Report data to better compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposal would apply uniformly to any market participant. The proposal allows any interested Member or non-Member to request Open-Close Report data based on their business needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[19] and Rule 19b–4(f)(2)[20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–EMERALD–2024–06 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–EMERALD–2024–06. 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–EMERALD–2024–06 and should be submitted on or before March 15, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03645 Filed 2–22–24; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20170 and #20171; CALIFORNIA Disaster Number CA–20007]

Presidential Declaration of a Major Disaster for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of California (FEMA–4758–DR), dated 02/19/2024.

Incident: Severe Storm and Flooding.

Incident Period: 01/21/2024 through 01/23/2024.

[17] *See supra* note 7.

[18] *Id.*

[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 240.19b–4(f)(2).

[21] 17 CFR 200.30–3(a)(12).

DATES: Issued on 02/19/2024.

Physical Loan Application Deadline Date: 04/19/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 11/19/2024.

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 President's major disaster declaration on 02/19/2024, 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 (Physical Damage and Economic Injury Loans): San Diego.

Contiguous Counties (Economic Injury Loans Only):

California: Imperial, Orange, Riverside

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	5.375
Homeowners without Credit Available Elsewhere	2.688
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
For Economic Injury:	
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 physical damage is 201706 and for economic injury is 201710.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–03753 Filed 2–22–24; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12335]

Global Magnitsky Human Rights Accountability Act Annual Report

ACTION: Notice.

SUMMARY: This notice contains the text of the report required by the Global Magnitsky Human Rights Accountability Act, as submitted by the Secretary of State.

FOR FURTHER INFORMATION CONTACT: Andrew Self, Email: *SelfAH@state.gov,* Phone: (202) 412 3586.

SUPPLEMENTARY INFORMATION: On January 25, 2024, the Under Secretary of State for Political Affairs approved the following report pursuant to the Global Magnitsky Human Rights Accountability Act (Pub. L. 114–328, title XII, subtitle F) (''the Act''), which is implemented and built upon by Executive Order 13818 of December 20, 2017, ''Executive Order Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption'' (E.O. 13818). The text of the report follows:

Pursuant to section 1264 of the Act, and in accordance with E.O. 13818, the Secretary of State, in consultation with the Secretary of the Treasury, submits this report to detail the Administration's implementation of the Act in the 2023 reporting period.

In 2023, the United States took significant action under the Global Magnitsky sanctions program (''Global Magnitsky''), sanctioning 78 foreign persons over the course of the year. As of December 2023, the United States has sanctioned over 650 foreign persons (individuals and entities) pursuant to E.O. 13818 since 2017. This sanctions program, which targets those connected to serious human rights abuse, corrupt actors, and their enablers, represents the best of the United States' values and enduring commitment to promoting respect for human rights and combatting corruption around the world. Through Global Magnitsky, the United States has sought to disrupt and deter serious human rights abuse and corruption abroad; promote accountability for those who act with impunity; and maintain U.S. global leadership on anti-corruption and human rights promotion in coordination with U.S. partners, allies, and civil society where appropriate. The Administration can and will continue to utilize this tool to promote respect for human rights and the rule of law globally.

As the President outlined in the National Security Strategy (NSS), the United States will stand with our allies and partners to combat new threats confronting our democracies. The Administration will take special aim at countering corruption, which corrodes democracy from the inside, erodes government stability, impedes economic development, and is increasingly weaponized by authoritarian states to undermine democratic institutions. The United States also seeks to promote respect for human rights; address discrimination, inequity, and marginalization in all its forms; and stand up for democracy, the rule of law, and human dignity. On all these issues, the United States works to forge a common approach with likeminded countries. Through implementation of the Global Magnitsky sanctions program, the Administration is taking action to execute the President's vision as described in the NSS.

Global Magnitsky, paired with cooperation with likeminded international partners, directly addresses the objectives outlined in the 2021 United States Strategy on Countering Corruption (''the strategy''), which underscores the fight against corruption as a national security priority. The strategy directs U.S. government action to: strengthen efforts to hold accountable corrupt individuals and their facilitators, including by, where appropriate, identifying, freezing, and recovering stolen assets through sanctions or other authorities; bolster the capacity of domestic and international institutions and multilateral bodies focused on establishing global anti-corruption norms; and work with international partners to counteract strategic corruption by foreign leaders, foreign state-owned or affiliated enterprises, and other foreign actors and their domestic collaborators.

The strategy spotlights the Global Magnitsky sanctions program among the U.S. Government's foreign policy tools for promoting global accountability for serious human rights abuse and corruption through the imposition of financial sanctions on foreign persons.

Actions taken in 2023 continue to demonstrate the reach, flexibility, and broad scope of Global Magnitsky. The United States responded to serious human rights abuse and corruption globally, deterring and disrupting some of the most egregious behavior by foreign actors. Actions taken in 2023 targeted, among others, corrupt politicians undermining the rule of law in Paraguay, Guatemala, Bulgaria, and Haiti and serious human rights abuse involving Russia's treatment of human rights defender, prominent opposition leader, author, and historian Vladimir Kara-Murza as well as abductions and sexual violence committed by Haitian gangs and their leaders. Actions against Paraguayan and former Afghan government officials highlighted the U.S. Government's ongoing effort to disrupt pervasive corruption and illicit financial networks in their most entrenched forms and at the highest level of public office.

When considering financial sanctions under Global Magnitsky, the United States prioritizes actions that are expected to produce a tangible and significant impact on corrupt actors, serious human rights abusers, and their affiliates, and prompt changes in behavior or disrupt the activities of malign actors. Sanctions under Global Magnitsky aim to target systemic corruption and human rights abuse, including the networks that engage in, facilitate, or perpetuate sustained patterns of such illicit behavior. Persons sanctioned pursuant to this authority appear on the Office of Foreign Assets Control's (OFAC's) List of Specially Designated Nationals and Blocked Persons (SDN List). As a result of these actions, all property and interests in property of the sanctioned persons that are in the United States or in the possession or control of U.S. persons are blocked and must be reported to OFAC. Unless authorized by a general or specific license issued by OFAC or otherwise exempt, OFAC's regulations generally prohibit all transactions by U.S. persons or within (or transiting) the United States that involve any property or interests in property of designated or otherwise blocked persons. The prohibitions include the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any blocked person or the receipt of any contribution or provision of funds, goods, or services from any such person.

In 2023, the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, imposed economic sanctions on the following 78 foreign persons (individuals and entities) pursuant to E.O. 13818:

Afghanistan

• *Fariduddin Mahmood:* Mahmood was designated on December 8, 2023, for being a foreign person who is responsible for, or complicit in—or has directly or indirectly engaged in—serious human rights abuses involving the restriction of access to all secondary education for women and girls in Afghanistan, solely on the basis of gender, which interferes with their enjoyment of equal protection. Mahmood is a member of the Taliban's so-called ''cabinet'' that made decisions to close education centers and schools to women and girls after the sixth grade. He serves as the so-called ''head of the Afghanistan Academy of Sciences'' and supported the education-related bans on women and girls.

• *Khalid Hanafi:* Hanafi was designated on December 8, 2023, for being a foreign person who is, or has been, a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure. Hanafi serves as the Taliban's so-called ''Minister'' for the so-called ''Ministry for the Propagation of Virtue and Prevention of Vice'' (MPVPV). Since August 2021, members of the so-called MPVPV have engaged in serious human rights abuse, including killings, abductions, whippings, and beatings. Members of the so-called MPVPV have assaulted people protesting the restrictions on women's activity, including access to education.

• *Mir Rahman Rahmani and Ajmal Rahmani:* Mir Rahmani and Ajmal Rahmani, collectively ''the Rahmanis,'' were designated on December 11, 2023, for being government officials, or persons acting for or on behalf of such an official, who are responsible for or complicit in, or have directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. The Rahmanis engaged in corruption related to government contracts involving the import and delivery of fuel, contract inflation, import tax fraud, fuel theft, and parliamentary corruption.

○ On December 11, 2023, 41 entities were designated for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Ajmal Rahmani:

□ *21 German companies:* Ozean Immobilien Projektentwicklung Verwaltungs- GmbH, Ozean Immobilien Management GmbH & Co. KG, Ozean Immobilien Projektentwicklung GmbH & Co. KG, Pyramaxia Immoprojekt GmbH & Co. KG, Pyramaxia Real Estate Development GmbH & Co. KG, Pyramaxia Real Estate GmbH & Co. KG, Ozean Group GmbH, Ozean Baustoffe GmbH & Co. KG, Ozean Horizont Baumaschinen & Bauequipment GmbH & Co. KG, Ozean Horizont Bauwerke GmbH, Ozean Horizont Erdarbeiten GmbH & Co. KG, Ozean Horizont Objektplanung GmbH & Co. KG, Ozean Horizont Projektentwicklungs GmbH & Co. KG, Ozean Horizont Spezialtiefbau GmbH & Co. KG, RG Immoprojekt GmbH & Co. KG, RG Real Estate Development GmbH & Co. KG, RG Real Estate GmbH & Co. KG, NAI Energy Europe GmbH & Co. KG, NAI Energy Europe Verwaltungs GmbH, NAI Europe Energy GmbH & Co. KG, and NAI Management GmbH

□ *Eight Cypriot companies:* Pyramaxia Limited, RG Holdings Limited, NAI Logistics Limited, Buoyant Holdings Limited, Ocean Europe CY Limited, DCH. Dream Creators Holdings LTD, Riseonic Holdings LTD, and ZEM Holdings LTD

□ *Six Emirati companies:* RG Group FZE, The Fern Limited, Ascent Holdings LTD, Orbit International FZE, Ocean Estate Company Limited, and Rahmani Group International JLT

□ *Two Afghan companies:* Fidelis Logistic and Supply Services and Secure Movement Logistics Services

□ *Two Austrian companies:* Ocean Estate GmbH and Ocean Properties GmbH

□ *One Dutch company:* NAI Logistics B.V.

□ *One Bulgarian company:* Lego Investments EOOD

○ Additionally, the following two German companies were designated for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, Ocean Properties GmbH: Ozean Development Real Estate GmbH & Co. KG and Ozean Real Estate GmbH & Co. KG.

○ The following Dutch company was designated for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, RZ Group FZE: AlphaOne Pharmaceutical B.V.

Bulgaria

• *Rumen Stoyanov Ovcharov:* Ovcharov was designated on February 10, 2023, for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Ovcharov is a former Minister of Energy and Economy, Bulgarian member of parliament (MP), and current member of the Bulgarian Socialist Party (BSP) National Council. Ovcharov repeatedly engaged in corrupt energy contracts with Russian energy companies, receiving bribes and other kickbacks in exchange for fixed-price contracts for Russian gas and nuclear fuel and support contracts at the Kozloduy Nuclear Power Plant (KNPP). Russian-based nuclear fuel contracts negotiated by Ovcharov proxies overcharged KNPP up to €50 million, resulting in tens of millions in ill-gotten profits for participants.

• *Aleksandar Hristov Nikolov:* Nikolov was designated on February 10, 2023, for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Nikolov is a former CEO and deputy director of KNPP. Nikolov, Ovcharov, and Ivan Kirov Genov coordinated personal commissions by corruptly diverting service contracts for KNPP to their own business interests, avoiding scrutiny from Bulgarian officials through offshore management. Nikolov and Genov agreed to accept five million Bulgarian leva in bribes from foreign nuclear power executives in exchange for guarantees of KNPP contracts.

• *Ivan Kirov Genov:* Genov was designated on February 10, 2023, for being a foreign person who is a current or former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Genov is a former CEO of KNPP and was a Bulgarian MP with the BSP from 2017 to 2019. Genov, Nikolov, and Ovcharov coordinated personal commissions by corruptly diverting service contracts for KNPP to their own business interests, avoiding scrutiny from Bulgarian officials through offshore management. Genov and Nikolov agreed to accept five million Bulgarian leva in bribes from foreign nuclear power executives in exchange for guarantees of KNPP contracts. Even after exiting his position as Executive Director of KNPP, Genov solicited three million Bulgarian leva in bribes from Bulgarian business executives to facilitate the reconsideration of KNPP contract awards to benefit their companies.

• *Nikolay Simeonov Malinov:* Malinov was designated on February 10, 2023, for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Malinov is a former MP from the BSP and leader of the pro-Russian lobby group Russophiles National Movement. After he was arrested and charged with espionage for spying for Russian-backed interests and barred from international travel in September 2019, Malinov bribed a Bulgarian judge to allow him to travel to Russia to personally receive the Friendship Medal from Russian President Vladimir Putin.

• *Inter Trade 2021 EOOD, MS Konsult 2016 EOOD, Russophiles National Movement, Russophiles for the Revival of the Fatherland Political Party:* These entities were designated on February 10, 2023, for being owned or controlled by, directly or indirectly, Malinov.

• *Vladislov Ivanov Goranov:* Goranov was designated on February 10, 2023, for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Goranov served as a Bulgarian MP and was Minister of Finance in the second and third administrations led by the Citizens for European Development of Bulgaria (GERB) political party until 2020. As Minister of Finance, Goranov participated in a corruption scheme that resulted in tens of millions of euros paid to Bulgarian officials in exchange for favorable legislation for interested parties involved in the gambling industry.

• *Trilemma Consulting Ltd EOOD:* This entity was designated on February 10, 2023, for being owned or controlled by, directly or indirectly, Goranov. Trilemma Consulting Ltd EOOD is a sole proprietorship consulting company.

Guatemala

• *Luis Miguel Martinez Morales:* Martinez was designated on December 1, 2023, for being a foreign person who is a current or former government official, or person acting for or on behalf of such an official, who is responsible for or complicit in, or who has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Martinez is the former head of the now-defunct Centro de Gobierno. Martinez has influenced the government contracts process to benefit himself and close associates. Martinez colluded with other Guatemalan government officials to illegally award contracts to favored bidders outside of Guatecompras, the Guatemalan government's formal procurement system. Martinez and his conspirators used antiquated procurement law to forego the bidding process and secure government contracts for companies in which he has a financial interest.

Haiti

• *Gary Bodeau:* Bodeau was designated on April 5, 2023, for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Bodeau is the former President of the Haitian Chamber of Deputies. Bodeau was involved in several corrupt schemes wherein he engaged in efforts to influence the outcome of Haitian political appointments, including facilitating and soliciting bribes worth millions of dollars. In 2018, Bodeau paid Haitian officials to secure their votes while seeking ministerial position appointments. He also solicited a large bribery payment worth hundreds of thousands of dollars from senior government officials in exchange for his political support. In 2019, Bodeau offered to deliver a successful vote in the Chamber of Deputies for a prospective ministerial appointee in exchange for millions of dollars paid out through individual payments to members of the Chamber of Deputies.

• *Johnson André, Renel Destina, Vitel'homme Innocent, and Wilson Joseph:* André, Destina, Innocent, and Joseph were each designated on December 8, 2023 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse and for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure in their roles as leaders of criminal gangs in Haiti. Respectively, André, Destina, Innocent, and Joseph are the leaders of four criminal gangs: 5 Segond, Grand Ravine, Kraze Baryé, and 400 Mawozo. Innocent and Joseph have both been indicted by the U.S. Department of Justice for their role in the armed kidnapping of U.S. citizens in Haiti. André and his gang have been identified by survivors as being directly responsible for 1,035 documented cases of sexual violence in 2022 alone. Destina, who is a key ally of André, has committed kidnappings as well as killings, robberies, rapes, looting and burning of residences, and continuous attacks against Haitian police officers.

Liberia

• *Jefferson Koijee:* Koijee was designated on December 8, 2023, for being a foreign person who is responsible for or complicit in, or who has directly or indirectly engaged in, serious human rights abuse and for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or who has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Koijee and his supporters have been involved in violence in connection with: an opposition rally in July 2022, students attending a memorial service for former Liberian president Amos Sawyer in March 2022, an anti-rape protest in August 2020, a student graduation ceremony in December 2019, and an opposition rally in November 2018. Koijee has also engaged in corrupt acts, including bribery and misappropriation of state assets for use by private political movements and pressuring anti-corruption investigators to halt corruption investigations.

Paraguay

• *Horacio Manuel Cartes Jara:* Cartes was designated on January 26, 2023, for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Former Paraguayan president Cartes engaged in corruption before, during, and after his term as President of Paraguay. Cartes paid party members up to $10,000 each to support his candidacy ahead of the 2013 elections. While President of Paraguay, Cartes continued his corrupt schemes, including making cash payments to officials in exchange for their loyalty and support. He maintained his grip on policymaking through monthly cash bribes paid out to loyal legislators; payments ranged from $5,000 to $50,000 per member. Cartes continued to influence legislative activities after leaving office, targeting political opponents, and bribing legislators to direct votes in his interest, with top supporters receiving as much as $50,000 monthly.

• *Hugo Adalberto Velazquez Moreno:* Velazquez was designated on January 26, 2023, for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who has engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Then-Paraguayan Vice President Velazquez interfered in legal processes to protect himself and criminal associates from criminal investigations, including by bribing and threatening those who would expose his criminal activity.

• *Tabacos USA Inc., Bebidas USA Inc., Dominicana Acquisition S.A., Frigorifico Chajha S.A.E.:* These entities were designated on January 26, 2023, for being owned or controlled by Cartes.

• *Tabacalera Del Este S.A. (Tabesa):* On March 31, 2023, OFAC identified Tabesa as an entity that is owned, directly or indirectly, 50 percent or more by Cartes and added Tabesa to the SDN List.

People's Republic of China

• *Gao Qi:* Gao was designated on December 8, 2023, for being a foreign person who is or has been a leader or official of the Xinjiang Public Security Bureau (XPSB), an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to his tenure. OFAC designated the XPSB on July 9, 2020, for being a foreign person responsible for, or complicit in, or that has directly or indirectly engaged in, serious human rights abuse. Gao was concurrently sanctioned under the Uyghur Human Rights Policy Act.

• *Hu Lianhe:* Hu was designated on December 8, 2023, for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, any of the activities described in subsection (ii)(A) of Section 1(a) of E.O. 13818. Hu has served as the Deputy Office Director for the Xinjiang Work Coordination Small Group of the Central Committee since 2012. The XWCSG engaged in direct and close involvement in the PRC's March 2017 Xinjiang Uyghur Autonomous Region ''De-Extremification Regulation,'' and its October 2018 revision, which provided the framework for Xinjiang's ''de-extremification'' through re-education campaign.

Russia

• *Andrei Andreevich Zadachin:* Zadachin was designated on March 3, 2023, for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse. Zadachin is a Special Investigator assigned to the Chief Investigative Directorate of the Investigative Committee of the Russian Federation. Zadachin ordered that a criminal case be initiated against Vladimir Kara-Murza based on his speech before the Arizona House of Representatives. Zadachin requested that detention be ordered as a pre-trial restraint for Kara-Murza and defended this request in court.

• *Danila Yurievich Mikheev:* Mikheev was designated on March 3, 2023, or being a foreign person who has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, serious human rights abuse that is conducted by a foreign person. Mikheev is a Russian Federation national who served as an expert witness for the Russian government on the case against Kara-Murza, reviewing video of Kara-Murza's speech and providing a report that served as part of the basis on which Elena Anatolievna Lenskaya ordered Kara-Murza be held.

- *Elena Anatolievna Lenskaya:* Lenskaya was designated on March 3, 2023, for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse. Lenskaya is a judge of the Basmannyy District Court in Moscow who oversaw Kara-Murza's pre-trial detention hearing. Lenskaya ordered that Kara-Murza be held in pre-trial detention on charges based on his exercising the right to freedom of expression.

Uganda

- *Johnson Byabashaija:* Byabashaija was designated on December 8, 2023, for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure. Byabashaija has served as Commissioner General of the Uganda Prisons Service (UPS) since 2005. During that period, members of the UPS have engaged in serious human rights abuse against prisoners held within UPS facilities. Prisoners have reported being tortured and beaten by UPS staff and by fellow prisoners at the direction of UPS staff. Members of vulnerable groups, including government critics and members of Uganda's LGBTQI+ community, have been beaten.

Visa Restrictions Imposed

Persons designated pursuant to E.O. 13818 are subject to the entry restrictions articulated in section 2, unless an exception applies. Section 2 provides that the entry of persons designated under section 1 of the order is suspended pursuant to Presidential Proclamation 8693.

In 2023, the Department took steps to impose visa restrictions, when appropriate, on foreign persons involved in certain human rights violations and significant corruption pursuant to other authorities, including Presidential Proclamations 7750 and 8697, and Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act. The Department will continue to identify individuals subject to those authorities as appropriate, including but not limited to individuals designated under Global Magnitsky. In addition, the Department continues to implement all grounds of inadmissibility in the Immigration and Nationality Act (INA), including INA section 212(a)(3)(E) which renders applicants ineligible for visas if a consular officer has reason to believe that they participated in acts of genocide, torture, or extrajudicial killings.

Efforts To Encourage Governments of Other Countries To Impose Sanctions Similar to Those Authorized by the Act

The United States recognizes that our sanctions are most impactful when implemented in coordination with our foreign partners. In 2023, the Administration continued its successful outreach campaign to international partners regarding the expansion and use of domestic and multilateral anticorruption and human rights sanctions regimes. Over the course of the reporting period, the Administration coordinated with likeminded partners in pursuing coordinated actions against human rights abusers and corrupt actors, particularly in the run up to annual International Anti-Corruption Day and Human Rights Day. The United States took its Human Rights Day actions in concert with the United Kingdom and Canada, each of which took similar measures to deter human rights abuse globally. Of note, in coordination with partners on the United Nations Security Council, the United States co-sponsored the designation by the Security Council of four Haitian gang leaders, consistent with the Presidential Memorandum on Conflict-Related Sexual Violence and underscoring the Administration's commitment to recognizing abhorrent abuse and promoting accountability for serious human rights abusers.

Though not concurrent with U.S. actions, the United Kingdom, Canada, European Union (EU), and Australia all took action against individuals in Russia connected to serious human rights abuse, namely the arbitrary detention of Russian pro-democracy activist Vladimir Kara-Murza. Additionally, the United States designated Gary Bodeau in April 2023, an individual previously designated by Canada under its Special Economic Measure for Haiti authority in November 2022. On the same day that the United States announced a second round of corruption sanctions in Bulgaria, the United Kingdom, together with U.S. government officials in Sofia, announced its designation of three corrupt Bulgarian actors for serious corruption and abuse of public institution funds under its Global Anti-Corruption and Global Human Rights regimes. The UK designations reinforced prior U.S. designations of these individuals under Global Magnitsky on June 2, 2021: Vassil Kroumov Bojkov, Delyan Slavchev Peevski, and Ilko Dimitrov Zhelyazkov. Similarly, in May 2023, the EU designated seven Moldovan individuals for undermining or threatening the sovereignty of Moldova, including Vladimir Plahotniuc, who was previously designated by the United States in October 2022 and by the United Kingdom in December 2022. In May 2023, Canada designated seven individuals, including Plahotniuc. In October 2023, Canada imposed sanctions on nine additional individuals associated with Plahotniuc. On December 8, 2023, the United States designated two Afghan individuals, including Khalid Hanafi, the Taliban's so-called ''Minister'' for the so-called ''Ministry for the Propagation of Virtue and Prevention of Vice'' (MPVPV) for serious human rights abuse related to the repression of women and girls, including through the restriction of access to secondary education for women and girls in Afghanistan solely on the basis of gender. The EU took similar action under its Global Human Rights Sanctions Regime on July 20, 2023, imposing restrictive measures on two of the Taliban's so-called ''acting Ministers''—including Hanafi—for their role in ''depriving Afghan girls and women of their right to education, access to justice and equal treatment between men and women.''

The United States is closely following the potential development of an EU anti-corruption sanctions authority and stands ready to support EU efforts by sharing insights and offering technical support, including regarding evidence collection, addressing legal challenges, and evidentiary requirements. The Administration will continue to seek out additional allies and partners, including civil society, to leverage all tools at our disposal to deny access to the United States' and international financial systems and deny entry to the United States to all those who engage in serious human rights abuse and corruption.

Andrew H. Self,

Foreign Affairs Officer, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2024–03532 Filed 2–22–24; 8:45 am]

BILLING CODE 4710–AE–P

DEPARTMENT OF STATE

[Public Notice: 12338]

Notification of Meetings of the United States-Bahrain Subcommittee on Environmental Affairs and Joint Forum on Environmental Cooperation; Withdrawal

ACTION: Notice; withdrawal.

SUMMARY: The Department of State published a document in the **Federal Register** of February 14, 2024, concerning meetings of the United States-Bahrain Subcommittee on Environmental Affairs and Joint Forum on Environmental Cooperation. The meetings have been postponed and are pending new dates to reschedule.

FOR FURTHER INFORMATION CONTACT: Merideth Manella, (202) 286–5271, *ManellaM@state.gov* or Tia Potskhverashvili, (202) 395–5414, *tiapots@ustr.eop.gov.*

SUPPLEMENTARY INFORMATION: Withdrawal.

In the **Federal Register** of February 14, 2024, we withdraw FR Doc 2024–03027 [Public Notice: 12330].

Scott B. Ticknor,

Director, Office of Environmental Quality, U.S. Department of State.

[FR Doc. 2024–03694 Filed 2–22–24; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice: 12337]

Regional Meeting of the Binational Bridges and Border Crossings Group in Mexico City, Mexico

ACTION: Notice of a meeting.

SUMMARY: Delegates from the United States and Mexican governments, the states of New Mexico and Texas, and the Mexican states of Chihuahua, Coahuila, Nuevo Laredo, and Tamaulipas will participate in a regional meeting of the U.S.-Mexico Binational Bridges and Border Crossings Group. The purpose of this meeting is to discuss operational matters involving existing and proposed international bridges and border crossings and their related infrastructure and to exchange technical information as well as views on policy. This meeting will include a public session. This session will allow proponents of proposed bridges and border crossings and related projects to make presentations to the delegations and members of the public.

DATES: March 13, 2024 at 9 a.m. Public session from 9 a.m. to 1 p.m.

ADDRESSES: Mexico City, Mexico.

FOR FURTHER INFORMATION CONTACT: For further information on the meeting and to attend the public session, please contact Beney Lee, Border Affairs Officer, via email at *leebj2@state.gov,* by phone at 202–647–9894, or by mail at Office of Mexican Affairs, Room 3924, Department of State, 2201 C St. NW, Washington, DC 20520.

Hillary C. Quam,

Border Coordinator, Office of Mexican Affairs, Department of State.

[FR Doc. 2024–03639 Filed 2–22–24; 8:45 am]

BILLING CODE 4710–29–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36753]

Wilmington Terminal Railroad, Limited Partnership—Operation Exemption—North Carolina State Ports Authority

Wilmington Terminal Railroad, Limited Partnership (WTR), a Class III railroad, has filed a verified notice of exemption under 49 CFR 1150.42 to exempt from regulation WTR's entry into an amendment (Amendment) with the North Carolina State Ports Authority (NCSPA) to extend a 2002 Rail Operating Agreement (Original Agreement) between WTR and NCSPA relating to WTR's continued operations as a common carrier over approximately 18 miles of track in three segments (the Line).[1] The Line encompasses: (1) the Front Street Spur, extending from the east line of Third Street at CSX Rail Valuation Station 91+37.3 and extending generally in a northerly direction a distance of approximately 0.66 miles to CSX Rail Valuation Station 56+39; (2) the New River Spur, extending from the CSX Rail Valuation Station 0+00, also being Rail Valuation Station 86+20 on the Front Street Spur at the west line of Second Street and extending generally in a southerly direction approximately 3.5 miles to CSX Rail Valuation Station 185+00; and (3) the line extending from the north entrance to the Port of Wilmington at Transit Road, near its intersection with Burnett Blvd., to the south entrance to the Port of Wilmington at River Road near its intersection with Shipyard Blvd., through and including the classification yards and including all of the railroad tracks on the Port of Wilmington, whether denominated as spurs, side tracks, industrial tracks, or otherwise (but excluding crane rails).

According to the verified notice, WTR currently operates the Line and has owned a permanent and exclusive railroad operating easement for the Line since 2002. WTR states that it has entered into the Amendment with NCSPA to extend the term of the Original Agreement and amend other commercial terms related to WTR's operations over the Line. The verified notice states that the Amendment will be effective on the effective date of the exemption.

WTR certifies that neither the Original Agreement nor the Amendment include an interchange commitment. WTR also certifies that its projected annual revenue are not expected to exceed those that would qualify it as a Class III carrier and that its revenues currently exceed $5 million.

Pursuant to 49 CFR 1150.42(e), if a carrier's projected annual revenues will exceed $5 million, it must, at least 60 days before the exemption becomes effective, post a notice of its intent to undertake the proposed transaction at the workplace of the employees on the affected lines, serve a copy of the notice on the national offices of the labor unions with employees on the affected lines, and certify to the Board that it has done so. However, WTR has filed a request for waiver of the 60-day advance labor notice requirements to allow the transaction to become effective 30 days after WTR's notice of exemption was filed. WTR's waiver request will be addressed in a separate decision. The Board will establish the effective date of the exemption in its separate decision on the waiver request.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than March 1, 2024.

All pleadings, referring to Docket No. FD 36753, must be filed with the

[1] WTR originally received acquisition and operation authority for the Line in 2002 using the Board's expedited notice-of-exemption process. *See Wilmington Terminal R.R.—Acquis. & Operation Exemption—N.C. Ports Ry. Comm'n,* FD 34257 (STB served Oct. 31, 2002). The verified notice here states that the Original Agreement has been amended three other times since 2002 and that it does not appear Board authority was sought for those amendments. WTR asserts that it is not clear that amendments to the Original Agreement require Board authority because, in a proceeding related to Docket No. FD 34257, the Board held that WTR's acquisition of a permanent and exclusive railroad operating easement over the Line means that WTR "will continue to have a common carrier obligation until we permit that obligation to be transferred to [an]other carrier[ ] or the line[ ] to be abandoned." *See N.C. State Ports Auth.—Acquis. Exemption—N.C. Ports Ry. Comm'n,* FD 34258, slip op. at 5 (STB served Oct. 31, 2002). WTR states that it is seeking authority for the Amendment out of an abundance of caution.

Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on WTR's representative, Eric M. Hocky, Clark Hill PLC, Two Commerce Square, 2001 Market St., Suite 2620, Philadelphia, PA 19103.

According to WTR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: February 16, 2024.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2024–03673 Filed 2–22–24; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–1076]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Aging Aircraft Program (Widespread Fatigue Damage)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 30, 2023. The collection involves submittal of limits of validity of engineering data that supports the structural maintenance program (hereafter referred to as LOV) for certain airplane models. The information to be collected will be used to demonstrate compliance with FAA regulations requiring establishment and incorporation of LOV into the airplane's structural maintenance program.

DATES: Written comments should be submitted by September 5, 2023.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By Mail: Kamruz Zaman, Federal Aviation Administration, Policy and Standards Division, 1600 Stewart Ave., Suite 410, Westbury, NY 11590.

By Fax: 516–794–5531.

FOR FURTHER INFORMATION CONTACT: Kamruz Zaman by email at: *Kamruz.Zaman@faa.gov;* phone: 516–228–7355.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0743.

Title: Aging Aircraft Program (Widespread Fatigue Damage).

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 30, 2023 (88 FR 34556). The ''Aging Aircraft Program (Widespread Fatigue Damage)'' final rule amended FAA regulations pertaining to certification and operation of transport category airplanes to preclude widespread fatigue damage in those airplanes. This collection requires that design approval holders submit LOV to the responsible Aircraft Certification Service office for approval to demonstrate compliance with § 26.21 or § 26.23, as applicable. This collection also requires that operators submit the LOV to their Principal Maintenance Inspectors to demonstrate compliance with § 121.1115 or § 129.115, as applicable.

Respondents: Approximately 27 design approval holders and operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 2.72 hours.

Estimated Total Annual Burden: 408 hours.

Issued in Washington, DC, on February 20, 2024.

Katina Waldrup,

Directives & Forms Management Officer (DMO/FMO), Aircraft Certification Service.

[FR Doc. 2024–03744 Filed 2–22–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Agency Information Collection Activities; Proposed Collection; Comment Request; New Markets Tax Credit Program (NMTC Program) Allocation Application

ACTION: Notice and request for public comment.

SUMMARY: The U.S. Department of the Treasury, 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 (PRA). Currently, the Community Development Financial Institutions Fund (CDFI Fund), U.S. Department of the Treasury, is soliciting comments concerning the New Markets Tax Credit Program (NMTC Program) Allocation Application, for the calendar year (CY) 2024–2026 funding rounds (hereafter, the Application or Applications). The CDFI Fund is required by law to make the Application publicly available for comment prior to submission for a new PRA number.

DATES: Written comments must be received on or before April 23, 2024 to be assured of consideration.

ADDRESSES: Direct all comments to Christopher Allison, NMTC Program Manager, CDFI Fund, at *nmtc@cdfi.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Christopher Allison, NMTC Program Manager, CDFI Fund, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220, or by email to *nmtc@cdfi.treas.gov* or contact by telephone at 202–653–0421.

SUPPLEMENTARY INFORMATION:

Title: NMTC Program Allocation Application.

OMB Number: 1559–0016.

Abstract: Title I, subtitle C, section 121 of the Community Renewal Tax Relief Act of 2000 (the Act) amended the Internal Revenue Code (IRC) by adding IRC § 45D and created the NMTC Program. The Department of the Treasury, through the CDFI Fund, Internal Revenue Service, and Office of Tax Policy, administers the NMTC Program. In order to claim the NMTC, taxpayers make Qualified Equity Investments (QEIs) in Community

Development Entities (CDEs) and substantially all of the QEI proceeds must, in turn, be used by the CDE to provide investments in businesses and real estate developments in low-income communities and other purposes authorized under the statute.

The tax credit provided to the investor totals 39 percent of the amount of the investment and is claimed over a seven-year period. In each of the first three years, the investor receives a credit equal to five percent of the total amount paid for the stock or capital interest at the time of purchase. For the final four years, the value of the credit is six percent annually. Investors may not redeem their investments in CDEs prior to the conclusion of the seven-year period without forfeiting any credit amounts they have received.

The CDFI Fund is responsible for certifying organizations as CDEs and administering the competitive allocation of tax credit authority to CDEs, which it does through annual allocation rounds. As part of the award selection process, CDEs will be required to prepare and submit an Allocation Application, which consists of five sections: Business Strategy; Community Outcomes; Organization Capacity; Capitalization Strategy; and Previous Allocations and Awards.

Current Actions: Extension with significant changes from currently approved collection.

Type of Review: Regular.

Affected Public: CDEs applying for NMTC Allocations.

Estimated Number of Respondents: 201.

Estimated Annual Time per Respondent: 307.

Estimated Total Annual Burden Hours: 61,876 hours.

Requests for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record and may be published at *www.reginfo.gov.* The CDFI Fund is seeking input on the NMTC Application. The Application may be obtained on the NMTC Program web page of the CDFI Fund's website at *https://www.cdfifund.gov/requests-for-comments.* Revisions to the NMTC Allocation Application will be highlighted in yellow.

Comments concerning the Application 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 technology; (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information; and (f) whether any additional questions or factors should be considered as part of the NMTC Application and/or review process with regards to the Business Strategy section.

(Authority: 26 U.S.C. 45D; 26 CFR 1.45D–1)

Marcia Sigal,

Acting Director, Community Development Financial Institutions Fund.

[FR Doc. 2024–03707 Filed 2–22–24; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Bank Secrecy Act Regulations Requiring Reports of Certain Domestic Transactions

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, FinCEN invites comments on the proposed renewal, without change, of an existing information collection relating to records of certain domestic transactions. Specifically, if the Secretary of the Treasury finds that reasonable grounds exist for concluding that additional recordkeeping and/or reporting requirements are necessary to carry out the purposes of the Bank Secrecy Act, or to prevent evasions thereof, the Secretary may issue an order that imposes certain additional recordkeeping and reporting requirements on one or more domestic financial institutions or nonfinancial trades or businesses in a geographic area. These orders are commonly referred to as geographic targeting orders (GTOs). This request for comments is made pursuant to the Paperwork Reduction Act of 1995 (PRA).

DATES: Written comments are welcome and must be received on or before April 23, 2024.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2024–0007 and Office of Management and Budget (OMB) control number 1506–0056.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2024–0007 and OMB control number 1506–0056.

Please submit comments by one method only. Comments will be reviewed consistent with the PRA and applicable OMB regulations and guidance. Comments will generally become a matter of public record. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. Given the nature of GTOs and their law enforcement purposes, any information that concerns confidential matters involving specific GTOs should be marked ''confidential'' and include the specific name of the GTO.

FOR FURTHER INFORMATION CONTACT: FinCEN's Regulatory Support Section at 1–800–767–2825, or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provisions

The legislative framework generally referred to as the Bank Secrecy Act (BSA) consists of the Currency and Foreign Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56 (October 26, 2001), and other legislation, including the Anti-Money Laundering Act of 2020 (AML Act).[1] The BSA is codified at 12 U.S.C. 1829b, 1951–1960, and 31 U.S.C. 5311–5314 and 5316–5336, and includes notes thereto, with implementing regulations at 31 CFR chapter X.

The BSA authorizes the Secretary of the Treasury (Secretary) to, *inter alia,* require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, or regulatory matters, risk assessments or

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[1] The AML Act was enacted as Division F, sections 6001–6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 134 Stat. 3388 (2021).

proceedings, or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement AML programs and compliance procedures.[2] The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.[3]

Congress amended the BSA in 1988 to give the Secretary the authority to issue GTOs requiring any domestic financial institution or group of domestic financial institutions in a geographic area to collect certain information regarding specified transactions, and to report that information in the manner and to the extent specified in the GTO.[4] Congress subsequently amended the GTO authority to: (i) permit the issuance of confidential GTOs; (ii) lengthen the maximum effective period (unless renewed) of GTOs from 60 to 180 days; (iii) cover transactions involving transfers of funds; and (iv) clarify that GTOs can be issued upon reasonable grounds for concluding that additional requirements are necessary to carry out the purposes of the BSA or to prevent evasions of the BSA.[5]

Pursuant to 31 U.S.C. 5326(a), as amended, if the Secretary finds that reasonable grounds exist for concluding that additional recordkeeping and reporting are necessary to carry out the purpose of the BSA or to prevent evasions thereof, the Secretary may issue a GTO requiring any domestic financial institution or nonfinancial trade or business or group of domestic financial institutions or domestic nonfinancial trades or businesses in a geographic area to obtain information about certain transactions, as described in the GTO.[6]

Generally, 31 U.S.C. 5326(a) requires entities that receive such a GTO to report, in the manner and to the extent specified in the GTO, information concerning any transaction in which such entity is involved for the payment, receipt, or transfer of funds (as described in the GTO). A GTO typically will include the following terms: (i) the dollar amount of transactions subject to the reporting requirement; (ii) the type of transactions subject to or exempt from the reporting requirement; (iii) the appropriate form for reporting and the method for form submission; (iv) the start and end dates by which the transactions specified in the GTO are to be reported; (v) a point of contact at for questions; (vi) the amount of time the reports and records of reports generated are required to be retained; and (vii) any other information deemed necessary to carry out the purpose of the GTO. Pursuant to 31 U.S.C. 5326(d), GTOs cannot prescribe a reporting period longer than 180 days, unless the GTO is renewed pursuant to 31 U.S.C. 5326(a).

Pursuant to 31 U.S.C. 5326(a)(2), as implemented by 31 CFR 1010.410(d), each entity that receives a GTO must retain the original or a copy of the information required to be reported in the GTO, for the period specified in the GTO, not to exceed five years.

II. Paperwork Reduction Act of 1995 [7]

Title: Reports and Records of Certain Domestic Transactions (31 U.S.C. 5326; 31 CFR 1010.370 and 1010.410(d)).

OMB Control Number: 1506–0056.

Form Number: FinCEN will specify the form and method for reporting in the GTO.

Abstract: FinCEN is issuing this notice to renew the OMB control number for regulations permitting the issuance of orders, commonly referred to as GTOs, requiring reports and records of certain domestic transactions.

Affected Public: Businesses or other for-profit institutions, and non-profit institutions.

Type of Review: Renewal without change of a currently approved information collection.

Frequency: As required.

Estimated Number of Respondents: 709 domestic financial institutions and/or domestic nonfinancial trades or businesses.[8]

Estimated Total Annual Responses: 21,513 responses.[9]

Estimated Reporting and Recordkeeping Burden Per Response: Generally, the information required to be recorded and reported pursuant to a GTO is basic information that a domestic financial institution or domestic nonfinancial trade or business would have access to in the normal course of doing business, such as payment, receipt, or transfer of funds information. The information required to be reported pursuant to a GTO, generally, includes the following: (i) the dollar amount of the transaction; (ii) the type of transaction; (iii) information identifying a party to the transaction, such as name, address, date of birth, and tax identification number; (iv) the role of a party in the transaction (*i.e.,* originator or beneficiary); and (v) the name, address, and contact information for the domestic financial institution or domestic nonfinancial trade or business.

As noted above, FinCEN will specify the form and method for reporting. Responses to GTOs generally are submitted to FinCEN electronically, such as through the BSA E-Filing System. FinCEN has on occasion directed filers to respond to GTOs by using existing BSA electronic forms (such as the forms used to file currency transaction reports, suspicious activity reports,[10] and Form 8300s), and completing them in the manner specified in the relevant GTO.

Because the information to be reported is readily available to a domestic financial institution or nonfinancial trade or business, in 2020 FinCEN estimated that reporting this information would take 20 minutes on average.[11] Since then, FinCEN has received additional feedback from the American Land Title Association, whose members have submitted a number of GTO reports, noting that it takes the Association's members approximately 45 minutes to complete a GTO report. For that reason, FinCEN is increasing the estimated time to report GTO information to 45 minutes.

GTO information is filed electronically, which allows the filer to save an electronic version of the report and satisfy the recordkeeping requirement. Therefore, FinCEN estimates that the recordkeeping requirement will take five minutes on average. In total, FinCEN estimates the hourly burden of reporting and recordkeeping for each reportable transaction under a GTO to be 50

[2] Section 358 of the USA PATRIOT Act expanded the purpose of the BSA by including a reference to reports and records ''that have a high degree of usefulness in intelligence or counterintelligence activities to protect against international terrorism.'' Section 6101 of the AML Act further expanded the purpose of the BSA to cover such matters as preventing money laundering, tracking illicit funds, assessing risk, and establishing appropriate frameworks for information sharing.

[3] Treasury Order 180–01 (Jan. 14, 2020).

[4] 31 U.S.C. 5326 was amended by Public Law 100–690, title VI, sec. 6185(c).

[5] *See* Public Law 102–550, title XV, sec. 1514; Public Law 107–56, sec. 353(d); Public Law 115–44, sec. 275.

[6] The authority set forth in 31 U.S.C. 5326 to impose reporting and recordkeeping requirements is self-implementing. Although 31 U.S.C. 5326 does not mention the need for a prescribing regulation, a rule corresponding to section 5326 is set forth at 31 CFR 1010.370. Among other things, the rule defines a geographic area.

[7] Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

[8] The number of respondents, 709, is the average for 2021 (619), 2022 (755), and 2023 (754). Note that FinCEN may issue a GTO to any business in the United States. Generally, a GTO is issued to a specific sector or business type.

[9] The number of responses, 21,513, is the average number of responses for 2021 (18,743), 2022 (25,389), and 2023 (20,411).

[10] When a modified SAR is used for reporting, it is considered a GTO report and not a SAR that is filed to comply with the regulations implementing 31 U.S.C. 5318(g).

[11] See, FinCEN, *Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Bank Secrecy Act Regulations Requiring Reports of Certain Domestic Transactions,* 85 FR 84104 (Dec. 23, 2020).

minutes (45 minutes for reporting and five minutes for recordkeeping).

Estimated Total Annual Reporting and Recordkeeping Burden: 17,928 hours. The average number of reportable transactions under GTOs is 21,513 responses. 21,513 responses multiplied by 50 minutes per response and converted to hours equals 17,928 hours.[12]

Estimated Total Annual Reporting and Recordkeeping Cost: $576,923.04. (17,928 hours multiplied by $32.18 per hour [13]).

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. Records required to be retained under the BSA must be retained for five years.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (i) whether the recordkeeping of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) the accuracy of the agency's estimate of the burden of the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information to be collected; (iv) 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 (v) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Andrea M. Gacki,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2024–03681 Filed 2–22–24; 8:45 am]

BILLING CODE 4810–02–P

[12] Although the burden is stated as an annual burden in accordance with the PRA, the estimated annual burden is not intended to indicate that there is a GTO in effect throughout a year or in each year.

[13] The average hourly wage rate is calculated from the May 2022 U.S. Bureau of Labor Statistics (BLS) median hourly wage for ''43–3099 Financial Clerk.'' *See* BLS, *Occupational Employment and Wages Statistics* (May 2022), *available at https://www.bls.gov/oes/tables.htm.* The ratio between benefits and wages for private industry workers is $12.19 (hourly benefits)/$29.34 (hourly wages) = 0.42, as of September 2023. The benefit factor is 1 plus the benefit/wages ratio, or 1.42. *See* BLS, *Employee Costs for Employee Compensation* (September 2023), *available at https://www.bls.gov/ecec/home.htm#:~:text=Employer%20costs%20for%20private%20industry,percent%20of%20total%20compensation%20costs.* The May 2022 BLS median hourly wage for ''43–3099 Financial Clerk'' is $22.66. ($22.66 × 1.42 = $32.18). The Financial Clerk average hourly wage is being used here because there is a great deal of variation across industries and geographies in who is responsible for responding to a GTO.

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of two individuals that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these individuals are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See Supplementary Information section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://ofac.treasury.gov/*).

Notice of OFAC Action

On February 20, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following individuals are blocked under the relevant sanctions authorities listed below.

Individuals

1. KONDRATIEV, Ivan Gennadievich (Cyrillic: КОНДРАТЬЕВ, Иван Геннадьевич) (a.k.a. KONDRATEV, Ivan; a.k.a. KONDRATYEV, Ivan; a.k.a. ''@AL3XL7''; a.k.a. ''@BASSTERLORD''; a.k.a. ''@BASSTERLORD 0170742922''; a.k.a. ''@SINNER6546''; a.k.a. ''@SINNER911''; a.k.a. ''BASSTERLORD''; a.k.a. ''EDITOR''; a.k.a. ''FISHEYE''; a.k.a. ''INVESTORLIFE1''; a.k.a. ''JACKROCK#3337''; a.k.a. ''SIN998A''), Novomokovsk, Russia; DOB 08 Apr 1996; nationality Russia; Email Address *sinner4iter@gmail.com;* Gender Male; Digital Currency Address—XBT bc1q5jqgm7nvrhaw2rh2vk0dk8e4gg5g373g0vz07r; alt. Digital Currency Address—XBT 32pTjxTNi7snk8sodrgfmdKao3DEn1nVJM; alt. Digital Currency Address—XBT 15cRqR3TXS1JehBGWERuxFE8NhWZzfoeeU; alt. Digital Currency Address—XBT 1A7SKE2dQtezLktCY8peLsdAtkqxV9r1dC; alt. Digital Currency Address—XBT bc1q8ew45w2agdffrnwp6adt2gqrc9n4mkev9ns29c; alt. Digital Currency Address—XBT bc1qagp0gy58v8hqvw4p2wsphcxg067rrppp45hexr; alt. Digital Currency Address—XBT bc1qn6segn8km4nfdp9vueu6msfjsaxaqgun9h60n9; alt. Digital Currency Address—XBT bc1qx9upga7f09tsetqf78wa3qrmcjar58mkwz6ng6; Digital Currency Address—ETH 0xf3701f445b6bdafedbca97d1e477357839e4120d; Secondary sanctions risk: Ukraine-/Russia-Related Sanctions Regulations, 31 CFR 589.201; Passport 7019934211 (Russia) (individual) [CYBER2].

Designated pursuant to section l(a)(ii)(D) of Executive Order 13694 of April 1, 2015, ''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities,'' 80 FR 18077, 3 CFR, 2015 Comp., p. 297, as amended by Executive Order 13757 of December 28, 2016, ''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities,'' 82 FR 1, 3 CFR, 2016 Comp., p. 659 (E.O. 13694, as amended) for being responsible for or complicit in, or having engaged in, directly or indirectly, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

2. SUNGATOV, Artur Ravilevich, Kazan, Tatarstan Republic, Russia; DOB 16 Jan 1990; POB Kazan, Russia; nationality Russia; Email Address *tkmegap@gmail.com;* alt. Email Address *imailo@ya.ru;* alt. Email Address *asungatov@gmail.com;* alt. Email Address *morozofkent@gmail.com;* Gender Male; Digital Currency Address—XBT 18gaXypKj9M23S2zT9qZfL9iPbLFM372Q5; Secondary sanctions risk: Ukraine-/Russia-Related Sanctions Regulations, 31 CFR 589.201; Passport 751412830 (Russia); alt. Passport 9209857353 (Russia) (individual) [CYBER2].

Designated pursuant to section l(a)(ii)(D) of E.O. 13694, as amended, for being responsible for or complicit in, or having engaged in, directly or indirectly, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

Dated: February 20, 2024.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024–03711 Filed 2–22–24; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 4506–C

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), 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 information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning, IVES Request for Transcript of Tax Return.

DATES: Written comments should be received on or before April 23, 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 Number 1545–1872–IVES Request for Transcript of Tax Return'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Martha R. Brinson, at (202) 317–5753, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: IVES Request for Transcript of Tax Return.

OMB Number: 1545–1872.

Form Number: 4506–C.

Abstract: Internal Revenue Code section 7513 allows taxpayers to request a copy of a tax return or related products. Form 4506–C is used to permit the cleared and vetted Income Express Service (IVES) participants to request tax return information on the behalf of the authorizing taxpayer.

Current Actions:

- A second ''signature box'' (Signatory attest this is to request tax information for mortgage loans for residential or commercial real property (land and buildings) was added to the form.
- Information was added to the top of the form regarding ''To request necessary tax information for mortgage loans specific to residential or commercial real property (land and buildings)''.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, farms, and Federal, state, local, or tribal governments.

Estimated Number of Respondents: 15,370,941.

Estimated Time per Respondent: 1hr, 28 mins.

Estimated Total Annual Burden Hours: 22,595,283.

The following paragraph applies to all of 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 as long as 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. Comments will be 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 has 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 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 15, 2024.

Martha R. Brinson,

Tax Analyst.

[FR Doc. 2024–03708 Filed 2–22–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Open Meeting of the Federal Advisory Committee on Insurance

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces that the U.S. Department of the Treasury's Federal Advisory Committee on Insurance (FACI) will meet in the Cash Room at the U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC, and also via videoconference on Wednesday, March 20, 2024, from 1:30 p.m.–4:30 p.m. Eastern Time. The meeting will be open to the public. The FACI provides non-binding recommendations and advice to the Federal Insurance Office (FIO) in the U.S. Department of the Treasury.

DATES: Wednesday, March 20, 2024, from 1:30 p.m.–4:30 p.m. Eastern Time.

Attendance: The meeting is open to the public, and the site is accessible to individuals with disabilities. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must register online. Attendees may visit *https://events.treasury.gov/s/event-template/a2m3d0000005HpiAAE/march-20-faci-public-meeting* and fill out a secure online registration form. A valid email address will be required to complete online registration. (Note: online registration will close on March 13th or when capacity is reached.) The public can also attend remotely via live webcast: *https://usdotyorktel.rev.vbrick.com/#/events/1ef087f9-0c1a-4ccc-ad92-c96e245e4bfc.* The webcast will also be available through the FACI's website: *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/federal-advisory-committee-on-insurance-faci.* Please refer to the FACI's website for up-to-date information on this meeting. Requests for reasonable accommodations under Section 504 of the Rehabilitation Act should be directed to Snider Page, Office of Civil Rights and Equal Employment Opportunity, Department of the Treasury at (202) 622–0341, or *snider.page@treasury.gov.*

ADDRESSES: The meeting will be held in the Cash Room, Department of the

Treasury, 1500 Pennsylvania Ave. NW, Washington, DC 20220 and also via videoconference.

FOR FURTHER INFORMATION CONTACT: John Gudgel, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220, at (202) 622–1748 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. 1009(a)(2), through implementing regulations at 41 CFR 102–3.150.

Public Comment: Members of the public wishing to comment on the business of the FACI are invited to submit written statements by either of the following methods:

Electronic Statements

- Send electronic comments to *faci@treasury.gov.*

Paper Statements

- Send paper statements in triplicate to the Federal Advisory Committee on Insurance, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220.

In general, the Department of the Treasury will make submitted comments available upon request without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. Requests for public comments can be submitted via email to *faci@treasury.gov.* The Department of the Treasury will also make such statements available for public inspection and copying in the Department of the Treasury's Library, 720 Madison Place NW, Room 1020, Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622–2000. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Tentative Agenda/Topics for Discussion: This will be the first FACI meeting of 2024. In this meeting, the FACI will continue to discuss topics related to climate-related financial risk and the insurance sector, and will also discuss cyber insurance developments and international insurance issues. The FACI will also receive status updates from each of its subcommittees and from FIO on its activities, as well as consider any new business.

Dated: February 16, 2024.

Steven Seitz,

Director, Federal Insurance Office.

[FR Doc. 2024–03677 Filed 2–22–24; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Veterans Health Administration (VHA), Department of Veterans Affairs (VA).

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the Privacy Act of 1974, notice is hereby given that the VA is modifying the system of records titled, ''My Health*e*Vet Administrative Records-VA'' (130VA10P2). This system is used to administer the My Health*e*Vet program, including registration and verification of Veteran identities or to register and authenticate those who have legal authority to participate in lieu of Veterans. It is also used to assign and verify administrators of the My Health*e*Vet portal, retrieve Veteran information to perform specific functions, and to allow access to specific information while providing other associated My Health*e*Vet electronic services in current and future program applications.

DATES: Comments on this amended system of records must be received no later than 30 days after date of publication in the **Federal Register**. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by the VA, the modified system of records will become effective a minimum of 30 days after date of publication in the **Federal Register**. If VA receives public comments, VA shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments may be submitted through *www.Regulations.gov* or mailed to VA Privacy Service, 810 Vermont Avenue NW, (005X6F), Washington, DC 20420. Comments should indicate that they are submitted in response to ''My Health*e*Vet Administrative Records-VA'' (130VA10P2). Comments received will be available at *regulations.gov* for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Stephania Griffin, VHA Chief Privacy Officer, 810 Vermont Avenue NW, Washington, DC 20420; telephone 704–245–2492 (Note: this is not a toll-free number).

SUPPLEMENTARY INFORMATION: VA is amending the system of records by revising the System Number; System Location; Purpose of the System; Records Source Categories; Categories of Individuals Covered by the System; Categories of Records in the System; Routine Uses of Records Maintained in the System; Policies and Practices for Retrieval of Records; Policies and Practices for Retention and Disposal of Records; Administrative, Technical and Physical Safeguards; Record Access Procedure; Contesting Records Procedures; and Notification Procedure. VA is republishing the system notice in its entirety.

The System Number is changed from 130VA10P2 to 130VA10 to reflect the current organizational alignment.

The System Location is being amended to remove the VA National Data Centers and the contracted data storage system located in Culpepper, Virginia. Replacing this section is, ''VA Enterprise Cloud Data Centers/Amazon Web Services, 1915 Terry Avenue, Seattle, WA 98101, and the VA Health Data Repository, 1615 Woodward Street, Austin, TX 78741.''

The Purpose of the System is being amended to include, ''administrative information may also be used for My Health*e*Vet help desk and staff to troubleshoot issues.''

The Categories of Individuals Covered by the System number 3 is being amended to include ''*i.e.,* Secure Messaging Administrators, My Health*e*Vet Coordinators, Role Administrators, VA Health Resource Center helpdesk staff.'' This section will remove number 5 stating, ''VA researchers fulfilling VA required authorization procedures.''

The Categories of Records in the System section is being amended to remove mother's maiden name. This section is being updated to reflect the following language: ''These records include the following information for My Health*e*Vet users: name, birth sex, date of birth, social security number, ZIP code, email profile, secure messaging email address, user identification, internal control number, reference number, date of account creation, account status, match status, date and time of match, correlation status, Master Person Index (MPI) authentication status, date of death from MPI, login date and time, deactivation date and time, deactivation description and status, place and date of registration, user block access and comments, delegate user identification associated with My Health*e*Vet accounts.''

The My Health*e*Vet Staff (*i.e.,* Coordinators and Providers) records include the following identification information: ''name, work telephone number, work email, VA network identification, job title, office and department, login date and time, web analytics for the purpose of monitoring site usage, My Health*e*Vet portal access termination date, role and role level, and user DUZ (number).''

In the Records Source Categories section, number 2 is being updated to include delegates; number 3 will be updated to include administrative staff; number 4 is being updated to include developers and testers; number 5 is being updated to include MPI. Number 6 is being removed, ''VA researchers fulfilling VA required authorization procedures in VHA Directive 1200.01(1)''.

Routine use number 10 is being added to state, ''To another Federal agency or Federal entity, when VA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (a) responding to a suspected or confirmed breach or (b) preventing, minimizing or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.''

Routine use number 11 is being added to state, ''VHA may disclose a My Health*e*Vet account user's information to a family member or friend after receiving the verbal permission of the My Health*e*Vet account user.''

Routine use number 12 is being added to state, ''To officials of labor organizations recognized under 5 U.S.C. chapter 71 provided that the disclosure is limited to information identified in 5 U.S.C. 7114(b)(4) that is relevant and necessary to their duties of exclusive representation concerning personnel policies, practices and matters affecting working conditions.''

Policies and Practices for Retrieval of Records is being updated to include ''electronic data interchange personal identifier.''

Policies and Practices for Retention and Disposal of Records is being updated to remove, ''Records from this system that are needed for audit purposes will be retained for at least six (6) years after a user's account becomes inactive. Routine records will be disposed of when the agency determines they are no longer needed for administrative, legal, audit, research, or other operational purposes, but no less than six (6) years from date of last account activity.'' This section is also being amended to include the Record Control Schedule (RCS) and Item Number(s).

Administrative, Technical and Physical Safeguards is being updated to include number 5, ''VA Enterprise Cloud data storage conforms to security protocols as stipulated in VA Directives 6500 and 6517. Access control standards are stipulated in specific agreements with cloud vendors to restrict and monitor access.''

Record Access Procedures is being amended to state, ''Individuals seeking information on the existence and content of records in this system pertaining to them should contact the system manager in writing as indicated above, or may write or visit the VA facility location where they normally receive their care. A request for access to records must contain the requester's full name, address, telephone number, be signed by the requester, and describe the records sought in sufficient detail to enable VA personnel to locate them with a reasonable amount of effort.''

Contesting Record Procedures is being amended to state, ''Individuals seeking to contest or amend records in this system pertaining to them should contact the system manager in writing as indicated above, or may write or visit the VA facility location where they normally receive their care. A request to contest or amend records must state clearly and concisely what record is being contested, the reasons for contesting it, and the proposed amendment to the record.''

Notification Procedure is being amended to state, ''Generalized notice is provided by the publication of this notice. For specific notice, see Record Access Procedure, above.''

The Report of Intent to Amend a System of Records Notice and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552al (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Signing Authority

The Senior Agency Official for Privacy, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Kurt D. DelBene, Assistant Secretary for Information and Technology and Chief Information Officer, approved this document on January 18, 2024 for publication.

Dated: February 20, 2024.

Amy L. Rose,

Government Information Specialist, VA Privacy Service, Office of Compliance, Risk and Remediation, Office of Information and Technology, Department of Veterans Affairs.

SYSTEM NAME AND NUMBER:

''My Health*e*Vet Administrative Records-VA'' (130VA10).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at Veterans Health Administration (VHA) facilities, Department of Veterans Affairs (VA) Enterprise Cloud Data Centers/Amazon Web Services, 1915 Terry Avenue, Seattle, WA 98101, and the VA Health Data Repository, 1615 Woodward Street, Austin, TX 78741. Address locations for VHA facilities are listed in VA Appendix 1 of the biennial publications of the VA system of records.

SYSTEM MANAGER(S):

Official responsible for policies and procedures: Director of Veterans and Consumers Health Informatics Office, 8455 Colesville Road, Suite 1200, Silver Spring, Maryland 20910. Officials maintaining this system of record: VHA facilities (address locations for VHA facilities are listed in VA Appendix 1 of the biennial publications of the VA system of records) and the My Health*e*Vet Chief Information Officer, 550 Foothill Drive, Suite 400, Salt Lake City, Utah 84113.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

38 U.S.C. 501.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system of records is to administer the My Health*e*Vet program, including registration and verification of Veteran identities or to register and authenticate those who have legal authority to participate in lieu of Veterans. It is also used to assign and verify administrators of the My Health*e*Vet portal, retrieve Veteran information to perform specific functions, and to allow access to specific information while providing other associated My Health*e*Vet electronic services in current and future program applications. The administrative information may also be used for My Health*e*Vet help desk and staff to troubleshoot issues, create administrative business reports for system owners and VA managers who are responsible for ensuring the My Health*e*Vet system is meeting performance expectations and is in compliance with applicable Federal laws and regulations. Administrative information may also be used for evaluation to support program improvement, including VA-approved research studies.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system encompass: (1) All individuals who successfully register for a My Health*e*Vet account and whose identity has been verified; (2) Representatives of the above individuals who have been provided Delegate access to My Health*e*Vet including, but not limited to, Power of Attorney (POA), legal guardian, or VA and non-VA health care providers; (3) VA health care providers and certain administrative staff (*i.e.*, Secure Messaging Administrators, My Health*e*Vet Coordinators, Role Administrators, VA Health Resource Center helpdesk staff etc.); and (4) VA Office of Information and Technology (OIT) staff and/or their approved contractors who may need to enter identifying, administrative information into the system to initiate, support and maintain electronic services for My Health*e*Vet participants.

CATEGORIES OF RECORDS IN THE SYSTEM:

These records include the following information for My Health*e*Vet users: name, birth sex, date of birth, social security number, ZIP code, email profile, secure messaging email address, user identification, internal control number, reference number, date of account creation, account status, match status, date and time of match, correlation status, Master Person Index (MPI) authentication status, date of death from MPI, login date and time, deactivation date and time, deactivation description and status, place and date of registration, user block access and comments, and delegate user identification associated with My Health*e*Vet accounts.

The My Health*e*Vet Staff (*i.e.,* Coordinators and Providers) records include the following identification information: name, work telephone number, work email, VA network identification, job title, office and department, login date and time, web analytics for the purpose of monitoring site usage, My Health*e*Vet portal access termination date, role and role level, and user DUZ (number).

RECORD SOURCE CATEGORIES:

Record sources include the individuals covered by this notice and an additional contributor, as listed below:

(1) All individuals who successfully register for a My Health*e*Vet account;

(2) Representatives of the above individuals who have been provided access to the private health space by the Veteran user, including but not limited to, POA, or VA, non-VA health care providers, and delegates;

(3) VA health care providers and administrative staff;

(4) VA OIT staff and/or their contractors and subcontractors, developers and testers who may need to enter information into the system to initiate, support and maintain My Health*e*Vet electronic services for My Health*e*Vet users;

(5) Veterans Health Information Systems and Technology Architecture (VistA), MPI and other VA Information Technology systems.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To the extent that records contained in the system include information protected by the HIPAA Privacy Rule and 38 U.S.C. 7332, that information cannot be disclosed under a routine use unless there is also specific statutory authority in both provisions.

1. *Contractors:* To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for VA, when reasonably necessary to accomplish an agency function related to the records.

2. *Law Enforcement:* To a Federal, state, local, territorial, tribal or foreign law enforcement authority or other appropriate entity charged with the responsibility of investigating or prosecuting a violation or potential violation of law, whether civil, criminal, or regulatory in nature, or charged with enforcing or implementing such law, provided that the disclosure is limited to information that, either alone or in conjunction with other information, indicates such a violation. The disclosure of the names and addresses of Veterans and their dependents from VA records under this routine use must also comply with the provisions of 38 U.S.C. 5701.

3. *National Archives and Records Administration (NARA):* To the NARA in records management inspections conducted under 44 U.S.C. 2904 and 2906, or other functions authorized by laws and policies governing NARA operations and VA records management responsibilities.

4. *Department of Justice (DoJ), Litigation, Administrative Proceeding:* To the DoJ, or in a proceeding before a court, adjudicative body, or other administrative body before which VA is authorized to appear, when:

(a) VA or any component thereof;

(b) Any VA employee in his or her official capacity;

(c) Any VA employee in his or her individual capacity where DoJ has agreed to represent the employee; or

(d) The United States, where VA determines that litigation is likely to affect the agency or any of its components is a party to such proceedings or has an interest in such proceedings, and VA determines that use of such records is relevant and necessary to the proceedings.

5. *Congress:* To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

6. *Federal Agencies, Fraud and Abuse:* To other Federal agencies to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. *Data Breach Response and Remediation, for VA:* To appropriate agencies, entities and persons when (a) VA suspects or has confirmed that there has been a breach of the system of records; (b) VA has determined that as a result of the suspected or confirmed breach there is a risk to individuals, VA (including its information systems, programs and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities or persons is reasonably necessary to assist in connection with VA efforts to respond to the suspected or confirmed breach or to prevent, minimize or remedy such harm.

8. *Researchers, for Research:* To epidemiological and other research facilities approved by the Under Secretary for Health for research purposes determined to be necessary and proper, provided that the names and addresses of Veterans and their dependents will not be disclosed unless those names and addresses are first provided to VA by the facilities making the request.

9. *Federal Agencies, for Research:* To a Federal agency for the purpose of conducting research and data analysis to

perform a statutory purpose of that Federal agency upon the prior written request of that agency.

10. *Data Breach Response and Remediation, for Another Federal Agency:* To another Federal agency or Federal entity, when VA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (a) responding to a suspected or confirmed breach or (b) preventing, minimizing or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

11. *Family Member:* VHA may disclose a My Health*e*Vet account user's information to a family member or friend after receiving the verbal permission of the My Health*e*Vet account user.

12. *Unions, for Representation:* To officials of labor organizations recognized under 5 U.S.C. Chapter 71 provided that the disclosure is limited to information identified in 5 U.S.C. 7114(b)(4) that is relevant and necessary to their duties of exclusive representation concerning personnel policies, practices and matters affecting working conditions.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained on paper and electronic media, including hard drive disks, which are backed up to tape at regular intervals.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by an individual's name, user identification, date of registration for My Health*e*Vet electronic services, ZIP code, electronic data interchange personal identifier, the VA assigned Integration Control Number (ICN), date of birth and/or Social Security Number, if provided.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system are retained and disposed of in accordance with the schedule approved by the Archivist of the United States, General Records Schedule 3.2 Item 031.

ADMINISTRATIVE, TECHNICAL AND PHYSICAL SAFEGUARDS:

1. Access to and use of the My Health*e*Vet Administrative Records are limited to those persons whose official duties require such access. VA has established security controls and procedures to ensure that access is appropriately limited. Information System Security Officers and system data stewards review and authorize data access requests. VA regulates data access with security software that authenticates My Health*e*Vet administrative users and requires individually unique codes and passwords. VA provides Information Security training to all staff and instructs staff on the responsibility each person has for safeguarding data confidentiality. VA regularly updates security standards and procedures that are applied to systems and individuals supporting this program.

2. Physical access to computer rooms housing the My Health*e*Vet Administrative Records is restricted to authorized staff and protected by a variety of security devices. The Federal Protective Service or other security personnel provide physical security for the buildings housing computer systems and data centers.

3. Data transmissions between operational systems and My Health*e*Vet Administrative Records maintained by this system of records are protected by telecommunications security software and hardware as prescribed by Federal security and privacy laws as well as VA standards and practices. This includes firewalls, encryption and other security measures necessary to safeguard data as it travels across the VA Wide Area Network.

4. Copies of back-up computer files are maintained at secure off-site locations.

5. VA Enterprise Cloud data storage conforms to security protocols as stipulated in VA Directives 6500 and 6517. Access control standards are stipulated in specific agreements with cloud vendors to restrict and monitor access.

RECORD ACCESS PROCEDURES:

Individuals seeking information on the existence and content of records in this system pertaining to them should contact the system manager in writing as indicated above or write or visit the VA facility location where they normally receive their care. A request for access to records must contain the requester's full name, address, telephone number, be signed by the requester, and describe the records sought in sufficient detail to enable VA personnel to locate them with a reasonable amount of effort.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest or amend records in this system pertaining to them should contact the system manager in writing as indicated above or inquire in person at the VA health care facility they normally receive their care. A request to contest or amend records must state clearly and concisely what record is being contested, the reasons for contesting it, and the proposed amendment to the record.

NOTIFICATION PROCEDURES:

Generalized notice is provided by the publication of this notice. For specific notice, see Record Access Procedure, above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

75 FR 70365 (November 17, 2010); 81 FR 58005 (August 24, 2016).

[FR Doc. 2024–03715 Filed 2–22–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: National Cemetery Administration (NCA), Department of Veterans Affairs (VA).

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the Privacy Act of 1974, notice is hereby given that the Department of Veterans Affairs (VA) is updating the system of records in its inventory entitled, ''Veterans and Dependents National Cemetery Gravesite Reservation Records-VA'' (41VA41). This system contains information related to Veterans and their dependents who have made gravesite reservations with the National Cemetery Administration (NCA). VA is updating the contact and location information. VA is republishing the system notice in its entirety.

DATES: Comments on this modified system of records must be received no later than 30 days after date of publication in the **Federal Register**. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by VA, the modified system of records will become effective a minimum of 30 days after date of publication in the **Federal Register**. If VA receives public comments, VA shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments may be submitted through *www.Regulations.gov* or mailed to VA Privacy Service, 810

Vermont Avenue NW, (005R1A), Washington, DC 20420. Comments should indicate that they are submitted in response to ''Veterans and Dependents National Cemetery Gravesite Reservation Records-VA'', (41VA41). Comments received will be available at *regulations.gov* for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Cindy Merritt, National Cemetery Administration (NCA) Privacy Officer (43E), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, *Cindy.Merritt@va.gov,* telephone (321) 200–7477 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The System Location and System Manager were incorrectly listed in the System Location and System Manager sections of the January 27, 2023, publication. Those sections are being modified.

The System Location is being amended to reflect ''Records are maintained at the National Cemetery Administration (41), VA Central Office, Washington DC 20420.''

The System Manager is being amended to reflect ''Lisa Pozzebon, Executive Director of Cemetery Operations (41A), National Cemetery Administration, VA Central Office, 810 Vermont Avenue NW, Washington, DC 20420, telephone (202) 461–0265, *ncaprivacy@va.gov.*''

Signing Authority

The Senior Agency Official for Privacy, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Kurt D. DelBene, Assistant Secretary for Information and Technology and Chief Information Officer, approved this document on January 18, 2024 for publication.

Dated: February 20, 2024.

Amy L. Rose,

Government Information Specialist, VA Privacy Service, Office of Compliance, Risk and Remediation, Office of Information and Technology, Department of Veterans Affairs.

SYSTEM NAME AND NUMBER:

Veterans and Dependents National Cemetery Gravesite Reservation Records-VA (41VA41).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the National Cemetery Administration (41), VA Central Office, Washington, DC 20420.

SYSTEM MANAGER(S):

Lisa Pozzebon, Executive Director of Cemetery Operations (41A), National Cemetery Administration, VA Central Office, 810 Vermont Avenue NW, Washington, DC 20420, telephone (202) 461–0265, *ncaprivacy@va.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

38 U.S.C. 2402.

PURPOSE(S) OF THE SYSTEM:

The purpose for which the records are used will include, but will not be limited to, the: provision of VA burial and memorial benefits; provision of information about VA burial and memorial benefits, including specific claims; determination of eligibility for burial in a VA national cemetery; disclosure of military service information upon request from VA-funded State and Tribal Veterans cemeteries; coordination of committal services and interment upon request of families, funeral homes, and others of eligible decedents at VA national cemeteries; investigation of potential bars to benefits for an otherwise eligible individual.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records contain information on: Veterans, dependents and family members of Veterans; Members of the Armed Forces (Service members), family members of Service members, Reservists and Retirees (Active Duty; Reserves; or National Guard); other VA customers (*e.g.,* attorneys, agents, Veterans Service Organizations, funeral directors, coroners, Missing in America Project (MIAP) volunteers, State and local governmental administrators; and VA authorized users permitted by VA to access VA IT systems (*e.g.,* VA employees, VA contractors, VA registered volunteers).

CATEGORIES OF RECORDS IN THE SYSTEM:

Records may include information submitted to VA by means of paper or online forms that respondents can mail or electronically transmit by fax or email for storage and retrieval in VA's secure filing and information technology systems. Records may contain information, such as demographics and personal identifiers (*e.g.,* names, mailing addresses, email addresses, phone numbers, social security numbers, VA claim numbers and military service numbers, date of birth, place of birth, date of death, gender, marital records, health records, health related information); socioeconomic characteristics (*e.g.,* education and training, military employment information); military service information (*e.g.,* dates of active duty, dates of active duty for training, military service numbers, branch of service including Reserves or National Guard service, locations of service for National Guard, dates of entry, enlistment, or discharge, type and character of discharge, rank, awards, decorations, and other military history and information).

Records may also include supporting documentation submitted to identify individuals submitting pre-need applications on behalf of claimants. Supporting documentation may include, but is not limited to the following items: VA Form 21–22 (Appointment of Veterans Service Organization as Claimant's Representative), VA Form 21–22a (Appointment of Individual as Claimant's Representative) for an Authorized Attorney, or Agent; proof of prior written authorization, such as a durable power of attorney, or an affidavit establishing a caregiver relationship to the claimant (spousal, parent, other relative); and documentation showing the individual as the court-appointed representative authorized to act on behalf of as the claimant.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by Veterans; Veteran beneficiaries; Veteran dependents; members of the Armed Forces of the United States, including Reserves and National Guard and their beneficiaries; other individuals (such as funeral home directors, coroners, medical examiners) submitting eligibility determinations on behalf of claimants; VA employees; other VA authorized users (*e.g.,* Department of Defense, State and Tribal government employees); other VA information technology systems and databases; VA claims records; and official military records information technology systems.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

1. *Congress:* To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

2. *Data Breach Response and Remediation for VA:* To appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that there has been a breach of the system of records; (2) VA has determined that as

a result of the suspected or confirmed breach there is a risk of harm to individuals, VA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with VA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

3. *Data Breach Response and Remediation for Another Federal Agency:* To another Federal agency or Federal entity, when VA 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.

4. *Law Enforcement:* To a Federal, state, local, territorial, tribal, or foreign law enforcement authority or other appropriate entity charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing such law, provided that the disclosure is limited to information that, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature. The disclosure of the names and addresses of veterans and their dependents from VA records under this routine use must also comply with the provisions of 38 U.S.C. 5701.

5. *DoJ, Litigation, Administrative Proceeding:* To the Department of Justice (DoJ), or in a proceeding before a court, adjudicative body, or other administrative body before which VA is authorized to appear, when:

(a) VA or any component thereof;

(b) Any VA employee in his or her official capacity;

(c) Any VA employee in his or her individual capacity where DoJ has agreed to represent the employee; or

(d) The United States, where VA determines that litigation is likely to affect the agency or any of its components is a party to such proceedings or has an interest in such proceedings, and VA determines that use of such records is relevant and necessary to the proceedings.

6. *Contractors:* To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for VA, when reasonably necessary to accomplish an agency function related to the records.

7. *OPM:* To the Office of Personnel Management (OPM) in connection with the application or effect of civil service laws, rules, regulations, or OPM guidelines in particular situations.

8. *EEOC:* To the Equal Employment Opportunity Commission (EEOC) in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or other functions of the Commission as authorized by law.

9. *FLRA:* To the Federal Labor Relations Authority (FLRA) in connection with the investigation and resolution of allegations of unfair labor practices, the resolution of exceptions to arbitration awards when a question of material fact is raised, matters before the Federal Service Impasses Panel, and the investigation of representation petitions and the conduct or supervision of representation elections.

10. *MSPB:* To the Merit Systems Protection Board (MSPB) in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions promulgated in 5 U.S.C. 1205 and 1206, or as authorized by law.

11. *NARA:* To the National Archives and Records Administration (NARA) in records management inspections conducted under 44 U.S.C. 2904 and 2906, or other functions authorized by laws and policies governing NARA operations and VA records management responsibilities.

12. *Funeral Homes, for Arrangements:* To funeral directors or representatives of funeral homes in order for them to make necessary arrangements prior to and in anticipation of a veteran's impending death.

13. *Federal Agencies, for Research:* To a Federal agency for the purpose of conducting research and data analysis to perform a statutory purpose of that Federal agency upon the written request of that agency.

14. *Federal Agencies, for Computer Matches:* To other federal agencies for the purpose of conducting computer matches to obtain information to determine or verify eligibility of veterans receiving VA benefits or medical care under title 38.

15. *Federal Agencies, Courts, Litigants, for Litigation or Administrative Proceedings:* To another federal agency, court, or party in litigation before a court or in an administrative proceeding conducted by a Federal agency, when the government is a party to the judicial or administrative proceeding.

16. *Former Employee or Contractor, Representative, for EEOC:* To a former VA employee or contractor, as well as the authorized representative of a current or former employee or contractor of VA, in connection with investigations by the Equal Employment Opportunity Commission pertaining to alleged or possible discrimination practices, examinations of Federal affirmative employment programs, or other functions of the Commission as authorized by law or regulation.

17. *Former Employee or Contractor, Representative, for MSPB, OSC:* To a former VA employee or contractor, as well as the authorized representative of a current or former employee or contractor of VA, in proceedings before the Merit Systems Protection Board or the Office of the Special Counsel in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions promulgated in 5 U.S.C. 1205 and 1206, or as otherwise authorized by law.

18. *Governmental Agencies, Health Organizations, for Claimants' Benefits:* VA To Federal, state, and local government agencies and national health organizations as reasonably necessary to assist in the development of programs that will be beneficial to claimants, to protect their rights under law, and assure that they are receiving all benefits to which they are entitled.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are maintained in paper and electronic formats in IT systems and on electronic storage media including magnetic tape, disk, microfilm, and laser optical media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name only; name and one or more numbers (military service or social security); name and one or more criteria (*e.g.,* date of birth or dates of service); VA claim number; or other VA or NCA assigned identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system are retained in accordance with records retention standards approved by the Archivist of the United States, National Cemetery Records, NC1–015–85–14. Permanent records are electronically stored and retained in VA IT systems.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Information in the system is protected from unauthorized access through administrative, physical, and technical safeguards. Access to the hard copy and computerized information is restricted to authorized VA employees and VA contractors by means of PIV card and PIN, and/or passwords. Information security officers and system data stewards review and authorize data access requests. VA regulates data access with security software that authenticates users and requires individually unique codes and passwords. VA requires information security training for all staff and instructs staff on the responsibility each person has for safeguarding data confidentiality. Hard copy records are maintained in offices or designated storage areas and locked after duty hours.

RECORD ACCESS PROCEDURES:

Individuals seeking information on the existence and content of records in this system pertaining to them should contact the system manager in writing as indicated above. A request for access to records must contain the requester's full name, address, telephone number, be signed by the requester, and describe the records sought in sufficient detail to enable VA personnel to locate them with a reasonable amount of effort.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest or amend records in this system pertaining to them should contact the system manager in writing as indicated above. A request to contest or amend records must state clearly and concisely what record is being contested, the reasons for contesting it, and the proposed amendment to the record.

NOTIFICATION PROCEDURES:

Generalized notice is provided by the publication of this notice. For specific notice, see Record Access Procedure, above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

88 FR 5435 (Jan. 27, 2023).

[FR Doc. 2024–03710 Filed 2–22–24; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 89 Friday,

No. 37 February 23, 2024

Part II

Department of Labor

Employment and Training Administration

Department of Education

20 CFR Part 677

34 CFR Parts 361 and 463

Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 677

[Docket No. ETA–2022–0006]

RIN 1205–AC01

DEPARTMENT OF EDUCATION

34 CFR Parts 361 and 463

RIN 1830–AA32

Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), Rehabilitation Services Administration (RSA), Department of Education; Employment and Training Administration (ETA), Department of Labor.

ACTION: Joint final rule.

SUMMARY: The Workforce Innovation and Opportunity Act (WIOA) establishes six primary indicators of performance and defines five of those performance indicators. With this final rule, the U.S. Departments of Labor and Education (Departments) define the sixth performance indicator—effectiveness in serving employers—as Retention with the Same Employer and require it be reported by one WIOA core program on behalf of all six WIOA core programs within each State. This final rule incorporates two changes from the notice of proposed rulemaking (NPRM): the final rule does not limit the type of wage information that must be used, thereby permitting the use of supplemental wage information in the definition of the effectiveness in serving employers performance indicator, and it specifies that the definition is measuring retention in unsubsidized employment.

DATES: This final rule is effective March 25, 2024.

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For persons with a hearing or speech disability who need assistance to use the telephone system, please dial 711 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

Acronyms and Abbreviations

AEFLA Adult Education and Family Literacy Act
AJC American Job Center
BLS Bureau of Labor Statistics
CFR Code of Federal Regulations
COVID–19 Coronavirus disease 2019
Departments U.S. Departments of Labor and Education
DOL U.S. Department of Labor
ED U.S. Department of Education
E.O. Executive Order
ETA Employment and Training Administration
FEIN Federal Employer Identification Number
FR Federal Register
GS General Schedule
ICR Information Collection Request
INA Indian and Native American
NAICS North American Industry Classification System
NPRM *or* proposed rule notice of proposed rulemaking
OCTAE Office of Career, Technical, and Adult Education
OEWS Occupational Employment and Wage Statistics
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
PIRL Participant Individual Record Layout
PRA Paperwork Reduction Act of 1995
Pub. L. Public Law
PY Program Year
QCEW Quarterly Census of Employment and Wages
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RIN Regulation Identifier Number
RSA Rehabilitation Services Administration
SBA U.S. Small Business Administration
SLDS Statewide Longitudinal Data System
Stat. United States Statutes at Large
SWIS State Wage Interchange System
TAC Technical Assistance Circular
TEGL Training and Employment Guidance Letter
UI Unemployment Insurance
UMRA Unfunded Mandates Reform Act
U.S.C. United States Code
VR Vocational Rehabilitation
WDB Workforce Development Board
WIOA Workforce Innovation and Opportunity Act

I. Background

In the final rule implementing WIOA,[1] the Departments indicated that they would initially implement the sixth indicator of performance—effectiveness in serving employers—in the form of a pilot program to test the feasibility and rigor of three proposed approaches.[2] The Departments assessed the pilot outcomes through Program Year (PY) 2021, and on September 14, 2022, published a NPRM to define in a single standardized way the effectiveness in serving employers performance indicator for the regulations implementing the jointly administered requirements governing WIOA's six core programs (87 FR 56318).[3]

[1] Public Law 113–128, 128 Stat. 1425 (2014).

[2] *Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Final Rule,* 81 FR 55792, 55845 (Aug. 19, 2016) (hereinafter ''Joint WIOA Final Rule'').

[3] *Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator; Joint Proposed Rule,* 87 FR 56318 (Sept.

A. Rulemaking Authority and Effectiveness in Serving Employers Performance Indicator for WIOA Core Programs

On July 22, 2014, President Barack Obama signed into law WIOA, which superseded titles I and II of the Workforce Investment Act of 1998 and amended the Wagner-Peyser Act and the Rehabilitation Act of 1973 (Rehabilitation Act). In WIOA sec. 503(f), Congress directed the Departments to issue regulations implementing statutory requirements to ensure that the public workforce system operates as a comprehensive, integrated, and streamlined system to provide pathways to prosperity and continuously improve the quality and performance of its services to job seekers and employers. The Secretaries of Labor and Education are also authorized to promulgate regulations governing the WIOA-authorized programs, the Wagner-Peyser Act programs, and the Vocational Rehabilitation (VR) program. Specifically, WIOA sec. 189(a) permits the Secretary of Labor to prescribe rules and regulations to carry out title I of WIOA. Similarly, section 12 of the Wagner-Peyser Act permits the Secretary of Labor to promulgate rules to administer the Wagner-Peyser Act programs. Section 410 of the General Education Provisions Act authorizes the Secretary of Education to promulgate regulations governing the programs the U.S. Department of Education (ED) administers, including title II of WIOA—the Adult Education and Family Literacy Act (AEFLA)—and the VR program. Section 414 of the Department of Education Organization Act also authorizes the Secretary of Education to prescribe rules and regulations necessary or appropriate to administer and manage the function of ED.

WIOA sec. 116 establishes the performance indicators [4] and performance reporting [5] requirements to assess [6] the six WIOA core programs' effectiveness in serving WIOA customers (*i.e.,* participants, other job seekers, and employers). The core programs are the adult, dislocated worker, and youth programs under title I of WIOA; the AEFLA program under title II of WIOA; programs authorized under the Wagner-Peyser Act as amended by WIOA title III; and the VR program authorized under title I of the Rehabilitation Act as amended by WIOA title IV.

In the 2016 Joint WIOA Final Rule, the Departments initiated a phased approach to defining the effectiveness in serving employers performance indicator. Currently, 20 CFR 677.155(a)(1)(vi) and 34 CFR 361.155(a)(1)(vi) and 463.155(a)(1)(vi) implement the effectiveness in serving employers performance indicator as described in WIOA sec. 116(b)(2)(A)(i)(VI), subject to WIOA sec. 116(b)(2)(A)(iv), which requires the Secretaries of Labor and Education to jointly develop and establish the performance indicator, after consultation with representatives of State and local governments, business and industry, and other interested parties. To that end, in developing the Joint WIOA Final Rule, the Departments consulted with stakeholders and considered public comments on three proposed approaches to defining the performance indicator, and in the Joint WIOA Final Rule, the Departments stated they would work to implement a pilot program, the details of which would be further delineated in joint Departmental guidance (81 FR 55792, 55846).

The pilot tested all three approaches described by the Departments in the Joint WIOA NPRM [7] and Joint WIOA Final Rule, with the intent of assessing each approach for its efficacy in measuring effectiveness in serving employers. The piloted approaches were Retention with the Same Employer, Repeat Business Customer, and Employer Penetration, which are further discussed in Section II.A below. The Departments included these approaches in the WIOA Joint Performance Information Collection Request (ICR) (Office of Management and Budget (OMB) Control Number 1205–0526) and required each State [8] to report on any two of the three approaches set out in the Joint WIOA Final Rule, as well as any additional measure a State established related to services to employers.[9] On behalf of the Departments, the Department of Labor (DOL) commissioned an examination of State experiences with the various approaches through a third-party contractor, and the Departments used the results of that study to help inform their analysis of which definition of the effectiveness in serving employers performance indicator to propose in the Joint WIOA Effectiveness in Serving Employers NPRM.

B. Public Comments Received on Proposed Rulemaking

Because of the narrow scope of the regulation, the Departments encouraged commenters to submit only comments regarding the definition of the effectiveness in serving employers performance indicator and the indicator's use in determining whether sanctions are necessary for failure to achieve adjusted levels of performance as set forth herein. The proposed amendments in the Joint WIOA Effectiveness in Serving Employers NPRM were on a limited number of provisions in the performance accountability regulations at 20 CFR part 677 and 34 CFR parts 361 and 463. Therefore, the Departments determined comments received on other provisions and aspects of the WIOA regulations that were not covered in this final rule, whether promulgated jointly by the Departments or independently by each agency, to be outside the scope of this rulemaking and, thus, did not consider those comments when developing this final rule.

14, 2022) (hereinafter ''Joint WIOA Effectiveness in Serving Employers NPRM'').

[4] WIOA sec. 116(b)(2)(A) states the primary indicators of performance: (1) the percentage of participants who are employed during the second quarter after exit from the program; (2) the percentage of participants who are employed during the fourth quarter after exit from the program; (3) the median earnings of participants who are employed during the second quarter after exit from the program; (4) the percentage of participants who obtain a recognized postsecondary credential during the program or within 1 year of exit from the program; (5) the percentage of participants who achieve measurable skill gains during a program year; and (6) ''indicators of effectiveness in serving employers.'' This last indicator is the subject of this final rule. Definitions of the other five performance indicators were included in the Joint WIOA Final Rule (*see* 20 CFR 677.155, 34 CFR 361.155, 34 CFR 463.155).

[5] WIOA sec. 116(d)(2)(A) requires States to include in their performance report information specifying levels of performance achieved with respect to the primary indicators of performance referenced in footnote 4 *supra* and the State adjusted levels of performance for such indicators for each program.

[6] WIOA sec. 116(b)(3)(A) establishes the procedures at the State, local, and Federal levels to assess levels of performance by each program, and the State as a whole, for each performance indicator.

[7] *Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Notice of Proposed Rulemaking,* 80 FR 20574 (Apr. 16, 2015) (hereinafter ''Joint WIOA NPRM'').

[8] Throughout this final rule, the Departments use the term ''State'' to mean those geographical areas covered by the definitions of ''State'' and ''outlying area,'' in WIOA secs. 3(56) and 3(45), respectively. Therefore, for purposes of this final rule, ''State'' includes the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, and for certain programs, the Republic of Palau.

[9] Governors had the option to establish and report on a third State-specific approach for measuring effectiveness in serving employers, in addition to two of the three Departmental pilot approaches selected by the State.

The Joint WIOA Effectiveness in Serving Employers NPRM invited written comments from the public concerning this rulemaking through November 14, 2022. No commenters requested an extension of the comment period. The comments received may be viewed by entering docket number ETA–2022–0006 at *https://www.regulations.gov.*

The Departments received 47 comments in the docket for this rulemaking, and the docket for the *Workforce Innovation and Opportunity Act Title I Non-Core Programs Effectiveness in Serving Employers Performance Indicator* NPRM (ETA–2022–0005, RIN 1205–AC08) published concurrently with the Joint WIOA Effectiveness in Serving Employers NPRM received 11 comments related to the Joint WIOA Effectiveness in Serving Employers NPRM. Of those 58 comments, 43 were unique; 14 were form letter copies, and 1 was not germane. Public sector commenters included State and local government agencies, State and local workforce development boards, and one-stop operators. Nonprofit sector commenters included advocacy groups, professional associations, and training providers. Of the unique comments, about one-third came from State workforce agencies and State VR agencies. The Departments also received comments from private citizens.

This section of the final rule provides a general overview of the comments received. Section II (Section-by-Section Analysis of this Final Rule), which follows this section, describes the comments in more detail and provides the Departments' responses to them.

A commenter expressed general support for the proposed rule because, in their view, it would benefit the workforce and promote cost savings for employers in the long term. Many commenters addressed the pilot program in a myriad of ways, including discussing the advantages and disadvantages of the piloted approaches for measuring effectiveness in serving employers, making alternative recommendations, requesting flexibilities, and seeking an extension of certain aspects of the pilot.

The Departments' proposal to use Retention with the Same Employer as the indicator for measuring effectiveness in serving employers received mixed reviews, with a few agreeing that it is the preferred approach while others expressed concerns that it would not measure the right things.

A few commenters asked the Departments for clarification about how the proposed indicator will be calculated and implemented, with some describing potential issues in data collection or recommending different approaches to calculating the indicator. Other commenters recommended that the Departments allow the use of supplemental wage information in the definition of effectiveness in serving employers. Responding to a request for comment in the proposed rule, some commenters offered recommendations about ways the Departments could mitigate potential unintended consequences and downsides of the Retention with the Same Employer measure.

Several commenters provided feedback on the Departments' proposal that the overall State indicator score for effectiveness in serving employers be a shared outcome reported by one core program on behalf of all six core programs in the State, with some opposing that approach and others supporting it. A few commenters focused on concerns about the administration and implementation of a shared outcome, requesting clarification about local level implementation of the effectiveness in serving employers performance indicator, and provided recommendations to the Departments with regard to certain aspects of implementation. A few commenters provided input on the administrative burden proposed in the Regulatory Impact Analysis (RIA) of the Joint WIOA Effectiveness in Serving Employers NPRM.

Additionally, a few commenters provided feedback on topics not within the scope of the rulemaking, including earnings data collected by workforce development boards and types of measurable skill gains under WIOA. The Departments appreciate the thoughtfulness of these comments and will address those germane to this final rule in the section-by-section analysis below. However, as explained in the Joint WIOA Effectiveness in Serving Employers NPRM and above, the scope of this rulemaking is limited to amendments to the definition of the effectiveness in serving employers performance indicator and the indicator's use in determining whether sanctions are necessary for failure to achieve adjusted levels of performance as set forth in the proposed rule. Because these comments pertain to other provisions and aspects of the WIOA regulations, they are considered outside the scope of this rulemaking and are not addressed in the section-by-section analysis below.

C. Summary of Changes From NPRM to Final Rule of the Effectiveness in Serving Employers Performance Indicator for WIOA Core Programs and Local Level Implementation for DOL-Administered Core Programs

The final rule implements Retention with the Same Employer as the definition for the effectiveness in serving employers indicator, as proposed in the NPRM, with two changes. First, this final rule removes the requirement that wage records be used to document a participant's employment status for purposes of the effectiveness in serving employers performance indicator, thereby allowing for the use of supplemental wage information as States are permitted to collect and report for purposes of the three employment performance indicators defined by WIOA sec. 116. Second, the final rule definition for effectiveness in serving employers now uses the term ''unsubsidized employment'' to better align with WIOA statutory language used in WIOA sec. 116 with respect to other performance indicators, specifically referring to unsubsidized employment in the second and fourth quarters after exit, which are key inputs to the definition of Retention with the Same Employer.

Regarding commenters' concerns and requests for clarification about local level implementation, as detailed below, the Departments have determined that WIOA sec. 116(c)(1)(A)(i) requires that all of the primary indicators of performance, including the effectiveness in serving employers performance indicator, must be applied at the local level for the WIOA title I programs (Adult, Dislocated Worker, and Youth).[10] Therefore, States must apply the effectiveness in serving employers performance indicator at the local level. The Departments believe this indicator should be assessed at each level for the WIOA title I programs in the same manner as the other primary indicators of performance are assessed.

II. Section-by-Section Analysis of This Final Rule

In the discussion of the regulatory text changes below, the heading references the DOL CFR part and section number. However, ED has identical provisions at 34 CFR part 361, subpart E (under its State VR program regulations) and at 34 CFR part 463, subpart I (under its AEFLA regulations). For purposes of

[10] Pursuant to WIOA sec. 116(c)(1)(A)(i), the requirement to implement the primary indicators of performance at the local level do not apply to the other core programs, specifically the AEFLA, Wagner-Peyser Act, and VR programs.

brevity, the discussion of regulatory text changes below appears only once—in conjunction with the DOL section number—but is applicable to all three regulatory sections and constitutes the Departments' collective explanation of the final rule. These changes to the joint performance regulations will appear in each of the CFR parts identified in this paragraph when the regulations are published in the CFR.

Section II of the final rule provides the Departments' responses to comments and explains the two changes in the language of the final rule from the proposed rulemaking. Section II.A provides greater background detail on the pilot for effectiveness in serving employers, comments regarding the pilot, commenters' suggestions for other approaches to measuring effectiveness in serving employers that were not part of the pilot, and the Departments' rationale for choosing Retention with the Same Employer as the definition of the effectiveness in serving employer performance indicator. Section II.B discusses comments received on the proposal to modify § 677.155 to adopt Retention with the Same Employer as the definition for the effectiveness in serving employers performance indicator and explains the Departments' decision to finalize the measure with two changes from the NPRM, as suggested by multiple commenters. Section II.C discusses comments on proposed modifications to § 677.190 where the effectiveness in serving employers performance indicator is incorporated into adjusted levels of performance.

A. Departments' Rationale for Retention With the Same Employer as the Definition of the Effectiveness in Serving Employers Performance Indicator

This section provides background detail on the pilot for effectiveness in serving employers, comments regarding the pilot, commenters' suggestions for other approaches to measuring effectiveness in serving employers that were not part of the pilot, and the Departments' rationale for choosing Retention with the Same Employer as the definition of the effectiveness in serving employer performance indicator.

In developing the Joint WIOA Effectiveness in Serving Employers NPRM, the Departments reviewed annual report data [11] for Program Year (PY) 2017 through PY 2020 [12] for each of the three approaches for measuring effectiveness in serving employers piloted as described in the 2016 Joint WIOA Final Rule, with a focus on using information that would provide an accurate picture of how well the public workforce system serves employers while minimizing employer burden. Specifically, States, under guidance from the Departments (hereinafter "joint guidance"), piloted the following definitions for the effectiveness in serving employers performance indicator: [13]

- *Retention with the Same Employer:* Percentage of participants with wage records who exit from WIOA core programs and were employed by the same employer in the second and fourth quarters after exit.
- *Repeat Business Customer:* Percentage of employers who have used WIOA core program services more than once during the last three reporting periods.
- *Employer Penetration:* Percentage of employers using WIOA core program services out of all employers in the State.

During the pilot,[14] the Departments determined that the effectiveness in serving employers performance indicator should be a shared outcome across all six core programs within each State (*i.e.,* meaning that one program would report on behalf of all six core programs in the State), rather than reported separately by each of the six core programs.

For PY 2021—the most recent data available at the time the Departments made their decisions for this final rulemaking—the piloted approaches for the effectiveness in serving employers performance indicator provided the following performance results: [15]

- *Retention with the Same Employer PY 2021 Rate:* 56 percent (35 States reported effectiveness in serving employers performance using this definition);
- *Repeat Business Customer PY 2021 Rate:* 35 percent (47 States reported using this definition); and

[11] The indicator is reported on an annual basis; therefore, the reporting period is the program year from July 1 through June 30.

[12] ETA, "Workforce Performance Results," *https://www.dol.gov/agencies/eta/performance/results* (last visited Oct. 23, 2021); ETA, "PY 2020 WIOA National Performance Summary," Feb. 28, 2022, *https://www.dol.gov/sites/dolgov/files/ETA/Performance/pdfs/PY%202020%20WIOA%20National%20Performance%20Summary.pdf* (last visited July 31, 2023). PY 2020 data were the most current information available at the time of the Joint WIOA Effectiveness in Serving Employers NPRM in September 2022 and, thus, were included in the Departments' rationale for the Joint WIOA Effectiveness in Serving Employers NPRM. At the time of the development of this final rule, PY 2021 data are available and are discussed below. The PY 2021 data support the Departments' rationale in this final rulemaking. ETA, "PY 2021 WIOA National Performance Summary," Feb. 28, 2022, *https://www.dol.gov/sites/dolgov/files/ETA/Performance/pdfs/PY%202021%20WIOA%20National%20Performance%20Summary.pdf* (last visited July 31, 2023).

[13] The Departments issued joint guidance on December 19, 2016, "Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs" (Training and Employment Guidance Letter [TEGL] No. 10–16, OCTAE Program Memorandum 17–2, and RSA Technical Assistance Circular [TAC] 17–01), that described the pilot indicators for effectiveness in serving employers. The Departments updated this joint guidance in August 2017, with the issuance of a change to the guidance, and required States to submit the first report of annual results using data collected during PY 2017 (July 1, 2017–June 30, 2018), meaning that States did not report any data for the pilot study for purposes of PY 2016. However, due to the lag in Quarterly Census of Employment and Wages (QCEW) data availability for the Retention with the Same Employer and Repeat Business Customer approaches, the initial results for the effectiveness in serving employers performance indicator pilot were not available for reporting in the WIOA annual report due October 16, 2017. As a result, States reported their initial data in PY 2017. ETA, TEGL No. 10–16, Change 1, "Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs," Aug. 23, 2017, page 26, *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3255;* ED, OCTAE Program Memorandum 17–2, "Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs," Aug. 23, 2017, page 23, *https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-17-2.pdf;* ED, RSA–TAC–17–01, "Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III, and Title IV Core Programs," Aug. 17, 2017, page 23, *https://rsa.ed.gov/sites/default/files/subregulatory/tac-17-01.pdf.*

[14] The pilot study began in PY 2016 and lasted through PY 2021. However, States must continue to report on the piloted measures for the effectiveness in serving employers performance indicator until these final regulations take effect.

[15] The most current public workforce system performance accountability data can be found on ETA's website. ETA, "Workforce Performance Results," *https://www.dol.gov/agencies/eta/performance/results* (last visited Oct. 13, 2023). *See* ETA, "PY 2021 WIOA National Performance Summary," Dec. 22, 2022, page 9, *https://www.dol.gov/sites/dolgov/files/ETA/Performance/pdfs/PY%202021%20WIOA%20National%20Performance%20Summary.pdf.*

- *Employer Penetration PY 2021 Rate:* 8 percent (48 States reported using this definition).

Exhibit 1 summarizes this information and provides further detail about the calculation methodology used to determine the outcome rate for the three approaches.

EXHIBIT 1—PILOT DEFINITION OUTCOMES FOR PROGRAM YEAR 2021

Pilot definition	Performance outcome national rate (%)	Pilot definition calculation methodology *	Number of states reporting outcomes for definition
Retention with the Same Employer	56	The number of participants with wage records who exit during the reporting period and were employed by the same employer during the second quarter after exit and the fourth quarter after exit *DIVIDED* by the number of participants with wage records who exit and were employed during the second quarter after exit.	35
Repeat Business Customer	35	The total number of establishments, as defined by the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW) program, served during the current reporting period (*i.e.,* one program year) and that during the prior three reporting periods have used core program services more than once *DIVIDED* by the number of establishments, as defined by BLS QCEW, served during the current reporting period.	47
Employer Penetration	8	The total number of establishments, as defined by the BLS QCEW program, that received a service or, if it is an ongoing activity, are continuing to receive a service or other assistance during the reporting period *DIVIDED* by the total number of establishments, as defined by BLS QCEW. This measure is a unique count of employers using WIOA core programs. If an establishment receives, or continues to receive, more than one service during the reporting period (*i.e.,* during the program year), that establishment should be counted only once in this calculation.	48

* As described in the joint guidance issued by the Departments.

Throughout the pilot period, only one State reported on a State-specific approach to the effectiveness in serving employers performance indicator.[16] However, this State-specific approach was only applied to Wagner-Peyser Act programs (as amended by WIOA title III), not all six core programs.[17]

The Departments assessed the pilot through a DOL contract that resulted in a final report titled *Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act.*[18] (hereinafter referred to as the Final Pilot Study Report). Specifically, the Final Pilot Study Report assessed each approach to defining the effectiveness in serving employers performance indicator for validity, reliability, practicality, and unintended consequences.[19] Though the Final Pilot Study Report did not definitively recommend one approach, in assessing the study's findings for each of the three approaches of the effectiveness in serving employers performance indicator and considering the subject matter expertise gained through the Departments' administration of WIOA, the Departments concluded, as explained in the Joint WIOA Effectiveness in Serving Employers NPRM, that Retention with the Same Employer provides a valid and reliable approach to measuring the indicator, while placing the least amount of burden on States to implement it.

The Departments received several comments regarding the pilot, findings from the Final Pilot Study Report, and alternatives to measuring the effectiveness in serving employers performance indicator. These comments and the Departments' responses are discussed below.

Suggestions To Use Multiple Performance Indicators To Measure Effectiveness in Serving Employers

Comments: One commenter asserted that the Retention with the Same Employer measure only provides a partial perspective for how the system is serving employers and urged the Departments to consider the other performance measures piloted over the previous period, as well as additional information, to more comprehensively demonstrate the impact of services rendered to employers.

A commenter stated that the Final Pilot Study Report noted the benefit of using multiple measures to understand the WIOA system's effectiveness in serving employers. According to the commenter, the Final Pilot Study Report asserted that because the system uses multiple measures to understand the system's effectiveness in serving workers, it would make sense to use

[16] *See* Shayne Spaulding, Burt Barnow, Amanda Briggs, John Trutko, Alex Trutko, and Ian Hecker, ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, Chapter 5 (Alternative Measures and Data Sources), *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf* (hereinafter ''Final Pilot Study Report'').

[17] One State reported a State-specific approach to measuring effectiveness in serving employers, which the State called ''Active Job Orders with Referrals.'' This measure is explained in the State's PY 2019 WIOA Annual Statewide Performance Report Narrative, which can be accessed at *https://www.dol.gov/sites/dolgov/files/eta/performance/pdfs/PY2019/PA_PY19%20WIOA%20Annual%20Report%20Narrative.pdf* (last visited Jan. 27, 2022).

[18] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf.*

[19] *See id.* at 3–6 (stating that validity ''is used to assess whether you are measuring what you intend to measure''; that reliability ''refers to the ability to maintain consistency in data collection over time and across organizations collecting the data''; that practicality means that the measure ''must be relatively uncomplicated and simple to administer to avoid threats to reliability and validity'' and ''must be practical to use in administrating programs''; and that unintended consequences are ''negative consequences or behaviors that result, like the displacement of goals or conflict with other goals'').

multiple measures to understand the system's effectiveness in serving employers. The commenter suggested additional data collection methods to better understand the system's effectiveness in meeting employers' needs, including periodic, random, and anonymous satisfaction surveys for both workers and employers, WIOA system user satisfaction surveys, and focus groups with both workers and employers.

Departments' Response: As discussed in more detail in the introduction to Section II.A. above, the Final Pilot Study Report considered each approach to defining the effectiveness in serving employers performance indicator for validity, reliability, practicality, and unintended consequences. Based upon a review of the pilot results, the Departments determined that a single measure best limits the implementation burden to States. Moreover, while the Final Pilot Study Report may have noted advantages for using multiple measures to understand the system's effectiveness in serving employers, the Departments note, in response to the commenter, that the Final Pilot Study Report did not definitively conclude multiple measures were necessary to assess effectiveness in serving employers. Therefore, the Departments decline to amend this final rule to use multiple approaches for defining the effectiveness in serving employers indicator of performance.

Over the pilot period and through stakeholder engagements, the Departments heard from employers about the burden of surveys and the preference for a measure that did not rely on survey responses. Because a survey would be too burdensome, the Departments decline to accept the suggestion to use surveys to assess effectiveness in serving employers.

Alternative Approaches to Defining Effectiveness in Serving Employers Performance Indicator

Comments: The Departments received comments in support of alternative approaches to measuring effectiveness in serving employers. These comments included preferences for other piloted approaches (Employer Penetration and Repeat Business Customer) or variations thereof, as well as a variety of suggestions for application of those various metrics.

Other commenters voiced support for different approaches, such as tracking work-based learning services, using employer satisfaction surveys, and tracking a suite of data points: number of job orders posted and number of candidates referred per posting; use of incumbent worker training (by percentage of WIOA funds used and number of businesses served); number, array, and availability of business services offered by a workforce development board or American Job Center (AJC); funding passed from workforce development boards or AJCs through to local businesses; or number of businesses engaged with Registered Apprenticeship opportunities through workforce development boards or AJCs.

A different commenter suggested Employer Penetration could be improved by measuring the increase in businesses served rather than the actual penetration rate, using a recording period longer than a quarter, and using penetration figures determined by 3-digit North American Industry Classification System (NAICS) sectors.

Departments' Response: The Departments acknowledge the various benefits of the different proposed pilot approaches for measuring the effectiveness in serving employers indicator. The Departments also appreciate the suggestions of different additional approaches to be considered; however, these metrics do not apply well to all six WIOA core programs due to differences in program design. For example, among the WIOA core programs, only Wagner-Peyser Act programs provide job order services to employers. Therefore, a job order measure would not be applicable to all six WIOA core programs. Moreover, as noted in the introduction to Section II.A. above, throughout the 6-year pilot period, States could submit a State-specific approach for measuring effectiveness in serving employers. Only one State did so throughout the pilot period, which suggests that States did not identify any viable additional approaches. The Departments do not believe it is prudent to impose untested, unpiloted approaches, through this final rule, particularly given the benefits and use of the Retention with the Same Employer metric.

The suggested alternative approaches mentioned in the comments, such as Employer Penetration and Repeat Business Customer, were ultimately not selected as indicators of employer satisfaction due to (1) the nature of a very low employer penetration rate compared to all businesses within a State, leading to difficulties in improving the measure over time; and (2) the fact that a satisfied business may not need to partner with the State workforce system again. Additionally, these alternative measures are not based on existing standardized reporting mechanisms, would be impractical to apply to all grantees across core programs, and would not fully track satisfied employers based on measuring only outputs of services provided.

In the Joint WIOA Effectiveness in Serving Employers NPRM, the Departments explained their rationale for proposing the Retention with the Same Employer measure and not proposing either Employer Penetration or Repeat Business Customer as the definition for the effectiveness in serving employers performance indicator. Specifically, the Departments noted in the Joint WIOA Effectiveness in Serving Employers NPRM that Employer Penetration, which reports the percentage of employers using services out of all employers in the State, would have required counts of services provided to employers requiring States and local areas to report unique counts of employer establishments receiving services through the WIOA core programs. While the Employer Penetration definition would have the benefit of capturing the extent to which employers within a State are engaged with WIOA core programs and would provide those programs an incentive to work with additional employers, it would require a more data-intensive analysis than the Retention with the Same Employer approach. Additionally, in the Final Pilot Study Report, the Department found significant weaknesses in this pilot approach including: (1) emphasis on quantity rather than quality or intensity of the employer service provided; (2) reliability issues associated with data entry and the process to count unique establishments; (3) measurement of program output rather than outcome; (4) potential for creation of perverse incentives to prioritize program breadth rather than depth in services; and (5) lack of sensitivity to industry sectors targeted by State and local workforce agencies.

The Repeat Business Customer definition, which reports the percentage of employers receiving services in a year who also received services within the previous 3 years requires a more data-intensive analysis than the Retention with the Same Employer. In the Final Pilot Study Report, the Department also found significant weaknesses in this pilot approach including that it: (1) may provide a disincentive to reach out to new employers; (2) is subject to variation in industry and sector economic conditions; and (3) may require a statistical adjustment model to mitigate the weaknesses and improve implementation and interpretation.

As we summarized in the introduction to Section II.A., comments received in response to the NPRM, the findings of an independent study conducted on the pilot, and the data reported by States in their annual reports, all considered, have not persuaded the Departments to change course and adopt either of the other alternative definitions for the effectiveness in serving employers performance indicator. Instead, the Departments adopt through this final rule the Retention with the Same Employer measure as the definition for the effectiveness in serving employers performance indicator as proposed. *See* 87 FR 56318, 56323.

Regarding employer satisfaction surveys, the Departments note that employer satisfaction surveys introduce a higher level of burden and potentially inconsistent results because of the subjective nature of such surveys and the respondents completing them compared to the quantifiable and verifiable employment data collected and reported for the Retention with the Same Employer metric. Furthermore, during previous webinars and town halls with State workforce agencies, members of the employer community, and other stakeholders that the Departments held in September and October 2014 to inform the development of the Joint WIOA NPRM (80 FR 20609) and the Joint WIOA Final Rule (81 FR 55792, 55848),[20] employers specifically commented that they consider satisfaction surveys burdensome and recommended they not be used in this indicator. At that time, several employers also provided input that reducing employee turnover was paramount for their success.

The Departments appreciate the commenters' ideas for additional data points to be collected and encourage States to do so where it aids in guiding service delivery policies. Specifically, commenters recommended including collecting and reporting data on: the number of job orders posted and number of candidates referred per posting; use of incumbent worker training (by percentage of WIOA funds used and number of businesses served); number, array, and availability of business services offered by a workforce development board or AJC; funding passed from workforce development boards or AJCs through to local businesses; or number of businesses engaged with Registered Apprenticeship opportunities through workforce development boards or AJCs. The Departments decline to use these additional data points in defining the effectiveness in serving employers indicator because they are not applicable to all of the programs, and in cases where the metric is a count of services they would merely measure the quantity of services provided to employers rather than the effectiveness of those services. The Departments believe these suggestions would measure outputs compared to an outcome. In most cases, an output like the number of services provided may not correlate to the ultimate goal, placing and retaining quality employees in this case, and therefore is not ideal for measuring effectiveness in serving employers.

After careful consideration of public comment opportunities, ongoing State stakeholder engagement efforts,[21] review of pilot data and narrative input submitted since 2017 through required annual performance reports,[22] and a third-party study, the Departments concluded that the Retention with the Same Employer approach provided a valid and reliable approach to measuring the indicator while placing the least amount of burden on States to implement.

Recommendation To Extend Pilot for an Additional 2 Years and Allow More Time for Testing Other Measures

Comments: Numerous commenters recommended that the pilot be extended for an additional 2 years to allow for the development of new and innovative indicators and urged that States be encouraged to propose such indicators. Several commenters remarked on the interruptions the Coronavirus disease 2019 (COVID–19) pandemic caused to the labor market and the resulting difficulties with the collection of representative and useful data during the pilot.

A commenter recommended that the Departments allow additional time for States to identify and test different ways of measuring participant career progression instead of only employee retention.

Departments' Response: After reviewing the outcomes of the Final Pilot Study Report and the information learned in the study, the Departments determined the 6-year pilot period was sufficient to gather relevant experience with the possible approaches. There is no evidence to suggest, and the commenters did not provide any such evidence, that extending the pilot period for potential approaches to measure effectiveness in serving employers would result in substantially new information. WIOA reporting did not cease during the COVID–19 pandemic, and States still submitted pilot data. While there was an impact on some service delivery, particularly with respect to the approaches used for delivering those services, there was no change in the Departments' expectations for States to continue to provide services to participants and employers. Therefore, the Departments believe that the data from the program years affected by the pandemic are representative and useful to determine the definition of the effectiveness in serving employers performance indicator, and these same years will provide useful data for purposes of the statistical adjustment model when the Departments determine there are sufficient data available to produce reliable results to assess for performance of this indicator. Furthermore, there has been ample time to test and provide suggestions for other potential approaches to measure this indicator during the pilot period. The Departments do not agree that extending the pilot period for identifying new potential measures for the effectiveness in serving employers indicator at this time would likely result in substantially new information, particularly given that only one State developed its own measure during the pilot period that lasted 6 program years, which was ample time for States to suggest an alternative metric (see the introduction to Section II.A. for complete discussion). Therefore, the Departments decline to extend the pilot phase and, instead, have decided to define the indicator as described in this final rule.

[20] The Departments conducted an extensive consultation process regarding methods for measuring the effectiveness in serving employers performance indicator. Prior to publication of the Joint WIOA NPRM, the Departments engaged with numerous stakeholders through a series of town hall meetings with State workforce agencies, State and local workforce development boards, and members of the employer community in September and October 2014, in various cities across the country (80 FR 20609). A great deal of discussion regarding proposed methods for measuring this indicator took place during the consultation process. The outcome of these discussions was the three options listed in the NPRM. Understanding the importance of receiving extensive feedback on this issue, the Departments requested further input via the NPRM and the WIOA Joint Performance ICR (81 FR 55848).

[21] ETA's WorkforceGPS technical assistance website provides access to materials from trainings and stakeholder engagements, including (1) the Effectiveness in Serving Employers Resource Page accessible at *https://performancereporting.workforcegps.org/resources/2018/01/29/21/13/Effectiveness-in-Serving-Employers-Resource-Page,* (2) the 2019 Performance Accountability Training accessible at *https://performancereporting.workforcegps.org/resources/2019/10/03/20/25/WIOA_2019_Performance_Accountability_Training,* and (3) the January 2020 Peer Learning Group event accessible at *https://www.workforcegps.org/events/2020/01/13/17/40/WIOA-Performance-Peer-Learning-Group-Effectiveness-in-Serving-Employers.*

[22] Annual performance reports can be found on ETA's website. ETA, ''Workforce Performance Results,'' *https://www.dol.gov/agencies/eta/performance/results* (last visited Apr. 26, 2023).

The Departments believe this definition, as adopted in this final rule, will promote accountability in serving employers and ultimately benefit workforce system participants.

After careful consideration of the information gained from the States' reports on using the three piloted approaches, the Final Pilot Study Report's findings, and the comments on the pilot and other potential approaches to defining effectiveness in serving employers, the Departments are finalizing the proposed definition of the effectiveness in serving employers performance indicator as Retention with the Same Employer on a statewide level. As discussed in further detail below in Section II.B, this final rule implements the proposed changes to 20 CFR 677.155(a)(1)(vi) and (c)(6), with one modification.

WIOA sec. 116(b)(2)(A)(i)(VI) applies the same effectiveness in serving employers performance indicator to four non-core programs DOL administers under WIOA title I.[23] For consistency and alignment across WIOA programs, in addition to all the reasons discussed above, DOL is incorporating this same definition for the effectiveness in serving employers performance indicator into regulations in a separate, but related, rulemaking, *DOL-Only Performance Accountability Final Rule* (RIN 1205–AC08), published concurrently with this final rule elsewhere in the **Federal Register**.

B. Retention With the Same Employer for the Effectiveness in Serving Employers Performance Indicator in § 677.155

§ 677.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?

Section 677.155 sets forth the primary indicators of performance that the Departments use to evaluate the performance of WIOA's six core programs, as required by WIOA sec. 116(b)(2)(A)(i). These primary performance indicators apply to the six WIOA core programs (*i.e.,* adult, dislocated worker, and youth programs, the AEFLA program, Wagner-Peyser Act programs, and the VR program). These primary performance indicators create a common language shared across the programs' performance measures, support system alignment, enhance programmatic decision-making, and help participants make informed decisions related to training, all of which are consistent with the purposes of WIOA as stated in WIOA sec. 2. Paragraphs 677.155(a)(1)(vi) and (c)(6) implement the sixth statutory performance indicator as described in WIOA sec. 116(b)(2)(A)(i)(VI), subject to WIOA sec. 116(b)(2)(A)(iv), which requires the Departments to develop the indicator after consultation with the stakeholders listed at WIOA sec. 116(b)(4)(B) and discussed above. This performance indicator measures program effectiveness in serving employers.

In this final rulemaking, for the reasons discussed in the NPRM and in Section II.A. above, the Departments have decided to revise § 677.155(a)(1)(vi) to establish Retention with the Same Employer as the standard definition for measuring effectiveness in serving employers, the sixth performance indicator for all WIOA core programs. The final rulemaking removes the general title of ''effectiveness in serving employers''; [24] defines Retention with the Same Employer as the percentage of participants who exited the program in unsubsidized employment and were employed by the same employer in the second and fourth quarters after exiting the program; clarifies that, for the six WIOA core programs, the indicator is a statewide indicator that is reported by one core program on behalf of all six core programs in the State; and references guidance to signal to States that the Departments will provide additional details and explanations for reporting on the effectiveness in serving employers performance indicator in joint guidance. The final rulemaking also updates § 677.155(c)(6) to define effectiveness in serving employers as Retention with the Same Employer for the WIOA title I youth program in a manner that mirrors the definition for the other WIOA core programs in paragraph (a)(1)(vi) as just described.

For the reasons discussed below, in response to multiple comments received to allow for the use of supplemental wage information in the definition of measuring effectiveness in serving employers, this final rulemaking removes references to wage records in § 677.155 that had been proposed in the Joint WIOA Effectiveness in Serving Employers NPRM. This change clarifies that the sources of wage data are not limited, meaning they could be wage records or supplemental wage information. As noted above, the Departments also want to make clear the final rule uses the term ''unsubsidized employment'' to align the effectiveness in serving employers performance indicator to WIOA statutory language, specifically referring to unsubsidized employment in the second and fourth quarters after exit, which are key inputs to this indicator's definition of Retention with the Same Employer.

Support for Retention With the Same Employer

Comments: Several commenters were generally supportive of the proposal to use Retention with the Same Employer as the definition for effectiveness in serving employers. Supportive comments include assertions that when an employee is performing their duties competently, their employer generally tries to retain the employee. Similarly, other commenters stated that Retention with the Same Employer demonstrates the effectiveness with which employee skills and training have been matched to employer needs. Another commenter argued that Retention with the Same Employer demonstrates a continued relationship between the employer and participants, as well as the success of WIOA customers, while the other two piloted approaches are based only on employer data and fail to capture job match effectiveness. Another commenter expressed support for the proposal because, in their view, it would benefit the workforce and promote cost savings for employers in the long term.

Several commenters agreed with the Departments' conclusion that Retention with the Same Employer would be the least burdensome definition of the three piloted measures. Similarly, another commenter agreed that this definition would be the least burdensome approach because States already collect wage records for other WIOA-related reporting and because States would be able to coordinate data aggregation for the six core programs more easily with this measure than with the other two piloted measures. Another echoed this sentiment, adding that the measure would be based on data that is objective, already collected by many States, and that can be standardized across States and territories.

Departments' Response: We appreciate commenters supporting Retention with the Same Employer as the definition for effectiveness in

[23] WIOA secs. 159(c), 166(h), 167(c)(3), and 171(f) direct the Secretary of Labor to establish levels of performance for the relevant primary indicators of performance in WIOA sec. 116(b)(2)(A) for the Job Corps program, Indian and Native American programs, the National Farmworker Jobs Program, and the YouthBuild program, respectively.

[24] The regulations for definitions for the other WIOA performance indicators do not include descriptive or general names of the indicators; they simply provide the definitions of the indicators. For consistency with the regulations for the other indicators, final § 677.155(a)(1)(vi) removes the name of the effectiveness in serving employers indicator and adds the definition.

serving employers. As discussed in more detail in Section II.A., we agree that this definition best aligns with WIOA employment performance indicators by using existing Participant Individual Record Layout (PIRL) terms and data elements (*i.e.,* use of ''participants,'' ''unsubsidized employment,'' and ''exit'') and measuring the same quarters as the employment rate indicators (*i.e.,* the second and fourth quarters after program exit), is the least burdensome definition of the three piloted measures, effectively illustrates the workforce system's ability to serve employers by reducing new employee turnover, and minimizes the burden on States and employers in measuring effectiveness in serving employers.

Retention With the Same Employer Definition: Program Impacts

Comments: Several commenters raised numerous points in asserting that adopting Retention with the Same Employer would adversely impact service delivery design and business outreach services. Commenters expressed opposition to measuring effectiveness in serving employers with Retention with the Same Employer, asserting that changing employers often enables individuals to seek jobs with higher pay or better benefits, which is a positive outcome but would reflect negatively on WIOA programs under the proposed definition. A few commenters asserted that, by negatively counting individuals who switch jobs, the proposed measure would incentivize programs to place individuals in jobs with minimal mobility, punish programs that provide individuals with skills and knowledge that enable them to seek higher paid jobs with other employers, and disincentivize programs from sharing better job placements because retention numbers would decrease if a participant switched to a better job after their initial placement.

Other commenters shared these concerns, asserting that programs should not be punished if participants' employment growth is with a different employer from the one with which the individual is initially placed and that WIOA participants should not be trapped in a job for the sake of WIOA programs' performance indicators.

Similarly, one commenter expressed concern that by incentivizing placing individuals in positions with limited mobility, the measure could serve to perpetuate or worsen racial and economic inequities or lead to worker exploitation, as well as further disadvantage job seekers with criminal records, undocumented immigrants, and individuals receiving income supplements conditioned on engaging in work activities.

Another commenter reasoned that while retention indicates some level of employer satisfaction, it may not be the desired outcome for the job seeker, who may be in a low-wage position or need to work multiple jobs to earn a living wage.

Another broad theme of opposition to the proposed measure is that Retention with the Same Employer primarily measures the success of a job seeker. A commenter asserted that success according to the proposed measure requires ongoing support of job seekers, not employers, which WIOA programs often provide, but that the employer inputs, such as wages, working conditions, and workplace culture, are not related to WIOA services. Similarly, another commenter asserted that the indicator would not measure or identify when an employer receives a service, stating that it would primarily reflect intervention with a client.

Several commenters asserted that using the proposed definition could disincentivize employers to support and train employees in such a way that enhances employees' ability to advance into a better job with another employer. Other commenters asserted that a performance indicator that prioritizes Retention with the Same Employer would be particularly misaligned with the current economy, in which employers are offering bonuses, higher salaries, and other benefits to attract talent. Another commenter remarked that high costs of living have forced many employees to move from expensive metropolitan areas to less expensive rural areas, thus leaving their jobs.

Several commenters raised concerns that Retention with the Same Employer is not a good fit for newer and smaller employers, younger workers, and certain sectors of the economy. One commenter said that while it considered the proposed definition to be the best of the three piloted definitions, measuring effectiveness in serving employers through Retention with the Same Employer would disincentivize programs from working with new or small employers because their employee retention history may be unknown and, thus, they may be seen as a risky partner.

A couple of commenters asserted that the proposed definition would not be the best measure of effectiveness in serving employers for younger generations, who are increasingly populating the workforce, place a high value on work/life balance, and will readily leave a position for a better opportunity, or for gig-economy workers, who change jobs frequently in search of better opportunities.

One commenter expressed concern that the proposed measure could negatively capture seasonal employment noting that some employers require seasonal employment so retention in the second and fourth quarters is not assessing the effectiveness of services provided to these employers. Similarly, another commenter noted that the metric does not recognize instances in which rapid replacements or temporary positions are necessary for fulfillment. The commenter noted that for those employers, skills training and WIOA services have little influence over retention rates. Similarly, another commenter asserted that the proposed measure would reflect negatively on WIOA programs in States where much of the workforce is transient.

Departments' Response: The Departments acknowledge the wide range of concerns expressed by commenters that implementing the Retention with the Same Employer definition may have adverse impacts on job seeker services and business outreach. The Departments address these concerns below.

Job mobility: The Departments note that an individual who moves to a new job with the same employer would be considered a successfully retained participant under this indicator because the indicator measures retention ''with the same employer'' in the second and fourth quarters; there is no requirement that the participant remain in the same employment status or position with the employer to count as a positive outcome. The Departments also note that the employer that will be measured for purposes of this indicator for this particular participant is not always the same employer that received services from a core program and initially hired the participant. The Departments also agree that many circumstances affect an employer's retention of employees, some of which may be outside the purview of WIOA services, including the general economy and business landscape of an area, which may include seasonal employers or other industries with cyclical work cycles that could impact calculated retention rates. These external economic impacts are likely not unique to one specific geographic area. If external economic factors were to affect the outcome of the indicator, they would be captured in the statistical adjustment model. Additionally, regarding States with a higher transient worker population or where individuals are more likely to leave for a higher paying job, the Departments' statistical adjustment model will account for such differences as it adjusts for variations in economic conditions and participant characteristics. These adjustment differences by the statistical adjustment model will be critical when the Departments determine there are sufficient data to produce reliable results for performance assessment purposes with the effectiveness in serving employers indicator.

The Departments acknowledge that individuals may leave for higher wages with a new employer, but States can seek to address these concerns in a variety of ways that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer. Despite these concerns and as discussed more fully in Section II.A., the Departments are adopting the Retention with the Same Employer definition of the indicator for multiple reasons, specifically because it: is the least burdensome since it uses data elements reported by States for other performance indicators; has a stable data collection mechanism in that the requisite data are already reported via an OMB-approved information collection request; aligns with other employment performance indicators in that it uses similar terminology and data elements; and demonstrates maintained relationships between employers and employees, thereby demonstrating that the services provided by the WIOA core programs not only meet the long-term needs of the participants but also the needs of employers in each State.

Equity: The Departments disagree with the comment that the selected metric will potentially perpetuate or worsen racial and economic inequities or negatively impact those with justice system issues, immigrants, and those receiving income supplements conditioned on engaging in work activities. As discussed in other parts of this final rule, we believe the Retention with the Same Employer metric does allow for employment opportunities and upward mobility for all workers. To be clear, the metric measures the number of participants who remained with the same employer over a period of time, not necessarily in the same job position or even the same geographic location. Consistent with various requirements of WIOA, the Departments continually emphasize that States and local areas should serve all participants so that they may obtain unsubsidized and sustainable employment. For example, as discussed more fully in ''Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PYs) 2024–2027,'' jointly issued by the Departments on October 31, 2023,[25] when developing their annual plans, States and local areas should demonstrate how they will develop education, training, and career service strategies that better address and promote equity to improve access and outcomes for disadvantaged populations. Furthermore, serving all participants, including those with barriers to employment, so that they may obtain unsubsidized and sustainable employment is reflected in the WIOA primary indicators of performance that measure all participants' employment in the second and fourth quarters after exit. Given that the definition of effectiveness in serving employers adopted by this final rule uses the data obtained in these indicators, the effectiveness in serving employers indicator will also reflect States' service delivery to all WIOA participants, including those with barriers to employment.

Another example is WIOA sec. 134(c)(3)(E), which requires that priority be given to recipients of public assistance, low-income individuals, and individuals who are basic skills deficient (including English language learners) when individualized career services and training services are provided using funds allocated to a local area for the WIOA title I Adult program. This priority of service requirement applies when providing these services under the title I Adult program at all times, regardless of the amount of funds available to provide services in the local area. WIOA requires States to develop criteria, policies, and procedures for applying this priority for purposes of the title I Adult program, including monitoring local areas' compliance with this priority (*see* 20 CFR 680.600 and TEGL No. 19–16). Moreover, for the AEFLA and VR programs, section 427 of the General Education Provisions Act (20 U.S.C. 1228a) requires grantees to include in their applications—*i.e.,* their WIOA State Plans—a description of how they will ensure participants' equitable access to and participation in the programs by addressing barriers based on gender, race, national origin, color, disability, and age. Lastly, WIOA permits States to develop and use internal metrics in addition to those reported to the Departments. This encourages States and local areas to develop and track additional measures that enhance internal service delivery policies, and continue to track the impact of any sector-specific strategies particularly relevant to their State. Therefore, the Departments have concluded that the Retention with the Same Employer definition for the effectiveness in serving employers performance indicator will not contribute to racial and economic inequities or negatively impact WIOA core program participants.

Counting services provided to employers: Some commenters suggested defining the measure as a count of the services delivered to employers. As discussed above in Section II.A, the Departments note that counting services would be measuring an input (effort) rather than an output (effectiveness). Aligning with the approach of all other indicators, Retention with the Same Employer measures output (results), whether an exiter is retained at the same employer in both the second and fourth quarters after exit, rather than a count of services to employers. The number of services does not necessarily provide a direct correlation to the effectiveness in serving employers. Therefore, the Departments have decided to use an outcome measure, such as retention of employees, as the desired goal to be measured through this indicator.

Lack of inclusion of the job seeker: Commenters expressed concern that the chosen definition for this measure focused unnecessarily on services to employers to the detriment of job seekers. WIOA sec. 116(b)(2)(A)(i)(VI) requires the Departments to assess ''effectiveness in serving employers.'' Therefore, this metric necessarily focuses on services to employers, not the job seekers. Nevertheless, Retention with the Same Employer highlights the alignment between employers and job seekers by measuring the workforce system's alignment with employer needs during the second and fourth quarters after a participant exits WIOA programs.

Effectiveness in serving employers is one of six indicators of performance under WIOA; it is the only shared

[25] ETA, TEGL No. 04–23, ''Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PY) 2024–2027,'' Oct. 31, 2023, *https://www.dol.gov/agencies/eta/advisories/tegl-04-23;* ED, OCTAE Program Memorandum 24–2, ''Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PY) 2024–2027,'' Oct. 31, 2023, *https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-24-2.pdf;* ED, RSA–TAC–24–02, ''Requirements for Workforce Innovation and Opportunity Act (WIOA) State Plans for Program Years (PY) 2024–2027,'' Oct. 31, 2023, *https://rsa.ed.gov/sites/default/files/subregulatory/TAC-24-02.pdf.*

indicator across core programs, and the only indicator that is not designed to measure job seeker outcomes. In other words, all other performance indicators (*i.e.,* employment in the second and fourth quarters after exit, median earnings in the second quarter after exit, credential attainment, and measurable skill gains) are designed to assess job seeker outcomes. However, the Departments also recognize that a service delivery design solely focused on the effectiveness in serving employers performance indicator, without regard to job seeker needs, would be at risk of failing to meet other areas of program performance. Therefore, the Departments have concluded that the chosen definition for the effectiveness in serving employers performance indicator strikes the proper balance between the needs of employers and those of job seekers and, thus, will not have a detrimental impact on job seekers.

Employer training: The Departments believe it more likely that employers provide training to encourage employees to advance within their own company. The performance indicator under WIOA is intended to measure the effectiveness of the WIOA core programs in serving employers. Retention with the Same Employer is calculated as the percentage of participants in unsubsidized employment who exited the program and were employed by the same employer in the second and fourth quarters after exiting the program. As such, the indicator is not designed to measure the internal training practices of employers, but rather the effectiveness of AJC services by reducing employee turnover within the first year of employment.

Outreach to and working with smaller or newer employers: The Departments acknowledge the needs of new and small employers and have determined that the definition for effectiveness in serving employers makes no distinction about the size of the employer, and therefore is not a disincentive for working with employers of any size. The Departments encourage programs, at both the State and local levels, to work closely with new and small employers to find participants who match well with the employers' needs. Ultimately it is the responsibility of the programs to assist job seekers in finding meaningful, long-lasting employment opportunities. Moreover, the Retention with the Same Employer calculation is not restricted to employers who received a direct employer service through a WIOA core program, so there is no incentive for WIOA core programs to avoid providing services to new or small employers.

The Departments acknowledge that individuals may leave for higher wages with a new employer, but there are a variety of ways in which States can seek to address these concerns in ways that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer. The Departments encourage provision of WIOA services to new and small employers to enhance employee retention. Examples of such services include, but are not limited to, the provision of labor market information to demonstrate what constitutes competitive wages and benefits in their industry, working with employers to develop career pathways for employees to pursue and advance in employment, providing technical assistance on the hiring of individuals with disabilities (including the requirements of the Americans with Disabilities Act), and sharing other research on the factors that increase retention rates. The Departments note that there is no restriction on working with new and small employers and expect that Retention with the Same Employer will lead to better services.

Seasonality: In cases of temporary seasonal work, AJCs should strive to place participants into long-term employment opportunities when possible. While a seasonal employee will not be a positive outcome in the indicator, the statistical adjustment model will account for this, and the Departments do not expect States to achieve a 100 percent positive outcome.

Retention With the Same Employer and Other Aspects of Effectiveness in Serving Employers

Another broad theme that commenters raised in opposition to the proposed measure was that it would not measure all of the aspects of effectiveness in serving employers. Their primary assertions were that outcomes may be skewed due to the inclusion or exclusion of specific populations, wage sources, or employers in the calculation.

Comments: One commenter expressed concern that not all employers who receive a service from the local workforce development board would have the effectiveness of those services assessed using the Retention with the Same Employer definition. For example, the commenter stated that if a local workforce development board hosted a job fair and an employer hired someone who was not a WIOA participant, those services to the employer would not be taken into account.

Commenters provided feedback regarding the pools of individuals and employers being measured in the proposed Retention with the Same Employer approach. They suggested that only employers that received a direct WIOA service be measured, that only targeted industries be included, that businesses that issue Worker Adjustment and Retraining Notification (WARN) Act notices be exempted, that participants employed by companies impacted by a qualified plant closing or mass layoff identified through the WARN Act Notification process if they lose or change employment locations be excluded, that employers that close or conduct layoffs during the reporting period be excluded from the measure's calculations, that the metric not include changes in employer caused by firms going bankrupt or downsizing, or that the measure extend beyond WIOA-funded programs.

Another comment mentioned that the proposed rule will solely focus on dislocated workers and that the greater public workforce system will suffer as this rulemaking will not encourage collaboration where dislocated workers are not present.

Some commenters noted that employers may have received no services. One commenter argued that while retention indicates some level of employer satisfaction, it does not speak to what business service an employer received. Similarly, a few commenters asserted that the performance indicated by the measure might not be a result of employers receiving a direct service from the workforce development system. Another commenter stated that the measure would say little about actual interactions between employers and their local workforce development board.

One commenter asserted that the proposed measure would not reflect the effectiveness of direct employer interaction, because placement of participants at a specific employer is not the result of employer service delivery but of credential skills obtained through tuition assistance, and that the employers reflected in the measure may not have sought or received a service but simply had a job opening filled by a program participant. Several commenters asserted that the proposed measure has no mechanism for linking the retention of a particular employee with instances of employer services being provided, therefore only indirectly reflecting effectiveness in serving employers and failing to inform strategic action to improve performance.

The commenters further stated that the measure can be calculated without any employer services data. Other commenters stated that Retention with the Same Employer does not capture all services to an employer. A commenter critical of the proposed measure asserted that there are too many services provided to employers that are unrelated to a program-funded job seeker, and furthermore that employment status at program exit is unknown to local program operators. The commenter also asserted that the measure would not truly capture effectiveness because it is limited to program-funded job seekers and would not evaluate all employer services and is instead primarily a retention metric for WIOA-funded job seekers.

Similarly, one commenter expressed opposition to the proposed measure, arguing that because AJCs and workforce development boards refer a universal pool of candidates for job openings, it would be inappropriate to only measure success for WIOA-enrolled customers. Other commenters similarly criticized the proposed indicator because, while workforce systems will provide services to any job seeker, the only employers that would be captured are those that a WIOA-funded job seeker exits a program to be employed by. Another commenter noted that Retention with the Same Employer does not speak to acuity of placement (for example, how difficult the position was to fill, how in demand the position is, whether the role was seasonal specific and not intended to maintain retention, rarity of skill set, or time to hire). A different commenter relatedly suggested that combining Retention with the Same Employer with some measure of acuity (such as skill/education level of the position or time to placement) and the ability to filter for those employers who received a business service would improve the measure.

Departments' Response: As noted previously, the Departments have determined that Retention with the Same Employer in both the second and fourth quarters after exit demonstrates a successful match between the job seeker and the employer. Moreover, the services delivered by core programs routinely benefit the broader employer community by increasing basic skills of the candidate pool, enhancing free job posting and search tools, and preparing workplaces and job seekers with disabilities for successful employment. WIOA participants who receive services that successfully prepare them to fill jobs that meet employers' needs benefit all the employers in the local economy, regardless of whether a specific employer directly received services from a WIOA core program.

Regarding the pool of participants measured in this indicator, one commenter mentioned that this metric only utilizes dislocated workers, but that is incorrect. The indicator will include all WIOA core program participants, regardless of employment status at time of participation or program enrollment.

Regarding whether the proposed indicator measures all aspects of effectiveness in serving employers, the Departments believe there are many aspects to employer effectiveness, some of which are very difficult to quantify and report. Therefore, the Departments chose one aspect of effectiveness that employers stated would be beneficial and can be measured across programs and States with minimal burden to employers—employee retention.

The Retention with the Same Employer calculation of effectiveness in serving employers is not restricted to employers who received a direct employer service through a WIOA core program. However, the services delivered by core programs, whether to participants or to the employers themselves, routinely benefit the broader employer community by increasing basic skills of the candidate pool, enhancing free job posting and search tools, and preparing workplaces and job seekers with disabilities for successful employment.[26] WIOA participants who receive services that successfully prepare them to fill jobs that meet employers' needs benefit all the employers in the local economy, regardless of whether a specific employer directly received services from a WIOA core program; therefore, the Departments have determined that excluding employers that have not received a WIOA core program service within the reporting period is not an appropriate holistic measure of the workforce system's impact on Retention with the Same Employer. In fact, such an approach would be contrary to the purpose of the performance measure itself. For example, it would be possible for a participant to obtain employment—from an employer that received services from a core program—as a result of services received from one of the six core programs, but change jobs within the first quarter after exiting the program to a new job with a different employer (that did not receive services from a WIOA core program) where the participant remained for at least a year. In these final regulations, the Departments define the effectiveness in serving employers performance indicator as the participant's Retention with the Same Employer in the second and fourth quarters after exiting the program. In other words, in this example, the employer that will be measured for purposes of this indicator for this particular participant is not the same employer that received services from a core program and initially hired the participant. Furthermore, the Departments acknowledge that this metric is one of many aspects of effectiveness in serving employers, but believe that retention is an important aspect to measure as stated by employer representatives during stakeholder engagements. States are encouraged to measure effectiveness in serving employers in other methods that are not required to be submitted officially to the Departments for performance accountability, consistent with WIOA sec. 116(b)(1)(A)(ii).

The Departments disagree with the suggestion that the metric should exclude cases where the participants are employed with employers that have a mass layoff or issue WARN notices. We did not exclude these employers because it is not practical to exclude them from the measure calculation. This is due to the limitations of the information that is currently available in State wage records, which will be the typical source for States to collect the required inputs for this metric. To the extent that States are concerned that this could impact results, the Departments anticipate the statistical adjustment model[27] will take into account this

[26] For example, 34 CFR 361.3 authorizes State VR agencies to expend VR funds on the costs of providing VR services and administering the program. According to 34 CFR 361.5(c)(2)(iii) and (iv), administrative costs include providing information about the VR program to the public (which, for purposes of this final rule, would include the broader employer community) and technical assistance and support services to other State agencies, private nonprofit organizations, and businesses and industries. In addition, 34 CFR 361.49(a)(4) permits State VR agencies to provide technical assistance to businesses that are seeking to employ individuals with disabilities. There is no requirement the business be seeking to hire a current VR program participant.

[27] Pursuant to WIOA sec. 116(b)(3)(A)(viii), the Departments developed an objective statistical adjustment model that is used to both negotiate expected levels of performance for each of the performance indicators to be incorporated into the approved Unified or Combined State Plan or State Plan modification (WIOA sec. 116(b)(3)(A)(iv)), and for purposes of determining the adjusted levels of performance for each indicator at the end of the Program Year (WIOA sec. 116(b)(3)(A)(vii)). For more detailed information about the statistical adjustment model, see the negotiations and sanctions guidance in TEGL No. 11–19, Change 1,

Continued

concern. For this and other reasons, the Departments will not negotiate targets for this indicator at 100 percent.

With regard to the concern that the definition of Retention with the Same Employer only indirectly reflects the effectiveness in serving employers and is not useful in informing strategic action to improve performance, the Departments note that this metric does not prevent States from including the information they feel is necessary in their strategic plans. States should incorporate labor market information, such as which occupations and industries are in demand, in their strategic plans. The Departments believe that information such as whether WIOA participants retain employment is important data to consider when States strategically plan outreach, business services, and participant service delivery design. Therefore, in terms of strategic planning at the State or local level, this metric will indicate the types of jobs participants are entering and retaining employment with, which may provide some indication of job quality. If a State's outcome results for the Retention with the Same Employer metric are below target, strategic policies can be made to ensure participants are entering long-term sustainable unsubsidized employment at a higher rate.

With regard to concerns that the Retention with the Same Employer indicator does not measure acuity of the WIOA participant's job placement, the Departments continue to acknowledge that this metric is one of many aspects of assessing effectiveness in serving employers. As noted above, States are encouraged to measure effectiveness in serving employers in other methods that are not required to be submitted to the Departments for performance accountability.

Comments: Commenters also expressed concerns about implementing one measure only and that one measure, or one data point, may not address all the facets of the effectiveness in serving employers indicator. Commenters also said that Retention with the Same Employer was not the best indicator of a program's success in serving employers.

One commenter expressed opposition to the proposed definition, asserting that it will be impacted by variables outside the control of State workforce agencies, such as ''talent migration.'' Similarly, another commenter asserted that many reasons that an employee might choose to leave a position within two quarters have little to do with how effectively the employer was served by the system.

One commenter asserted that the proposed measure is not a good indicator of WIOA program performance because it is significantly impacted by employers' choices as to wages, working conditions, and workplace culture, over which WIOA programs have little control. Another commenter expressed similar concerns, asserting that retention depends on employers and employees learning to communicate effectively and employees getting along, adapting to company culture, acquiring new skills, and being satisfied with their job, which AJCs cannot control. A third commenter echoed these concerns, adding that factors such as labor shortages likely encourage employees to switch employers.

One commenter stated that long-term employee retention is not solely about initial placement after exiting a program, asserting that commitment is required by both the employee and employer, and concluding that as a measure of effectiveness in serving employers, Retention with the Same Employer would not be able to prove or disprove the success of a program.

Another commenter asserted that the proposed measure could deter local workforce development board and one-stop center staff from taking a customer-based approach to career services and thus skew the results of the statistical adjustment model.

Departments' Response: The Departments recognize that there are many factors, beyond the control of the WIOA core programs, that can impact a participant's Retention with the Same Employer. For that reason, as discussed more fully in Section II.A. above, the Departments considered other approaches during the 6-year pilot period and encouraged States to devise their own State-specific approaches to measuring effectiveness of serving employers. After considering all the evidence, the Departments considered the options of implementing more than one metric to measure effectiveness in serving employers, but determined a single indicator approach was most logistically feasible, aligned with the existing performance indicator structure, and resulted in lowest burden to grantees; this single indicator is set forth in this final rule at 20 CFR 677.155(a)(1)(vi) and (c)(6).

Single data point: The reason for selecting this one metric (and not a combination of measures) is that it is most applicable across the differing mandates and program designs of all six core programs, uses existing joint PIRL data elements, and effectively illustrates the broad impact of the workforce system's ability to serve employers by reducing new employee turnover through effective job placement. Commenters to the proposed rule have provided several alternatives to the proposed measure, which are described in this document, and States are encouraged to internally adopt any of those suggested metrics that will provide feedback on the success of efficiently serving employers. To reduce burden on States, and to ensure that all States can accurately report on the data elements required, the Departments have decided to use one measure for the effectiveness in serving employers performance indicator, using existing common data elements across all core programs.

The Departments acknowledge the challenges related to developing an indicator that reflects the efforts of multiple programs, avoids additional collection and reporting burden, and results in stable data that can be assessed across programs. The Departments note that Retention with the Same Employer has the benefit of aligning with two of the three employment-related performance indicators, specifically the employment in the second and fourth quarters after exit indicators that measure the employment outcomes of program participants. As such, it promotes the statutory purpose of WIOA to ''support the alignment of workforce investment . . . in support of a comprehensive, accessible, and high-quality workforce development system in the United States.'' WIOA sec. 2(2). The alignment of definitions, data elements, and performance indicators with one another, as the Departments have done with the Retention with the Same Employer metric for measuring the effectiveness in serving employers indicator, improves the comprehensiveness of the workforce development system in each State and nationwide. Information such as whether WIOA participants are retained in job placement is important data to

and related ED guidance. ETA, TEGL No. 11–19, Change 1, ''Negotiations and Sanctions Guidance for the Workforce Innovation and Opportunity Act (WIOA) Core Programs,'' May 10, 2023; *https://www.dol.gov/agencies/eta/advisories/tegl-11-19-change-1;* ED, OCTAE Program Memorandum 20–2, ''Negotiations and Sanctions Guidance for the Workforce Innovation and Opportunity Act (WIOA) Core Programs,'' May 10, 2023, *https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-20-2.pdf,* ED, OCTAE Program Memorandum 20–2, Attachment I ''Calculation—Overall State Indicator and Program Scores,'' May 10, 2023, *https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-20-2-attachments.pdf;* ED, RSA–TAC–20–02, ''Negotiations and Sanctions Guidance for the Workforce Innovation and Opportunity Act (WIOA) Core Programs,'' May 10, 2023, *https://rsa.ed.gov/sites/default/files/subregulatory/RSA-TAC-20-02_0.pdf* consider when States strategically plan outreach, business services, and participant service delivery design to ensure that the workforce system is matching employers with skilled workers to meet business needs, thereby satisfying another purpose of WIOA, as set forth in WIOA sec. 2(2), which is to ''provide America's employers with the skilled workers the employers need to succeed in a global economy.''

Addressing all factors of effectiveness in serving employers: The Departments agree that many circumstances affect an employer's retention of employees, some of which may be outside the purview of WIOA services, including the general economy and business landscape of an area. However, an indication that an employee maintains employment with the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for employers (*i.e.,* successfully preparing participants to fill jobs that meet employers' needs). Retention of an employee reduces the costs to the employer associated with employee turnover and retraining, which is enhanced when participants are placed in jobs aligned to their skills and career goals.

Commenters also said that Retention with the Same Employer was not the best indicator of a program's success in serving employers. Retention with the Same Employer is a measure of the workforce system's alignment with employer needs and is measured during the second and fourth quarters after a participant exits WIOA programs. The Departments acknowledge that individuals may leave for higher wages with a new employer, but there are a variety of ways in which States can seek to address these concerns that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer.

The Departments acknowledge that the limitations for Retention with the Same Employer could include the unintended consequence that this approach may be at odds with an employee seeking a higher paying job or employment benefits. It is possible that a significant percentage of participants will not be counted in the numerator for this indicator. However, many of those participants who have left their current employer for another will contribute toward improved performance on employment-based indicators, such as median earnings. Moreover, as discussed above, the Departments believe that Retention with the Same Employer accomplishes the goals of WIOA with the least burden on the States.

Regarding the comment that service delivery approaches taken by local workforce development boards and one-stop staff to assist employers will skew the statistical adjustment model outcomes, the Departments disagree and note that the model does in fact account for results of these employer engagements.

Effectiveness in serving employers is one of six indicators of performance under WIOA; it is the only shared indicator across core programs, and the only indicator that is not designed to measure job seeker outcomes. Local workforce development boards and one-stop center staff delivering services solely focused on the effectiveness in serving employers indicator without regard to job seeker needs would be at risk of failing to meet other areas of program performance. The statistical adjustment model will account for economic factors affecting the Retention with the Same Employer indicator in the State and local areas. Therefore, the Departments have concluded that States will still focus on providing quality services to job seekers.

Questions and Requests for Clarifications About Calculations, Data Sources, Wage Records, and External Factors That Impact the Measure

Comments: Commenters suggested that the calculation for the Retention with the Same Employer measure be expanded to include supplemental wage information. One commenter asserted that by relying exclusively on wage records, the measure will produce an incomplete picture of the effectiveness of the WIOA system because it would obscure the ways WIOA programs serve employers by developing employees with the skills to respond flexibly and creatively to changing working challenges, whether for the same employer or a different one.

Some commenters were concerned that local providers do not know the status of a participant's employment at exit. A few commenters stated that workforce programs may not receive hiring outcome information and may be unable to report information for Wagner-Peyser Act participants.

Another commenter asked how common exit would apply to this measure and which programs' exit date will be used to determine this measure when an individual participant is co-enrolled in more than one core partner program.

One commenter recommended that the Departments explore methods of capturing data that demonstrate employment success for self-employed individuals and individuals employed by the Federal Government. Relatedly, another commenter recommended not limiting the performance indicator to individuals with wage records but rather expanding it to include participants whose employment can be verified by other means, specifically the same supplemental data sources as are permitted for the other primary performance indicators, such as information provided to case managers. Other commenters cautioned that wage records are not readily available for Federal, military, and self-employment, asserting that this would lead to negative performance results in States with high proportions of individuals seeking these types of employment or necessitate statistical adjustments. Similarly, another commenter questioned if Federal agencies would provide additional wage data sources on individuals employed by the military, Postal Service, or Federal Government.

Some commenters discussed whether State Wage Interchange System (SWIS) data could be used to collect and report on the proposed measure, given that SWIS data show how many employees work across State lines, a figure that becomes increasingly important in the post-pandemic shift to remote work. Another commenter expressed concerns about being able to match employers consistently in wage data and noted that during the pilot period their concerns over the Retention with the Same Employer measure caused them to choose the Repeat Business Customer and Employer Penetration rates for reporting. The commenter noted that the approach had the lowest adoption rate (per the Joint WIOA Effectiveness in Serving Employers NPRM) of the three pilot measures, suggesting that other States may have shared the commenter's concerns about choosing it.

Departments' Response: The Departments agree that supplemental wage information could play a vital role when wage records are either unavailable for a participant or difficult to obtain. For this reason, we revise § 677.155(a)(1)(vi) and (c)(6) of this joint final rule to remove the requirement that wage records be used to document a participant's employment status for purposes of the effectiveness in serving employers performance indicator. This change allows for the effectiveness in serving employers indicator to include the same data sources as the other

WIOA employment-based primary indicators of performance, including supplemental wage information. The Departments also agree that core programs will be able to obtain wage data for performance reporting purposes through the SWIS Clearinghouse for those participants employed across State lines.

Regarding the commenter's observation that the fewest number of States selected Retention with the Same Employer measure for the pilot and the commenter's interpretation that this lowest adoption rate indicates that States did not think it was a useful measure, the Departments did not inquire why States chose certain measures during the pilot period, and note that there is no evidence that a lower adoption rate correlates with a lack of usefulness in measuring effectiveness in serving employers in the State. The Departments note that Retention with the Same Employer was the easiest measure to implement based on it being calculated from existing PIRL elements. Therefore, it is plausible that fewer States chose to pilot this measure because they already knew how to calculate this measure and would not have needed to test how to implement it in their State. They may have wanted to assess how the two other pilot measures would work. The Departments cannot determine if this was the case, but it seems reasonable that this possibility could have led to the lower adoption rate for the Retention with the Same Employer measure.

Measuring only WIOA-funded programs: Regarding the comments that stated measuring only WIOA core programs was not a reflection of the effectiveness of the workforce system's services to employers, the performance indicator under WIOA is intended to measure the effectiveness of the WIOA core programs in serving employers. While States and organizations may provide services to employers through other programs, it is appropriate in this instance to limit the metric to those participants who have exited from WIOA-funded programs.

Use of supplemental wage information: The Departments proposed that the effectiveness in serving employers indicator only include participants whose employment status is obtainable through wage records because wage records are the least burdensome records to use; States already have these records for other WIOA-required reporting purposes, and they are the most standardized and statistically valid records available. Most employers are covered through unemployment insurance (UI) wage records and therefore wage records remain the most accurate and least burdensome method of calculating this indicator.

However, the Departments acknowledge that certain categories of employment, such as entrepreneurial employment, Federal employment, employment with the U.S. Postal Service and the military, and farmwork, are not reflected in State UI wage record databases. Additionally, participants are not required to provide Social Security numbers, which are needed to use wage records, to obtain services and some participants may be reluctant to share this information. WIOA's regulations and implementing guidance authorize the use of supplemental wage information for the calculation of the median earnings indicator. See TEGL No. 26–16.[28]

To ensure that effectiveness in serving these additional employers is assessed, the Departments concur with commenters that the Retention with the Same Employer measure should be expanded to include the number of participants with wage records or supplemental wage information who exit during the reporting period and were employed by the same employer during the second quarter after exit and the fourth quarter after exit DIVIDED by the number of participants with wage records or supplemental wage information who exit and were employed during the second quarter after exit. Organizations collecting supplemental wage information for the purposes of calculating Retention with the Same Employer must be able to ascertain that the participant's wage information reflects the same establishment (which may include tax documents, payroll records, employer records, and follow-up surveys from program participants) in both the second and fourth quarters after exit.

Questions about program exit: Regarding commenters' concern about local providers not knowing a participant's employment status at program exit, the Departments note that States already report this information to the Departments. Additionally, the Departments understand that there are mechanisms in place that local providers use to track participants' employment status after program exit. Local providers interested in monitoring their performance in this area may wish to leverage existing follow-up practices to identify if participants who have exited services are employed, and to work with cognizant State agencies to monitor their performance.

Regarding the commenter's question about common exit, the implementation of this definition for the effectiveness in serving employers performance indicator will not alter existing policy around common exit dates. The Departments will release future guidance regarding implementation of the common exit date for participants enrolled in multiple core programs.

Comments: A commenter questioned how the proposed measure would apply to employees changing positions to subsidiaries of the same company, as well as how it would count individuals working part time in order to maintain Social Security eligibility, because the commenter interpreted the proposal as covering full-time employment only. Another commenter similarly asserted that when determining whether a participant is employed with the same employer in the second and fourth quarters after exit, the Departments should take into account all establishments and physical addresses of the employer, to ensure that employees who move locations are still counted as being employed by the same employer.

Departments' Response: The Departments clarify that employment is not required to be full-time. The determination whether someone is employed with the same employer will typically be based on an employer identification number, such as the Federal Employer Identification Number (FEIN) or tax ID found in the individual's wage record. For the specific scenario raised by the commenter, a participant who is employed by the same employer in a different physical location would count positively in the numerator of the metric if the FEIN/tax ID is the same. The Departments acknowledge that if the FEIN/tax ID is different for a subsidiary of a given employer, the participant may not be captured as a positive outcome by using wage records alone and would require the collection of supplemental wage information to verify Retention with the Same Employer.

Comments: One commenter recommended that individuals who maintained employment with a different employer but at a higher wage be included in the numerator in the calculation, as this indicates the success of the employee and the quality of

[28] The Departments issued joint guidance on June 1, 2017, ''Guidance on the use of Supplemental Wage Information to implement the Performance Accountability Requirements under the Workforce Innovation and Opportunity Act,'' TEGL No. 26–16, OCTAE Program Memorandum 17–6, and RSA–TAC–17–04, that describes the Departments' protocols on the use and reporting of supplemental wage information.

training from their initial employer. The commenter also recommended excluding from the Retention with the Same Employer performance measure participants who have changed employers but increased their wages between the second and fourth quarters after exit, because doing otherwise would disincentivize upward mobility. Another commenter recommended measuring retention within the same industry rather than with the same employer.

Another commenter was concerned that retention of employees may vary based on ''right-to-work'' rules, working conditions, pay and benefits, production volumes, or any number of business factors that occur well after interaction with the workforce system. Commenters also voiced concerns that variations in economic conditions would impact States' ability to meet targets for the effectiveness in serving employers indicator because of downturns in the local economy and specific industries that were in-demand and used by the system are suddenly experiencing layoffs.

Departments' Response: The Departments acknowledge the alternatives commenters presented. However, these alternatives do not reflect the effectiveness of services to the employer that originally hired the participant. Including individuals who moved from one employer to another and obtained a higher wage does not demonstrate success in serving the individual's employer in the second quarter as that employer would need to repeat the process of recruitment and referrals and undertake the cost of hiring and training a new employee. Similarly, including individuals who are within the same industry in the second and fourth quarters after exit but not with the same employer, results in the same issue—the individual's first employer needs to rehire and train a new employee.

The Departments recognize that there are numerous factors in a participant's ability and willingness to remain employed with the same employer, including those mentioned by the commenter, such as pay/benefits, work volumes, temporary jobs, industry and economic variations, and unexpected layoffs. Because of this, it is very likely a State's suggested target from the statistical adjustment model will never be 100 percent, just like the other five indicators of performance.

As noted earlier, there are a variety of ways in which States can seek to address these concerns that are beneficial to both the employer and the participant, such as striving to find quality job placements or working with employers to develop career pathways and good jobs that more effectively incentivize participants they have hired to maintain their employment with the same employer.

Regarding the comments on the effects of economic conditions, the Departments agree that many circumstances affect an employer's retention of employees, some of which may be outside the purview of WIOA services, including the general economy and business landscape of an area. The Departments acknowledge that different States experience different economic conditions. As noted above, the statistical adjustment model will account for economic factors impacting Retention with the Same Employer outcomes for WIOA core programs, so that no State is unfairly impacted by its economic conditions.

Comments: A commenter recommended shortening the amount of time that the system tracks workers with the same employer or to simultaneously track job quality to mitigate the potential consequence that the proposed measure could trap workers in poor-quality jobs or incentivize the WIOA system to push workers into any job instead of high-quality jobs.

Another commenter recommended that the Departments consider labor market trends or other relevant information in a State or region when negotiating performance for individuals who leave a position for a higher wage or better benefits. Several commenters similarly recommended adjusting the performance indicator to count individuals who leave positions and achieve higher wages, better benefits, or better working conditions as successes.

One commenter raised cautions ''that [the Retention with the Same Employer measure] is subject to variation in industry and sector economic conditions, and that it may have a negative impact on sensitivity to industry sectors targeted by State and local workforce agencies.'' Another commenter stated that the proposed measure could lead to employers ''cherry-picking'' employees who they believe could lead to higher retention rates. The commenter suggested that to mitigate this potential effect, the Departments could require States to submit reports on the demographics of WIOA participants to ensure there are no negative changes by race, ethnicity, or gender among workers between reporting periods that do not correspond to similar changes in the local labor market.

To avoid disincentivizing the use of WIOA funding for transitional jobs, a commenter recommended excluding such jobs from the performance indicator. The commenter cited studies showing that transitional job programs have significant positive impacts for workers, families, communities, and employers, such as reducing poverty rates substantially, particularly for Black and Hispanic workers.

Another commenter recommended increasing access to and sharing of information between workforce partners, to enable agencies to track employer retention information, and developing best practices and a unified reporting structure among WIOA agencies.

Departments' Response: The Departments will not be shortening the amount of time for tracking participant outcomes in the Retention with the Same Employer metric. Determining whether an individual is still employed with the same employer in the second and fourth quarters after exit allows the Departments to assess whether the individual stayed with the employer, which leads to savings for the employer as the employer would not need to undergo the rehiring and retraining process. The second-and-fourth-quarter time frame allows the Departments to assess whether employers benefit from the WIOA system. Additionally, using information collected for other WIOA indicators of performance under *the same* established time frames reduces reporting burden for the States.

Additionally, as discussed throughout this document, the Departments note that effectiveness in serving employers is oriented to the employer experience rather than the participant experience. The proposed metric may encourage promotional opportunities from within the original employer.

For these reasons, the Departments believe the established time frames are appropriate to demonstrate Retention with the Same Employer.

Regarding commenters' concerns about labor market trends, including variations in industry and sector economic conditions, the Departments are aware of external factors that influence the outcome of this measure. The Departments will adjust for those external factors in the statistical adjustment model, and those adjustments will play a key role when the Departments determine they have sufficient data to produce reliable results for assessing performance of the effectiveness of serving employers indicator.

The Departments appreciate comments regarding participants who leave positions for higher paying job opportunities. While this is a benefit to participants and should be encouraged, this also leaves employers with the need to fill open vacancies. The Departments will continue to evaluate wage growth after exit and the statistical adjustment model will account for participants who leave a position for a higher-paying job. This metric, like all WIOA indicators of performance, will never be targeted at 100 percent for this reason.

The Departments considered the alternative definition of Retention with the Same Employer commenters suggested—including as a success the individuals who have higher wages in the fourth quarter after exit even though they are working at a different employer. However, the Departments decided not to adopt this definition because in these situations, an employer still has a need to fill an open vacancy. The Departments recognize that while this is a benefit to participants, it is not assessing how the workforce system served employers. Therefore, the Departments determined this is not an appropriate method of assessing the effectiveness in serving employers.

Effectiveness in serving employers is measured after the participants exit a program. Regarding potential exclusion of participants placed in transitional jobs, the Departments note that transitional jobs are a participant level service that would prevent a participant from exiting, and therefore are not included in the calculation of the measure. Therefore, this definition of the indicator does not disincentivize use of transitional jobs as a service strategy.

Regarding other potential exclusions for the measure, consistent with the Departments' rationale in Section II.A. above, the Departments believe that simplicity in the measure calculation is important, both in terms of collecting data that reflect the real world of employment, and consistency with the other participant employment and earnings indicators of performance. Therefore, the measure calculation will not include exclusions other than those mentioned for existing WIOA indicators of performance. Additionally, the commenter mentioned benefits to the participant, but not to the employer who experiences turnover and needs to re-fill a position. The Retention with the Same Employer measure advocated for by business customers and employers in stakeholder engagements, alignment with the other WIOA participant employer performance measures/indicators, and support due to strengths over weaknesses of the measures assessed in the Final Pilot Study Report can best meet the system's goals for assessing and ensuring the effectiveness in servicing employers, the workforce system's dual or equal customer served by the workforce system.

Regarding analysis of this metric by race, ethnicity, or gender, the Departments currently collect these data elements and will report outcomes by each of these. The existing WIOA indicators of performance are already reported by these data elements in the Departments' respective annual reports.

After consideration of the comments, as discussed above the Departments have decided to revise the definition of Retention with the Same Employer in this final rule to remove reference to wage records, thereby permitting States to include individuals in the metric who may not have wage records but who are still employed with the same employer in the second and fourth quarters after exit. This revision allows States to use supplemental wage information to capture these individuals.

Final § 677.155(a)(1)(vi) and (c)(6) implement the changes as outlined in the proposed rule with one modification to remove the term "wage records," thereby allowing for the use of supplemental wage information, and adds a clarification that participants tracked by this performance measure are those in unsubsidized employment during the second quarter who exit from the program. While the nature of wage records would have limited this indicator to unsubsidized employment without explicitly stating the requirement, the removal of the wage record requirement, thereby enabling States to use supplemental wage information for reporting purposes, necessitates the addition of language limiting the indicator to those in unsubsidized employment in order to align this indicator with the other employment-based indicators, all of which track the percentage of participants in unsubsidized employment at either the second or fourth quarter after exiting from a program. In so doing, the Departments ensure that the employment reported, for purposes of assessing the effectiveness in serving employers, is that which is consistent with the purpose of WIOA sec. 2 (*e.g.,* to increase the prosperity of workers and employers, the economic growth of communities, and the global competitiveness of the United States).

C. Adjusted Levels of Performance for WIOA Core Programs—Changes to § 677.190

§ 677.190 When are sanctions applied for failure to achieve adjusted levels of performance?

Currently, 20 CFR 677.190 details the circumstances under which sanctions are applied when WIOA core programs fail to achieve adjusted levels of performance. Paragraph (c) sets forth criteria the Departments use to determine which States have met adjusted levels of performance: (1) the overall State program score (§ 677.190(c)(1)); (2) the overall State indicator score (§ 677.190(c)(3)); and (3) the individual indicator score (§ 677.190(c)(5)).

In this final rulemaking the Departments revise § 677.190 to include the effectiveness in serving employers performance indicator in the criteria for determining if a State has failed to meet adjusted levels of performance as part of the overall State indicator score. Final § 677.190 establishes conforming language regarding the assessment of effectiveness in serving employers as a statewide performance indicator, as expressed in the Joint WIOA Final Rule, and the definition for effectiveness in serving employers proposed in § 677.155(a)(1)(vi) and (c)(6). Final § 677.190(c)(1) excludes the effectiveness in serving employers performance indicator from the calculation of an overall State program score, which compares a program's results regarding the other primary indicators of performance with the adjusted levels of performance for that program. This final rulemaking adds two paragraphs to § 677.190(c)(3) to ensure the effectiveness in serving employers performance indicator's sole use as a shared statewide indicator. Final § 677.190(c)(3)(i) specifies that the overall State indicator score is the average of the percentages achieved of the adjusted levels of performance by all the core programs on the performance indicator and would exclude the effectiveness in serving employers performance indicator from this calculation. Final § 677.190(c)(3)(ii) adopts in regulations the recommendation in the joint guidance that one core program report performance data for the effectiveness in serving employers performance indicator on behalf of all six core programs. Final § 677.190(c)(3)(ii) also establishes that the indicator would be assessed only as an overall State indicator score, the State indicator score for effectiveness in serving employers is calculated as the statewide percentage achieved of the statewide adjusted level of performance, and includes mention of guidance to signal to States that the Departments will provide additional details and explanations for reporting on the effectiveness in serving employers performance indicator in joint guidance. Final § 677.190(c)(5) specifies that the Departments will not include the effectiveness in serving employers performance indicator when calculating individual indicator scores. Finally, as the Joint WIOA Effectiveness in Serving Employers NPRM explained, consistent with how the Departments have implemented the provisions for the other five performance indicators, the effectiveness in serving employers performance indicator will not be included in sanctions determinations until the Departments collect a minimum of 2 years of performance data, develop a statistical adjustment model that yields reliable estimates for the indicator, provide additional guidance regarding the process for negotiating this joint indicator, and then negotiate performance levels for the indicator.

The Departments received no comments on the proposed exclusion of effectiveness in serving employers from the overall State program score in § 677.190(c)(1) and the proposed exclusion of effectiveness in serving employers when calculating individual indicator scores in § 677.190(c)(5). The Departments received several comments regarding provisions for the statewide nature of the effectiveness in serving employers performance indicator in § 677.190(c)(3)(ii), application of this indicator at the local level, performance level negotiation and the statistical adjustment model, and inclusion of the effectiveness in serving employers indicator in sanctions determinations. These comments are discussed below. No changes are made to proposed § 677.190; the final rule implements § 677.190 as proposed.

Support for the Implementation of a Shared Statewide Indicator

Comments: Several commenters expressed support for the proposed use of a shared outcome for all core programs. One commenter stated that the shared outcome measure supports the WIOA reporting goal and also reduces the burden of collecting data.

Departments' Response: We appreciate commenters supporting effectiveness in serving employers as a shared outcome for all WIOA core partner programs. We agree that this definition best aligns with WIOA employment performance indicators by utilizing already existing PIRL elements and minimizes the burden on States and employers in measuring the effectiveness in serving employers.

Comments: Several commenters opposed the provisions, urging that Retention with the Same Employer should not be a shared outcome and should be reported for each of the six core programs individually. A few of these commenters discussed the difficulties of reporting the measure as a shared outcome, particularly the specifics of creating and implementing a unified statistical adjustment model that accounts for program- and State-level differences. The commenters described the particular challenge and burden for States that did not pilot the proposed measure or do not currently have a shared data system across core programs. One commenter noted that the different performance indicators arise from different reporting systems, which further complicates the process of unifying the reporting into a shared outcome model. Another commenter described the issues of incorporating data from the separate systems for title II and title IV, incorporating other data from referrals placed by job seeker teams outside the State, and a lack of Social Security number collection by the State agency responsible for title II programs in the State. Other commenters noted that while many States are reporting this measure, not all do so with the coordination and full contribution of title II data, and asserted that some States' title II programs that are not currently reporting this data on title II students will need additional time to update data match agreements and data reporting processes in order to participate in State reporting. One different commenter noted that the performance measure is not defined by statute as a shared system-wide measure and suggested that sharing confidential data across State programs may not be supported by State laws. The commenter further asserted that complying with the varied reporting deadlines for different programs might be difficult under a unified model. This commenter also expressed concern about the costs and time associated with developing a system that combines data across all programs. Further, the commenter said, to successfully capture data from multiple agencies, States that are not already doing so would need to establish a cross-agency data system or statewide longitudinal data system (SLDS), which may require costs for set-up, storage, management, and maintenance. The commenter cited a recent evaluation that indicated that a comprehensive SLDS project would take 3 years to establish and cost $1 million to $3 million for staffing and technology.

Departments' Response: The Departments recognize that there are challenges in coordinating the reporting of data across agencies, but also note that reporting this indicator as a shared measure supports closer alignment, increased coordination, and improved data sharing across State agencies, which are important parts of the vision and purpose of WIOA, and the Departments will work with States towards realizing this vision. In fact, the Departments' guidance details the requirements set forth in WIOA, specifically that closer alignment, increased coordination, and improved data sharing across State agencies in reporting on the WIOA core performance indicators are an important part of the vision of WIOA. *See* TEGL No. 10–16, Change 1. Current and further resources to provide technical assistance and guidance,[29] and community of practice tools [30] will be provided to support States in the collection of required performance data, as well as supplemental data, and development of State plans [31] to ensure accountability of service provision.

Additionally, since this is an annual measure, with alignment of performance accountability reporting to consolidate reporting across WIOA core programs and alleviate variation in deadlines for common reporting, the Departments do not consider individual program reporting deadlines to be an issue. Finally, the Departments note that all reporting is due to the agencies on the same date so that there should not be issues with reporting deadline differences.

The Departments note that there will be challenges in developing a statistical adjustment model for any definition of this measure and there is no reason to believe the development would be any less challenging if the Departments were to select an alternative definition for this indicator or to assess this indicator by program.

States are not required to collect this information using an SLDS. States are

[29] ETA, ''WIOA Technical Assistance Resources and Tools,'' *https://www.dol.gov/agencies/eta/Performance/resources* (last visited July 31, 2023).

[30] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf.*

[31] ETA, ''WIOA Plans, Waivers, & Performance,'' *https://www.dol.gov/agencies/eta/wioa/plans-waivers-performance* (last visited July 31, 2023).

not required to share confidential data across programs to report on this measure. However, the sharing of confidential data across programs is a permissible approach for reporting on the effectiveness in serving employers performance indicator, if the State does so in accordance with State and Federal law requirements. Performance accountability reporting across WIOA core programs will continue to be conducted in the current manner for all of the six primary WIOA core programs indicators of performance and measures, including collection and sharing of data as necessary to retain the integrity of the data collected for the Retention with the Same Employer effectiveness in serving employers performance indicator.

With regard to concerns about reporting by title II programs for a single, statewide outcome for all WIOA core programs on the Retention with the Same Employer measure, the State's title II program would be expected to provide the data it has collected for title II participants who were employed in the second and fourth quarters to the State agency responsible for reporting on the effectiveness in serving employers indicator. If the State's title II program does not have access to the information required to determine Retention with the Same Employer through a data match, the State agency responsible for reporting on the indicator would use the data provided by the State's title II program to determine Retention with the Same Employer.

Comments: A few commenters recommended that this measure be reported and assessed just as the other five are reported and assessed: across programs and indicator scores. The commenter stated that if effectiveness in serving employers is measured only at the system level using a single target, as the Departments proposed, programs that achieved less than 90 percent of target on this one measure for 2 years in a row would be sanctioned. The commenter asserted that such a result would not be consistent with the Departments' original intent of leveling sanctions in cases of ''catastrophic failures on a single measure (<50% of target)'' or ''systemic performance issues in a program or in a measure across programs (average of <90% of target).'' The commenter, expressing concern about the proposal resulting in programs facing significantly greater risk of sanction, thus recommended that the standard of 90 percent of target not be applied to the effectiveness in serving employers measure if it is treated as a shared outcome.

Departments' Response: The Departments agree that State performance falling below 90 percent of the adjusted level of performance on this measure for 2 consecutive years would be subject to sanctions. However, at a systemic level, this is no different than it is for any other primary indicator of performance where 2 consecutive years of averaging below 90 percent of the adjusted level of performance across programs for an indicator would be subject to sanctions. Since the Departments are assessing this indicator as a shared outcome across all programs in a State, the individual indicator score assessments do not apply. Therefore, performance failure where an individual indicator score falls below 50 percent does not apply. Additionally, because the statistical adjustment model will be used to establish the adjusted level of performance, the risks of failure due to low performance resulting from external factors will be mitigated.

Comments: One commenter asserted measuring outcomes at the individual program and workforce area levels does not discourage statewide coordination and collaboration but rather provides for both accountability for poor performance and credit for performance success, which promotes coordination across programs and contributes to continuous improvement.

Departments' Response: The Departments acknowledge that coordination and collaboration are indeed occurring in many States. However, the comments received on the proposed rule as well as feedback during the pilot phase have underscored the need for increased collaboration and coordination and highlighted the partnership benefits that additional shared performance accountability incentives would yield.

Comments: Several commenters stated that the effectiveness in serving employers performance indicator should not be applied at the local level and recommended restricting its application in that context. Commenters discussed the restriction on including the indicator in individual score calculations, asserting that States should not be allowed to set and evaluate local operator targets for the shared outcome indicator, to include effectiveness in serving employers as part of the calculation to determine the individual indicator scores for a local workforce area, or to assess these indicators to determine sanctions on local areas or local operators. The commenters expressed concern that sanctioned States might pass on ''punishments'' from the sanctions to local operators. Acknowledging that State performance necessarily aggregates the performance of individual local and State program operators, the commenters nevertheless asserted that local operators would bear too high a cost from the unintended consequences of performance failure if the measure is applied as proposed. Another commenter suggested that the indicator should only apply at the State level as local workforce development areas that have administrative oversight for non-core programs cannot rely on outcomes achieved by the title II program, Wagner-Peyser Act programs (title III), and VR program (title IV) to help achieve performance goals set for achieving the ''more robustly defined'' statewide performance target. The commenter requested further guidance to States on this point.

Departments' Response: WIOA sec. 116(c)(1)(A)(i) requires that all of the primary indicators of performance, including the effectiveness in serving employers indicator, must be applied at the local level for the WIOA title I programs (Adult, Dislocated Worker, and Youth). Therefore, States must apply the effectiveness in serving employers indicator at the local level. Furthermore, § 677.205(a) provides that ''[e]ach local area in a State under WIOA title I is subject to the same primary indicators of performance for the core programs for WIOA title I under § 677.155(a)(1) and (c) that apply to the State.'' The Departments are not changing this provision in this rulemaking; therefore, the same definition and method of assessing performance applies at the local level. The Departments will provide updates to any guidance related to this as needed.

Sanctions Determinations

Comments: Several commenters supported the proposal to delay the inclusion of the effectiveness in serving employers indicator in sanctions determinations and suggested that the Departments should consider an even longer time period than proposed to collect the data. Commenters noted that not all States currently work with WIOA title I data and that extra time might be required to facilitate the data inclusion. Other commenters noted that this additional time would be particularly helpful in determining targets. One commenter suggested a specific extension of at least an additional year of data collection and reasoned that the additional time frame would allow States to implement the necessary methods of data collection, particularly if they did not pilot the proposed measure; learn from other States that have implemented the statewide measure; and train personnel on implementing the data collection and sharing requirements.

Departments' Response: The Departments will implement this indicator similarly to how other indicators have been approached under WIOA. This will include providing technical assistance to States to ensure that they have the systems in place that are necessary to begin reporting on this indicator according to timelines that the Departments will establish and announce in guidance following the finalization of this rulemaking.

The Departments note that sanctions only occur after 2 consecutive years of performance failures for the same score. Furthermore, the implementation of performance assessments requires a minimum of 2 years of data before the Departments would use a statistical adjustment model in the negotiations process, and any potential implementation of performance assessments would be conditional upon having sufficient data to produce an objective statistical adjustment model. The metric uses existing data collected in the PIRL; States have been required to collect this information since the inception of the jointly administered performance accountability system established in WIOA sec. 116. The Departments believe there is sufficient time built into the implementation process and are not extending the implementation time frame currently.

Comments: One commenter questioned if an effectiveness in serving employers indicator dropped below a certain threshold could trigger a probation period for additional oversight by the Departments, possibly including sanctions as well.

Departments' Response: The Departments appreciate the commenter's suggestion and note that the first year of failure to meet 90 percent of a State's adjusted level of performance on the effectiveness in serving employers indicator would trigger required technical assistance, including a corrective action plan, and the second consecutive year of failure in this same manner would result in a sanction against the Governor's Reserve for statewide activities under the title I adult, dislocated worker, and youth formula programs under WIOA sec. 116(f)(1)(B). The Departments reiterate that this indicator will be treated similarly to how other indicators have been approached under WIOA.

Comments: Several commenters questioned whether the sanctions would be leveraged only against State set-aside title I allocations, expressing concern that the penalty would be inequitable if it impacted all six core programs.

Departments' Response: As is the case for each of the six primary indicators of performance, WIOA sec. 116(f)(1)(B) requires that the application of sanctions is against the Governor's Reserve for statewide activities under the title I adult, dislocated worker, and youth formula programs. The Departments recognize the commenters' concerns regarding funding and sanctions being tied to individual programs; however, WIOA sec. 116(f)(1)(B) makes clear that the sanctions are imposed against the Governor's Reserve for statewide activities under the title I adult, dislocated worker, and youth formula programs regardless of which of the six core programs' performance constitutes a failure giving rise to the sanction. Therefore, given the explicit statutory requirement, the Departments do not have the authority to do as these commenters suggest. No change to the regulatory text was made in response to these comments.

Statistical Adjustment Model

Comments: Several commenters recommended ensuring that the statistical adjustment model accounts for fluctuations in employment rates caused by the seasonal and migrant workforces, particularly in the construction, agriculture, and hospitality sectors. Similarly, another commenter recommended that the statistical adjustment model incorporate factors such as self-employment, temporary employment, transitioning job seekers, and gig workers. The commenter further recommended that the Departments consider external factors that would cause measurement deviations, such as participants seeking immediate employment to avoid hardship, participants accepting a better job offer with sustainable wages or benefits, and participants seeking opportunities to upgrade their skills.

One commenter stated that the proposed measure would require additional statistical adjustments, that it would be subject to variations based on sector and economic conditions, and that it would not reflect current workforce trends like increases in self-employment. Another commenter expressed similar concerns about the measure's ability to accurately capture effectiveness in serving employers given particular economic conditions and differences across industries. A third commenter likewise asserted that the indicator would be subject to fluctuating economic conditions.

One commenter recommended that the Departments consider additional factors in the final rule, including: factors that can affect the median tenure of workers, which is lower for younger people; difficulty in accounting for differences among regions, such as areas with relatively greater or fewer employment opportunities; inconsistencies among reporting platforms; differences in tracking timelines and reporting requirements among workforce partners; and the possibility that employer retention rates can increase or decrease without changes in levels of employer services being provided.

Departments' Response: The Departments thank the commenters for these recommendations. The Departments acknowledge the commenters' recommendations and note that the statistical adjustment model will address the commenters' concerns. The Departments will conduct a thorough development process for the statistical adjustment model for this indicator, as has been and continues to be done in the development of the model for the other five primary indicators of performance. The Departments will provide updates to the appropriate performance guidance and technical assistance for reporting on this indicator.

Request for Guidance

Comments: Commenters requested that the Departments provide grantees with defined methods for gathering and reporting the relevant data to ensure that all programs collect and report the data consistently. Another commenter asked for guidance on how performance negotiations would be handled in States without centralized organization into one agency, specifically if the designated State workforce agency will complete the negotiations for this statewide measure in such cases. Another commenter noted that retention with employers during the second and fourth quarters after exit is reported on the RSA 911 and the PIRL and suggested that the Departments use State ETA 9169 reports to collect the percentage of retention, a practice that it said would reduce any duplicate reporting. Another commenter asked multiple questions related to implementation of the Retention with the Same Employer measure, namely how it would affect the reporting requirements outlined in TEGL No. 10–16, Change 2, Attachment IV, Table B; what the impacts would be for the defined services to business since those measures would no longer be required to be reported; and how employer establishments would be reported.

Departments' Response: The Departments appreciate these comments and note that the Departments will provide detailed information on these requirements through ICRs, guidance, instructions, and technical assistance relating to definitions, data collection and reporting, negotiations, and local level application of this primary indicator of performance.

The Departments made no changes to proposed § 677.190; the final rule implements § 677.190 as proposed.

III. Regulatory Analysis and Review

A. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review) and Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996

Under Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. *See* 58 FR 51735 (Oct. 4, 1993). Section 1(b) of E.O. 14094 amends section 3(f) of E.O. 12866 to define a ''significant regulatory action'' as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of 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) create a serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O. *See* 88 FR 21879 (Apr. 11, 2023). This final rule is a significant regulatory action under section 3(f) of E.O. 12866, as amended by E.O.14094.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

1. Outline of the Analysis

Section III.A.2 provides a summary of the results of the RIA. Section III.A.3 describes the need for the final rule, and Section III.A.4 describes the process used to estimate the costs and cost savings of the final rule and the general inputs used, such as wages and number of affected entities. Section III.A.5 explains how the provisions of the final rule will result in quantified costs and cost savings and presents the calculations the Departments used to estimate them. In addition, Section III.A.5 describes the qualitative benefits of the final rule. Section III.A.6 summarizes the estimated first-year and 10-year total and annualized costs, cost savings, and net costs of the final rule. Finally, Section III.A.7 describes the regulatory alternatives considered when developing the final rule.

2. Analysis Summary

The Departments estimate that the final rule will result in costs and cost savings. As shown in Exhibit 2, the final rule is expected to have an annualized quantified cost of $44,208 and a total 10-year quantifiable cost of $310,497 at a discount rate of 7 percent.[32] The final rule is estimated to have annualized quantified cost savings of $2.30 million and total 10-year quantifiable cost savings of $16.13 million at a discount rate of 7 percent.[33] The Departments estimate that the final rule will result in an annualized net quantified cost savings of $2.25 million and a total 10-year net cost of $15.82 million, both at a discount rate of 7 percent and expressed in 2022 dollars.[34]

EXHIBIT 2—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COST SAVINGS OF THE FINAL RULE

[2022 $millions]

	Costs	Cost savings	Net cost savings
Undiscounted 10-Year Total	$0.35	$21.46	$21.11
10-Year Total with a Discount Rate of 3%	0.33	18.85	18.52
10-Year Total with a Discount Rate of 7%	0.31	16.13	15.82
10-Year Average	0.03	2.15	2.11
Annualized at a Discount Rate of 3%	0.04	2.21	2.17
Annualized at a Discount Rate of 7%	0.04	2.30	2.25

The cost of the final rule is associated with rule familiarization and the requirement to calculate and report Retention with the Same Employer for the effectiveness in serving employers performance indicator for 57 States and 78 VR agencies.[35] No longer requiring States to collect, calculate, and report for two alternative definitions of the effectiveness in serving employers performance indicator and instead requiring States to calculate and report only the Retention with the Same Employer definition of the indicator will contribute to the cost savings of the final rule. See the costs and cost savings subsections of Section III.A.5 (Subject-by-Subject Analysis) below for a

[32] The final rule would have an annualized cost of $38,607 and a total 10-year cost of $329,323 at a discount rate of 3 percent in 2022 dollars.

[33] The final rule would have an annualized cost savings of $2.21 million and a total 10-year cost savings of $18.85 million at a discount rate of 3 percent in 2022 dollars.

[34] The final rule would have an annualized net cost savings of $2.17 million and a total 10-year cost of $18.52 million at a discount rate of 3 percent in 2022 dollars.

[35] Consistent with WIOA sec. 3(56) and 20 CFR 677.150(d), the use of the term ''States'' in this RIA refers to the 50 States; the District of Columbia; Puerto Rico; and the outlying areas of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands; and the Republic of Palau, a country in free association with the United States. *See also* footnote 8 *supra.*

detailed explanation. To be clear, however, the Departments' decision with respect to this final rule was not based on the cost savings but rather on the programmatic and data benefits described previously in Sections II.A and II.B above.

The Departments cannot quantify the benefits of the final rule; therefore, Section III.A.5 (Subject-by-Subject Analysis) describes the benefits qualitatively.

Comments that the Departments received regarding the RIA set forth in the proposed rule are summarized and responded to below.

Comments: A commenter expressed concern about the costs and time associated with developing a system that combines data across all programs. Further, the commenter said, to successfully capture data from multiple agencies, States that are not already doing so would need to establish a cross-agency data system or SLDS, which may require costs for set-up, storage, management, and maintenance. The commenter cited a recent evaluation that indicated that a comprehensive SLDS project would take 3 years to establish and cost $1 million to $3 million for staffing and technology.

Departments' Response: The Departments estimate the costs of the requirements of the final rule, which are to calculate and report the Retention with the Same Employer indicator. Those costs include the time for programming and reporting. Currently, States report on two of the three pilot measures for effectiveness in serving employers. Therefore, States are already reporting effectiveness in serving employers measures that include data across all core programs in the State. In other words, this is not a new approach for reporting data for this indicator and, thus, is familiar to States. The Retention with the Same Employer measure is not requiring the establishment of a cross-agency data system.

Comments: A commenter said that although using the proposed measure, Retention with the Same Employer, may require less administrative costs than the other piloted alternatives, meeting the performance goals would be difficult and thus negate the cost savings.

Departments' Response: Retention with the Same Employer supports meeting performance goals as it is a valid measure of WIOA's core programs' effectiveness in serving employers with lesser administrative costs. As discussed in the qualitative benefits section of the RIA, Retention with the Same Employer demonstrates a continued relationship between the employer and participants who have exited WIOA core programs. While many circumstances can have an impact on an employer's retention of employees, an indication that an employee is still working for the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for both parties, as retention of an employee reduces the costs to the employer associated with employee turnover and retraining (see also the Departments' Responses to comments in Section II.B). In terms of meeting the performance goals, the Departments disagree that meeting the target for this measure will be more difficult compared to the other piloted alternatives. As would be true for all the piloted measures and like the other primary indicators of performance, the statistical adjustment model will adjust based on actual values from the States, and therefore the Departments do not believe this definition of the indicator will be more difficult to achieve success than any of the other indicators.

3. Need for Regulation

In the Joint WIOA Final Rule, the Departments described a phased approach, which included a pilot study, to defining in regulation the sixth statutory performance indicator—effectiveness in serving employers—required by WIOA. This final rulemaking is necessary to complete implementation of the performance accountability requirements as discussed in the Joint WIOA Final Rule and required by statute. Specifically, States, under the Departments' joint guidance, piloted the following definitions for the effectiveness in serving employers performance indicator:

- Retention with the Same Employer: Percentage of participants with wage records who exit from WIOA core programs and were employed by the same employer in the second and fourth quarters after exit.
- Repeat Business Customer: Percentage of employers who have used WIOA core program services more than once during the last three reporting periods.
- Employer Penetration: Percentage of employers using WIOA core program services out of all employers in the State.

The Departments are establishing Retention with the Same Employer as the standard definition of the effectiveness in serving employers performance indicator to complete implementation of the WIOA performance accountability requirements to assess the effectiveness of States and local areas in achieving positive outcomes.

4. Analysis Considerations

a. WIOA Core Programs

The Departments estimated the costs and cost savings of the final rule relative to the existing baseline (*i.e.,* the current practices for complying with the joint WIOA performance accountability regulations and the Departments' joint guidance). WIOA sec. 116 establishes the requirement for performance indicators and performance reporting requirements to assess the effectiveness of the WIOA core programs enumerated in WIOA sec. 116(b)(3)(A)(ii) in serving employers. The core programs include adult, dislocated worker, and youth programs under title I of WIOA; the AEFLA program under title II; programs authorized under the Wagner-Peyser Act as amended by WIOA title III; and the VR program authorized under title I of the Rehabilitation Act as amended by WIOA title IV. The analysis refers to the WIOA title I and Wagner-Peyser Act programs jointly as the DOL programs.

The baseline consists of the combination of piloted approaches for effectiveness in serving employers that States collected in 2021 and would be expected to continue to report in the absence of this final rule. The baseline uses DOL historical data on the number of States that report each combination of the three piloted approaches for the effectiveness in serving employers performance indicator. Exhibit 3 displays DOL data from 2017 through 2021 on the existing effectiveness in serving employers approach combinations. The Departments used the most recent year of State data reported for PY 2021 to define the existing baseline of States reporting combinations of approaches to the effectiveness in serving employers performance indicator.

EXHIBIT 3—STATE REPORTING COMBINATIONS OF EFFECTIVENESS IN SERVING EMPLOYERS DEFINITIONS

	Retention with the same employer + employer penetration	Retention with the same employer + repeat business customer	Repeat business customer + employer penetration	All three effectiveness in serving employers approaches	Total states reporting
2017	12	5	17	10	44
2018	10	10	17	15	52
2019	9	11	18	14	52
2020	9	12	20	15	56
2021	10	9	22	16	57

In accordance with the RIA guidance articulated in OMB's Circular A–4 and consistent with the Departments' practices in previous rulemakings, this RIA focuses on the likely consequences of the final rule (*i.e.,* costs and cost savings that accrue to entities affected). The analysis covers 10 years (from 2024 through 2033) to ensure it captures major costs and cost savings that accrue over time. The Departments express all quantifiable impacts in 2022 dollars and use discount rates of 3 and 7 percent, pursuant to OMB Circular A–4.

Exhibit 4 presents the number of entities that are expected to be affected by the final rule. The Departments provide these estimates and use them throughout this analysis to estimate the costs and cost savings of the final rule.

EXHIBIT 4—WIOA CORE PROGRAMS—NUMBER OF AFFECTED ENTITIES BY TYPE

Entity type	Number
DOL Programs:	
States	57
Local Workforce Development Boards (WDBs)	580
AEFLA Program:	
States	57
Local AEFLA providers [36]	1,719
VR Program:	
VR agencies	78

b. Compensation Rates

In Section III.A.5 (Subject-by-Subject Analysis), the Departments present the costs, including labor, associated with the implementation of the provisions of the final rule. Exhibits 5a through 5c present the hourly compensation rates for the occupational categories expected to experience a change in level of effort (workload) due to the final rule. We used the BLS mean hourly wage rate for State and local employees.[37] [38] We also used the wage rate from the Office of Personnel Management's Salary Table for the 2022 General Schedule for Federal employees in the management analyst occupation (Grade 14, Step 5).[39] To reflect total compensation, wage rates include nonwage factors, such as overhead and fringe benefits (*e.g.,* health and retirement benefits). For all labor groups (*i.e.,* local, State, and Federal governments), we used an overhead rate of 17 percent.[40] For the State and local sectors, we used a fringe benefits rate of 62 percent, which represents the ratio of average total compensation to average wages for State and local government workers in March 2022.[41] For the Federal Government, we used a fringe benefits rate of 63 percent.[42] We then multiplied the sum of the loaded wage factor and overhead rate by the corresponding occupational category wage rate to calculate an hourly compensation rate.[43]

EXHIBIT 5a—COMPENSATION RATES FOR LOCAL EMPLOYEES

[2022$]

Position	Grade level	Base hourly wage rate	Loaded wage factor	Overhead costs	Hourly compensation rate
		(a)	(b)	(c)	d = a + b + c
Management Analyst	N/A	$43.61	$27.04 ($43.61 × 0.62)	$7.41 ($43.61 × 0.17)	$78.06
Database Administrator	N/A	$49.01	$30.39 ($49.01 × 0.62)	$8.33 ($49.01 × 0.17)	$87.73

[36] Local AEFLA providers include local educational agencies; community-based organizations; faith-based organizations; libraries; community, junior, and technical colleges; 4-year colleges and universities; correctional institutions; and other agencies and institutions.

[37] BLS, "May 2022 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999200—State Government, excluding schools and hospitals (OEWS Designation)," *https://www.bls.gov/oes/current/naics4_999200.htm* (last updated April 25, 2023).

[38] BLS, "May 2022 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999300—Local Government, excluding schools and hospitals (OEWS Designation)," *https://www.bls.gov/oes/current/naics4_999300.htm* (last updated April 25, 2023).

[39] Office of Personnel Management, "Salary Table 2022," *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2022/GS_h.pdf* (last visited Aug. 29, 2023).

[40] Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[41] BLS, "Employer Costs for Employee Compensation—March 2022," June. 16, 2022, *https://www.bls.gov/news.release/archives/ecec_06162022.pdf.* Calculated using Table 1. Employer Costs for Employee Compensation by ownership.

[42] DOL, "Workforce Innovation and Opportunity Act (WIOA) Common Performance Reporting" OMB Control No. 1205–0526, *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202012-1205-003* (last visited Aug. 29, 2023).

[43] The hourly compensation rates presented in Exhibit 5a, Exhibit 5b, and Exhibit 5c are rounded. Calculations used throughout the RIA use the unrounded value. Therefore, numbers may not sum due to rounding for the convenience of the reader.

EXHIBIT 5b—COMPENSATION RATES FOR STATE EMPLOYEES

[2022$]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Management Analyst	N/A	$35.31	$21.89 ($35.31 × 0.62)	$6.00 ($35.31 × 0.17)	$63.20
Staff Trainer	N/A	$39.31	$24.37 ($39.31 × 0.62)	$6.68 ($39.31 × 0.17)	$70.36
Rehabilitation Counselor	N/A	$27.31	$16.93 ($27.31 × 0.62)	$4.64 ($27.31 × 0.17)	$48.88

EXHIBIT 5c—COMPENSATION RATES FOR FEDERAL EMPLOYEES

[2022$]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Management Analyst	GS–14, Step 5	$52.12	$32.84 ($52.12 × 0.63)	$8.86 ($52.12 × 0.17)	$93.82

5. Subject-by-Subject Analysis

The Departments' analysis below covers the estimated costs and cost savings of the final rule.

c. Costs

The following sections describe the costs of the final rule.[44]

(1) WIOA Core Programs Rule Familiarization

State- and local-level DOL programs, State- and local-level AEFLA programs, and State VR agencies will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year.

To estimate the first-year cost of rule familiarization at the State level, the Departments multiplied the estimated number of management analysts (1) by the time required to read and review the rule (1 hour), and by the applicable hourly compensation rate ($63.20/hour). We multiplied this result by the sum of the number of States (57) for the DOL programs, the number of States (57) for the AEFLA programs, and the number of VR agencies (78). This calculation yields $12,135 in one-time labor costs, which is equal to an average annual cost of $1,214 over the 10-year analysis period.

At the local level for the DOL programs, the Departments multiplied the estimated number of management analysts (1) by the time required to read and review the rule (1 hour), by the applicable hourly compensation rate ($78.06/hour), and by the number of local WDBs (580). This calculation yields $45,276 in one-time labor costs, which is equal to an average annual cost of $4,528 over the 10-year analysis period.[45]

At the local level for the AEFLA programs, the Departments multiplied the estimated number of management analysts (1) by the time required to read and review the rule (1 hour), by the applicable hourly compensation rate ($78.06/hour), and by the number of local AEFLA providers (1,719). This calculation yields $134,188 in one-time labor costs, which is equal to an average annual cost of $13,419 over the 10-year analysis period.

The sum of these costs yields a total one-time labor cost of $191,600 for State- and local-level DOL programs, State- and local-level AEFLA programs, and State VR agencies to read and review the new rule. Over the 10-year period of analysis, these estimated one-time costs result in an average annual cost of $19,160 undiscounted, or $22,461 and $27,279 at discount rates of 3 and 7 percent, respectively. Exhibit 6 summarizes the above calculations.

EXHIBIT 6—WIOA CORE PROGRAMS, RULE FAMILIARIZATION ONE TIME COST

Agency	Management analyst hours	Number of management analysts	Loaded wage rate	Population [1]	Total [2]
State-level DOL	1	1	$63.20	57	$3,602
Local-level DOL	1	1	78.06	580	45,276
State-level AEFLA	1	1	63.20	57	3,602
Local-level AEFLA	1	1	78.06	1,719	134,188
State-level VR	1	1	63.20	78	4,930
Total Initial Cost					191,600

[1] Population figures represent States (57) and VR agencies (78).
[2] Numbers may not sum due to rounding for the convenience of the reader.

[44] Numbers may not sum due to rounding for the convenience of the reader.

[45] Numbers may not sum due to rounding for the convenience of the reader.

(2) Calculating and Reporting Retention With the Same Employer

WIOA sec. 116(b)(2)(A)(i)(VI) provides that the sixth primary indicator of performance will be an indicator that measures program effectiveness in serving employers, which WIOA sec. 116(b)(2)(A)(iv) directs the Departments to establish. Currently, under the Departments' joint guidance, States must report at least two of the following three approaches to measuring effectiveness in serving employers: Retention with the Same Employer, Employer Penetration, and Repeat Business Customer. All States will be required to adopt the same approach to measure effectiveness in serving employers: Retention with the Same Employer. Seventeen States do not currently report the Retention with the Same Employer approach to the effectiveness in serving employers performance indicator.[46] These 17 States will have new costs associated with setting up procedures to calculate and report Retention with the Same Employer and annual costs associated with continuing to calculate and report Retention with the Same Employer. To estimate the cost of establishing Retention with the Same Employer as the effectiveness in serving employers performance indicator, the Departments followed the assumptions used to estimate the pilot cost of the Retention with the Same Employer approach to effectiveness in serving employers in the 2016 Joint WIOA Final Rule. However, we updated those assumptions for this analysis by removing the cost of collecting data (4 hours) because all States are already collecting the required data in the baseline. We then increased the number of hours we assume State-level DOL programs require for one-time costs of programming (from 4 to 6 hours) based on the Departments' experience with initial costs for programming following the Joint WIOA Final Rule. The assumptions and costs are summarized as follows:

At the Federal level for the DOL core programs, the Departments estimate the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance development (8 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in a one-time labor cost of $751.

The Departments estimated DOL's annual labor costs for calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the DOL core programs, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for programming (6 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($379) by the number of States (57) to estimate this one-time cost at $21,616.

The Departments estimated the State-level DOL core programs' annual labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($253) by the number of States (57) to estimate this annual cost at $14,411.

At the Federal level for the AEFLA program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance development (8 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in a one-time labor cost of $751.

The Departments estimated AEFLA's annual labor cost for calculating and reporting Retention with the Same Employer at the Federal level by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the AEFLA program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for programming and data collection (6 hours) and by the hourly compensation rate ($63.20). We multiplied the labor cost ($379) by the number of States (57) to estimate this one-time cost at $21,616.[47]

The Departments estimated the State-level AEFLA program's annual labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($53) by the number of States (57) to estimate this annual cost at $14,411.

At the Federal level for the VR program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance development (8 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in a one-time labor cost of $751.

The Departments estimated the annual labor costs associated with calculating and reporting Retention with the Same Employer at the Federal level for the VR program by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the VR program, the Departments estimated the one-time labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for programming (6 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($379) by the number of VR agencies (78) to estimate this one-time cost at $29,580.

The Departments estimated the State-level VR program's annual labor cost associated with calculating and reporting Retention with the Same Employer by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($253) by the number of VR agencies (78) to estimate this annual cost of $19,720.

[46] Thirty-five States report Retention with the Same Employer according to DOL data. DOL collects data on 52 of 57 States defined in this analysis. DOL assumes the remaining 5 States report the cheapest combination of pilot approaches (Retention with the Same Employer + Employer Penetration), resulting in the RIA assuming 40 States report Retention with the Same Employer.

[47] Numbers may not sum due to rounding for the convenience of the reader.

The sum of these one-time costs of the retention measure yields $75,064 for individuals from the Federal- and State-level DOL core programs, AEFLA program, and VR program. In addition, the sum of the annual costs associated with calculating and reporting Retention with the Same Employer for these entities yields $49,667 per year. Exhibits 7a and 7b summarize the above calculations.

EXHIBIT 7a—RETENTION WITH THE SAME EMPLOYER, INITIAL COST

Agency	Management analyst hours [1]	Number of management analysts	Loaded wage rate	Population [2]	Total [3]
Federal-level DOL	8	1	$93.82	NA	$751
State-level DOL	6	1	63.20	57	21,616
Federal-level AEFLA	8	1	93.82	NA	751
State-level AEFLA	6	1	63.20	57	21,616
Federal-level VR	8	1	93.82	NA	751
State-level VR	6	1	63.20	78	29,580
Total Initial Cost					75,064

[1] Management analysts on the Federal level are GS–14, Step 5.
[2] Population figures represent States (57) and VR agencies (78).
[3] Numbers may not sum due to rounding for the convenience of the reader.

EXHIBIT 7b—RETENTION WITH THE SAME EMPLOYER, ANNUAL COST

Agency	Management analyst hours [1]	Number of management analysts	Loaded wage rate	Population [2]	Total [3]
Federal-level DOL	4	1	$93.82	NA	$375
State-level DOL	4	1	63.20	57	14,411
Federal-level AEFLA	4	1	93.82	NA	375
State-level AEFLA	4	1	63.20	57	14,411
Federal-level VR	4	1	93.82	NA	375
State-level VR	4	1	63.20	78	19,720
Total Annual Cost					49,667

[1] Management analysts on the Federal level are GS–14, Step 5.
[2] Population figures represent States (57) and VR agencies (78).
[3] Numbers may not sum due to rounding for the convenience of the reader.

The costs in Exhibits 7a and 7b represent the costs for all 57 States to report the Retention with the Same Employer approach to the effectiveness in serving employers performance indicator. Currently, 40 States already report Retention with the Same Employer. The remaining 17 States will face costs with having to start reporting Retention with the Same Employer. We therefore multiply the total one-time costs ($75,064) and annual costs ($49,667) by the 29.8 percent of States not currently reporting the retention measure (17 out of 57) yielding $22,387 in one-time costs and an additional $14,813 in annual costs to increase the number of States reporting the retention measure from 40 to all 57.

The estimated total cost from requiring all States to report Retention with the Same Employer over the 10-year period is $155,704 undiscounted, or $137,723 and $118,898 at discount rates of 3 and 7 percent, respectively, with an annualized cost over the 10-year period of $16,145 and $16,928 at discount rates of 3 and 7 percent, respectively.

d. Cost Savings

The following sections describe the cost savings of the final rule.

(1) Summary of Approach

The pilot program announced in the 2016 Joint WIOA Final Rule required States to report two of the three approaches for measuring effectiveness in serving employers. Under this final rule States will no longer face costs associated with collecting the information required to calculate the Employer Penetration or Repeat Business Customer approaches to the effectiveness in serving employers performance indicator. To estimate the cost savings, we first update the costs associated with collecting each of these pilot approaches following the assumptions used to estimate the cost of the Retention with the Same Employer pilot approach in the 2016 Joint WIOA Final Rule. We then estimate the cost savings under the final rule associated with the proportion of States that will no longer report the various combinations of the pilot approaches that States report in the baseline.

Currently, 15 States report Retention with the Same Employer and Employer Penetration, 9 States report Retention with the Same Employer and Repeat Business Customer, 22 States report Employer Penetration and Repeat Business Customer, and 16 States report all 3 approaches to defining the effectiveness in serving employers performance indicator. To estimate cost savings, we first estimate the annual cost of all 57 States collecting data for, calculating, and reporting the percentage of employers using services out of all employers in the State (Employer Penetration) and the percentage of repeat employers using services within the previous 3 years (Repeat Business Customer). We then multiply the annual cost by the percentage of States currently using the pilot approach to estimate the cost savings. Below, we present the updated costs associated with all 57 States reporting each pilot approach, and then present the cost savings associated with the proportion of States no longer reporting them.

(2) Employer Penetration: Percentage of Employers Using Services Out of All Employers in the State

Under the pilot program, States must use two of three specified approaches to measure effectiveness in serving employers. The final rule will only require States to collect data for, calculate, and report the first approach (Retention with the Same Employer). This section calculates the cost for all 57 States to collect data, calculate, and report Employer Penetration and then uses these costs to estimate cost savings for the proportion of States that will no longer report Employer Penetration under the final rule.

At the Federal level for the DOL core programs, the Departments estimated the annual labor cost associated with Employer Penetration by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the DOL core programs, the Departments estimated Employer Penetration's annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to Local WDBs (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($695) by the number of States (57) to estimate this annual cost at $39,629.

For local-level DOL core programs, the Departments estimated the annual labor cost for Employer Penetration by multiplying the estimated number of management analysts (one) by the time required for data collection (4 hours) and by the hourly compensation rate ($78.06/hour). We multiplied the labor cost ($312) by the number of Local WDBs (580) to estimate this annual cost at $181,104.

At the Federal level for the AEFLA program, the Departments estimated the annual labor cost associated with Employer Penetration by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the AEFLA program, the Departments estimated Employer Penetration's annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to local AEFLA providers (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($695) by the number of States (57) to estimate this annual cost at $39,629.

For the local-level AEFLA program, the Departments estimated the annual labor cost for Employer Penetration by multiplying the estimated number of management analysts (one) by the time required for data collection (4 hours) and by the hourly compensation rate ($78.06/hour). We multiplied the labor cost ($312) by the number of local AEFLA providers (1,719) to estimate this annual cost at $536,754.[48]

At the Federal level for the VR program, the Departments estimated the annual labor cost associated with Employer Penetration by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the VR program, the Departments estimated Employer Penetration's annual labor cost by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). In addition, we added the estimated number of rehabilitation counselors (62 assistants) by the time required for data collection (1 hour each) and by the hourly compensation rate ($48.88/hour). We summed the labor cost for both categories and multiplied it ($3,284) by the number of VR agencies (78) to estimate this annual cost at $256,127.

Summing these annual costs for all 57 States to calculate and report Employer Penetration yields $1,054,369 per year for the Federal-, State-, and local-level DOL core programs and AEFLA programs and the State-level VR programs. The Departments used the updated costs in Exhibit 8 to estimate the cost savings for States that will no longer report this pilot approach.

EXHIBIT 8—EMPLOYER PENETRATION, ANNUAL

Agency	Labor category [1]	Hours	Workers	Loaded wage rate	Population [2]	Total [3]
Federal-level DOL	Management Analyst	4	1	$93.82	NA	$375
State-level DOL	Management Analyst	11	1	63.20	57	39,629
Local-Level DOL	Management Analyst	4	1	78.06	580	181,104
Federal-level AEFLA	Management Analyst	4	1	93.82	NA	375
State-level AEFLA	Management Analyst	11	1	63.20	57	39,629
Local-Level AEFLA	Management Analyst	4	1	78.06	1,719	536,754
Federal-level VR	Management Analyst	4	1	93.82	NA	375
State-level VR	Management Analyst	4	1	63.20	78	19,720
State-level VR	Rehab Counselor	1	62	48.88	78	236,407
Annual Total						1,054,369

[1] Management analysts on the Federal level are GS–14, Step 5.
[2] Population figures represent States (57), VR agencies (78), and AEFLA providers (1,719).
[3] Numbers may not sum due to rounding for the convenience of the reader.

[48] Numbers may not sum due to rounding for the convenience of the reader.

(3) Repeat Business Customer: Percentage of Repeat Employers Using Services Within the Previous 3 Years

This section calculates the cost for all 57 States to collect data, calculate, and report the Repeat Business Customer approach to the effectiveness in serving employers performance indicator. The Departments use these costs to estimate cost savings for the proportion of States that will no longer report this pilot approach under the final rule.

At the Federal level for the DOL core programs, the Departments estimated the annual labor cost associated with Repeat Business Customer by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the DOL core programs, the Departments estimated Repeat Business Customer's annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to Local WDBs (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($695) by the number of States (57) to estimate this annual cost at $39,629.

For the local-level DOL core programs, the Departments estimated the annual labor cost for Repeat Business Customer by multiplying the estimated number of management analysts (one) by the time required for data collection (6 hours) and by the hourly compensation rate ($78.06/hour). We multiplied the labor cost ($468) by the number of Local WDBs (580) to estimate this annual cost at $271,655.

At the Federal level for the AEFLA program, the Departments estimated the annual labor cost associated with Repeat Business Customer by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the AEFLA program, the Departments estimated Repeat Business Customer's annual labor cost by multiplying the estimated number of management analysts (one) by the sum of time required for data collection (4 hours), providing training and technical assistance to local AEFLA providers (3 hours), and Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). We multiplied the labor cost ($695) by the number of States (57) to estimate this annual cost at $39,629.

For the local-level AEFLA program, the Departments estimated the annual labor cost for Repeat Business Customer by multiplying the estimated number of management analysts (one) by the time required for data collection (6 hours) and by the hourly compensation rate ($78.06/hour). We multiplied the labor cost ($468) by the number of local AEFLA providers (1,719) to estimate this annual cost at $805,130.

At the Federal level for the VR program, the Departments estimated the annual labor cost associated with Repeat Business Customer by multiplying the estimated number of GS–14, Step 5 management analysts (one) by the time required for technical assistance delivery (4 hours) and by the hourly compensation rate ($93.82/hour). This calculation results in an annual labor cost of $375.

At the State level for the VR program, the Departments estimated Repeat Business Customer's annual labor cost by multiplying the estimated number of management analysts (one) by the time required for Federal reporting (4 hours) and by the hourly compensation rate ($63.20/hour). In addition, we added the estimated number of rehabilitation counselors (62 counselors) by the time required for data collection (1 hour each) and by the hourly compensation rate ($48.88/hour). We summed the labor cost for both categories ($3,284) and multiplied it by the number of VR agencies (78) to estimate this annual cost of $256,127.

Summing these annual costs for all States to calculate and report Repeat Business Customer yields $1,413,298 per year for the Federal-, State-, and local-level DOL core programs and AEFLA programs and the State-level VR programs. The Departments used the updated costs in Exhibit 9 to estimate the cost savings for States to no longer report this pilot approach.

EXHIBIT 9—REPEAT BUSINESS CUSTOMER, ANNUAL

Agency	Labor category [1]	Hours	Workers	Loaded wage rate	Population [2]	Total [3]
Federal-level DOL	Management Analyst	4	1	$93.82	NA	$375
State-level DOL	Management Analyst	11	1	59.70	57	39,629
Local-Level DOL	Management Analyst	6	1	73.67	580	271,655
Federal-level AEFLA	Management Analyst	4	1	93.82	NA	375
State-level AEFLA	Management Analyst	11	1	59.70	57	39,629
Local-Level AEFLA	Management Analyst	6	1	73.67	1,719	805,130
Federal-level VR	Management Analyst	4	1	93.82	NA	375
State-level VR	Management Analyst	4	1	59.70	78	19,720
State-Level VR	Rehab Counselor	1	62	47.94	78	236,407
Annual Total						1,413,298

[1] Management analysts on the Federal level are GS–14, Step 5.
[2] Population figures represent States (57), VR agencies (78), and AEFLA providers (1,719).
[3] Numbers may not sum due to rounding for the convenience of the reader.

(4) Summary of Cost Savings

Under the final rule, the 15 States that currently report only the Retention with the Same Employer and Employer Penetration pilot approaches will have cost savings from no longer having to collect data for, calculate, and report Employer Penetration. Multiplying the annual cost for all 57 States to collect data for, calculate, and report Employer Penetration ($1,054,369) by the 26.3 percent of States reporting these two pilot approaches only (15 out of 57) yields annual cost savings of $277,466.

The 9 States currently reporting only the Retention with the Same Employer and Repeat Business Customer pilot approaches will have cost savings from no longer collecting data for, calculating, and reporting Repeat Business Customer. Multiplying the annual cost for all 57 States to collect data for, calculate, and report Repeat Business Customer ($1,413,298) by the 15.8 percent of States reporting these two pilot approaches only (9 out of 57) yields annual cost savings of $223,152.

The 22 States currently reporting only Employer Penetration and Repeat Business Customer and the 16 States currently reporting all three pilot approaches to the effectiveness in serving employers performance indicator will have cost savings from no longer collecting data for, calculating, and reporting both Employer Penetration and Repeat Business Customer. Multiplying the sum of annual costs for all 57 States to collect data for, calculate, and report both Employer Penetration and Repeat Business Customer ($2,467,667) by the 38.6 percent of States reporting Employer Penetration and Repeat Business Customer only and by the 28.1 percent of States reporting all three approaches yields annual cost savings of $952,433 and $692,679, respectively.

Summing these annual cost savings yields total annual cost savings for all 57 States of $2,145,729 from the final rule. The Departments estimate total cost savings over the 10-year period at $21,457,293 undiscounted, or $18,852,612 and $16,125,654 at discount rates of 3 and 7 percent, respectively. At discount rates of 3 and 7 percent, the 10-year period results in annualized cost savings of $2,210,101 and $2,295,930, respectively.

e. Qualitative Benefits Discussion

(1) General Benefits of Measuring Effectiveness in Serving Employers

The Departments cannot quantify the final rule's benefits associated with improving the WIOA core programs' effectiveness in serving employers. Measuring effectiveness in serving employers allows the DOL, AEFLA, and VR programs to set goals, monitor, and learn how to serve employers more effectively.[49] Reporting a measure of effectiveness in serving employers also helps Federal, State, and local policymakers evaluate program performance and inform future policy changes to better meet program goals, particularly providing employers with skilled workers and other services.

The Departments cannot quantify these estimated benefits because we do not have quantitative data on how the effectiveness in serving employers performance measure has influenced program implementation and how much it will influence future policies.

(2) Specific Benefits of Reporting Retention With the Same Employer

Requiring all States to calculate and report Retention with the Same Employer as the effectiveness in serving employers performance indicator will make it easier to compare WIOA core programs' effectiveness in serving employers performance across States and ensure all States have an indicator of job turnover and match quality between workers exiting WIOA core programs and employers. Retention with the Same Employer demonstrates a continued relationship between the employer and participants who have exited WIOA core programs. While many circumstances can have an impact on an employer's retention of employees, an indication that an employee is still working for the same employer in both the second and fourth quarters after exiting from a WIOA program demonstrates a level of success for both parties, as retention of an employee reduces the costs to the employer associated with employee turnover and retraining. Thus, reporting Retention with the Same Employer can help inform design and implementation of program services to reduce job turnover and improve employer-employee match quality. Improved matching and reduced turnover allow employees and employers to operate closer to their productive potential and can make it more worthwhile for employers to invest in training their employees and for employees to invest in learning employer-specific skills.

6. Summary of the Analysis

Exhibit 10 summarizes the estimated total costs and cost savings of the final rule over the 10-year analysis period. Discontinuing reporting of Employer Penetration and Repeat Business Customer has the largest effect as a cost savings. The Departments estimate the total net cost savings of the final rule at $16,125,654 at a discount rate of 7 percent.

EXHIBIT 10—ESTIMATED 10-YEAR MONETIZED COSTS AND COST SAVINGS OF THE FINAL RULE BY PROVISION

[2022 $millions]

Provision	Cost	Cost savings	Total net cost savings
Rule Familiarization	$0.13		
Reporting Retention with the Same Employer	0.16		
No Longer Reporting Other Measures		$21.46	
Undiscounted	0.35	21.46	$21.11
With a Discount Rate of 3%	0.33	18.85	18.52
With a Discount Rate of 7%	0.31	16.13	15.82

The Departments estimate the annualized costs of the final rule at $44,208 and the annualized cost savings at $2,295,930, at a discount rate of 7 percent. The Departments estimate the final rule will result in an annualized net quantifiable cost savings of $2,251,723 and a total 10-year net cost savings of $15,815,157, both at a

[49] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf.*

discount rate of 7 percent and expressed in 2022 dollars. Exhibit 11 summarizes the estimated total costs and cost savings of the final rule over the 10-year analysis period.

EXHIBIT 11—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COST SAVINGS OF THE FINAL RULE

[2022$]

Year/total	Costs	Costs savings	Net cost savings
2024	$213,987	$2,145,729	$1,931,742
2025	14,813	2,145,729	2,130,916
2026	14,813	2,145,729	2,130,916
2027	14,813	2,145,729	2,130,916
2028	14,813	2,145,729	2,130,916
2029	14,813	2,145,729	2,130,916
2030	14,813	2,145,729	2,130,916
2031	14,813	2,145,729	2,130,916
2032	14,813	2,145,729	2,130,916
2033	14,813	2,145,729	2,130,916
Undiscounted 10-Year Total	347,304	21,457,293	21,109,989
10-Year Total with a Discount Rate of 3%	329,323	18,852,612	18,523,289
10-Year Total with a Discount Rate of 7%	310,497	16,125,654	15,815,157
10-Year Average	34,730	2,145,729	2,110,999
Annualized with a Discount Rate of 3%	38,607	2,210,101	2,171,495
Annualized with a Discount Rate of 7%	44,208	2,295,930	2,251,723

7. Regulatory Alternatives

The Departments considered two alternatives to the proposed definition of the effectiveness in serving employers performance indicator. First, the Departments considered requiring use of the Employer Penetration pilot approach, which reports the percentage of employers using services out of all employers in the State. This approach would have required counts of services provided to employers, requiring States and local areas to report unique counts of individual employers receiving services through WIOA's programs. Employer Penetration would require a more data-intensive analysis than the proposed approach of Retention with the Same Employer. Employer Penetration would have the benefit of capturing the extent to which employers within a State are engaged with WIOA-funded services and would provide State programs an incentive to work with additional employers. As discussed earlier in Section II.A (Pilot Programs for WIOA Core Programs), on behalf of the Departments, DOL commissioned an examination of State experiences with the various approaches through a third-party contractor (the Final Pilot Study Report discussed elsewhere in this final rule), which found weaknesses in this pilot approach, including (1) an emphasis on quantity rather than quality or intensity of the employer service provided; (2) reliability issues associated with data entry and the process to count unique establishments; (3) measurement of program output rather than outcome; (4) potential for creation of perverse incentives to prioritize program breadth rather than depth in service and delivery; and (5) a lack of sensitivity to industry sectors targeted by State and local workforce agencies.[50] The Departments estimated the costs and cost savings of this alternative using the same method as the proposed approach. That is, the Departments used the estimated cost of collecting data, calculating, and reporting Employer Penetration, and then estimated the cost for the proportion of States that would need to start using this approach to reporting effectiveness in serving employers (4 States). Exhibit 12 summarizes these calculations below.

EXHIBIT 12—SUMMARY OF REGULATORY ALTERNATIVE 1 COSTS

Non-reported measure	Number of states	Updated 2016 cost estimates: initial cost	Updated 2016 cost estimates: annual cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), initial cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), annual cost
Employer Penetration	4	$264,215	$1,054,369	$18,541	$73,991

Costs include calculating and reporting Employer Penetration and rule familiarization for WIOA core programs. The Departments estimate the total cost of the first alternative over the 10-year period at $876,059 undiscounted, or $786,242 and $692,209 at discount rates of 3 and 7 percent, respectively, and an annualized cost of the 10-year period at $92,172 and $98,555 with discount rates of 3 and 7 percent, respectively.

To calculate cost savings the Departments used the estimated cost of collecting data for, calculating, and reporting the two other effectiveness in serving employers approaches (Retention with the Same Employer and

[50] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, page 68, *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf.*

Repeat Business Customer), and then estimated the cost savings for the proportion of States that would transition from their existing reporting combination of two or three effectiveness in serving employers approaches to the single Employer Penetration approach to the performance indicator. Exhibit 13 summarizes these calculations below.

EXHIBIT 13—SUMMARY OF REGULATORY ALTERNATIVE 1 COST SAVINGS

Reported measures	Number of states	Updated 2016 cost estimates: annual cost savings	Adjusted cost savings estimates: updated cost estimates × (# states ÷ 57): annual cost savings
Employer Penetration + Retention with the Same Employer	15	$49,667	$13,070
Employer Penetration + Repeat Business Customer	22	1,413,298	545,483
Retention with the Same Employer + Repeat Business Customer (No Employer Penetration)	9	1,462,965	230,994
All Three	16	1,462,965	410,657

The Departments estimated the total cost savings associated with the first alternative over the 10-year period at $12,002,050 undiscounted, or $10,545,132 and $9,019,820 at discount rates of 3 and 7 percent, respectively, with an annualized cost savings associated with the first alternative over the 10-year period at $1,236,211 and $1,284,219 with discount rates of 3 and 7 percent, respectively.

We estimate the first regulatory alternative to result in total net cost savings over the 10-year period of $11,125,992 undiscounted, or $9,758,890 and $8,327,611 at discount rates of 3 and 7 percent, respectively, with an annualized net cost savings of the 10-year period at $1,144,040 and $1,185,664 with discount rates of 3 and 7 percent, respectively.

The Departments considered a second regulatory alternative that would require the use of the Repeat Business Customer approach to the effectiveness in serving employers performance indicator, which reports the percentage of employers receiving services in a year who also received services within the previous 3 years. This approach to the effectiveness in serving employers measure requires counts of services provided to employers through WIOA's core programs. Repeat Business Customer requires a more data-intensive analysis than the proposed approach of Retention with the Same Employer. Repeat Business Customer captures the extent to which employers within a State can find workers and the employer's level of satisfaction with the public workforce system services. The Departments, in the Final Pilot Study Report, found weaknesses in this pilot approach, including that it (1) may provide a disincentive to reach out to new employers; (2) is subject to variation in industry and sector economic conditions; and (3) may require a statistical adjustment model to mitigate the weaknesses and improve implementation and interpretation.[51] The Departments estimated the costs and cost savings of this alternative using the same method as the proposed approach. That is, the Departments used the estimated cost of collecting data, calculating, and reporting Repeat Business Customer, and then estimated the cost for the proportion of States that would need to start using this approach to reporting effectiveness in serving employers (10 States). Exhibit 14 summarizes these calculations below.

EXHIBIT 14—SUMMARY OF REGULATORY ALTERNATIVE 2 COSTS

Non-reported measure	Number of states	Updated 2016 cost estimates: initial cost	Updated 2016 cost estimates: annual cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), initial cost	Adjusted cost estimates: updated cost estimates × (# states ÷ 57), annual cost
Repeat Business Customer	10	$260,613	$1,413,298	$45,722	$247,947

Costs include the cost of calculating and reporting Repeat Business Customer and the cost of rule familiarization for WIOA core programs. The Departments estimated the total cost of the second alternative over the 10-year period at $2,468,844 undiscounted, or $2,167,864 and $1,852,753 at discount rates of 3 and 7 percent, respectively, with an annualized cost of the 10-year period at $254,140 and $263,790 with discount rates of 3 and 7 percent, respectively.

To calculate cost savings, the Departments used the estimated cost of collecting data for, calculating, and reporting the two other effectiveness in serving employers approaches (Retention with the Same Employer and Employer Penetration), and then estimated the cost savings for the proportion of States that would transition from their existing reporting combination of two or three effectiveness in serving employers approaches to the single Repeat Business Customer approach to the performance indicator. Exhibit 15 summarizes these calculations below.

[51] S. Spaulding, et al., ''Measuring the Effectiveness of Services to Employers: Options for Performance Measures under the Workforce Innovation and Opportunity Act,'' Jan. 2021, page 67, *https://wdr.doleta.gov/research/FullText_Documents/ETAOP2021-17%20Measures%20of%20Effectiveness%20in%20Serving%20Employers_Final%20Report.pdf.*

EXHIBIT 15—SUMMARY OF REGULATORY ALTERNATIVE 2 COST SAVINGS

Reported measures	Number of states	Updated 2016 cost estimates: annual cost savings	Adjusted cost savings estimates: updated cost estimates × (# states ÷ 57): annual cost savings
Repeat Business Customer + Retention with the Same Employer	9	$49,667	$7,842
Repeat Business Customer + Employer Penetration	22	1,054,369	406,950
Employer Penetration + Retention with the Same Employer (No Repeat Business Customer)	15	1,104,036	290,536
All Three	16	1,104,036	309,905

The Departments estimated total cost savings associated with the second alternative over the 10-year period is $10,152,326 undiscounted, or $8,919,944 and $7,729,709 at discount rates of 3 and 7 percent, respectively with an annualized cost savings associated with the second alternative over the 10-year period is $1,045,690 and $1,086,299 with discount rates of 3 and 7 percent, respectively.

The Departments estimate the second regulatory alternative to result in total net cost savings over the 10-year period of $7,683,482 undiscounted, or $6,752,081 and $5,776,955 at discount rates of 3 and 7 percent, respectively, with an annualized net cost savings of the 10-year period at $791,550 and $822,508 with discount rates of 3 and 7 percent, respectively.

Exhibit 16 summarizes the estimated net cost savings associated with the three considered approaches to the effectiveness in serving employers performance indicator (*i.e.,* the three piloted approaches). The Departments prefer the proposed approach of requiring the use of Retention with the Same Employer because it has data more readily available, and, therefore, is less burdensome. The Retention with the Same Employer approach better aligns with workforce system goals of supporting employer-employee job match quality and reducing turnover without the weaknesses associated with the other two approaches to defining the effectiveness in serving employers performance indicator.

EXHIBIT 16—ESTIMATED MONETIZED COSTS OF THE FINAL RULE AND REGULATORY ALTERNATIVES

[2021 $millions]

	Final rule	Regulatory alternative 1	Regulatory alternative 2
Total 10-Year Net Cost Savings	$21.1	$11.1	$7.7
Total with 3% Discount	18.5	9.8	6.8
Total with 7% Discount	15.8	8.3	5.8
Annualized with 3% Discount	2.17	1.14	0.79
Annualized with 7% Discount	2.25	1.19	0.82

B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 and 604. The RFA permits an agency, in lieu of preparing such an analysis, to certify that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

The Departments determined that the final rule will not have a significant economic impact on a substantial number of small entities because any impacted small entities are already receiving financial assistance under the WIOA program and likely would continue to do so. The Departments have certified this to the Chief Counsel for Advocacy, Small Business Administration, pursuant to the RFA. 5 U.S.C. 605.

1. Affected Small Entities

The WIOA title I adult, dislocated worker, and youth program grantees, the WIOA title II State-level AEFLA grantees, Wagner-Peyser Act grantees (under the Wagner-Peyser Act as amended by WIOA title III), and VR program grantees (under the Rehabilitation Act as amended by WIOA title IV), are State government agencies and, therefore, are not considered small entities. However, the final rule could have a minimal impact on a variety of AEFLA local providers, some of which are small entities by U.S. Small Business Administration (SBA) size standards:[52] (1) local educational agencies (NAICS 611710; $24.0 million); (2) community-based organizations (NAICS 813410; $9.5 million); (3) faith-based organizations (NAICS 813110; $13.0 million); (4) libraries (NAICS 519210; $21.0 million); (5) community, junior (NAICS 611210; $32.5 million), and technical colleges (NAICS 611519; $21.0 million); (6) 4-year colleges and universities (NAICS 611310; $34.5

[52] SBA, ''Table of size standards,'' effective March 17, 2023, *https://www.sba.gov/document/support-table-size-standards* (last visited September 13, 2023). Dollar values provided in parentheses are the SBA average annual receipts small entity threshold (2022 dollars) for the relevant NAICS code.

million); (7) correctional institutions (NAICS 922410; NA [53]); (8) other institutions, such as medical and special institutions not designed for justice-involved individuals (NAICS 623210; $19.0 million); and (9) other public or private nonprofit agencies or institutions (NAICS 813319; $18.0 million).

Comments: Some commenters stated that the proposed rule assumes the only small entities affected by the rule would be AEFLA local program operators. However, the commenters said, in Michigan, local program operators of title I adult, dislocated worker, and youth programs, title II AEFLA programs, and title III Wagner-Peyser Act programs all meet the definition of small entities.

Departments' Response: This RFA section includes a discussion of the multiple types of small entities that may be affected by the rule, including local educational agencies (NAICS 611710), community-based organizations (NAICS 813410), public or private non-profit agencies or institutions (NAICS 813319), and additional local AEFLA provider classifications discussed in the RFA that might be implicated. The only cost of the final rule to these entities is $73.67 for rule familiarization, which would pose a *de minimis* cost for even the smallest entity.

2. Impact on Small Entities

The final rule definition of the effectiveness in serving employers performance indicator will have a minimal impact on AEFLA local providers. Each local AEFLA provider is expected to incur a $78.06 cost to review the rule. The $78.06 cost to review the rule is a *de minimis* burden on the entities incurring the cost, including the smallest entities subject to the rule. For example, the smallest category of community-based organization (NAICS 813410—civic and social organizations) has annual revenue of $58,521 in 2022 dollars.[54] They would therefore spend only 0.13 percent of their annual revenue on this cost. Amongst the smallest category of libraries (NAICS 519120—libraries and archives) this cost would also be 0.13 percent of the average entity's annual revenue of $58,581 in 2022 dollars.[55]

Local AEFLA providers are not estimated to incur any new costs, beyond the cost to review the rule, to report Retention with the Same Employer. Some local AEFLA providers may incur net cost savings if they currently report Employer Penetration or Repeat Business Customer. Local AEFLA providers that currently report Employer Penetration will incur cost savings of $312 and local AEFLA providers that currently report Repeat Business Customer will incur cost savings of $468. Therefore, some local AEFLA providers would have net cost savings of between $233.94 (= $312 − $78.06) and $389.94 (= $468 − $78.06) depending on the measure they currently report. For these local AEFLA providers the net cost savings would still be less than 1% of revenue (0.40% and 0.67% respectively for the smallest categories of entities in NAICS 813410 and NAICS 519120).[56] Federal transfer payments to States would fully finance the minor WIOA program cost burdens on grantees that would result from the final rule. Therefore, the Departments hereby certify that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act of 1995

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing for public comment a summary of the collection of information and a brief description of the need for and proposed use of the information.

As part of their continuing efforts to reduce paperwork and respondent burden, the Departments conduct a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. *See* 44 U.S.C. 3506(c)(2)(A). This activity helps to ensure that (1) the public understands the Departments' collection instructions; (2) respondents can provide the requested data in the desired format; (3) reporting burden (time and financial resources) is minimized; (4) collection instruments are clearly understood; and (5) the Departments can properly assess the impact of collection requirements on respondents. Furthermore, the PRA requires all Federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions in the proposed regulations that require any party to obtain, maintain, retain, report, or disclose information. The information collection requirements also must be submitted to OMB for approval.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number. The public also is not required to respond to a collection of information unless it displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 44 U.S.C. 3512.

The final rule revises ETA 9169, WIOA Statewide and Local Performance Report Template approved under OMB Control Number 1205–0526. The revision requires ''Retention with the Same Employer'' as the only definition of the effectiveness in serving employers performance indicator in the WIOA Common Performance Reporting ICR by an entity that reports to the Departments on behalf of the State. Data elements for the collection and calculation for the two other piloted definitions of the effectiveness in serving employers performance indicator—Repeat Business Customer and Employer Penetration—are removed from the ICR, along with the corresponding breakouts of the employer services that comprise them. No other changes were proposed for this ICR in the Joint WIOA Effectiveness in Serving Employers NPRM. In accordance with the PRA, the Departments submitted the associated ICR to OMB in concert with the publishing of the proposed rule, and provided the public with a 60-day opportunity to submit comments on the ICR, either directly to the Departments or to OMB, which began with the submission of the ICR to OMB. The Departments and OMB received no comments on the proposed changes.

Agency: DOL–ETA.

Title of Collection: Workforce Innovation and Opportunity Act (WIOA) Common Performance Reporting.

Type of Review: Revision of an approved ICR.

OMB Control Number: 1205–0526.

[53] There is no SBA size standard for this NAICS code.

[54] The smallest category are entities with less than $100,000 in annual revenue. Revenue data from U.S. Census Bureau ''Statistics of U.S. Businesses,'' *http://www.census.gov/programs-surveys/susb/data.html* (last updated May 10, 2022).

[55] *Ibid.*

[56] For NAICS 813410 average revenue is $58,521 for entities with less than $100,000 in revenue and for NAICS 519120 average revenue is $58,581 for entities with less than $100,000 in revenue. 0.4% and 0.67% is based on either net savings of $233.94 or $389.94 (0.40 = 233.94 ÷ 58,521; 0.67 = 389.94 ÷ 58,521).

Description: The final rule requires Retention with the Same Employer as the only definition of the effectiveness in serving employers performance indicator in ETA 9169, WIOA Statewide and Local Performance Report Template by an entity that reports to the Departments on behalf of the State. Data elements for the collection and calculation for the two other piloted definitions of the effectiveness in serving employers performance indicator—Repeat Business Customer and Employer Penetration—are to be removed from the ICR, along with the corresponding breakouts of the employer services that comprise them. This package is unchanged except to remove the data elements discussed above. The final rule makes no other changes to this ICR.

Affected Public: State Governments.

Obligation to Respond: Required to Obtain or Retain Benefits.

Frequency: Annually.

Estimated Total Annual Respondents: 19,114,129.

Estimated Total Annual Responses: 38,216,054.

Estimated Total Annual Burden Hours: 9,863,057.

Estimated Total Annual Other Burden Costs: $34,594,532.

Authority for the Information Collection: 20 CFR 677.155(a)(1)(vi), and 34 CFR 361.155(a)(1)(vi) and 463.155(a)(1)(vi).

D. Executive Order 13132 (Federalism)

E.O. 13132 aims to guarantee the division of governmental responsibilities between the Federal Government and the States and to further the policies of the Unfunded Mandates Reform Act of 1995 (UMRA). Accordingly, E.O. 13132 requires executive departments and agencies to ensure that the principles of federalism guide them in the formulation and implementation of policies. Further, agencies must adhere to constitutional principles, examine the constitutional and statutory authority supporting a regulation that would limit the policymaking discretion of the States, and assess the need for such a regulation. To the extent practicable, agencies must consult State and local officials before implementing any such regulation.

E.O. 13132 further provides that agencies must implement a regulation that limits the policymaking discretion of the States only where there is constitutional and statutory authority for the regulation, and it addresses a problem of national significance. For a regulation administered by the States, the Federal Government must grant the States the maximum administrative discretion possible to avoid intrusive Federal oversight of State administration, and agencies must adhere to special requirements for a regulation that pre-empts State law. E.O. 13132 also sets forth the procedures agencies must follow for certain regulations with federalism implications, such as preparation of a summary impact statement.

Accordingly, the Departments reviewed this WIOA-required final rule for federalism implications and have concluded that none exist in this rulemaking. This joint final rule does not contain any substantial direct effects on States, on the relationships between the States, or on the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, the Departments concluded that this final rule does not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

E. Unfunded Mandates Reform Act of 1995

UMRA directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or Tribal governments, or imposes a duty upon the private sector.

Following the consideration of the above factors, the Departments concluded this joint final rule contains no unfunded Federal mandates, as defined in 2 U.S.C. 658(6) to include either a ‘‘Federal intergovernmental mandate’’ or a ‘‘Federal private sector mandate.’’ Reporting Retention with the Same Employer as the effectiveness in serving employers performance indicator as proposed does not place any additional burdens on State, local, and Tribal governments because the WIOA core programs already collect and report the necessary information. Furthermore, Federal program funding triggers the reporting requirement; therefore, the Departments provide funding for any associated reporting mandate. Private training entities participate as a provider under a WIOA core program on a purely voluntary basis, and voluntarily assume the information collection.

F. Executive Order 13175 (Indian Tribal Governments)

The Departments reviewed this final rule under the terms of E.O. 13175 and DOL's Tribal Consultation Policy and have determined that it would have Tribal implications, because the proposed regulations would have substantial direct effects on: one or more Indian Tribes; the relationship between the Federal Government and Indian Tribes; or the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, DOL has prepared a Tribal summary impact statement. Because the Tribal implications of this final rule relate only to DOL Indian and Native American (INA) program grantees, DOL has printed the requisite Tribal summary impact statement in the DOL-specific effectiveness in serving employers final rule published elsewhere in this issue of the **Federal Register**, which proposes related changes for effectiveness in serving employers to DOL's INA program regulations.

List of Subjects

20 CFR Part 677

Employment, Grant programs—labor.

34 CFR Part 361

Administrative practice and procedure, Grant programs—education, Grant programs—social programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

34 CFR Part 463

Adult education, Grant programs—education.

For the reasons discussed in the preamble, the Employment and Training Administration amends 20 CFR part 677 as follows:

PART 677—PERFORMANCE ACCOUNTABILITY UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

■ 1. The authority citation for part 677 continues to read as follows:

Authority: Secs. 116, 189, and 503 of Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

Subpart A—State Indicators of Performance for Core Programs

■ 2. Amend § 677.155 by revising paragraphs (a)(1)(vi) and (c)(6) to read as follows:

§ 677.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?

(a) * * *

(1) * * *

(vi) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

* * * * *

(c) * * *

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

Subpart B—Sanctions for State Performance and the Provision of Technical Assistance

■ 3. Amend § 677.190 by revising paragraph (c) to read as follows:

§ 677.190 When are sanctions applied for failure to achieve adjusted levels of performance?

* * * * *

(c) Whether a State has failed to meet adjusted levels of performance will be determined using the following criteria:

(1) The overall State program score, which is expressed as the percent achieved, compares the actual results achieved by a core program on the primary indicators of performance, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi), to the adjusted levels of performance for that core program. The average of the percentages achieved of the adjusted level of performance for each of the primary indicators, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi), by a core program will constitute the overall State program score.

(2) However, until all indicators for the core program have at least 2 years of complete data, the overall State program score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data for that program.

(3) The overall State indicator score, which is expressed as the percent achieved, compares the actual results achieved on a primary indicator of performance by all core programs in a State to the adjusted levels of performance for that primary indicator.

(i) The average of the percentages achieved of the adjusted level of performance by all of the core programs on that indicator will constitute the overall State indicator score, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi).

(ii) The overall State indicator score for effectiveness in serving employers, as reported by one core program on behalf of all six core programs in the State, as described in guidance, is a statewide indicator that reflects the performance for all core programs. It is calculated as the statewide percentage achieved of the statewide adjusted level of performance.

(4) However, until all indicators for the State have at least 2 years of complete data, the overall State indicator score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data in a State.

(5) The individual indicator score, which is expressed as the percent achieved, compares the actual results achieved by each core program on each of the individual primary indicators to the adjusted levels of performance for each of the program's primary indicators of performance, except for the effectiveness in serving employers indicator described in § 677.155(a)(1)(vi).

* * * * *

For the reasons stated in the preamble, the Department of Education amends 34 CFR parts 361 and 463 as follows:

PART 361—STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

Subpart E—Performance Accountability Under Title I of the Workforce Innovation and Opportunity Act

■ 4. The authority citation for part 361, subpart E continues to read as follows:

Authority: Secs. 116, 189, and 503 of Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

■ 5. Amend § 361.155 by revising paragraphs (a)(1)(vi) and (c)(6) to read as follows:

§ 361.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?

(a) * * *

(1) * * *

(vi) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

* * * * *

(c) * * *

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

■ 6. Amend § 361.190 by revising paragraph (c) to read as follows:

§ 361.190 When are sanctions applied for failure to achieve adjusted levels of performance?

* * * * *

(c) Whether a State has failed to meet adjusted levels of performance will be determined using the following criteria:

(1) The overall State program score, which is expressed as the percent achieved, compares the actual results achieved by a core program on the primary indicators of performance, except for the effectiveness in serving employers indicator described in § 361.155(a)(1)(vi), to the adjusted levels of performance for that core program. The average of the percentages achieved of the adjusted level of performance for each of the primary indicators, except for the effectiveness in serving employers indicator described in § 361.155(a)(1)(vi), by a core program will constitute the overall State program score.

(2) However, until all indicators for the core program have at least 2 years of complete data, the overall State program score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data for that program.

(3) The overall State indicator score, which is expressed as the percent achieved, compares the actual results achieved on a primary indicator of performance by all core programs in a State to the adjusted levels of performance for that primary indicator.

(i) The average of the percentages achieved of the adjusted level of performance by all of the core programs on that indicator will constitute the overall State indicator score, except for the effectiveness in serving employers indicator described in § 361.155(a)(1)(vi).

(ii) The overall State indicator score for effectiveness in serving employers, as reported by one core program on behalf of all six core programs in the State, as described in guidance, is a statewide indicator that reflects the performance for all core programs. It is calculated as the statewide percentage achieved of the statewide adjusted level of performance.

(4) However, until all indicators for the State have at least 2 years of complete data, the overall State indicator score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data in a State.

(5) The individual indicator score, which is expressed as the percent achieved, compares the actual results achieved by each core program on each of the individual primary indicators to the adjusted levels of performance for each of the program's primary indicators of performance, except for the effectiveness in serving employers indicator described in § 361.155(a)(1)(vi).

* * * * *

PART 463—ADULT EDUCATION AND FAMILY LITERACY ACT

Subpart I—Performance Accountability Under Title I of the Workforce Innovation and Opportunity Act

■ 7. The authority citation for part 463, subpart I continues to read as follows:

Authority: Secs. 116, 189, and 503 of Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

■ 8. Amend § 463.155 by revising paragraphs (a)(1)(vi) and (c)(6) to read as follows:

§ 463.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?

(a) * * *

(1) * * *

(vi) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

* * * * *

(c) * * *

(6) The percentage of participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the State, as described in guidance.

■ 9. Amend § 463.190 by revising paragraph (c) to read as follows:

§ 463.190 When are sanctions applied for failure to achieve adjusted levels of performance?

* * * * *

(c) Whether a State has failed to meet adjusted levels of performance will be determined using the following criteria:

(1) The overall State program score, which is expressed as the percent achieved, compares the actual results achieved by a core program on the primary indicators of performance, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi), to the adjusted levels of performance for that core program. The average of the percentages achieved of the adjusted level of performance for each of the primary indicators, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi), by a core program will constitute the overall State program score.

(2) However, until all indicators for the core program have at least 2 years of complete data, the overall State program score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data for that program.

(3) The overall State indicator score, which is expressed as the percent achieved, compares the actual results achieved on a primary indicator of performance by all core programs in a State to the adjusted levels of performance for that primary indicator.

(i) The average of the percentages achieved of the adjusted level of performance by all of the core programs on that indicator will constitute the overall State indicator score, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi).

(ii) The overall State indicator score for effectiveness in serving employers, as reported by one core program on behalf of all six core programs in the State, as described in guidance, is a statewide indicator that reflects the performance for all core programs. It is calculated as the statewide percentage achieved of the statewide adjusted level of performance.

(4) However, until all indicators for the State have at least 2 years of complete data, the overall State indicator score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data in a State.

(5) The individual indicator score, which is expressed as the percent achieved, compares the actual results achieved by each core program on each of the individual primary indicators to the adjusted levels of performance for each of the program's primary indicators of performance, except for the effectiveness in serving employers indicator described in § 463.155(a)(1)(vi).

* * * * *

Julie Su,

Acting Secretary of Labor.

Miguel A. Cardona,

Secretary of Education.

[FR Doc. 2024–03278 Filed 2–22–24; 8:45 am]

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Part III

Consumer Financial Protection Bureau

12 CFR Parts 1005 and 1026

Overdraft Lending: Very Large Financial Institutions; Proposed Rule

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Parts 1005 and 1026

[Docket No. CFPB–2024–0002]

RIN 3170–AA42

Overdraft Lending: Very Large Financial Institutions

AGENCY: Consumer Financial Protection Bureau.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) proposes to amend Regulations E and Z to update regulatory exceptions for overdraft credit provided by very large financial institutions, thereby ensuring that extensions of overdraft credit adhere to consumer protections required of similarly situated products, unless the overdraft fee is a small amount that only recovers applicable costs and losses. The proposal would allow consumers to better comparison shop across credit products and provide substantive protections that apply to other consumer credit.

DATES: Comments must be received on or before April 1, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2024–0002 or RIN 3170–AA42, by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. A brief summary of this document will be available at *https://www.regulations.gov/docket/CFPB-2024-0002.*

• *Email: 2024-NPRM-OVERDRAFT@cfpb.gov.* Include Docket No. CFPB–2024–0002 or RIN 3170–AA42 in the subject line of the message.

• *Mail/Hand Delivery/Courier:* Comment Intake—2024 NPRM Overdraft, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The CFPB encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov.*

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Anna Boadwee, Attorney-Advisor; Joseph Baressi, Pedro De Oliveira, Thomas Dowell, Brandy Hood, Kristin McPartland, or Mark Morelli, Senior Counsels, Office of Regulations, at 202–435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Summary of Proposed Rule

Overview

This proposed rule would update non-statutory exceptions in Regulations Z and E that have allowed very large financial institutions to avoid statutory requirements when extending certain overdraft credit.[1]

Consumer credit is subject to Regulation Z if the creditor imposes a finance charge, which generally includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.[2] However, when the Board of Governors of the Federal Reserve System (Board) first adopted Regulation Z in 1969,[3] it excepted from Regulation Z's definition of finance charge any charges for honoring checks that overdraw a checking account unless the payment of the check and imposition of the fee were previously agreed upon in writing. The Board subsequently made ''minor editorial changes'' to this exception, *e.g.,* to reflect ''items that are similar to checks, such as negotiable orders of withdrawal.'' [4] This exception is unique to credit extended to pay account overdrafts. In adopting this exception, the Board did not rely on an interpretation of the statute; rather, the Board used its authority to create regulatory exceptions. Similar consumer credit products are subject to Regulation Z.

This exception was evidently intended to allow banks to continue providing limited overdraft services, as a courtesy to consumers who inadvertently overdrew their account, without the banks complying with Regulation Z. In the early years of the regulation, decisions to pay an item that

[1] When amending commentary, the Office of the Federal Register (OFR) requires reprinting of certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of regulatory text and commentary included in this document show the language of those sections if the Bureau adopts its changes as proposed. In addition, the Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes that it proposes to make to the regulatory text and commentary of Regulation E and Regulation Z. This redline may be found on the Bureau's website, *https://files.consumerfinance.gov/f/documents/cfpb_unofficial-redline_overdraft-credit-very-large-financial-institutions-proposed-rule_2024-01.pdf.* If any conflicts exist between the redline and the text of Regulation E or Regulation Z, its commentary, or this proposed rule, the documents published in the **Federal Register** are the controlling documents.

[2] Consumer credit is also subject to Regulation Z in other circumstances. *See, e.g.,* 12 CFR 1026.1(c).

[3] 34 FR 2002 (Feb. 11, 1969).

[4] 46 FR 20848, 20855 (Apr. 7, 1981).

overdraws an account instead of returning it unpaid were made as a relatively infrequent part of administering asset accounts. At the time, consumers typically withdrew funds from their bank accounts through in-person withdrawals or by writing checks. If a consumer mistimed when funds from a check deposit would be available for withdrawal [5] and inadvertently overdrew their account and the overdrawing check were returned unpaid, the bank would typically charge the consumer a nonsufficient funds (NSF) fee and the consumer could be subject to additional fees imposed by the payee and other negative consequences from bounced checks. If, instead of returning the check, the financial institution paid it notwithstanding the unavailable or insufficient funds in the account, such courtesy payment could provide a benefit to the consumer, who would avoid all of the negative consequences of a bounced check without being charged any additional fees beyond the amount charged for nonsufficient funds.

Over the last 30 years, in conjunction with widespread financial institution adoption of information technology systems as well as the expansion of debit card transactions that can overdraw an account, overdraft credit products provided under the exception have morphed from an occasional courtesy provided to consumers into frequently used and promoted products that increase costs to consumers (in certain instances) and generate a substantial portion of the direct fee revenue that financial institutions make from checking accounts (and much of the total revenue that financial institutions make from low-balance accounts). The volume of overdrawing transactions rose drastically over the years, including on transactions where the consumer may have suffered no negative consequences if the transaction were declined. Since the CFPB focused substantial enforcement and supervision attention on overdraft fees in 2021, overdraft fee revenue has contracted somewhat. However, it is still a source of billions of dollars in profits every year, and most very large financial institutions continue to charge $35 today. Financial institutions today generally make pay/no-pay decisions in advance—for example, by setting overdraft limits that the consumer may not be aware of and using information technology systems to make automated pay/no-pay decisions. They sometimes calibrate these systems with the goal of generating fee revenue. Because of these market changes, which increase the risk that a consumer will unwittingly incur high overdraft fees, helping consumers make informed decisions about overdraft credit has become a much more serious concern.

Key Changes

Given these changes over the past 30 years and consistent with TILA's purpose of promoting the informed use of credit, the CFPB is proposing to update several non-statutory exceptions in Regulation Z to extend consumer credit protections that generally apply to other forms of consumer credit to certain overdraft credit provided by very large financial institutions. These changes would allow consumers to better compare certain overdraft credit to other types of credit and would provide consumers with several substantive protections that already apply to other consumer credit.

These amendments would apply only to very large financial institutions—*i.e.,* insured depository institutions and credit unions with more than $10 billion in assets. The proposal would not change the regulatory framework for overdraft services offered by financial institutions with assets of $10 billion or less. The CFPB plans to monitor the market's response to this rule before determining whether to alter the regulatory framework for financial institutions with assets less than or equal to $10 billion.

Under this proposal, Regulation Z would generally apply to overdraft credit provided by very large institutions unless it is provided at or below costs and losses as a true courtesy to consumers. The proposed rule would accomplish this result by updating two regulatory exceptions from the statutory definition of finance charge. First, the proposal would update an exception that currently provides that a charge for overdraft is not a finance charge if the financial institution has not previously agreed in writing to pay items that overdraw an account [6] so that the exception would not apply to ''above breakeven overdraft credit'' offered by a very large financial institution. The proposal would give financial institutions the ability to determine whether an overdraft charge is considered above breakeven overdraft credit by either: (1) calculating its own costs and losses using standards set forth in the proposal; or (2) relying on a benchmark fee set by the CFPB in the proposal. The CFPB is considering setting the benchmark fee at $3, $6, $7, or $14. Second, the proposal would update a related exception that provides that a charge imposed in connection with an overdraft credit feature (*e.g.,* a charge for each item that results in an overdraft) is not a finance charge if the charge does not exceed the charge for a similar transaction account without a credit feature (*e.g.,* the charge for returning each item).[7] As a result of the proposed change, all transfer charges that very large financial institutions impose on asset accounts with linked overdraft lines of credit (*i.e.,* fees imposed for transferring funds to an asset account from an overdraft line of credit to cover an item that would otherwise take the asset account's balance negative) would be finance charges.

If the proposal is finalized, above breakeven overdraft credit that is not currently subject to Regulation Z would become subject to Regulation Z, including provisions in subpart B that govern open-end credit (*e.g.,* the account opening disclosures, periodic statements, and advertising rules). For ease of reference, this proposal generally refers to overdraft credit that is not subject to Regulation Z as non-covered overdraft credit and overdraft credit that is subject to Regulation Z as covered overdraft credit. Above breakeven overdraft credit is currently a type of non-covered overdraft credit, but it would become covered overdraft credit if this proposal is finalized.

The proposal would also require covered overdraft credit offered by very large financial institutions to be put in a credit account separate from the asset account, and it would update exceptions relating to credit cards. Among other changes, it would apply the portions of Regulation Z that implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) to covered overdraft credit that can be accessed by a hybrid debit-credit card, such as a debit card or other single credit device (including certain account numbers) that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. Provisions of the CARD Act that would apply to such overdraft credit include, but are not limited to, ability-to-pay underwriting requirements, limitations on penalty fees including certain fees on

[5] In 1987, Congress enacted the Expedited Funds Availability Act (12 U.S.C. 4001 *et seq.*) to provide depositors of checks with prompt funds availability and to foster improvements in the check collection and return processes. *See* 82 FR 27552, 27552 (June 15, 2017). Section 229.2(d) of Regulation CC (12 CFR 229), which implements that act, defines ''available for withdrawal.''

[6] 12 CFR 1026.4(c)(3).

[7] 12 CFR 1026.4(b)(2).

transactions that are declined due to nonsufficient funds, and various requirements related to rate changes.

The proposal would also prohibit compulsory use of preauthorized electronic fund transfers (EFTs) for repayment of covered overdraft credit provided by very large financial institutions, which would ensure that consumers using those products have a choice of at least one alternative method of repayment. As a result of this change, covered overdraft credit offered by very large financial institutions could not be conditioned on consumers agreeing to automatic debits from their checking account. Consumers could still opt into automatic payments on a periodic basis if offered by their financial institution, but they would have the right to repay this overdraft credit manually if they prefer.

The CFPB proposes that the final rule, if adopted, would take effect on the October 1 which follows by at least six months the date it is published in the **Federal Register**, consistent with 15 U.S.C. 1604(d). The CFPB expects that would likely fall on October 1, 2025.

The CFPB invites comment on all aspects of this notice of proposed rulemaking and on the specific issues on which it solicits comment elsewhere herein, including on any appropriate modifications or exceptions to the Proposed Rule.

II. Background

A. Overview of Overdraft Credit

An overdraft occurs when consumers do not have a sufficient balance in their asset account to pay a transaction, but the financial institution pays the transaction anyway. Typically, the financial institution pays an overdraft transaction by either transferring the consumer's own funds from another asset account held by the financial institution, such as a savings account, or by extending overdraft credit (*i.e.,* using the financial institution's own funds and requiring the consumer to repay).

Currently, not all overdraft credit is subject to Regulation Z. For example, when the Board first adopted Regulation Z in 1969,[8] it excepted from Regulation Z's coverage charges for honoring checks that overdraw a checking account unless the payment of the check and imposition of the fee were previously agreed upon in writing. A Board official interpretation stated that this exception for ad hoc credit decisions applies only to ''regular demand deposit accounts which carry no credit features and in which a bank may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account.'' [9] The Board subsequently adopted commentary excluding debit cards with no credit agreement from Regulation Z's definition of ''credit card.'' [10] While the Board did not explain this exception, it appears it was intended to exclude discretionary overdraft services from being subject to Regulation Z when they are accessed by a debit card, consistent with the exclusion for overdraft charges from the definition of finance charge.[11]

Some overdraft credit is previously agreed upon in writing and is currently covered by Regulation Z. Such covered overdraft credit enables consumers to link a checking account to a credit account, like an overdraft line of credit or a credit card, from which funds are transferred automatically to pay transactions when the checking account balance is insufficient to pay them. Some financial institutions charge a fee, often referred to as an overdraft protection transfer fee, for these transfers.[12] Financial institutions may assess such a fee once per day that a transfer is made, once to transfer a round dollar value increment (*e.g.,* a fee for $100 transferred to cover any overdraft(s) less than $100), or, less commonly, once per overdraft transaction; [13] however, since late 2021, a number of financial institutions have voluntarily eliminated such fees.[14] Credit accounts used to cover overdrafts also carry an interest rate applied to the outstanding balance. Repayment of the overdrawn amount and interest is typically made periodically according to a payment schedule. The ability to obtain and use covered overdraft credit is typically limited to consumers whose credit history allows them to qualify for an overdraft line of credit or who have available credit on a credit card.

Financial institutions may also pay overdrafts through currently non-covered overdraft credit, where the financial institution typically pays overdrafts up to certain limits but does not agree in advance to pay the overdrawn transactions, reserving discretion to decline any given overdraft transaction. This type of overdraft credit is currently non-covered overdraft credit because it is currently not subject to Regulation Z. This proposal may also refer to currently non-covered overdraft credit as an overdraft service, overdraft services, or an overdraft program. With certain exceptions provided for by internal policies, the financial institution typically assesses a flat fee for each overdraft transaction the financial institution pays. In addition, some financial institutions charge an additional fee or fees, known as extended or sustained overdraft fees, if the consumer does not bring the account back to a positive balance within a specified period. To collect repayment of the funds advanced to cover overdraft transactions as well as payment of the fees assessed, the financial institution typically deducts those amounts as a lump sum from the consumer's next incoming deposit(s), usually within three days after the account became overdrawn.[15]

Financial institutions typically provide non-covered overdraft credit for certain transaction types—primarily checks, automated clearinghouse (ACH) transactions, and recurring debit card transactions—as a default, up to certain coverage limits. For one-time (non-recurring) debit card and ATM transactions, financial institutions may not assess overdraft fees for paying such transactions without first obtaining the consumer's opt-in following the process required by Regulation E 12 CFR 1005.17(b).

Financial institutions employ a number of different practices and policies when making pay/return decisions in connection with non-covered overdraft.[16] While, as noted above, overdraft credit must technically be discretionary to be excepted from Regulation Z, in practice, financial

[8] 34 FR 2002 (Feb. 11, 1969).

[9] 42 FR 22360, 22362 (May 3, 1977).

[10] 46 FR 50288, 50293 (Oct. 9, 1981) (providing that a ''credit card'' does not include ''[a] check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft''); *see also* Regulation Z comment 2(a)(15)–2.ii.A.

[11] Under Regulation Z, an issuer of a credit card can be a creditor regardless of whether the credit is subject to a finance charge. 12 CFR 1026.2(a)(17)(iii); *see also* 12 CFR 1026.2(a)(7) (defining ''card issuer''). Thus, without the 1981 exception, a financial institution that extends overdrafts could be a ''creditor'' for purposes of subpart B of TILA even with an exemption of overdraft fees from the finance charge.

[12] Consumer Fin. Prot. Bureau (CFPB), *CFPB Study of Overdraft Programs: A white paper of initial data findings,* at 55 (June 2013), *https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf* (CFPB 2013 White Paper) (noting 28 of a sample of 33 large institutions charged a transfer fee in 2012, ranging from $3 to $20 per transfer, with a median of $10, while smaller institutions charged a median of $5).

[13] *Id.*

[14] Between December 2022 and July 2023, CFPB reviewed publicly available information describing the overdraft-related practices of very large financial institutions (CFPB Market Monitoring of Publicly Available Overdraft Practices, Dec. 2022–July 2023).

[15] Trevor Bakker et al., CFPB, *Data Point: Checking account overdraft,* at 5, 22 (July 2014), *https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf* (CFPB 2014 Data Point).

[16] CFPB 2013 White Paper at 48–52.

institutions typically assign each account an overdraft coverage limit representing the maximum amount of overdraft coverage the financial institution will extend on the account. Once an account reaches its overdraft coverage limit, the financial institution will no longer pay transactions into overdraft and will return those transactions unpaid. Overdraft coverage limits may be static (*i.e.,* the financial institution assigns an unchanging limit to each customer) or dynamic (*i.e.,* the financial institution changes the limit for each account periodically based on account usage patterns, market conditions, or account and accountholder characteristics in an attempt to manage more precisely credit risk, overdraft program revenues, and customer retention).[17] Financial institutions that use static limits may communicate those limits to account holders, while financial institutions that use dynamic limits generally do not communicate those limits to account holders.

Historically, financial institutions have charged an NSF fee when they reject, rather than pay, transactions initiated by check or ACH or other electronic payments; in contrast, financial institutions have rarely if ever charged an NSF fee when declining a one-time debit card purchase or an ATM withdrawal. Financial institutions typically have charged the same amount for an NSF fee as for a non-covered overdraft fee.[18] As noted in part II.C, many financial institutions have eliminated NSF fees over the past two years.

B. Evolution and Growth of Non-Covered Overdraft

Non-covered overdraft credit started as a courtesy that financial institutions provided when they would decide on a manual, ad hoc basis to pay particular check transactions into overdraft rather than returning those checks unpaid.[19] This courtesy would help consumers avoid NSF fees, merchant fees, and other negative consequences from bounced checks. Over time, non-covered overdraft credit began to move away from that historical model, as financial institutions shifted to a system involving heavy reliance on automated programs to process transactions and to make overdraft decisions.[20] Financial institutions also began to extend overdraft credit to debit card transactions, even though a declined debit card transaction did not pose the same risk to consumers of an NSF fee, a merchant fee, or certain other consequences associated with a bounced check.[21] Over time, debit card transactions became more numerous than checks, increasing the number of transactions that could generate overdrafts, with typical debit card transactions involving smaller amounts than typical check transactions.[22] Even as transaction processing and overdraft decisioning became more automated and overdraft transactions increased in frequency and decreased in size, financial institutions increased the size of overdraft fees. In 1976, when the process was typically manual and included only checks, one survey of banks in Washington, DC, and New York found that the median fee was $5, while some banks charged zero.[23] By 1994, concern had risen about the increase in the average fee to over $15 ($5.77 in 1976 dollars); [24] by 2000, the average had surpassed $20 ($6.61 in 1976 dollars) and continued to increase thereafter.[25]

As a result of these market shifts and operational changes, fee revenue from non-covered overdraft credit began to significantly influence the overall business model for many asset accounts. Financial institutions became less likely to charge consumers upfront monthly checking account fees, which consumers could more easily compare across the market, and instead began to rely heavily overdraft fees.[26] In essence, the provision of non-covered overdraft credit moved away from its original purpose—paying occasional or inadvertent overdrafts as a courtesy—and became the dominant component of

[17] Common account and account holder characteristics include account tenure, average balance, overdraft history, and deposit patterns, as well as other relationships the accountholder may have with the institution.

[18] *See Consumers Guide to Banking: Staff Report on Commercial Bank Charges in the New York and Washington, DC Metropolitan Area,* S. Comm. on Banking, Hous. and Urban Affairs, 94th Cong. 10–11 tbl.3 (1976) (Senate Staff Report); *see also* 70 FR 8428, 8429 (Feb. 18, 2005) (''Regardless of whether the overdraft is paid, institutions typically charge the NSF fee when an overdraft occurs.''); 74 FR 59033, 59035 (Nov. 17, 2009) (''Second, a consumer will generally be charged the same fee by the financial institution whether or not a check is paid; yet if the institution covers an overdrawn check, the consumer may avoid other adverse consequences, such as the imposition of additional merchant fees); Fed. Deposit Ins. Corp. (FDIC), *2008 FDIC Study of Bank Overdraft Programs,* at 16 n.18 (Nov. 2008), *https://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf* (FDIC 2008 Study) (''For most of the survey population operating automated programs, the per-item fee charged when items were paid under automated overdraft programs was the same as the fee charged by the bank on NSF items that it did not pay. These two fees were equal to each other for 98.1 percent of 451 institutions reporting the two fee items.'').

[19] *See* 42 FR 22360, 22362 (May 3, 1977) (describing the exception from Regulation Z as applying when overdraft is provided ''as an accommodation . . . honoring a check which inadvertently overdraws that account.''); *see also Federal Reserve Board Staff Opinion Letter No. 948* (Nov. 17, 1975) (explaining that the exception ''relates only to regular demand deposit accounts which carry no credit feature and in which a bank may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account'').

[20] *See* 74 FR 59033, 59033 n.1 (Nov. 17, 2009) (citing *FDIC's Study of Bank Overdraft Programs* (Nov. 2008), which found that nearly 70 percent of banks surveyed implemented their automated overdraft program after 2001).

[21] *See id.* at 59035; *see also id.* at 59034 n.6 (citing *Overdraft Protection: Fair Practices for Consumers: Hearing before the House Subcomm. On Financial Institutions and Consumer Credit, House Comm. On Financial Services,* 110th Cong., at 72 (2007)) (''noting that as recently as 2004, 80 percent of banks still declined ATM and debit card transactions without charging a fee when account holders did not have sufficient funds in their account.'').

[22] Federal Reserve Payments Studies from 2004 to 2013 (exhibit 1 in each study) show that from 2000 to 2012, annual debit card transactions increased from 8.3 billion to 47 billion, while annual check transactions decreased from 41.9 billion to billion to 18.3 billion. By 2008, debit card transactions exceeded the number of checks. *See* Bd. of Governors of the Fed. Rsrv. Sys. (FRS), *Federal Reserve Payments Study (FRPS)—Previous Studies, https://www.federalreserve.gov/paymentsystems/frps_previous.htm* (last updated Apr. 21, 2023); *see also* FRS, *The 2013 Federal Reserve Payments Study,* at 9 ex.2 (Dec. 2013), *https://www.frbservices.org/binaries/content/assets/crsocms/news/research/2013-fed-res-paymt-study-summary-rpt.pdf* (showing the average debit card transaction ranged from $37 to $40 from 2003–2012, while the average check transaction ranged from $1,103 to $1,410). The CFPB has found that the median transaction amount that leads to an overdraft fee in the case of debit card transactions is $24, while the median check and ACH transactions that lead to overdraft fees are $100 and $90, respectively. *See* CFPB 2014 Data Point at 5; *see also* Fin. Health Network (FHN), *Overdraft Trends Amid Historic Policy Shifts* (June 1, 2023), *https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/* (FHN Brief 2023) (finding almost half (45 percent) of overdrafters reported that their most recent overdraft occurred on a transaction of $50 or less).

[23] Senate Staff Report at 10–11.

[24] *See Bank Fees Associated with Maintaining Depository, Checking, and Credit Card Accounts,* Hearing Before the Subcomm. on Consumer Credit and Ins., Comm. on Banking, Finance and Urban Affairs, 103rd Cong. 73 tbl.3 (1993) (Testimony by Susan M. Phillips, Member, Bd. of Governors of the Fed. Rsrv. Sys.) (showing average overdraft fee of over $15 in 1993); *see also id.* at 95–96, 101–02 (Statement of Chris Lewis, Dir. of Banking and Hous. Pol'y, Consumer Fed'n of Am.) (noting concerns about the rise in the size of ''bounced check fees'', a term the organization used to describe the fee assessed when funds were insufficient, whether the transaction was returned unpaid or paid into overdraft).

[25] Gov't Accountability Off., *Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts,* at 14 (Jan. 2008), *https://www.gao.gov/assets/gao-08-281.pdf; see also* FDIC 2008 Study (by 2007, among primarily financial institutions with less than $5 billion in assets, the average fee was $27); CFPB 2013 White Paper at 52 (by 2012, among the nation's largest financial institutions, the average fee was $34).

[26] CFPB 2013 White Paper at 16–17.

a back-end pricing business model. By 2004, marketwide overdraft revenue was estimated at approximately $10 billion and, by 2009, had increased to an estimated $25 billion.[27]

C. Non-Covered Overdraft Credit Today

Marketwide overdraft revenue declined following the 2010 implementation of the Board's ''opt-in'' rule under Regulation E to an estimated $12 billion in 2011 before beginning to increase again.[28] In the several years preceding the COVID–19 pandemic, marketwide overdraft revenue was persistent, climbing from an estimated $11.8 billion in 2015 to $12.6 billion in 2019.[29] With the onset of the pandemic in March 2020, overdraft revenue dropped significantly. The drop was likely primarily due to pandemic-related stimulus payments pushing up average checking account balances, as well as temporarily decreased use of debit cards.[30] In addition, Federal regulators encouraged, and some State regulators encouraged or mandated, financial institutions to offer leniency around imposition of overdraft fees in light of the pandemic.[31] Notwithstanding the trend downward during the pandemic, estimated marketwide overdraft revenue exceeded $9 billion in 2020 and 2021.[32]

Beginning in late 2021, a number of large banks began announcing and implementing changes to their overdraft policies.[33] Some banks eliminated overdraft fees altogether or reduced them to $10 or $15 per transaction.[34] Some banks made changes to their policies by expanding their fee waiver policies, including establishing a daily limit of one fee per day; [35] establishing de minimis negative balance thresholds, within which overdrafts do not result in a fee of $50 or more; and implementing grace periods giving consumers time through the next business day to bring their accounts positive before a fee is assessed.[36] Collectively these changes resulted in a sustained reduction in overdraft revenues as compared to pre-pandemic levels.[37] Marketwide overdraft revenue in 2022 was an estimated $9.1 billion ($7.9 billion in 2019 dollars, a 37 percent drop in real terms).[38] Of that, an estimated $6.16 billion, or 68 percent, was earned by financial institutions with above $10 billion in assets.[39] At the same time, most very large financial institutions eliminated NSF fees.[40]

Despite these changes, the vast majority of banks and credit unions with over $10 billion in assets continue to charge between $30 and $37 per overdraft fee, and more than half charge $35.[41] Most financial institutions' policies allow consumers to incur multiple overdraft fees per day. Financial institutions continue charging these high fees even though the fees far exceed institutions' costs and losses associated with providing non-covered overdraft credit. CFPB data collections and outreach have found that the single largest cost or loss to financial institutions associated with overdraft programs is charged-off account balances, which most frequently occur when a consumer's subsequent deposits do not cover the negative balance created by the overdraft(s) and associated fee(s).[42] The CFPB's study of 2011 bank data found that charge-offs were small relative to the fee revenue banks earned through their overdraft programs.[43] Among those banks, charged-off principal account balances due to overdraft programs represented 14.4 percent of the net overdraft fees (not including NSF fees) at those banks.[44] During the first half of 2023, the CFPB collected additional data from several banks, which again showed that charge-offs associated with negative account balances were the largest cost or loss associated with providing overdraft. As discussed further in part V.C.2, charge-offs amounted to an average of $2 per overdraft transaction whether or not such transaction incurred an overdraft fee, and an average of $5 per overdraft transaction that incurred an overdraft fee—representing 6 percent and 15 percent, respectively, of the average fee of $32.50 charged by the banks during the period studied.

[27] CFPB's estimates of marketwide overdraft revenue, before banks with over $1 billion in assets began reporting overdraft/NSF revenue on call reports in 2015, are based on the esitmated share of aggregated fee revenue that banks and credit unions reported on call reports that was attributable to overdraft fees. For more details on methodology, *see* Jacqueline Duby et al., Ctr. for Responsible Lending (CRL), *High Cost & Hidden From View: The $10 Billion Overdraft Loan Market* (May 26, 2005), *https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/ip009-High_Cost_Overdraft-0505.pdf; see also* Leslie Parrish, CRL, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years,* at 4 (Oct. 6, 2009), *https://www.responsiblelending.org/research-publication/overdraft-explosion-bank-fees-overdrafts-increase-35-two-years.*

[28] *Id.*

[29] CFPB's estimates of marketwide overdraft revenue for 2015 to 2022 extrapolate total overdraft/NSF revenue reported on call reports by banks with over $1 billion in assets to banks with less than $1 billion in assets and to credit unions in order to reach a total marketwide estimate of overdraft/NSF revenue, and then estimate the portion of that combined overdraft/NSF revenue that is attributable to overdraft revenue alone. To extrapolate reported overdraft/NSF revenue to banks with less than $1 billion in assets and to credit unions, the CFPB uses data collected from core processors for the number of accounts by asset size and the overdraft/NSF revenue per account, and from 2014 call report data for distribution of institutions by asset size, and then assumes that overdraft/NSF revenue at small institutions saw the same growth from 2014 to 2019 as at large banks to arrive at the 2019 estimate. These extrapolations result in estimates where banks with over $1 billion in assets comprise 77.4 percent of marketwide overdraft/NSF revenue, banks with less than $1 billion in assets comprise 7.3 percent of such revenue, and credit unions comprise 15.3 percent of such revenue. *See* Éva Nagypál, Ph.D., CFPB, *Data Point: Overdraft/NSF Fee Reliance Since 2015—Evidence from Bank Call Reports,* at 7 (Dec. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-call_report_2021-12.pdf* (CFPB 2021 Data Point). For the 2022 estimate, the CFPB assumes that banks with assets over $1 billion, banks with assets below $1 billion, and all credit unions represent the same relative portions of total marketwide overdraft/NSF revenue in 2022 as they did in 2019.

[30] CFPB 2021 Data Point at 22–24.

[31] *See* Press Release, FRS, FDIC & Off. of the Comptroller of the Currency (OCC), *Joint Statement on CRA Consideration for Activities in Response to COVID–19* (Mar. 19, 2020), *https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-19a.pdf;* Press Release, CFPB, *Consumer Financial Protection Bureau Encourages Financial Institutions and Debt Collectors to Allow Stimulus Payments to Reach Consumers* (Mar. 17, 2021), *https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-encourages-financial-institutions-and-debt-collectors-to-allow-stimulus-payments-to-reach-consumers/; see also, e.g.,* State of Cal. Bus., Consumer Servs. & Hous. Agency, *Guidance to Financial Institutions During the COVID–19 Pandemic* (Mar. 22, 2020), *https://www.bcsh.ca.gov/coronavirus19/dbo_banks.pdf;* Press Release, N.Y. State Dep't of Fin. Servs., *DFS Issues New Emergency Regulation Requiring New York Regulated Financial Institutions To Provide Financial Relief To New Yorkers Demonstrating Financial Hardship From COVID–19 Pandemic* (Mar. 24, 2020), *https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202003241.*

[32] *See* discussion of methodology at FN 29.

[33] Rebecca Borné & Amy Zirkle, *Comparing overdraft fees and policies across banks,* CFPB (Feb. 10, 2022), *https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] CFPB, *Data Spotlight: Overdraft/NSF revenue down nearly 50% versus pre-pandemic levels* (May 24, 2023), *https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/* (CFPB May 2023 Data Spotlight).

[38] *See* discussion of methodology at FN 29.

[39] Estimated using data from 2022 Federal Financial Institutions Examination Council (FFIEC) Call Reports and methodology discussed at FN 29.

[40] CFPB, *Data spotlight: Vast majority of NSF fees have been eliminated, saving consumers nearly $2 billion annually* (Oct. 11, 2023), *https://www.consumerfinance.gov/data-research/research-reports/vast-majority-of-nsf-fees-have-been-eliminated-saving-consumers-nearly-2-billion-annually/* (CFPB October 2023 Data Spotlight) (finding that nearly two-thirds of banks with over $10 billion in assets have eliminated NSF fees).

[41] CFPB Market Monitoring of Publicly Available Overdraft Practices, Dec. 2022–July 2023.

[42] CFPB 2013 White Paper at 17.

[43] *Id.*

[44] *Id.*

D. Consumer Impact of Overdraft Fees

As cumulative overdraft fee revenue for financial institutions increased, so did the cumulative burden of overdraft fees on consumers. CFPB research found that 79 percent of combined overdraft and NSF fees were paid by 9 percent of consumers who paid more than 10 such fees per year, incurring a median of $380 in these fees in a year.[45] Consumers paying more than 20 such fees in a year accounted for about 5 percent of accounts, while paying over 63 percent of the fees.[46]

High overdraft fees can make it more difficult for consumers to return their account to a positive balance, contributing to account charge-offs, involuntary account closures, and consumers blocked out of the banking system. The CFPB found that the banks with the highest share of accounts with frequent overdrafts tended to have the highest rates of involuntary account closure; conversely, those with the lowest share of accounts with frequent overdrafts tended to have the lowest rates of involuntary closure.[47] Account closures, in turn, are often reported to account screening consumer reporting agencies, and a negative report from an account screening company may limit a consumer's ability to open an account at a bank or credit union in the future. Negative experiences with overdraft fees likely also discourage many consumers from wanting a bank account at all. The FDIC estimates that there were nearly 6 million unbanked households in the U.S. in 2021,[48] nearly half of which had a bank account in the past.[49] Of those previously banked households, more than two-thirds have little or no interest in having a bank account again,[50] with high fees, unpredictable fees, and not enough funds to meet minimum balance requirements among the most cited reasons.[51]

Consumers can face significant uncertainty about whether they will incur overdraft fees. Though financial institutions may provide disclosures related to their transaction processing, deposit availability, and overdraft assessment policies, these policies can be extraordinarily complex.[52] Even consumers who closely monitor their account balances may not know with certainty when transactions will post to their accounts, whether a particular transaction will be paid or returned unpaid, and whether a particular paid transaction will be deemed an overdraft and assessed an overdraft fee.[53]

In response to the CFPB's 2022 request for information regarding fees that are not subject to competitive processes that ensure fair pricing, which received over 80,000 responses,[54] overdraft-related fees were by far the most common issue raised. Common concerns included that the fees were unclear or confusing, disproportionate compared to the incidents resulting in the fees, and difficult or impossible to avoid. These concerns were generally consistent with those reflected in complaints about overdraft fees consumers have submitted to the CFPB's Consumer Complaints Database since its inception in 2011.

The CFPB has also studied how consumers who are opted-in to overdraft services on one-time debit card and ATM transactions—and thus subject to overdraft fees on those transactions—fare compared to those who are not opted-in. In total, opted-in accounts incurred more than seven times as many overdraft fees as accounts that were not opted-in.[55] At the account level, opted-in accounts were three times as likely to have more than 10 overdrafts per year as accounts that were not opted-in.[56] And among frequent overdrafters, those who were opted-in appeared similar across a number of dimensions to frequent overdrafters who were not opted-in, but incurred significantly more—at the median, 13 more—overdraft/NSF fees per year.[57] In addition, involuntary account closure was about 2.5 times as likely for consumers who had opted-in than for consumers who had not.[58]

Consumers whose accounts are frequently overdrawn are typically more financially insecure than those who do not overdraw or who do so infrequently.[59] Compared to non- or infrequent overdrafters, frequent overdrafters tend to have lower incomes and lower end-of-day balances.[60] They are also less likely to have access to alternative credit options: they have lower credit scores, are less likely to have a general purpose credit card, and, if they do have such a card, they have less credit available on it.[61] Black households and Latino households are more likely to incur overdraft fees than white households.[62]

E. Growing Regulatory Concerns About Non-Covered Overdraft Credit

As financial institutions began to evolve provision of non-covered overdraft away from the historical

[45] David Low et al., CFPB, *Data Point: Frequent Overdrafters,* at 5 (Aug. 2017), *https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf* (CFPB 2017 Data Point); CFPB 2014 Data Point at 12 (both analyzing 2011–2012 data).

[46] CFPB 2017 Data Point at 5.

[47] CFPB 2013 White Paper at 25.

[48] FDIC, *2021 FDIC National Survey of Unbanked and Underbanked Households,* at 1, *https://www.fdic.gov/analysis/household-survey/2021report.pdf* (last updated July 24, 2023).

[49] *Id.* at 17 tbl.3.3 (48.8 percent of unbanked households previously had a bank account).

[50] *Id.* at 18 fig.3.4 (49.4 percent of previously banked households are not at all interested in having a bank account, and 18.3 percent are not very interested).

[51] FDIC, *2021 FDIC National Survey of Unbanked and Underbanked Households—Appendix Tables,* at 11 tbl.A.6, *https://www.fdic.gov/analysis/household-survey/2021appendix.pdf* (last updated July 24, 2023) (FDIC Tables) (among previously banked households, 30.5 percent cited bank account fees are too high, 28.8 percent cited bank account fees are too unpredictable, and 43 percent cited that they do not have enough money to meet minimum balance requirements).

[52] *See* Press Release, CFPB, *CFPB Orders Regions Bank to Pay $191 Million for Illegal Surprise Overdraft Fees* (Sept. 28, 2022), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/.*

[53] *Id.; see also* 87 FR 66935, 66935–40 (Nov. 7, 2022).

[54] 87 FR 5801 (Feb. 2, 2022).

[55] CFPB 2014 Data Point at 21.

[56] *Id.* at 13.

[57] CFPB 2017 Data Point at 6, 32–33. This dynamic was likely driven primarily by the scenario where a debit card or ATM transaction is authorized against a sufficient balance but then settles against an insufficient balance. A consumer who was not opted-in would have had this transaction approved and assessed no fee. A consumer who was opted-in may have been charged a fee. For discussion of regulatory guidance and CFPB enforcement actions addressing overdraft fees assessed on these ''authorize positive, settle negative'' transactions, *see* part II.E.

[58] CFPB, *A Closer Look: Overdraft and the Impact of Opting-In* (Jan. 19, 2017), *https://files.consumerfinance.gov/f/documents/201701_cfpb_Overdraft-and-Impact-of-Opting-In.pdf* (citing a rate of 6.2 percent in a given year for non-opted-in consumers and 2.5 percent for opted-in consumers, based on calculations using the same large bank data used in CFPB 2014 Data Point).

[59] CFPB has previously used ''frequent overdrafters'' to describe those who incur more than 10 overdraft/NSF fees in one year and ''very frequent overdrafters'' to describe those who incur more than 20 overdraft/NSF fees in one year. *See* CFPB 2017 Data Point at 4–5.

[60] CFPB 2017 Data Point at 15–16 (finding that as neighborhood income decreases, overdraft frequency increases); *id.* at 6 (finding that nearly 70 percent of frequent overdrafters had end-of-day balances with medians between $237 and $439, while another 20 percent had median end-of-day balances of $140). *See also* FHN Brief 2023 (finding that households with incomes under $30,000 were twice as likely to report at least one overdraft than those with incomes of $100,000 or more).

[61] CFPB 2017 Data Point at 15–16.

[62] FHN Brief 2023 (finding that 26 percent of Black, 23 percent of Latinx, and 14 percent of White households reported having overdrafted, making Black and Latinx households 1.9 and 1.6 times as likely as White households, respectively, to have overdrafted); *see also* Meghan Greene et al., FHN, *FinHealth Spend Report 2022: What U.S. Households Spent on Financial Services During COVID–19,* at 14 (Apr. 2022), *https://finhealthnetwork.org/wp-content/uploads/2022/05/FinHealth_Spend_Report_2022_Final.pdf* (finding in a 2021 survey that Black and Latinx households with a savings or checking account were 1.8 and 1.4 times as likely as White households to report having overdrafted).

model and toward increased automation, greater frequency, and higher revenues, Federal regulators expressed increasing consumer protection concerns. In 2001, in declining to issue a requested ''comfort letter'' for a financial institution's overdraft program, the OCC stated that overdraft services are extensions of credit and that the associated charges may be ''just as burdensome as those imposed on borrowers utilizing other types of high interest rate credit.'' [63] In 2002, the Board noted that some non-covered overdraft credit may not be all that different from overdraft lines of credit,[64] and in 2004 the Board stated that further consideration of the need for Regulation Z coverage of overdraft services would be appropriate if consumer protection concerns were to persist.[65] In 2005, the Federal banking agencies issued joint guidance on non-covered overdraft credit noting that ''the existing regulatory exceptions [*i.e.,* exceptions in Regulation Z such that it does not apply] were created for the occasional payment of overdrafts, and as such could be reevaluated by the Board in the future, if necessary. Were the Board to address these issues more specifically, it would do so separately under its clear [TILA] authority.'' [66] In 2009, the Board adopted a rule under Regulation E prohibiting institutions from assessing overdraft fees on one-time debit card and ATM transactions unless the institution obtained the consumer's affirmative consent to such fees (''opt-in rule'').[67] Following the adoption of the Board's rule, the FDIC issued additional supervisory guidance,[68] which advises, among other things, that where transactions overdraw an account by a de minimis amount, the overdraft fee should be eliminated or be reasonable and proportional to the amount of the transaction.[69]

More recently, in October 2022, the CFPB issued a policy statement stating that the assessment of overdraft fees that consumers would not reasonably anticipate, including overdraft fees on debit card or ATM transactions that are authorized when the consumer's available balance is sufficient to cover the transaction but that later settle against a negative balance due to intervening transactions or complex processes (''authorize positive, settle negative'' or ''APSN'' transactions), likely violates the Consumer Financial Protection Act of 2010 (CFPA)'s statutory prohibition against unfair practices.[70] In April 2023, the OCC and FDIC issued guidance advising that overdraft fees charged on such transactions raise heightened risk of unfair, deceptive, or abusive acts or practices.[71] The OCC's guidance also describes certain practices that it notes may help to manage risks associated with overdraft programs, including assisting consumers in avoiding ''unduly high costs'' in relation to the face value of the item being presented, the amount of their regular deposits, and their average account balances, and implementing fees and practices that bear a reasonable relationship to the risks and costs of providing overdraft programs.[72]

The CFPB has previously established rules governing overdraft credit on prepaid accounts. In 2016, the CFPB amended Regulation Z to provide that prepaid accounts that offer credit features are generally covered under Regulation Z's credit card rules.[73] The CFPB also amended the compulsory-use provision under Regulation E to prohibit prepaid card issuers from requiring consumers to set up preauthorized EFTs to repay credit extended through an overdraft credit feature accessible by a hybrid prepaid-credit card.[74]

In applying Regulation Z to overdraft credit features on prepaid accounts, the CFPB noted that the term ''credit'' in TILA includes ''the right to . . . incur debt and defer its payment'' [75] and explained that that definition ''covers the situation when a consumer makes a transaction that exceeds the funds in the consumer's account and a person elects to cover the transaction by advancing funds to the consumer.'' [76] The CFPB further stated that overdraft fees on prepaid accounts ''generally constitute finance charges, because they are directly payable by the consumer and imposed directly by the creditor as a condition of the extension of credit.'' [77] The CFPB also stated that overdraft services offered in connection with prepaid accounts ''can be regulated by Regulation Z as a 'plan' when the consumer is contractually obligated to repay the debt, even if the creditor retains, by contract, the discretion not to extend credit.'' [78] At that time, the CFPB stated that it was continuing to study overdraft services on checking accounts and would propose any further regulatory consumer protections in that space through a separate rulemaking.[79]

F. Need for CFPB Action

As a result of the evolution of the overdraft market over the last few decades, the overdraft-related exception to the definition of finance charge in Regulation Z no longer serves its original purpose. The CFPB is proposing to update the exception, and several others that allow financial institutions to follow different rules for overdraft credit than for other forms of consumer credit, to ensure that overdraft credit offered by very large financial institutions is generally treated no differently than any other form of consumer credit, except in the narrow cases where it is provided as a courtesy to consumers. Preserving a limited exception from Regulation Z may encourage the availability of overdraft coverage, which can benefit consumers, especially given that much overdraft

[63] OCC, Interpretive Letter No. 914, at 6 (Sept. 2001), *https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2001/int914.pdf.*

[64] 67 FR 72618, 72620 (Dec. 6, 2002). In 2003, the Board noted that ''[t]he Board's staff is continuing to gather information on these services, which are not addressed in the final rule.'' (68 FR 16185 (Apr. 3, 2003)).

[65] 69 FR 31760, 31761 (June 7, 2004).

[66] *See* 70 FR 9127, 9128–29 (Feb. 24, 2005).

[67] 74 FR 5212 (Jan. 28, 2009).

[68] FDIC, *Final Overdraft Payment Supervisory Guidance,* FIL–81–2010 (Nov. 24, 2010), *https://www.fdic.gov/news/news/financial/2010/fil10081.html.*

[69] *Id.*

[70] *CFPB Circular 2022–06: Unanticipated Overdraft Fee Assessment Practices,* 87 FR 66935 (Nov. 7, 2022). The CFPB, the Board, and the FDIC also highlighted risks related to the imposition of overdraft fees from 2015 to 2018. *See* CFPB, *Supervisory Highlights,* at 8–9 (Winter 2015), *https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf* (last visited Jan. 4, 2024) (CFPB Winter 2015 Highlight); FRS, *Interagency Overdraft Services Consumer Compliance Discussion,* Outlook Live presentation slides, at 20–21 (Nov. 9, 2016), *https://www.consumercomplianceoutlook.org/-/media/cco/Outlook-Live/2016/110916.pdf;* FRS, *Consumer Compliance Supervision Bulletin,* at 12 (July 2018), *https://www.federalreserve.gov/publications/files/201807-consumer-compliance-supervision-bulletin.pdf* (FDIC 2018 Highlight); FDIC, *Consumer Compliance Supervisory Highlights,* at 2–3 (June 2019), *https://www.fdic.gov/regulations/examinations/consumercomplsupervisory highlights.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery* (FDIC 2019 Highlight).

[71] OCC, *OCC Bulletin 2023–12, Overdraft Protection Programs: Risk Management Practices* (Apr. 26, 2023), *https://www.occ.treas.gov/news-issuances/bulletins/2023/bulletin-2023-12.html* (OCC Bulletin 2023–12); FDIC, *Supervisory Guidance on Charging Overdraft Fees for Authorize Positive, Settle Negative Transactions,* FIL–19–2023 (Apr. 26, 2023), *https://www.fdic.gov/news/financial-institution-letters/2023/fil23019a.pdf.*

[72] OCC Bulletin 2023–12.

[73] 81 FR 83934, 83934–35 (Nov. 22, 2016). The CFPB amended the 2016 Prepaid Final Rule in 2017 and 2018. *See* 82 FR 18975 (Apr. 25, 2017); 83 FR 6364 (Feb. 13, 2018). The 2016 Prepaid Final Rule and subsequent amendments to that rule are referred to collectively herein as the Prepaid Accounts Rule.

[74] 81 FR 83934, 83935–36 (Nov. 22, 2016).

[75] 15 U.S.C. 1602(f).

[76] 81 FR 83934, 84168 (Nov. 22, 2016).

[77] *Id.* at 84160.

[78] *Id.*

[79] *Id.* at 84162.

credit is incidental in nature, as consumers often do not know with certainty whether or not a transaction will be presented against sufficient funds. But a blanket exception for all of today's non-covered overdraft credit—which poses serious risks to consumers as reflected in the discussion of consumer impacts noted above, and resembles other mass-marketed high-cost consumer credit products—cannot be justified as an exception for a courtesy, nor as consistent with TILA's purposes of promoting the informed use of credit and comparison shopping across credit products. Therefore, the CFPB proposes to limit the exception from TILA, for very large financial institutions, to overdraft credit that is offered at a cost to the consumer that does not exceed the financial institution's costs and losses associated with providing such coverage.

III. Outreach and Related Research

The CFPB has engaged in outreach and research related to overdraft fees since soon after the CFPB's inception. In 2012, the CFPB initiated a broad inquiry into overdraft programs for consumer checking accounts.[80] This inquiry included a request for information on the impacts of overdraft fees on consumers,[81] and collection and analysis of overdraft-related data from several large banks with over $10 billion in assets that provided a significant portion of all U.S. consumer checking accounts.[82] The CFPB published analyses of these data in a series of reports from 2013–2017, which examined institution-level policies and data, as well as account- and transaction-level data.[83] These studies assessed, among other things, overdraft fee size, prevalence, and related account closure; overdraft policies and practices across institutions; the distribution of overdraft fee incurrence across accounts; how overdraft transactions and fees vary across opt-in status; the size of transactions that lead to overdrafts; how long account balances stay negative after overdrafts; and the characteristics of account holders (including end-of-day balance, deposits, credit score, and available credit on a credit card) across distributions of overdraft frequency. The CFPB also collected anonymized institution-level information from several core processors, which provide operations and accounting systems to financial institutions. This data collection informed the CFPB's 2021 report assessing policies and practices among a large sample of financial institutions using core processors.[84]

In 2021, the CFPB examined financial institutions' reliance on overdraft/NSF fees from 2015 to 2019, finding that it was persistent.[85] Since then, the CFPB has continued tracking trends in the marketplace[86] and evaluating some banks' key overdraft-related metrics through the CFPB's supervision work.[87] From December 2022 to June 2023, the CFPB reviewed the publicly available overdraft practices of financial institutions with assets over $10 billion.[88] In addition, the CFPB has recently collected information from several financial institutions under the CFPB's supervision, including data regarding financial institutions' costs associated with offering overdraft credit, which is discussed further in part V.C.2 as well as in a separate report titled Overdraft and NSF Practices at Very Large Financial Institutions.

Consistent with the CARD Act, the CFPB consulted with the following agencies regarding rules that implement TILA section 149: (1) the Office of the Comptroller of the Currency; (2) the Board of Directors of the Federal Deposit Insurance Corporation; and (3) the National Credit Union Administration Board. The CFPB also consulted with the Board and several other Federal agencies, as discussed in [part VIII].

IV. Legal Authority

The CFPB is issuing this proposal pursuant to its authority under TILA, EFTA, and the CFPA. This part includes a general discussion of the provisions on which the CFPB relies in this rulemaking.

A. Truth in Lending Act

TILA section 105(a). TILA section 105(a) directs the CFPB to prescribe regulations to carry out the purposes of TILA and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the CFPB judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.[89] A purpose of TILA is to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various available credit terms and avoid the uninformed use of credit.[90] This stated purpose is tied to Congress's finding that economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.[91] Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes. A purpose of TILA is also to protect the consumer against inaccurate and unfair credit billing and credit card practices.[92]

CARD Act Section 2. Section 2 of the CARD Act, which amended TILA to establish fair and transparent practices relating to the extension of credit under an open-end consumer plan, and for other purposes, also specifically grants the CFPB authority to issue rules and model forms it considers necessary to carry out the CARD Act and amendments made by the CARD Act.[93]

For the reasons discussed in this notice, the CFPB is proposing amendments to Regulation Z with respect to overdraft credit to carry out TILA's purposes. The CFPB at this time is proposing to retain additional requirements, adjustments, and exceptions as, in the CFPB's judgment, are necessary and proper to carry out the purposes of TILA, prevent

[80] Press Release, CFPB, *CFPB Launches Inquiry into Overdraft Practices* (Feb. 22, 2012), *https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/.*

[81] 77 FR 12031 (Feb. 28, 2012).

[82] *See* CFPB 2013 White Paper at 8; *see also* CFPB 2014 Data Point at 6–7.

[83] *See* CFPB 2013 White Paper; CFPB 2014 Data Point; CFPB 2017 Data Point.

[84] Nicole Kelly & Éva Nagypál, Ph.D., CFPB, *Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors* (Dec. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf.*

[85] CFPB 2021 Data Point.

[86] CFPB, *Trends in overdraft/non-sufficient fund (NSF) fee revenue and practices, https://content.consumerfinance.gov/data-research/research-reports/trends-in-overdraftnon-sufficient-fund-nsf-fee-revenue-and-practices/* (last updated Oct. 11, 2023) (reflecting data and analysis published periodically from Dec. 1, 2021 to present).

[87] *See* Patrick Gibson & Lisa Rosenthal, *Measuring the impact of financial institution overdraft programs on consumers,* CFPB (June 16, 2022), *https://www.consumerfinance.gov/about-us/blog/measuring-the-impact-of-financial-institution-overdraft-programs-on-consumers/;* CFPB, *Fall 2023 Supervisory Highlights Junk Fees Update Special Edition,* at 7–9 (Oct. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory_highlights_junk_fees-update-special-ed_2023-09.pdf* (CFPB Fall 2023 Highlight).

[88] CFPB Market Monitoring of Publicly Available Overdraft Practices, Dec. 2022–July 2023.

[89] 15 U.S.C. 1604(a).

[90] 15 U.S.C. 1601(a).

[91] *Id.*

[92] *Id.*

[93] Public Law 111–24; § 2, 123 Stat. 1734, 1735 (2009).

circumvention or evasion thereof, or to facilitate compliance. In developing these aspects of the proposal pursuant to its authority under TILA section 105(a), the CFPB has considered the purposes of TILA, including ensuring meaningful disclosures, facilitating consumers' ability to compare credit terms, helping consumers avoid the uninformed use of credit, and protecting consumers against inaccurate and unfair credit billing and credit card practices, and the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization.

B. Electronic Fund Transfer Act

EFTA section 902 establishes that the purpose of the statute is to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in EFT and remittance transfer systems but that its primary objective is the provision of individual consumer rights.[94] Among other things, EFTA contains provisions regarding compulsory use of EFTs.[95]

EFTA section 904(a) authorizes the CFPB to prescribe regulations to carry out the purposes of EFTA.[96] EFTA section 904(c) provides that regulations prescribed by the CFPB may contain such classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of EFTs or remittance transfers, that the CFPB deems necessary or proper to effectuate the purposes of EFTA, to prevent circumvention or evasion, or to facilitate compliance.[97] The Senate Report accompanying EFTA noted that regulations are ''essential to the act's effectiveness'' and ''will add flexibility to the act by permitting the [CFPB] to modify the act's requirements to suit the characteristics of individual EFT services. Moreover, since no one can foresee EFT developments in the future, regulations would keep pace with new services and assure that the act's basic protections continue to apply.'' [98]

EFTA section 904(c) also provides that the ''CFPB shall by regulation modify the requirements imposed by this subchapter on small financial institutions if the CFPB determines that such modifications are necessary to alleviate any undue compliance burden on small financial institutions and such modifications are consistent with the purpose and objective of this subchapter.''

As discussed in part V below, the CFPB is adopting amendments to Regulation E, including with respect to compulsory use of preauthorized repayment and the definition of overdraft services, pursuant to the CFPB's authority under, as applicable, EFTA section 904(a) and (c). The CFPB is proposing to retain existing rules for financial institutions with less than $10 billion in assets because the CFPB has determined that such exceptions will alleviate undue compliance burdens as the CFPB continues to examine the market for smaller financial institutions.

C. Consumer Financial Protection Act

CFPA section 1022(b)(1). Section 1022(b)(1) of the CFPA authorizes the CFPB to prescribe rules ''as may be necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' [99]

Among other statutes, TILA, EFTA, and the CFPA are Federal consumer financial laws.[100] Accordingly, in setting forth this proposal, the CFPB is exercising its authority under CFPA section 1022(b) to prescribe rules that carry out the purposes and objectives of TILA, EFTA, and the CFPA and prevent evasion of those laws.

V. Discussion of the Proposed Rule

A. Who is covered? (§ 1026.62(b)(8))

This proposed rule would expand protections to consumers of overdraft credit at financial institutions with more than $10 billion in assets. This proposal would not change the regulatory framework for overdraft credit offered by financial institutions with $10 billion or less in assets.

To limit the proposed rule to overdraft credit offered by financial institutions with assets of more than $10 billion, the proposed rule would define in proposed § 1026.62(b)(8) the term ''very large financial institution'' as an insured depository institution or an insured credit union with total assets of more than $10 billion and any affiliate thereof. A financial institution may determine whether it has total assets of more than $10 billion using the same determination that is used to determine whether such institutions are subject to the CFPB's supervisory authority under 12 U.S.C. 5515(a). The CFPB currently publishes a list of such institutions at *https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/*. As discussed below, the proposed rule then uses the term ''very large financial institution'' to limit the scope of overdraft credit that would be subject to the proposed rule.

The CFPB has preliminarily determined that overdraft services offered by financial institutions with more than $10 billion in assets should be subject to this rule. As noted above, in the supervisory context, Congress adopted in 12 U.S.C. 5515(a) a $10 billion threshold to define the ''very large banks, savings associations, and credit unions'' that would be subject to the CFPB's primary supervision authority. The CFPB has preliminarily determined that a $10 billion threshold similarly should be used to define ''very large financial institution'' for limiting the scope of overdraft credit that would be covered by the proposed rule.

The CFPB has preliminarily determined that consumers would benefit from the CFPB's proceeding with a rule that would apply to very large financial institutions—*i.e.,* those with assets of $10 billion or more. Such a rule would increase protections for the overwhelming majority of consumers of overdraft credit. This proposal would cover financial institutions holding approximately 80 percent of consumer deposits as of December 2022 [101] and responsible for approximately 68 percent of overdraft charges as of December 2022.[102] The CFPB believes that consumers at very large financial institutions would benefit from the expanded protections that would be provided by the proposed rule.

In light of the different circumstances smaller financial institutions may face in adapting to the proposed regulatory framework, the CFPB is proposing not to extend the new rule to those institutions with $10 billion or less in assets. While the CFPB is not proposing any changes to the regulatory requirements for smaller financial institutions, the CFPB will continue to monitor the market in coordination with State and Federal supervisors.

The CFPB seeks comment on its preliminary determination to apply the proposed rule only to very large financial institutions and on whether $10 billion is an appropriate threshold for defining very large financial institutions.

[94] 15 U.S.C. 1693.

[95] 15 U.S.C. 1693k.

[96] 15 U.S.C. 1693b(a).

[97] 15 U.S.C. 1693b(c).

[98] *See* S. Rept. No. 95–1273, at 26 (1978).

[99] 12 U.S.C. 5512(b)(1).

[100] CFPA section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the provisions of the CFPA and enumerated consumer laws; ''enumerated consumer laws'' is defined in CFPA section 1002(12), 12 U.S.C. 5481(12)).

[101] Computed from 2022 FFIEC and National Credit Union Administration call report data.

[102] Estimated using data from 2022 FFIEC Call Reports and methodology discussed at FN 29.

B. What transactions and accounts are covered?

The CFPB proposes to add § 1026.62(a) and (b) to define the scope of transactions and accounts that would be covered under the proposed rule. The proposed rule would introduce new terms and amend several existing Regulation Z definitions and their commentary to state that overdraft credit is credit and assist with ease of reference to various types of overdraft credit. First, the proposal would define overdraft credit in proposed § 1026.62(a)(2), and proposed comment 2(a)(14)–4 would provide a brief example to illustrate that overdraft credit is credit under TILA and Regulation Z.

The CFPB's proposed rule would add commentary to the definition of open-end credit in § 1026.2(a)(20) to confirm that overdraft credit that is subject to a finance charge is generally open-end credit and is therefore subject to the Regulation Z provisions that apply to open-end credit. The proposed definitions of covered overdraft credit and non-covered overdraft credit in new § 1026.62(b) would assist with referencing overdraft credit that would be or not be credit subject to Regulation Z under this proposal. Covered overdraft credit under this proposal would be overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments, and would be subject to Regulation Z. Non-covered overdraft credit under this proposal would be overdraft credit that is neither subject to a finance charge nor payable by written agreement in more than four installments, and would not be subject to Regulation Z. Additionally, the CFPB proposes to add a new definition of covered overdraft credit account to facilitate ease of reference to credit accounts through which the financial institutions extend or can extend covered overdraft credit.

1. Overdraft Credit (§§ 1026.2(a)(14) and 1026.62(a))

TILA defines ''credit'' to mean the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.[103] Regulation Z similarly defines ''credit'' in existing § 1026.2(a)(14) to mean the right to defer payment of debt or to incur debt and defer its payment. To facilitate compliance with the proposed rule, proposed comment 2(a)(14)–4 would provide a brief, illustrative example of overdraft credit. The 2016 Prepaid Final Rule similarly notes that a ''person, in extending overdraft funds, has provided the consumer with 'the right . . . to incur debt and defer its payment.' ''[104]

The CFPB is proposing to update several exceptions in Regulation Z, increasing consumer protections that apply to overdraft credit offered by very large financial institutions. To that end, the CFPB would add a definition of ''overdraft credit'' in proposed § 1026.62(a) to help clarify the scope of transactions covered by the proposed rule. Proposed § 1026.62(a) would define ''overdraft credit'' as any consumer credit extended by a financial institution to pay a transaction from a checking or other transaction account (other than a prepaid account as defined in § 1026.61) held at the financial institution when the consumer has insufficient or unavailable funds in that account. Proposed § 1026.62(a) would provide non-exhaustive examples, such as consumer credit extended through a transfer from a credit card account or overdraft line of credit.

The proposed definition of ''overdraft credit'' would not cover credit features with respect to a prepaid account as defined in § 1026.61. The CFPB has preliminarily determined that it would be unnecessary and unduly burdensome to include prepaid accounts within the scope of this proposed rule. The CFPB's Prepaid Accounts Rule already provides comprehensive consumer protections tailored to prepaid accounts.[105]

Proposed § 1026.62(a) would also clarify that the term ''overdraft credit'' does not include credit exempt from Regulation Z pursuant to existing § 1026.3. For example, consistent with TILA section 104(2),[106] transactions in securities or commodities accounts in which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission are not subject to Regulation Z pursuant to existing § 1026.3(d).

2. Open-End Credit (§ 1026.2(a)(20))

The term ''open-end credit'' is defined in § 1026.2(a)(20) as (1) consumer ''credit,'' (2) that is extended under a ''plan,'' (3) where the person extending the credit may impose a ''finance charge'' from time to time on an outstanding unpaid balance, (4) the person extending the credit is a ''creditor,'' (5) the person extending the credit reasonably contemplates repeated transactions, and (6) the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

For the reasons discussed below, the CFPB has preliminarily determined that virtually all overdraft credit that financial institutions provide today, such as through negative balances on checking accounts, would meet the Regulation Z definition of open-end credit, but for Regulation Z excepting overdraft fees from the definition of finance charge. Specifically, but for those exceptions, the typical $35 overdraft fee plainly constitutes a finance charge and a financial institution that regularly assesses such a finance charge is a creditor.[107]

The CFPB has preliminarily determined that overdraft credit that is typical in the market today would become covered overdraft credit under the proposed rule and would meet the six elements of open-end credit under Regulation Z. For clarity and to facilitate compliance, the CFPB is proposing additional commentary regarding two terms used in the definition of open-end credit: ''plan'' and ''finance charge.'' The following discusses each of the six elements in turn.

(1) Credit. As discussed above, a person extending overdraft funds has provided credit under TILA and Regulation Z.[108] Because the consumer is obligated to repay the funds, the financial institution is allowing the consumer to incur debt and defer its payment consistent with the TILA and Regulation Z definitions of ''credit.''

(2) Plan. The CFPB has preliminarily determined that a checking account agreement offered in connection with overdraft credit would—but for the Regulation Z exceptions of overdraft fees from the definition of finance charge—constitute a ''plan'' consistent with the definition of ''open-end credit plan'' in TILA.[109] Specifically, but for the Regulation Z exceptions, the checking account agreement—consistent with the language of comment 2(a)(20)–2.i—would be ''a contractual arrangement between the creditor [the institution offering checking account overdraft credit] and the consumer.'' As noted, the CFPB's proposed rule would modify those exceptions. The CFPB has preliminarily determined that an

[103] 15 U.S.C. 1602(f).

[104] 81 FR 83934, 84168 (Nov. 22, 2016).

[105] The 2016 Prepaid Final Rule and subsequent amendments to that rule are referred to collectively herein as the Prepaid Accounts Rule.

[106] 15 U.S.C. 1603(2).

[107] *See* § 1026.2(a)(17)(i) (defining ''creditor'' as ''[a] person who regularly extends consumer credit that is subject to a finance charge. . . .'').

[108] 15 U.S.C. 1602(f); 12 CFR 1026.2(a)(14).

[109] 15 U.S.C. 1602(j).

institution offering checking account overdraft credit would be a creditor (discussed under *(4) Person extending credit is a creditor,* below) and the account agreement would be ''a contractual arrangement between the creditor and the consumer.'' The CFPB proposes to add comment 2(a)(20)–2.iv to clarify that with respect to covered overdraft credit, a plan means a program where the consumer is obligated contractually to repay any credit extended by the creditor, even if the creditor retains discretion not to extend credit in individual transactions.

The CFPB has preliminarily determined that the reservation of such discretion in connection with covered overdraft credit does not connote the absence of an open-end credit plan. The CFPB understands that financial institutions offering automated overdraft services include in their agreements provisions about how the overdraft service will operate and information about overdraft fees. These terms-and-conditions documents typically stipulate that consumers using overdraft programs must and do agree to repay the debt created by an overdraft and the related fee, indicating that a contractual arrangement between the creditor and the consumer exists. Although these agreements typically state that the financial institution retains discretion to authorize or decline any particular overdraft, as a practical matter, financial institutions operating automated overdraft programs exercise limited if any discretion in authorizing particular transactions so long as the overdraft transaction is within the overdraft coverage limit that the institution internally established. The CFPB notes that credit card issuers similarly reserve the right to reject individual transactions in their contractual agreements, yet credit card programs are treated as open-end credit plans under TILA and Regulation Z. Treating the provision of automated overdraft credit in a comparable way would promote consistency. Therefore, the CFPB has preliminarily determined that a checking account agreement offered in connection with overdraft credit is a plan notwithstanding that the person offering the agreement reserves the right to not extend credit on individual transactions.

(3) Imposing a ''finance charge'' from time to time. The CFPB has preliminarily determined that overdraft credit is generally subject to fees that would be finance charges but for Regulation Z's exceptions to the statutory finance charge definition. As noted, the CFPB's proposed rule would modify those exceptions such that checking account overdraft fees would generally be finance charges. In the absence of the exceptions, the CFPB has preliminarily determined that an institution offering checking account overdraft credit would be imposing a finance charge from time to time.

While the proposed definition of covered overdraft credit includes overdraft credit that is subject to a finance charge as well as overdraft credit payable by a written agreement in more than four installments, the CFPB anticipates that most overdraft credit would meet the definition of covered overdraft credit because it is subject to a finance charge rather than because it is payable in more than four installments.[110] The CFPB proposes comment 2(a)(20)–4.iii to explain that charges for paying a transaction that overdraws a consumer's account generally would be finance charges unless they are expressly excluded from the definition of finance charge by the proposed rule.

Proposed comment 2(a)(20)–4.iii would clarify that these are charges ''imposed from time to time on an outstanding unpaid balance'' as long as there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. The CFPB does not anticipate that there will be a specific amount financed for overdraft credit at the time the credit plan is established because the CFPB anticipates that the credit lines on these credit plans generally will be replenishing (discussed under *(6) Amount of credit replenishes when outstanding balance is repaid,* below). In such cases, an amount financed for the plan could not be calculated because the creditor will not know at the time the plan is established the amount of credit that will be extended under the plan. Thus, to the extent that any finance charge may be imposed in connection with such a credit plan, the credit plan will meet this criterion.

(4) Person extending credit is a creditor. Assuming overdraft fees are finance charges, the CFPB has preliminarily determined that an institution providing covered overdraft credit is a ''creditor'' for purposes of the definition of ''open-end credit.'' A ''creditor'' is generally defined under Regulation Z to mean a person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no contract.[111] Therefore, to the extent that overdraft credit is subject to a finance charge and is accordingly covered overdraft credit, it is also extended by a creditor if the creditor ''regularly extends'' overdraft credit. The CFPB anticipates that most persons offering covered overdraft credit regularly extend overdraft credit and therefore would meet the definition of ''creditor.'' If an institution providing open-end covered overdraft credit is considered a ''card issuer,'' then it would also be considered a creditor under current § 1026.2(a)(17)(iii) for purposes of Regulation Z, subpart B.

(5) Reasonably contemplates repeated transactions. The CFPB has preliminarily determined that institutions providing checking account overdraft credit typically contemplate repeated overdraft transactions as the CFPB found that 93.2 percent of overdraft and NSF fees were assessed on consumers with four or more overdraft and NSF transactions per year.[112] The CFPB has therefore preliminarily determined that this fifth element of the open-end credit definition is satisfied.

(6) Amount of credit replenishes when outstanding balance is repaid. The CFPB has preliminarily determined that institutions providing checking account overdraft credit generally replenish the amount of overdraft credit available to consumers up to any overdraft coverage limit (*i.e.,* consumers' ''shadow lines'') to the extent that any outstanding overdraft balance is repaid. This replenishable credit distinguishes open-end credit from a series of advances made pursuant to a closed-end credit loan commitment, but it does not mean that the credit plan must always be replenished to the original amount. The creditor may refuse to extend new credit in a particular case due to changes in the creditor's financial condition or the consumer's creditworthiness, if permitted by Regulation Z. While consumers should have a reasonable expectation of obtaining credit as long as they remain current, further extensions of credit need not be an

[110] A card issuer that extends covered overdraft credit that takes the form of closed-end credit and is subject to a finance charge or payable by a written agreement in more than four installments (including closed-end credit accessed by a hybrid debit-credit card) would be a creditor under § 1026.2(a)(17)(iv) and subject to the special rules in that paragraph. A person who is not a card issuer and regularly extends covered overdraft credit that takes the form of closed-end credit and is subject to a finance charge or is payable by written agreement in more installments would be a creditor under § 1026.2(a)(17)(i) and subject to the closed-end credit rules in Regulation Z, subpart C.

[111] *See* § 1026.2(a)(17)(i).

[112] CFPB 2017 Data Point at 13.

absolute right in order for the plan to meet the self-replenishing criterion. Because the CFPB anticipates that financial institutions will generally replenish overdraft credit to the extent that any outstanding overdraft balance is repaid, the CFPB has preliminarily determined that covered overdraft credit plans are generally replenishing.

3. Covered Overdraft Credit (§ 1026.62(b)(3)), Non-Covered Overdraft Credit (§ 1026.62(b)(6)), and Card Issuer (§ 1026.2(a)(7))

The CFPB proposes to define ''covered overdraft credit'' as overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments and ''non-covered overdraft credit'' as overdraft credit that is not subject to a finance charge and is not payable by written agreement in more than four installments. The purpose of the proposed definitions is to assist with ease of reference to overdraft credit that is subject to, or covered by, Regulation Z. As discussed in more detail in part V.C, some charges imposed in connection with overdraft credit are not considered finance charges. Thus, use of the proposed definitions will also help a person extending overdraft credit to readily ascertain whether they are subject to the requirements of the regulation.

The proposed definition of ''overdraft credit'' is limited to consumer credit, but, even with that qualification, not all overdraft credit would be subject to Regulation Z if the definition is finalized as proposed. Many provisions of Regulation Z apply to a ''creditor,'' which generally is defined at § 1026.2(a)(17)(i) as ''[a] person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments.'' Thus, a financial institution must offer overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments (*i.e.,* covered overdraft credit) to be considered a creditor under Regulation Z. (Any financial institution offering overdraft credit will generally satisfy the definition of ''regularly'' under § 1026.2(a)(17)(v).) Because some charges imposed in connection with overdraft credit are not considered finance charges, a financial institution may charge for overdraft credit without being considered a creditor under Regulation Z if certain requirements are met.

Section 1026.2(a)(7) defines ''card issuer'' as a person that issues a credit card or that person's agent with respect to the card. Unlike other creditors, card issuers are subject to Regulation Z even if they extend credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.[113] However, this does not apply to overdraft credit that is not subject to a finance charge or repayable by written agreement in more than four installments, even if the financial institution extending such credit would otherwise be considered a card issuer.[114] Under the proposal, extensions of overdraft credit that are not subject to a finance charge and are not payable by written agreement in more than four-installments (non-covered overdraft credit) would continue to not be covered by Regulation Z. Further, under the proposal, institutions providing debit cards that access only non-covered overdraft credit would continue to not be card issuers, and would therefore not be creditors under § 1026.2(a)(17)(iii), because the CFPB has preliminarily determined that allowing financial institutions to offer debit cards that access only below breakeven overdraft credit without being subject to Regulation Z would further the purposes of this proposal as discussed in part V.C.

For these reasons, the CFPB has preliminarily determined that a new definition of ''covered overdraft credit'' that parallels the general definition of creditor will assist with ease of reference to overdraft credit that is subject to Regulation Z. Additionally, the CFPB has preliminarily determined that a new definition of ''non-covered overdraft credit'' will assist with ease of reference to overdraft credit that is not subject to, or covered by, Regulation Z, particularly in the proposed rule's costs and losses calculation in § 1026.62(d).

4. Covered Overdraft Credit Account (§ 1026.62(b)(4))

The CFPB proposes to define ''covered overdraft credit account'' as a credit account through which a financial institution extends or can extend covered overdraft credit. The term includes any line of credit, credit card account, credit feature, credit line, credit plan, or credit subaccount through which the financial institution extends or can extend covered overdraft credit. Proposed § 1026.62(c) would require very large financial institutions to structure covered overdraft credit as a separate credit account. Therefore, the term ''covered overdraft credit account'' would assist in ease of reference to these separate credit accounts and in distinguishing them from tied checking or other transaction accounts.

C. Changes to the Definition of ''finance charge'' (§ 1026.4(b)(2), (b)(12), and (c)(3); § 1026.62(d))

Under Regulation Z, the term ''finance charge'' generally is defined in § 1026.4(a) to mean ''the cost of consumer credit as a dollar amount.'' It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

Regulation Z currently excludes certain fees or charges imposed by a financial institution for paying items that overdraw an account from the definition of ''finance charge'' unless ''the payment of such items and the imposition of the charge were previously agreed upon in writing.''[115] Additionally, where the payment of such items and imposition of the charge were previously agreed upon in writing, when a creditor imposes a service, transaction, activity, or carrying charge for each item that results in an overdraft on an account, such fees are excluded from the definition of finance charge if they do not exceed the charges imposed for paying or returning overdrafts on a similar transaction account that does not have such a written agreement.[116] Neither of these exclusions appear within the statutory text of TILA.

The proposal would amend the definition of ''finance charge'' in § 1026.4 in three ways. First, it would modify the partial exception provided in § 1026.4(b)(2) for certain charges imposed on checking and other transaction accounts so that the partial exception would no longer apply to ''covered asset accounts'' as defined in proposed § 1026.62. Second, it would add proposed § 1026.4(b)(12) that would provide examples of charges imposed in connection with covered overdraft credit that are finance charges. Third, it would amend the exception provided in § 1026.4(c)(3) so that the exception would no longer apply to ''above breakeven overdraft credit'' as defined

[113] *See* 12 CFR 1026.1(c), and 1026.2(a)(17)(iii). Card issuers are also covered by the general rule that subjects them to Regulation Z if they extend open-end credit.

[114] Comment 2(a)(15)–2.ii.A. This comment provides that a debit card is not a credit card if there is no credit agreement, even if the creditor occasionally honors an inadvertent overdraft. Because the debit card is not considered a ''credit card'' under Regulation Z, a financial institution offering a debit card that can access non-covered overdraft credit is not considered a card issuer.

[115] 12 CFR 1026.4(c)(3).

[116] 12 CFR 1026.4(b)(2).

in proposed § 1026.62. These proposed amendments are intended to specify which overdraft transactions include a finance charge and, therefore, may be subject to the requirements of TILA and Regulation Z.

1. Comparable Cash Transactions (§ 1026.4(b)(2))

Under TILA section 106(a) (15 U.S.C. 1605(a)), the term ''finance charge'' generally provides that ''the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.'' [117] The finance charge does not include any charge of a type payable in a comparable cash transaction.[118]

The current official interpretations address comparable cash transactions by stating that charges imposed uniformly in cash and credit transactions are not finance charges and by instructing that, to determine whether a transaction is a finance charge, the creditor should compare the credit transaction to a similar cash transaction.[119] The Board updated the commentary addressing finance charges numerous times.[120]

Section 1026.4(b) lists examples of the types of charges that generally are finance charges. In particular, § 1026.4(b)(2) provides that the finance charge includes ''[s]ervice, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account (except a prepaid account as defined in § 1026.61) to the extent that the charge exceeds the charge for a similar account without a credit feature.''

The historical roots of § 1026.4(b)(2) trace back to the first version of Regulation Z, published by the Board in 1969. In that version, § 226.4(a)(2) indicated that the finance charge included service, transaction, activity, or carrying charges. The 1969 version of § 226.4(a)(2) also included a footnote stating that the charges listed in § 226.4(a)(2) included ''any charges imposed by the creditor in connection with a checking account to the extent that such charges exceed any charges the customer is required to pay in connection with such account when it is not being used to extend credit.'' [121]

As part of its 1981 amendments to Regulation Z, the Board moved the text of § 226.4(a)(2) to its current location in § 1026.4(b)(2) and incorporated the language from the accompanying footnote into the main regulation text.[122] Later that year, the Board also published comment 4(b)(2)–1, which provided two examples of service charges assessed on asset accounts with tied overdraft lines of credit that are not finance charges.[123] In 1998, the Board revised comment 4(b)(2)–1 to clarify that a service charge on a checking or other transaction account with a credit feature is a finance charge only if the charge exceeds the charge for a similar account without a credit feature.[124]

The CFPA generally granted rulemaking authority under the TILA and transferred primary oversight of Regulation Z to the CFPB. Subsequently, the CFPB renumbered § 226.4 to § 1026.4.[125] In 2016, the CFPB amended both § 1026.4(b)(2) and comment 4(b)(2)–1 to exclude prepaid accounts as defined in § 1026.61.[126] As part of that rulemaking, the CFPB provided detailed guidance in comment 4(b)(11)(ii) regarding how fees on prepaid accounts with a covered separate credit feature accessible by a hybrid prepaid-credit card should be compared to fees imposed on prepaid accounts without a covered separate credit feature. This guidance was more detailed and more restrictive than the guidance provided under § 1026.4(b)(2) with regard to checking and transaction accounts other than prepaid accounts.[127] As part of this guidance, the CFPB noted that the per transaction fee for a credit extension in the course of a transaction from a covered separate credit feature cannot be compared to a fee for declining to pay a transaction that is imposed on a prepaid account without such a credit feature in the same prepaid account program.[128] The CFPB was concerned about possible evasion of the rule, noting that many prepaid cardholders who wish to use covered separate credit features may not have other asset accounts or savings accounts from which they can transfer funds to prevent an overdraft on the prepaid account in the course of authorizing, settling, or otherwise completing a transaction to obtain goods or services, obtain cash, or conduct person-to-person (P2P) transfers.[129] As a result, if such a comparison were permitted, card issuers could charge a substantial fee to transfer funds from the checking account or savings account during the course of a transaction using the prepaid account (which many prepaid cardholders who wish to use covered separate credit features may not be able to use as a practical matter) and then charge that same substantial per transactions fee for credit drawn or transferred from the covered separate credit feature during the course of a transaction without such fee being considered a finance charge.[130] The CFPB thus concluded that it was appropriate to limit the comparable fee in this case to per transaction fees imposed on prepaid accounts for transactions that access funds in the prepaid account in the same prepaid account program that does not have a covered separate credit feature because all prepaid accountholders can use prepaid accounts to make transactions that access available funds in the prepaid account and thus these types of transactions are available to all prepaid accountholders.[131]

i. What is changing?

The proposal would revise § 1026.4(b)(2) and comment 4(b)(2)–1 to provide that § 1026.4(b)(2) does not apply to ''covered asset accounts'' as defined in § 1026.62. This proposed exception would mirror the exception created by the CFPB's Prepaid Rule.

The proposal also would add a paragraph at § 1026.4(b)(12). Proposed § 1026.4(b)(12) would add examples of finance charges with regard to covered asset accounts, as defined in proposed § 1026.62(b)(2). These proposed changes would broaden the definition of

[117] 12 CFR 1026.4(a). Current § 1026.4 implements TILA section 106 by largely mirroring the statutory definition of finance charge and the specific exclusions from that definition. In addition, § 1026.4 specifies certain inclusions and exclusions from the finance charge that are not specifically listed in the statute. For example, § 1026.4(c) specifically excludes application fees and forfeited interest from the definition of finance charge, whereas TILA does not.

[118] *See* 15 U.S.C. 1605(a).

[119] Regulation Z comment 4(a)–1.

[120] For example, the Board initially adopted comment 226.4(a)–4 to indicate that a fee charged by a card issuer when a consumer takes a cash advance on a credit card account using an ATM was not a finance charge to the extent that it did not exceed the charge imposed by the card issuer on its cardholders for using an ATM to withdraw cash from a consumer asset account, such as a checking or savings account. 48 FR 54642 (Dec. 6, 1983) and 49 FR 40560 (Oct. 17, 1984). After subsequent rulemaking activity, current comment 4(a)–4.1 provides that, for example, any charge imposed on a credit cardholder by a card issuer for the use of an ATM to obtain a cash advance is a finance charge regardless of whether the card issuer imposes a charge on its debit cardholders for using the ATM to withdraw cash from a consumer asset account, such as a checking or savings account. 74 FR 5263 (Jan. 29, 2009).

[121] 34 FR 2002, 2004 n.2 (Feb. 11, 1969).

[122] 46 FR 20848, 20894 (Apr. 7, 1981).

[123] 46 FR 50288, 50299 (Oct. 9, 1981).

[124] 63 FR 16669, 16675 (Apr. 6, 1998).

[125] 76 FR 79767 (Dec. 22, 2011).

[126] 81 FR 83934, 84369, 84374 (Nov. 22, 2016).

[127] *Id.* at 84185.

[128] *Id.* at 84186.

[129] *Id.*

[130] *Id.* at 84186–87.

[131] *Id.* at 84187.

''finance charge'' for covered asset accounts to apply the applicable rules to such accounts so that the full cost of credit is more accurately disclosed. The effect of the proposed changes would be to limit the existing exclusion in § 1026.4(b)(2) such that nearly all service, transaction, activity, and carrying charges imposed on covered asset accounts, including, in particular, fees commonly known as ''transfer fees'' for moving funds from overdraft lines of credit to covered asset accounts, would be ''finance charges'' under Regulation Z unless subject to another exclusion or limitation.[132]

ii. Charges Imposed on Credit Accounts Required by § 1026.62(c) (§ 1026.4(b)(12)(i))

Proposed § 1026.4(b)(12)(i) would specify that any service, transaction, activity, or carrying charge imposed on the separate credit account required by § 1026.62(c) is a finance charge. That is, the fees described in proposed § 1026.4(b)(12)(i) would be finance charges without regard to a comparison to fees for a comparable cash transaction.

Under § 1026.62(c), the required credit account exists for the purpose of providing credit. Therefore, service, transaction, activity, or carrying charges on this separate credit account are, per the finance charge definition in § 1026.4(a), generally imposed as an incident to or a condition of the extension of credit, separate and distinct from any such fees applied to a separate checking or other transaction account. Because of the nature of the credit account, it would be difficult or impossible to determine which, if any, charge applied to a checking or other asset account is a charge for a similar or comparable cash transaction for the purpose of § 1026.4(a). As with the Board's analysis in the 2009 amendment regarding credit card fee transactions, there is not necessarily a single or standard checking account to use for fee comparison. For example, there may be different fees applied to a checking account with a low balance minimum versus another type of checking account. Thus, it would be difficult in many cases to say which checking account provides the appropriate fee for comparison. Even assuming a comparable transaction could be identified, the disclosure a consumer might receive would depend on whether the creditor provides other asset accounts and imposes service, transaction, activity, or carrying charges on those accounts and whether the fees applied to those accounts exceed the fees for those on the separate credit account. As with the distinctions analyzed by the Board in the 2009 amendment, it is not clear that these distinctions are meaningful to consumers.[133] The CFPB has thus preliminarily determined that any service, transaction, activity, or carrying charge imposed on the separate credit account required by § 1026.62(c) would be a finance charge, except for charges specifically excluded by paragraphs (c) through (e) of section 1026.4.

iii. Charges Imposed on Covered Asset Accounts (§ 1026.4(b)(12)(ii))

Proposed § 1026.4(b)(12)(ii) would specify that any service, transaction, activity, or carrying charge imposed on the covered asset account is a finance charge to the extent that the charge exceeds a comparable charge imposed on a checking or other transaction account that does not have covered overdraft credit tied to it. That is, any such charge is a finance charge to the extent that it exceeds a comparable charge imposed on a checking or other transaction account that is not a covered asset account. This provision would largely mirror existing § 1026.4(b)(2) but with adjustments for covered asset accounts.

iv. Examples of Charges Imposed on Covered Asset Accounts (§ 1026.4(b)(12)(iii)(A) Through (C))

Proposed § 1026.4(b)(12)(iii) would describe certain charges on a checking or other transaction account that does not have covered overdraft credit tied to it that are not comparable to charges imposed on a covered asset account, which, by definition, does have covered overdraft credit tied to it. These charges would therefore not be permitted to be subtracted from charges applied to the covered asset account for the purpose of determining whether or not a charge on the covered asset account is a finance charge.

Proposed § 1026.4(b)(12)(iii)(A) would exclude from the determination of a finance charge comparison of a charge for authorizing or paying a transaction that overdraws the checking or other transaction account that does not have covered overdraft credit. Proposed § 1026.4(b)(12)(iii)(B) would exclude from the determination of a finance charge comparison of a charge for declining to authorize or pay a transaction, and proposed § 1026.4(b)(12)(iii)(C) would exclude from the determination of a finance charge comparison of a charge for returning a transaction unpaid.[134] Thus, under proposed § 1026.4(b)(12)(iii)(A) through (C), a very large financial institution may impose a service fee on a covered asset account when the institution transfers funds into the account from a covered overdraft credit account to cover a transaction that would otherwise overdraw the covered asset account. The institution may also impose a fee on a checking or other transaction account that does not have covered overdraft credit (*i.e.,* is not a covered asset account) when the institution authorizes or pays a transaction that would otherwise overdraw the checking or other transaction account, declines to authorize or pay a transaction that would otherwise overdraw the checking or other transaction account, or returns unpaid a transaction that would otherwise overdraw the checking or other transaction account. However, the fee applied to a checking or other transaction account that does not have covered overdraft credit may not be compared to the fee on a covered asset account for the transfer of funds to cover a transaction. Accordingly, under proposed § 1026.4(b)(12)(iii)(A) through (C), the full amount of the service fee on a covered asset account when a very large financial institution transfers funds into the account from a covered overdraft credit account to cover a transaction that would otherwise overdraw the covered asset account would be a finance charge. Taken together, these three provisions would clarify that the service, transaction, activity, or carrying charges imposed on covered asset accounts may not, for the purposes of determining whether such fees are ''finance charges,'' be reduced by fees that relate to granting or denying a transaction that would overdraw an account without covered overdraft credit.

The CFPB has made the preliminary determination to exclude from the determination of a finance charge these categories of charges for two reasons.

[132] Under the proposal, fees would continue to be excluded from the definition of finance charge if they are described in existing § 1026.4(c) through (e).

[133] 74 FR 5263 (Jan. 29, 2009). As discussed above, the purposes of TILA are to provide a meaningful disclosure of credit terms to enable consumers to compare credit terms available in the marketplace more readily and avoid the uninformed use of credit and to protect consumers against inaccurate and unfair credit billing and credit card practices. 15 U.S.C. 1601(a).

[134] Some or all of the fees described in proposed § 1026.4(b)(12)(iii)(A) through (C) are sometimes referred to as ''overdraft fees,'' ''declination fees,'' or ''NSF fees.'' Proposed § 1026.4(b)(12)(iii)(A) through (C) are broadly inclusive of the types of fees described therein, regardless of how such fees are labeled.

First, these types of charges are charges associated with decisions regarding whether or not to extend credit. The charges described in proposed § 1026.4(b)(12)(iii)(A) are applied if credit is extended; the charges described in proposed § 1026.4(b)(12)(iii)(B) and (C) are applied if credit is denied. As such, they are not charges associated with cash transactions, comparable or otherwise, and should not be compared to or subtracted from fees associated with covered overdraft credit. Additionally, the charges described in proposed § 1026.4(b)(12)(iii)(B) may be described as a penalty, while the charges described in proposed § 1026.4(b)(12)(iii)(C) may be described as a service charge. In neither case are the charges of a type payable in comparable cash transactions.

v. Additional Examples of Charges Imposed on Covered Asset Accounts (§ 1026.4(b)(12)(iii)(D) and (E))

Proposed § 1026.4(b)(12)(iii)(D) would exclude, for purposes of determining whether the fee is a finance charge, comparison of a charge for transferring funds from any credit account into a checking or other transaction account that does not have covered overdraft credit. Proposed § 1026.4(b)(12)(iii)(E) would exclude, for purposes of determining whether the fee is a finance charge, comparison of a charge for transferring funds from any other asset account, such as a savings account, into a checking or other transaction account that does not have covered overdraft credit. Thus, under proposed § 1026.4(b)(12)(iii)(D) and (E), a very large financial institution may impose a service fee on a covered asset account when the institution transfers funds into the account from a covered overdraft credit account to cover a transaction that would otherwise overdraw the covered asset account. The institution may also impose a fee to transfer funds into the checking or other transaction account (*i.e.,* an account that is not a covered asset account) from any credit account or from any other asset account, such as a savings account, to cover a transaction that would otherwise overdraw the checking or other transaction account. But the fee applied to a checking or other transaction account that does not have covered overdraft credit may not be compared to the fee on a covered asset account for the transfer of funds to cover a transaction. Accordingly, under proposed § 1026.4(b)(12)(iii)(D) and (E), the full amount of the service fee on a covered asset account when a very large financial institution transfers funds into the account from a covered overdraft credit account to cover a transaction that would otherwise overdraw the covered asset account would be a finance charge.

The exclusion in proposed § 1026.4(b)(12)(iii)(D) addresses charges in connection with an extension of credit that is regulated as credit, albeit not overdraft credit. Because these are charges payable in a credit transaction, the CFPB has preliminarily determined that these are not charges payable in a comparable cash transaction and should not be used for comparison in the determination of a finance charge.

The exclusion in proposed § 1026.4(b)(12)(iii)(E) addresses charges to transfer funds into a checking or other transaction account that is not a covered asset account from any other asset account to cover a transaction that would otherwise overdraw the checking or other transaction account. This is because the CFPB is concerned about the possibility for evasion from the requirements of Regulation Z if comparison of the charges described in § 1026.4(b)(12)(iii)(E) were to be permitted.

The majority of combined overdraft and NSF fees are paid by a small subset of consumers. CFPB research found that 79 percent of combined overdraft and NSF fees were paid by 9 percent of consumers who paid more than 10 such fees per year, incurring a median of $380 in these fees in a year.[135] Consumers paying more than 20 such fees in a year accounted for about 5 percent of accounts, while paying over 63 percent of the fees.[136]

Consumers whose accounts are frequently overdrawn are typically more financially insecure than those who do not overdraw or who do so infrequently.[137] Accordingly, many consumers who overdraft may not have other asset accounts or may not have sufficient funds in those accounts from which they can transfer funds to prevent such overdraft.

If such a comparison were permitted, a bank could potentially avoid the definition of ''finance charge'' by charging a substantial fee for transferring funds into a checking or other transaction account that is not a covered asset account from any other asset account and then charge that same substantial amount for any service, transaction, activity, or carrying charge imposed on the covered asset account. By comparing the two substantial fees to each other, the amount of the charge on the covered asset account would not be considered a finance charge. For the subset of consumers who pay the majority of overdraft and NSF fees, however, this comparison of fees would be a comparison between a product that such consumers can readily access (*i.e.,* covered asset accounts) to a product that a majority of such consumers may not be able to access (*i.e.,* other asset accounts) because they do not have such accounts or do not have sufficient funds in those accounts to easily execute transfers. As a result, the CFPB preliminarily concludes that a per transaction fee for transferring asset funds from other asset accounts such as a savings account should not be compared with (should not be allowed to be subtracted from) a service, transaction, activity, or carrying charge assessed on a covered asset account. The CFPB seeks comment on the proposed revisions to § 1026.4(b)(2), the proposal to add § 1026.4(b)(12), and the CFPB's preliminary conclusions regarding comparable cash transactions.

2. History of the Current § 1026.4(c)(3) Exception

Historically, whenever a consumer bounced a check written against a deposit account that lacked a credit feature, the consumer's financial institution typically returned the check unpaid and assessed the consumer an NSF fee. In addition, the payee on the check might have taken various actions against the consumer, such as assessing the consumer a late fee or returned item fee, reporting the consumer's payment as late to a credit bureau, or bringing legal action against the consumer for writing a bad check.[138] However, instead of returning the check unpaid, a financial institution, in its discretion, might have paid the check into overdraft as a courtesy.[139]

Although Congress did not exempt any category of overdraft credit from TILA,[140] the Board used its exception (not its interpretive) authority to create a limited exception for this longstanding practice when it issued Regulation Z in

[135] CFPB 2017 Data Point at 5; CFPB 2014 Data Point at 12.

[136] CFPB 2017 Data Point at 5.

[137] *See id.* at 5–6.

[138] 74 FR 5212, 5214 (Jan. 29, 2009); 74 FR 59033, 59035 (Nov. 17, 2009); Steve Cocheo, *Follow the Bouncing Check,* 95 ABA Banking J. 32, at 34 (Apr. 2003) (Cocheo 2003).

[139] *See* Peter G. Weinstock & Stephanie E. Dreyer, *Overdraft Protection Programs: The Emerging Battleground for Bankers and Consumer Advocates,* 121 Banking L. J. 791, at 795 (2004) (''Banks have been paying NSF items as a service to customers on a case-by-case basis for decades.''); *see also* Cocheo 2003 at 34 (''Our overdraft program formalizes the traditional courtesy of paying insufficient checks. . . .'') (quoting Gaynell Lawson, Executive Vice-President and Chief Financial Officer of Citizens Bank of Blount County).

[140] *See* Public Law 90–321, 82 Stat. 146 (May 29, 1968), codified as amended at 15 U.S.C. 1601 *et seq.*

1969.[141] Specifically, the Board added § 226.4(d), which provided that ''[a] charge imposed by a bank for paying checks which overdraw or increase an overdraft in a checking account is not a finance charge unless the payment of such checks and the imposition of such finance charge were previously agreed upon in writing.'' [142] A bank providing discretionary, check-centric overdraft (*a.k.a.* ''bounce-check protection'' or ''courtesy overdraft protection'' services, as noted in later **Federal Register** publications [143]) was not a creditor subject to Regulation Z because, pursuant to this exception, it did not impose a finance charge (and otherwise did not structure the repayment of credit by written agreement in more than four installments).[144] As Board commentary on Regulation Z noted, this exception enabled a bank to ''occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account'' without having to comply with the requirements of Regulation Z.[145]

In 1981, the Board amended Regulation Z to, among other things, make ''a few minor editorial changes'' to the § 226.4(d) exception.[146] Specifically, the Board changed the term ''bank'' to ''financial institution'' and the term ''checks'' to ''items.'' [147] The Board made these changes ''to reflect the ability of financial institutions other than banks, such as savings and loan associations, to pay items that are similar to checks, such as negotiable orders of withdrawal, into overdraft.'' [148] Additionally, the Board renumbered § 226.4(d) to § 226.4(c)(3).[149] By making these ''minor editorial changes,'' the Board stated that ''[n]o substantive change is intended . . . .'' [150] In other words, the Board did not change the purpose of the § 226.4(d) exception, which was to allow financial institutions to provide consumers with courtesy check-centric overdraft services without having to comply with the requirements of TILA and Regulation Z.

The language from the Board's 1981 version of § 226.4(c)(3) remains in effect unchanged at § 1026.4(c)(3) in the CFPB's current version of Regulation Z.[151]

3. Proposed Changes to the § 1026.4(c)(3) Exception

It is the CFPB's preliminary view that the § 1026.4(c)(3) exception is overbroad for purposes of the current non-covered overdraft market. To address the issue, the CFPB proposes to add a new sentence to the end of § 1026.4(c)(3) that would provide that the paragraph no longer applies to ''above breakeven overdraft credit'' as that term is defined in proposed § 1026.62. As discussed in part V.A, the CFPB proposes to apply its proposed § 1026.4(c)(3) amendment only to very large financial institutions.

The CFPB proposes to define the term ''above breakeven overdraft credit'' at § 1026.62(b)(1) to mean overdraft credit extended by a very large financial institution to pay a transaction on which, as an incident to or a condition of the overdraft credit, the very large financial institution imposes a charge or combination of charges exceeding the average of its costs and charge-off losses for providing non-covered overdraft credit as described in § 1026.62(d). The CFPB proposes to establish above breakeven overdraft credit by reference to the average of a very large financial institution's cost and charge off losses for providing non-covered overdraft credit rather than the cost and estimated charge-off losses for providing non-covered overdraft credit for each separate transaction because the CFPB has preliminarily determined, based on its supervisory experience, that many financial institutions currently do not track their costs and charge-off losses at the transaction level, but generally can calculate their average costs and charge-off losses at the product level. Further, the CFPB expects that an institution-wide calculation would be easier for very large financial institutions to administer.

The CFPB is proposing these changes for several independent reasons.

First, the market for non-covered overdraft credit has changed in important ways—many financial institutions have automated their non-covered overdraft programs and expanded them to cover non-check transactions, while also adjusting their account pricing structure to more heavily emphasize overdraft fees.[152] These changes have caused the market for non-covered overdraft credit to move away from the historical courtesy model to the point that, for a significant number of consumers, non-covered overdraft credit is no longer an occasional accommodation for inadvertent overdrafts.

Unlike in 1969, when checks made up the lion's share of overdraft transactions,[153] recent CFPB analysis of account data from a number of large banks showed that on average overall only 10.36 percent of monthly debit transactions occurred by check, while 62.14 percent occurred by debit card (both one-time and recurring), 12.14 percent occurred by ACH, 6.43 percent occurred by ATM, 0.71 percent occurred by bank teller, and the remainder occurred by other means.[154]

This shift away from check transactions is significant because, as financial institutions have automated their non-covered overdraft programs and expanded them to cover non-check transactions, the sheer volume of overdraft transactions and associated fees has increased.[155] This trend especially is pronounced with respect to debit cards, where CFPB research shows that incidence of overdraft increases for consumers who use debit cards. For example, CFPB research shows that 92.3 percent of accounts that do not use debit cards have no overdrafts in a year of account use and only 0.6 percent of such accounts incur more than 10 overdrafts per year.[156] In contrast, accounts that use their debit cards more than 30 times per month have the lowest percentage of accounts with no overdraft (51.2 percent) and the highest percentage of accounts that overdraft more than 10 times per year (18.0 percent).[157] In other words, for many consumers who use debit cards frequently, non-covered overdraft credit services are no longer provided as an occasional accommodation.[158]

[141] 34 FR 2002, 2004 (Feb. 11, 1969); 73 FR 28904, 28927 (May 19, 2008) (''Historically, if a consumer engaged in a transaction that overdrew his or her account, depository institutions used their discretion on an ad hoc basis to pay the overdraft, usually imposing a fee. The Board recognized this longstanding practice when it initially adopted Regulation Z in 1969 to implement TILA.'').

[142] 34 FR 2002, 2004 (Feb. 11, 1969).

[143] 70 FR 29582, 29582 n.1 (May 24, 2005).

[144] *See* 12 CFR 1026.2(a)(17)(i).

[145] 42 FR 22360, 22362 (May 3, 1977).

[146] 46 FR 20848, 20855 (Apr. 7, 1981).

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] In 2016, the CFPB added an additional sentence to the end of § 1026.4(c)(3) to clarify that the paragraph does not apply to credit offered in connection with a prepaid account as defined in § 1026.61. *See* 81 FR 83934, 84179 (Nov. 22, 2016). However, this amendment did not impact the text of the portion of § 1026.4(c)(3) adopted in 1981.

[152] 74 FR 5212 (Jan. 29, 2009); 81 FR 83934, 83950–51 (Nov. 22, 2016).

[153] Stephen Quinn & William Roberds, *The Evolution of the Check as a Means of Payment: A Historical Survey,* 93 Fed. Rsrv. Bank of Atlanta Econ. Rev. 1, at 21 (2008).

[154] CFPB 2014 Data Point at 17.

[155] 81 FR 83934, 83950–51 (Nov. 22, 2016).

[156] CFPB 2014 Data Point at 15 tbl.4c.

[157] *Id.*

[158] 42 FR 22360, 22362 (May 3, 1977) (''[Section 226.4(d) (now section 1026.4(c)(3)] relates only to regular demand deposit accounts which carry no credit features and in which a bank may occasionally, as an accommodation to its customer,

Continued

Moreover, financial institutions today routinely extend overdraft credit in circumstances where they stand to generate more direct revenue from extending overdraft credit to cover a transaction than they would from declining it (because, for example, consumers are rarely charged NSF fees for declined debit card transactions,[159] and nearly two-thirds of banks with over $10 billion in assets have eliminated NSF fees [160]).[161] As a result of these changes, non-covered overdraft programs now generate a substantial portion of the direct fee revenue that many financial institutions make from checking accounts (and much of the total revenue that financial institutions make from low-balance accounts), which has encouraged some financial institutions to promote consumers' use of non-covered overdraft credit and/or to calibrate their systems to increase overdraft fee revenue.[162] This shift represents a significant departure from the historical courtesy model, which provided an accommodation to consumers for the occasional inadvertent overdraft.

The proposed changes described in this section would return the exception to its original conception—excepting overdraft services from Regulation Z when offered as a courtesy or accommodation to customers—while adapting it to fit within the modern payments system. The concept of a courtesy or an accommodation is the provision of a service primarily for the convenience of a customer. A credit product that produces large amounts of revenue and profit, and is provided to many people who may not want the service, is not consistent with the concept of providing an additional service as a courtesy. The CFPB preliminarily finds that, where a financial institution sets its overdraft fees at or below its breakeven point, it provides a courtesy service to consumers who overdraw their accounts. Conversely, where a financial institution sets its overdraft fees above its breakeven point, and profits from those fees, it cannot be said to be providing a courtesy. The CFPB has preliminarily determined that the § 1026.4(c)(3) exception should continue to apply to overdraft fees set at or below the breakeven point, so that very large financial institutions have the option to recover their costs and losses associated with providing non-covered overdraft credit to consumers (without having to comply with Regulation Z), and thus, are not disincentivized from providing non-covered overdraft to consumers as a convenience.

In addition to returning the § 1026.4(c)(3) exception to its original courtesy conception, an independent justification for the proposed amendments to § 1026.4(c)(3) is that they would further TILA's purposes of promoting the informed use of credit and comparison shopping across credit products. Currently, most non-covered overdraft credit is subject to Regulations DD and E. Although Regulation DD and Regulation E require certain disclosures for overdraft services, neither regulation requires that such non-covered overdraft credit be disclosed as a credit product. Instead, both regulations use terms like overdraft fees, overdraft practices, or overdraft services that tend to obscure the fact that financial institutions are providing consumers a credit product. Applying the Regulation Z regulatory framework would benefit consumers by ensuring that above breakeven overdraft credit is disclosed as a credit product and treated like other credit products. Treating above breakeven overdraft credit like other credit would benefit consumers by helping them understand that they are entering into a contract for a credit product provided by a creditor. Unlike the disclosures required under Regulation DD and Regulation E, the disclosures required by Regulation Z are designed to set forth contractual terms for credit products clearly. Providing such disclosures will help promote the informed use of credit. In addition, treating above breakeven overdraft credit like other credit would benefit consumers by aligning the disclosures for such credit with other credit types and by applying Regulation Z's substantive credit protections consistently across similar credit products.

Further, disclosing above breakeven overdraft credit under the Regulation Z regulatory framework would make it easier for consumers to compare the cost of such credit with the cost of other credit products, such as linked credit cards, because financial institutions would present the credit terms for above breakeven overdraft credit in the same form that creditors present the credit terms of other credit products. In its November 2009 rulemaking finalizing the current Regulation E opt-in rule, the Board acknowledged that, based on its own consumer testing, consumers are interested in receiving more information about alternatives to non-covered overdraft credit services on ATM and one-time debit card transactions prior to deciding whether or not to opt in to such services.[163] Even though consumers generally are interested in alternatives to non-covered overdraft credit services, some consumers, including consumers who may even have alternative credit available to them,[164] continue to be frequent users of non-covered overdraft credit services despite its higher cost relative to other forms of credit. For example, CFPB research found that in 2012 the median overdraft fee was $34, the median size of a debit card transaction incurring an overdraft fee was $24, and that the majority of non-covered overdraft credit transactions were repaid within three days.[165] Putting these figures in lending terms, the annual percentage rate (APR) for such a non-covered overdraft credit transaction would be 17,000 percent (if transaction fees were included in the APR calculation).[166] By comparison, CFPB research found that the APR for a typical payday loan was 391 percent and APRs on credit cards can range between 12 and 30 percent.[167] The fact that frequent overdrafters continue to use non-covered overdraft credit services despite its higher cost relative to other credit suggests that some frequent overdrafters have difficulty comparing non-covered overdraft credit services with available alternatives. Disclosing above breakeven overdraft credit services under the Regulation Z regulatory framework would promote

honor a check which inadvertently overdraws that account.'').

[159] 74 FR 5212, 5217 (Jan. 29, 2009).

[160] *See* CFPB October 2023 Data Spotlight.

[161] This was not always the case. Historically, financial institutions charged no more for honoring an overdrawing check through non-covered overdraft credit than they did for returning the check unpaid. For example, a 1976 report on bank fees presented the results of a survey of banks in New York and Washington, DC. Of the 41 banks surveyed, 39 charged overdraft fees that were equal to or less than the amount of their NSF fees. *See* Senate Staff Report at 10–11.

[162] *See* 81 FR 83934, 83950–51 (Nov. 22, 2016); 70 FR 29582, 29583 (May 24, 2005); CFPB 2013 White Paper at 16–17; CFPB Winter 2015 Highlight at 8–9; FDIC 2018 Highlight at 12; FDIC 2019 Highlight at 2–3.

[163] 74 FR 59033, 59048 (Nov. 17, 2009).

[164] CFPB 2017 Data Point at 16 tbl. 2.

[165] CFPB 2013 White Paper at 52; CFPB 2014 Data Point at 5.

[166] Press Release, CFPB, *CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges* (July 31, 2014), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/*. Recent supervisory data the CFPB has collected, reflecting transactions from 2022 and 2023, found that the median debit card overdraft resulted in an overdraft credit extension of approximately $25.50. Assuming a credit extension of $25.50, the $35 overdraft fee typical of very large financial institutions, and a three-day repayment period results in a similar APR of over 16,000 percent.

[167] CFPB, *Payday Loans and Deposit Advance Products,* at 9 (Apr. 24, 2013), *https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf;* CFPB, *Ask CFPB: What is a payday loan?, https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567/* (last reviewed Jan. 17, 2022).

the informed use of credit by ensuring that credit terms were disclosed consistently across competing credit products, thereby helping consumers compare such credit with alternative credit options.

Moreover, the CFPB expects that applying the Regulation Z regulatory framework to above breakeven overdraft credit services would benefit consumers by applying the regulation's existing substantive protections to such credit services. For example, the CFPB's proposal, as discussed in additional detail in this notice, would apply the due date requirement in 1026.7(b)(11)(i)(A), the offset prohibitions in § 1026.12(d)(1), and the ability to pay provisions in § 1026.51 to covered overdraft credit accounts (including credit that currently is non-covered above breakeven overdraft credit) that can be accessed by a hybrid debit-credit card. Therefore, applying Regulation Z to above breakeven overdraft credit would prohibit very large financial institutions from immediately taking funds from any incoming deposit in repayment of the consumer's overdraft balance, would require very large financial institutions to establish due dates on the same day of each billing cycle, and would require very large financial institutions to assess the consumer's ability to pay for such credit—all protections that the current Regulation DD and Regulation E regulatory frameworks do not provide.

The CFPB acknowledges that the current § 1026.4(c)(3) exclusion has existed in its present form for decades and that very large financial institutions have undertaken efforts to ensure that their non-covered overdraft credit services comply with Regulations DD and E. The CFPB also recognizes that some consumers have come to rely on the availability of non-covered overdraft credit. The CFPB's proposal reflects, in part, an effort to balance these reliance interests against the other considerations discussed above in this section. The proposed changes to § 1026.4(c)(3) would require very large financial institutions to comply with Regulation Z when providing above breakeven overdraft credit services, but would allow them to continue to comply with Regulations DD and E when providing non-covered overdraft credit services at or below breakeven pricing. Thus, a very large financial institution that has invested in compliance with Regulations DD and E could maintain its current processes for providing consumers with non-covered overdraft credit so long as it priced such credit at or below breakeven pricing.

i. Alternatives to the Proposed § 1026.4(c)(3) Amendment Considered

During the development of its proposal, the CFPB considered alternatives to its proposed amendment to § 1026.4(c)(3) including (1) striking § 1026.4(c)(3) from Regulation Z in its entirety and (2) updating the opt-in disclosure requirements at § 1005.17 of Regulation E in a manner that would better disclose the costs associated with authorizing non-covered overdraft protection for ATM and debit card transactions.[168]

With respect to the first alternative, the CFPB has preliminarily determined that it should not eliminate all non-covered overdraft credit. The CFPB believes that the proposed amendment to § 1026.4(c)(3) is preferable because it would address the CFPB's concerns relating to consumers' informed use of above breakeven overdraft credit, including a consumer's ability to compare competing credit offers, and apply other substantive protections, including ability to pay requirements and offset restrictions, while allowing very large financial institutions to still offer non-covered overdraft credit as a courtesy if they chose to do so.

With respect to the second alternative, the CFPB preliminarily determined that Regulation E opt-in disclosures would not communicate the cost of above breakeven overdraft credit as effectively as Regulation Z disclosures. As discussed above, applying Regulation Z will ensure that above breakeven overdraft credit is disclosed as a credit product and treated like other credit products. In addition, Regulation E disclosures distinguish between overdraft transactions completed via electronic fund transfers and overdraft transactions completed via other funds transfer methods (such as checks), whereas Regulation Z disclosures would apply identically to above breakeven overdraft transactions regardless of fund transfer method. Modifying the opt-in disclosure requirements at § 1005.17 of Regulation E also would not provide other substantive protections available through Regulation Z, such as the ability to pay requirements and the offset prohibition discussed above. These substantive protections are important. For example, by requiring financial institutions to assess consumers' ability to pay, the proposed rule would ensure that financial institutions confirm that consumers could make the required minimum periodic payments under the terms of their account based on their income or assets and their current obligations. As another example, by prohibiting offset and requiring the due date to be on the same day each month for covered overdraft credit accessible by a hybrid debit-credit card, the proposed rule would give consumers more time to repay overdraft credit and greater control over how to structure those repayments. Therefore, the CFPB preliminarily believes that its proposal better protects consumers than an approach that merely updates the opt-in disclosure requirements at § 1005.17 of Regulation E.

ii. How To Calculate Whether Overdraft Credit Is Above Breakeven Overdraft Credit

To clarify the circumstances under which overdraft credit offered by a very large financial institution is "above breakeven overdraft credit" for purposes of proposed § 1026.62(b)(1), the CFPB also proposes to add a paragraph at § 1026.62(d).

Proposed § 1026.62(d)(1) would clarify that overdraft credit offered by a very large financial institution is "above breakeven overdraft credit" for purposes of proposed § 1026.62(b)(1) if the charge or combination of charges for such credit exceeds the greater of (1) the pro rata share of the very large financial institution's annual total direct costs and charge-off losses for providing non-covered overdraft credit calculated in accordance with § 1026.62(d)(2); or (2) an estimate published by the CFPB.

For purposes of proposed § 1026.62(d)(1), a "combination of charges" would include all revenue received in connection with an overdraft transaction when determining whether the charges for that transaction exceed its average costs and charge-off losses for providing non-covered overdraft credit, including any extended or sustained overdraft fees, any interest charges on outstanding overdraft balances, and any other payments the very large financial institution receives in connection with an overdraft transaction or transactions.

The approach outlined in proposed § 1026.62(d)(1) would provide a very large financial institution with two methods for determining whether its current charge for an overdraft transaction exceeds the average of its costs and charge-off losses for providing non-covered overdraft credit—the breakeven standard described at proposed § 1026.62(d)(1)(i) and the benchmark fee described at proposed

[168] Press Release, CFPB, *CFPB Unveils Prototypes of "Know Before You Owe" Overdraft Disclosure Designed to Make Costs and Risks Easier to Understand* (Aug. 4, 2017), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-unveils-prototypes-know-you-owe-overdraft-disclosure-designed-make-costs-and-risks-easier-understand/.*

§ 1026.62(d)(1)(ii). To the extent that a very large financial institution does not determine or prefers not to calculate its average costs and charge-off losses for providing non-covered overdraft credit using the breakeven standard described at proposed § 1026.62(d)(1)(i), the proposal would permit the very large financial institution to determine whether it is offering above breakeven overdraft credit based solely on the benchmark fee at proposed § 1026.62(d)(1)(ii). The CFPB has preliminarily determined that this approach would decrease compliance costs for some very large financial institutions by providing them with a simple bright-line method for determining whether the overdraft credit they extend is above breakeven overdraft credit. Other very large financial institutions would be permitted the flexibility to calculate on their own whether the overdraft credit they extend is above breakeven pricing.

To employ the breakeven standard described at proposed § 1026.62(d)(1)(i), a very large financial institution would determine its total direct costs and charge-off losses for providing non-covered overdraft credit to all accounts open at any point during the previous 12 months and then divide that figure by the total number of non-covered overdraft transactions attributable to those accounts occurring the previous 12 months. The CFPB proposes to use figures from the prior 12 months because (1) reviewing annualized data would even out any seasonal variations that could occur with a shorter review period; (2) very large financial institutions likely already collect annualized cost and loss data; and (3) reviewing annualized data would require very large financial institutions to make average cost and loss calculations only once per year. When determining the total number of non-covered overdraft transactions occurring the previous 12 months, the financial institution may account for non-covered overdraft transactions that do not incur fees, including those that do not incur fees consistent with fee waiver policies, by excluding from its transaction total any non-covered overdraft transaction for which the financial institution either refunded or did not assess any fee or charge. The CFPB believes that allowing very large financial institutions to adjust their transaction totals to account for overdraft transactions that do not incur fees would give financial institutions flexibility to maintain or to implement fee waiver policies.

Under the proposal, when a very large financial institution applies the breakeven standard either for the first time or after transitioning from the benchmark fee described at proposed § 1026.62(d)(1)(ii), it may include direct costs and charge-off losses from any transaction that was a non-covered overdraft transaction during the prior 12-months even if, applying the breakeven standard, it would have been considered above breakeven overdraft credit during that period. When determining the total number of non-covered overdraft transactions occurring the previous 12 months, a very large financial institution applying the breakeven standard either for the first time or after transitioning from the benchmark fee described at proposed § 1026.62(d)(1)(ii) also may exclude from its transaction total any non-covered overdraft transaction for which the financial institution either refunded or did not assess any fee or charge.

To provide additional guidance regarding the types of costs and charge-off losses a very large financial institution could consider when calculating the breakeven standard, the CFPB also proposes to add a paragraph at § 1026.62(d)(2). Proposed § 1026.62(d)(2) would provide that, when calculating the breakeven standard, a very large financial institution could consider costs and charge-off losses that are specifically traceable to its provision of non-covered overdraft credit in the previous year. The CFPB proposes to allow very large financial institutions to consider only costs and charge-off losses that are specifically traceable to their provision of non-covered overdraft credit to prevent very large financial institutions from employing the breakeven standard in a manner that would circumvent § 1026.62(b)(1). For example, without the specifically traceable restriction, very large financial institutions might include in their average cost and loss calculations costs and charge-off losses that are more appropriately attributable either to other segments of their deposit business or to their deposit business overhead.

Based on its previous experience collecting overdraft cost data from financial institutions, the CFPB has preliminarily determined that specifically traceable costs and charge-off losses would include a very large financial institution's cost of funds for providing non-covered overdraft credit, its charge-off losses for non-covered overdraft credit, and any operational costs that are directly attributable to its non-covered overdraft program. For example, if a very large financial institution uses issue tagging in its call center to reasonably and accurately gauge the number of customer service calls it receives relating to non-covered overdraft credit, direct costs relating to those customer service calls would be specifically traceable and the very large financial institution could include the direct costs relating to those calls in its calculation of costs under the breakeven standard. Conversely, the CFPB preliminarily believes that both general overhead costs and charge-off losses resulting from unauthorized use, EFT errors, billing errors, returned deposit items, or rescinded provisional credit are not specifically traceable to a very large financial institution's provision of non-covered overdraft credit and must not be included in its calculation of costs under the breakeven standard. For example, if a very large financial institution purchases office equipment to support its depository business generally, such costs would not be specifically traceable to its provision of overdraft services and the very large financial institution could not include the cost of such office equipment in its calculation of costs under the breakeven standard.

Under the benchmark fee approach outlined at proposed § 1026.62(d)(1)(ii), a very large financial institution may presume that any charge or combination of charges it imposes for paying a transaction that overdraws an account does not exceed its costs and charge-off losses for providing non-covered overdraft credit if the charge or combination of charges is less than or equal to any benchmark fee established by the CFPB. The CFPB is considering four alternatives for this benchmark fee—$3, $6, $7, and $14. The CFPB views each of these options as potentially viable because, as discussed in additional detail in the following paragraphs, they each apply the calculation method proposed by the breakeven standard to alternative data sets and/or alternative approaches for calculating the total number of non-covered overdraft transactions. (As highlighted at the end of this section, the CFPB seeks comment on each of these alternatives.)

The CFPB requested data, information, and documents from eight financial institutions relating to, among other things, their costs and charge-off losses for providing non-covered overdraft credit in the 2022 calendar year.[169] Each of these eight financial institutions would qualify as very large financial institutions for purposes of

[169] CFPB, *Discretionary Overdraft and NSF Practices at Very Large Financial Institutions* (Jan. 2024), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-practices-very-large-financial-institutions_2024-01.pdf* (CFPB 2024 Overdraft NSF Report).

proposed § 1026.62(b)(8) and, collectively, these eight institutions account for over 30 percent of the total assets of very large financial institutions and represent a diverse set of geographic footprints, asset sizes, and business models.[170] The CFPB received data from all eight institutions, but some institutions were unable to provide all the requested data at the level of detail requested.[171] As a result, the CFPB referenced data from five financial institutions to calculate the four alternatives for the proposed benchmark fee.

The CFPB used the same general formula to calculate all four of the proposed alternative benchmark fees but relied on different datapoints to derive each fee amount. To calculate each benchmark fee, the CFPB first determined the total charge-off losses (excluding losses attributable to unauthorized use, billing errors, rescinded provisional credit, returned deposit items, and other sources not attributable to overdraft transactions) for the financial institutions included in its estimate calculation and then divided that figure by the total number of non-covered overdraft transactions (*i.e.,* overdraft transactions currently excepted from Regulation Z) in the relevant dataset for each estimate. Next, the CFPB adjusted this charge-off loss per transaction figure by adding to it $1 per transaction to account for the CFPB's estimate of a financial institution's cost of funds and operational costs, which the CFPB estimates does not exceed $0.50 per transaction each.[172] To calculate the $0.50 cost of funds figure, the CFPB estimated that financial institutions would pay interest of 5 percent per year to obtain funds and would lend an average of $120 to consumers per transaction for a period of one month. The CFPB preliminarily believes that this cost of funds estimate would cover most institutions' costs given that the median overdraft amount per transaction is $50 and that consumers typically repay overdraft transactions within three days.[173] Based on its supervisory and enforcement experience, the CFPB preliminarily believes that call center expenses represent the bulk of the operational costs associated with providing non-covered overdraft programs at very large financial institutions. To calculate the figure for operational costs, the CFPB estimated that 10 percent of non-covered overdraft transactions would require 10 minutes of a customer service representative's time and that 20 percent of these customer service contacts also would require 10 minutes of a supervisor's time.[174] Based on this estimate, the CFPB determined that at an average hourly wage of $21.07 and $30.81 for customer service representatives and supervisors in the financial sector, respectively, financial institutions would incur roughly $0.45 per non-covered overdraft transaction on call center expenses.[175] The CFPB then rounded this figure up to $0.50 to account for other potential operational costs.

To calculate the $3 benchmark fee figure, the CFPB first added together the charge-off losses for the five financial institutions in its sample that produced sufficient data to analyze. Next, the CFPB calculated a charge-off loss per transaction figure by dividing the total charge-off loss figure by the total number of non-covered overdraft transactions paid by those five financial institutions. When tallying the total number of non-covered overdraft transactions for the charge-off loss per transaction figure, the CFPB counted both non-covered overdraft transactions that resulted in an overdraft fee and non-covered overdraft transactions that did not result in an overdraft fee. This approach yielded a charge-off loss per transaction figure of $2 per transaction after rounding to the nearest dollar. The CFPB then added $1 per transaction to this figure to account for the CFPB's estimate of a financial institution's cost of funds and operational costs.

To calculate the $6 benchmark fee figure, the CFPB used the same approach it used to calculate the $3 benchmark fee figure, but changed how it tallied the total number of non-covered overdraft transactions for the charge-off loss per transaction figure. Instead of counting both non-covered overdraft transactions that resulted in an overdraft fee and non-covered overdraft transactions that did not result in an overdraft fee, the CFPB counted only non-covered overdraft transactions that resulted in an overdraft fee. This change increased the charge-off loss per transaction figure to $5 per transaction after rounding to the nearest dollar. The CFPB then added $1 dollar per transaction to this figure to account for the CFPB's estimate of a financial institution's cost of funds and operational costs.

To calculate the $7 benchmark fee figure, the CFPB first identified the financial institution in its sample with the highest charge-off losses. Next, the CFPB calculated a charge-off loss per transaction figure by dividing total charge-off losses by the total number of non-covered overdraft transactions paid by the financial institution. When tallying the total number of non-covered overdraft transactions for the charge-off loss per transaction figure, the CFPB counted both non-covered overdraft transactions that resulted in an overdraft fee and non-covered overdraft transactions that did not result in an overdraft fee. This approach yielded a charge-off loss per transaction figure of $6 per transaction after rounding to the nearest dollar. The CFPB then added $1 dollar per transaction to this figure to account for the CFPB's estimate of a financial institution's cost of funds and operational costs.

To calculate the $14 benchmark fee figure, the CFPB used the same approach it used to calculate the $7 benchmark fee figure (*i.e.,* identifying the financial institution in its sample with the highest charge-off losses) but changed how it tallied the total number of non-covered overdraft transactions for the charge-off loss per transaction figure. Instead of counting both non-covered overdraft transactions that resulted in an overdraft fee and non-covered overdraft transactions that did not result in an overdraft fee, the CFPB only counted non-covered overdraft transactions that resulted in an overdraft fee. This change increased the charge-off loss per transaction figure to approximately $13 per transaction after rounding to the nearest dollar. The CFPB then added $1 dollar per transaction to this figure to account for the CFPB's estimate of a financial institution's cost of funds and operational costs.

In addition to amending § 1026.4(c)(3), the proposed rule also would revise the commentary to § 1026.4(c)(3) by adding proposed comment 4(c)(3)–3. Proposed comment 4(c)(3)–3 would direct readers to see proposed § 1026.4(b)(12) for guidance on when fees imposed on a covered asset account as defined in § 1026.62 are finance charges.

The CFPB seeks comment on all aspects of the proposed amendments to § 1026.4(c)(3) and its commentary and on its proposal to add § 1026.62(b)(1) and (d). In particular, the CFPB seeks comment on the following issues:

[170] *Id.* at 4.

[171] *Id.*

[172] *Id.* at 8–9.

[173] *Id.* at 8.

[174] *Id.* at 9.

[175] U.S. Bureau of Labor Stat., *Occupational Employment and Wage Statistics: May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 5220A1—Credit Intermediation and Related Activities (5221 and 5223 only), https://www.bls.gov/oes/current/naics4_5220A1.htm (last modified Apr. 25, 2023).*

1. Should the CFPB eliminate the § 1026.4(c)(3) exception for very large financial institutions rather than amend its application to above breakeven overdraft credit?

2. What alternative formulae, if any, should the CFPB consider for calculating costs and charge-off losses for the breakeven standard and the proposed alternative benchmark fee? For example, instead of requiring a very large financial institution to calculate its average costs and charge-off losses for non-covered overdraft across its entire depository account portfolio, should the breakeven standard allow a very large financial institution to make separate calculations of its average costs and charge-off losses for non-covered overdraft within subsets of its depository account portfolio, such as account relationship tiers or average account balance ranges?

3. What are the pros and cons of permitting very large financial institutions to adjust their non-covered overdraft transaction totals to account for their fee waiver policies under the breakeven standard described at proposed § 1026.62(d)(1)(i)?

4. What alternative approaches, if any, should the CFPB consider for calculating the breakeven standard described at proposed § 1026.62(d)(1)(i)? For example, should the CFPB consider an approach that allows very large financial institutions to estimate their costs as a flat dollar amount per transaction, as a percentage of their total asset account costs, or as a percentage of losses?

5. What alternative figures should the CFPB consider, if any, for its cost of funds and operational cost estimates?

6. Which of its proposed benchmark fee figures—$3, $6, $7, and $14—should the CFPB adopt? What alternative figures should the CFPB consider, if any?

7. Should the breakeven standard require the same calculation used to calculate the benchmark fee? For example, if the CFPB finalizes a benchmark fee based on all non-covered overdraft transactions, whether or not the very large financial institution collected a fee in connection with the transaction, should the breakeven standard also require the very large financial institution to calculate their costs based on all non-covered overdraft transactions, whether or not the very large financial institution collected a fee in connection with the transaction?

D. Changes to Covered Overdraft Credit Offered by Very Large Financial Institutions

As discussed below, the CFPB is proposing to change requirements that apply to covered overdraft credit offered by a very large financial institution by: (1) requiring covered overdraft credit to be structured as a separate account; (2) applying additional credit card provisions to covered overdraft credit that can be accessed by a hybrid debit-credit card; and (3) applying Regulation E's compulsory-use prohibition to covered overdraft credit. For existing open-end covered overdraft credit products, the proposed new designation as covered overdraft credit accounts would not impose duplicative or additional account opening requirements.

1. Structure of Covered Overdraft Credit (§ 1026.62(c))

The CFPB proposes in § 1026.62(c) to prohibit a very large financial institution from structuring covered overdraft credit as a negative balance on a checking or other transaction account. Conversely, the CFPB proposes to require such institution to structure covered overdraft credit as a separate credit account.

The CFPB has preliminarily determined that this structural prohibition and requirement will make it easier for creditors and consumers to implement and understand, respectively, covered overdraft credit. Regulation Z's open-end credit rules generally address independent credit products that do not have substantial positive (asset) funds associated with them. For example, existing § 1026.11(a) generally provides that creditors must refund any asset balances on a credit account to the consumer within six months.

In contrast, overdraft credit, whether or not subject to Regulation Z's requirements, by its nature involves both consumer assets and consumer credit, the purpose of the latter being to cover shortfalls in the former. In the context of overdraft credit, the CFPB has preliminarily determined that requiring the separation of a consumer's asset balance, such as a checking or other transaction account that is a ''covered asset account'' as defined in proposed § 1026.62(b)(2), from the consumer's credit balance, such as a credit account that is a ''covered overdraft credit account'' as defined in proposed § 1026.62(b)(4), is an appropriate addition to Regulation Z under its TILA section 105(a) authority, as it is necessary or proper to facilitate creditor compliance and to effectuate the purposes of TILA by helping to avoid the uninformed use of credit and protecting consumers against inaccurate and unfair credit billing and credit card practices. Existing § 1026.61(b), which was established by the Bureau's 2016 Prepaid Final Rule, similarly prohibits credit accounts tied to prepaid accounts from being structured as negative balances on the prepaid accounts and requires that the prepaid account and the tied credit account be separate.[176] Further, commenters that addressed this aspect of the Bureau's 2014 prepaid accounts proposed rule universally supported the separate asset account and credit account structure that the 2016 rule adopted.[177]

In the context of overdraft credit that is not subject to Regulation Z's requirements, financial institutions today typically provide overdraft credit to consumers through negative balances on consumers' asset accounts. That is, institutions typically provide one account to a consumer, which is regulated as an asset account such as a checking or other transaction account, with an asset balance being a positive balance in the account and an overdraft credit balance being a negative balance in the account. Further, institutions typically obtain repayment of a consumer's negative overdraft credit balance by immediately taking any incoming deposit to the asset account, such as an electronic direct deposit, as repayment (or ''offset'') of the account's negative balance. For example, if a consumer's asset account balance is a negative $100 overdraft credit balance and an institution receives a $150 electronic direct deposit which is to be credited to the consumer's account, the institution immediately takes the first $100 of the electronic deposit to repay the consumer's overdraft credit balance, such that the consumer's account balance subsequent to the institution's receipt of the electronic direct deposit is a positive asset balance of $50.

This practice by institutions of immediately taking incoming deposits as repayment of overdrafts is known as ''offset.'' Regulation Z generally prohibits offset in connection with covered overdraft credit, as defined in proposed 1026.62(b)(3), which can typically be accessed by a ''credit card'' as defined in 1026.2(a)(15).[178] That is, the institution providing the covered overdraft credit is generally prohibited from immediately taking funds from

[176] *See* 12 CFR 1026.61(b).

[177] *See* 81 FR 83934, 84264 (Nov. 22, 2016).

[178] *See* TILA section 169(a) (15 U.S.C. 1666h(a)) and 12 CFR 1026.12(d)(1).

incoming deposits in repayment of consumers' outstanding overdraft credit balances. Thus, continuing the above example of an outstanding overdraft credit balance of $100, when Regulation Z applies and the institution receives a $150 deposit to be credited to the consumer's account, the institution is prohibited from immediately taking the funds of the incoming deposit, but must instead credit the funds to the consumer's asset account and give the consumer the use of the funds. In other words, when Regulation Z applies, the regulation's offset prohibition requires that the institution make it such that the consumer has *both* an overdraft credit balance of $100 (the money the consumer continues to owe the institution) and an asset balance of $150 (the money from the incoming deposit) at the same time.[179]

Accordingly, the CFPB has preliminarily determined that the proposed requirement in § 1026.62(c) to structure covered overdraft credit as a separate credit account that is separate from the checking or other transaction account will enable institutions to comply with the TILA and Regulation Z offset prohibition. Specifically, the CFPB has preliminarily determined that that proposed requirement would facilitate compliance with the TILA and Regulation Z offset prohibition by requiring an institution to retain at the same time both an outstanding overdraft credit balance and an outstanding asset balance for a consumer. Conversely, the CFPB has preliminarily determined that it is difficult or impossible for an institution to maintain both an asset (positive) balance and a credit (negative) balance at the same time for a consumer within a single asset account and that it is therefore difficult or impossible for the institution to provide overdraft credit to the consumer in a manner that complies with Regulation Z without providing the consumer with an asset account and a credit account that are separate from each other.

In addition, the CFPB has preliminarily determined that the proposed requirement to structure covered overdraft credit as a separate credit account would (1) protect consumers against inaccurate and unfair credit billing and credit card practices by enabling them to exercise control over their funds and (2) avoid the uninformed use of credit by enabling consumers to better understand their asset and credit balances. With respect to protecting consumers by enabling them to control their funds, the requirement will facilitate consumers' ability to control incoming deposits to their accounts and use them for purposes other than immediately repaying an overdraft balance, as the offset prohibition requires institutions to permit consumers to do. For example, continuing the example above, rather than the institution immediately using the incoming $150 electronic direct deposit to eliminate the $100 negative overdraft balance in the single account, under the proposed separate-account structure the consumer might use the electronically deposited funds to pay a phone or electric bill and to retain the unpaid $100 balance in the separate credit account (*i.e.,* to repay the credit balance to the institution at a later time).

With respect to avoiding the uninformed use of credit by enabling consumers to understand their asset and credit balances, the requirement for separate accounts will enable consumers to better monitor their account balances and trace how their funds are being used through the better disclosures (*e.g.,* entries on periodic statements) that institutions will provide to consumers in compliance with Regulations E and DD for asset accounts and in compliance with Regulation Z, which effectuates the informed use of credit, for the credit accounts. Continuing the above example of a $150 incoming deposit and $100 overdraft balance, with a separate asset account and credit account (as would be required by proposed § 1026.62(c)), the consumer whose asset account receives an electronic direct deposit would see disclosed on the periodic statements a $150 credit entry to the asset account and, at that time, a $150 balance in the asset account and a $100 balance in the credit account.

Further, if the consumer were to subsequently choose to use the $150 asset funds to repay the overdraft, the consumer would at that later point in time see on the statements the following data points on the asset account and credit account: (1) a debit entry of $100 to the asset account for repayment of the overdraft credit balance, (2) a resulting balance in the asset account of $50, (3) a credit entry of $100 to the credit account, and (4) a resulting balance in the credit account of $0. In contrast, *without* the separate credit account, where overdrafts are represented as negative balances on the asset account, the same consumer would see disclosed only the following: a $150 credit to the asset account for the incoming electronic deposit and a resulting balance of $50 in the asset account. The CFPB has preliminarily determined that this latter approach may result in the uninformed use of credit by the consumer, because the consumer may not readily appreciate how the credit and asset aspects of their asset account have interacted. The CFPB has therefore also preliminarily determined that the former approach of requiring that the asset account and the credit account be separate from each other—and the better periodic-statement disclosures that necessarily accompany that approach—will help avoid the uninformed use of credit by the consumer.

Credit account opening. Opening an open-end consumer credit plan, such as a covered overdraft credit account, that is subject to Regulation Z may trigger certain requirements and protections, including account opening disclosures pursuant to §§ 1026.5 and 1026.6 and, if a credit card is involved, ability to pay requirements in § 1026.51 and fee limitations in § 1026.52(a). Consistent with existing requirements, for purposes of determining compliance with provisions of Regulation Z that are tied to credit account opening, an account opening with respect to covered overdraft credit occurs on the date a consumer may first engage in a transaction for which covered overdraft credit can be extended under the account.

If the CFPB finalizes the rule as proposed, very large financial institutions that offer overdraft services on existing accounts may need to take steps to come into compliance with Regulation Z. For example, assume that prior to the effective date of this proposed rule, a very large financial institution through negative balances on a deposit account provides above breakeven overdraft credit that is not subject to Regulation Z to a consumer, and assume further that the institution seeks to continue to provide above breakeven overdraft credit to the consumer subsequent to the effective date of the proposed rule. After the proposed rule's effective date, such above breakeven overdraft credit would be covered overdraft credit, and proposed § 1026.62(c) of the proposed rule (discussed in the preceding paragraphs) would require the institution to provide the covered overdraft credit to the consumer through a separate covered overdraft credit account. Therefore, to provide above

[179] While TILA and Regulation Z prohibit offset, the statute and regulation do permit periodic deductions pursuant to the consumer's written agreement. *See* 12 CFR 1026.12(d)(3). These periodic deductions must occur at regular intervals and therefore cannot occur immediately whenever deposit funds are received to be credited to the consumer's account. Thus, the permissibility of periodic deductions does not change the requirement that the institution make it such that the consumer has both an overdraft credit balance of $100 and an asset balance of $150 at the same time.

breakeven, covered overdraft credit to the consumer subsequent to the effective date of this proposed rule, the institution would need to open a covered overdraft credit account for the consumer. Further, the institution would be required by § 1026.5(b)(1)(i) to provide to credit account opening disclosures to the consumer for the covered overdraft credit account before the consumer makes the first transaction under the covered overdraft credit plan. This is so regardless of whether there was any change in the terms or conditions of the previously existing deposit account under which the above breakeven non-covered overdraft credit was previously extended.[180]

Disclosure requirements. Subsequent to the effective date of the CFPB's proposed rule, when a very large financial institution seeks to provide above breakeven overdraft credit to a consumer through a covered overdraft credit account, the institution will need to comply with the existing disclosure requirements in Regulation Z. The CFPB seeks comment on whether any specific disclosure requirements should be clarified and on whether any adjustments should be made to existing disclosure requirements to help better promote the informed use of covered overdraft credit.

Credit subaccounts. Like the CFPB's current proposal, section 1026.61(b), established by the CFPB's 2016 Prepaid Final Rule, prohibits a covered separate credit feature from being structured as a negative balance on a prepaid account. Section 1026.61(b) requires that the covered credit feature be provided ''as a separate credit feature, either as a separate credit account, or as a credit subaccount of a prepaid account that is separate from the asset feature of the prepaid account.'' Further, comment 61(b)–1 requires that ''the credit feature [] be set up as a separate balance on the prepaid account such that there are at least two balances on the prepaid account—the asset account balance and the credit account balance.''

In light of these requirements that the prepaid accounts rule attaches to covered credit subaccounts tied to prepaid asset accounts (*i.e.,* the same requirements that it attaches to covered credit accounts tied to prepaid asset accounts) the CFPB has preliminarily determined that there would be no meaningful distinction between a covered overdraft credit account tied to a covered asset account and a covered overdraft credit subaccount tied to a covered asset account. For clarity in this regard, proposed § 1026.62(b)(4) would establish that a credit subaccount is a type of covered overdraft credit account. Nonetheless, the CFPB seeks comment on whether any distinctions should be made between covered overdraft credit subaccounts and other types of covered overdraft credit accounts. The CFPB also seeks comment on whether any additional requirements should be adopted to specify how covered overdraft credit accounts should be disclosed to consumers.

Existing overdraft lines of credit. Many very large financial institutions currently provide overdraft lines of credit subject to Regulation Z. Subsequent to the effective date of the CFPB's proposed rule, these lines of credit would be covered overdraft credit accounts, regardless of whether they are above or below breakeven pricing. However, under the proposed rule the institution would not be opening a new credit account (*i.e.,* would not be newly opening an account that is subject to Regulation Z) because a credit account—the overdraft line of credit—already existed prior to the effective date of the proposed rule. Thus, Regulation Z requirements triggered by credit-account opening (such as §§ 1026.5, 1026.6, 1026.51, and § 1026.52(a) mentioned above) would not apply to these previously existing overdraft lines of credit. However, other Regulation Z requirements such as change-in-terms requirements would continue to apply to them. Further, as discussed under proposed § 1026.4(b)(2) and (12), fees for transferring funds from the overdraft line of credit to the tied deposit account, which are currently excepted from being finance charges under Regulation Z, would be finance charges under the CFPB's proposed changes to § 1026.4(b)(2) and (12). Accordingly, very large financial institutions may need to provide change-in-terms notices in connection with many of the overdraft lines of credit that they currently provide. The CFPB seeks comment on whether additional guidance would be helpful for understanding the disclosure and other requirements that under the proposed rule would be applicable to very large financial institutions in these circumstances. If so, what examples should be addressed and added?

2. Credit Card Changes

Credit cards and card issuers are generally subject to additional requirements in Regulation Z. The requirements that apply generally depend on whether the credit account can be accessed by a ''credit card,'' ''credit card account under an open-end (not home-secured) consumer credit plan,'' or ''charge card'' under Regulation Z. Currently, a covered overdraft credit account that can be accessed by a debit card or other device that qualifies as a credit card (including certain account numbers) is subject to some Regulation Z requirements that apply to ''credit cards.'' Such covered overdraft credit is not subject to requirements that apply to a ''credit card account under an open-end (not home-secured) consumer credit plan.'' It is also specifically excepted from some of the requirements that apply to ''credit cards.'' As discussed in more detail below, the CFPB is proposing to apply all credit card provisions generally to covered overdraft credit accounts if the credit can be accessed by a hybrid debit-credit card, as defined in this proposal, such as a debit card offered by a very large financial institution.

i. Applying CARD Act Provisions of Regulation Z to Covered Overdraft Credit

The CFPB is proposing to subject all covered overdraft credit to the CARD Act provisions of Regulation Z in subparts G and B (the CARD Act provisions) if that credit is (1) open-end credit; (2) accessible by a credit card; and (3) offered by a very large financial institution. Currently, covered overdraft credit accessible by a debit card is considered a credit card under Regulation Z and generally is subject to the Regulation Z provisions that apply to credit cards, but, because of two non-statutory exceptions, such overdraft credit is not subject to the CARD Act provisions.[181] The proposal would

[180] The only change in the terms of the previously existing deposit account that would be required by the CFPB's proposed rule would be a reduction in the dollar amount of the overdraft fee the institution charges for negative-balance (non-covered) overdraft. Because that changed term would be a change in the consumer's favor, a change-in-terms notice would not be required in advance of the change. *See* Regulation E § 1005.8(a)(1) and Regulation DD § 1030.5(a)(1).

[181] 12 CFR 1026.2(a)(15)(i), (iv) and comment 2(a)(15)–2.i.B. Non-covered overdraft credit is not subject to Regulation Z, which includes the provisions applicable generally to credit cards and the provisions implementing the CARD Act, because (1) it is not subject to a finance charge or repayable by a written agreement in more than four installments and (2) a debit card that can access non-covered overdraft credit is not considered a credit card because, as current comment 2(a)(15)–2.ii.A explains, a debit card with no credit feature or agreement is not a credit card even if the creditor occasionally honors an inadvertent overdraft. As discussed in the changes to the definition of finance charge section above, the CFPB is proposing to amend the definition of ''finance charge'' to expand the scope of covered overdraft credit, such that certain overdraft credit that is currently non-covered overdraft credit would be considered covered overdraft credit if this proposal is finalized

subject such credit to the CARD Act provisions when it is offered by very large financial institutions. To implement these changes, the proposal would add a new definition of ''hybrid debit-credit card,'' amend the definitions of ''credit card'' and ''credit card account under an open-end (not home-secured) consumer credit plan,'' and make other clarifying changes to the rule text and associated commentary.

The CARD Act and Overdraft

The CARD Act amended TILA to institute new substantive and disclosure requirements to establish fair and transparent practices for open-end consumer credit card plans. The CARD Act addressed multiple aspects of the credit card market, regulating, among other things, rate increases, the imposition of penalty fees, the timing of payments, the issuance of subprime credit cards, ability to pay assessments, the specifics of certain credit card disclosures, the marketing of credit reports, and the marketing of credit cards to young consumers.[182] These provisions indicate that Congress was particularly concerned with protecting vulnerable populations of consumers—like students and individuals with subprime credit—and with regulating high-cost consumer credit card products subject to burdensome fees.[183]

The statutory language of the CARD Act applies the protections broadly to credit card products that can access open-end consumer credit. The CARD Act generally applies to any ''credit card account under an open-end consumer credit plan.'' Absent two non-statutory exceptions, this broad language generally would apply to open-end covered overdraft credit that is accessed by a credit card, including a debit card.

The Board implemented this statutory language in Regulation Z in 2010 through the term ''credit card account under an open-end (not home-secured) consumer credit plan.'' [184] That term is defined in current § 1026.2(a)(15)(ii) to generally mean an open-end credit account that is accessed by a credit card. The Board then used the term ''credit card account under an open-end (not home-secured) consumer credit plan'' in provisions of Regulation Z in subpart G and subpart B that were promulgated or amended to implement the CARD Act. Like the statutory definition, absent non-statutory exceptions, this regulatory definition would be broad enough so that the CARD Act provisions generally would apply to covered overdraft credit that is accessed by a credit card, including a debit card.

However, overdraft lines of credit are not subject to the CARD Act provisions in subpart G and subpart B that apply to a ''credit card account under an open-end (not home-secured) consumer credit plan'' because the Board adopted two exceptions that exclude overdraft lines of credit from that definition. Current § 1026.2(a)(15)(ii)(B) and (C), respectively, except from this definition (1) an overdraft line of credit that is accessed by a debit card; and (2) an overdraft line of credit that is accessed by an account number other than an account number that is a hybrid prepaid-credit card and that can access a covered separate credit feature as defined in § 1026.61. Although Regulation Z does not define ''overdraft line of credit,'' the term is generally understood to refer to an open-end credit product tied to an asset account. Funds are advanced from the credit product to pay for a withdrawal when the consumer withdraws more money than they have in the asset account.

Aside from the CARD Act provisions in subpart G and subpart B, currently these overdraft line of credit products are generally subject to Regulation Z's open-end credit rules when the fees and other charges imposed on this product are finance charges.[185] To the extent these overdraft line of credit products can be accessed by a debit card or other single credit device, they are thus also a ''credit card'' and are generally subject to provisions in Regulation Z that apply to a ''credit card.'' [186]

The Board acknowledged in its February 2010 Rule that it believed that, as a general matter, Congress intended the CARD Act to apply broadly to products that meet the definition of a credit card.[187] The Board also acknowledged that a debit card that accesses an overdraft line of credit is a ''credit card.'' [188]

Nevertheless, the Board relied on its authority under TILA section 105(a) and section 2 of the CARD Act to create two exceptions for overdraft lines of credit, including one for debit cards that can access an overdraft line of credit. As a result of the exceptions, such accounts are not subject to the various CARD Act provisions in subpart G and subpart B, as discussed below, that apply to a ''credit card account under an open-end (not home-secured) consumer credit plan.'' In creating the exceptions, the Board stated that, at the time, Regulation Z-covered overdraft lines of credit were not in wide use and that, as a general matter, creditors who offered overdraft lines of credit did not engage in some of the practices regulated by the CARD Act provisions with respect to those products.[189] The Board cited three examples of practices regulated by the CARD Act that were not currently present in the market: (1) increasing annual percentage rates, (2) applying different rates to different balances, and (3) allowing grace periods before charging interest. The Board did not specifically address other provisions, such as limitations on penalty fees and the requirement to assess ability to pay, which may have had an impact on practices involving overdraft lines of credit. Because of its assessment that the small market for overdraft lines of credit did not present substantial consumer protection concerns similar to those addressed by the CARD Act, the Board concluded that ''alternative forms of regulation'' such as Regulation E were ''better suited'' to protect consumers from harm with respect to those products.[190]

The CFPB is proposing to amend the non-statutory overdraft-related exceptions so that a very large financial institution that offers open-end covered overdraft credit that can be accessed by a ''credit card'' must comply with provisions that apply to a ''credit card account under an open-end (not home-secured) consumer credit plan.'' As a result, open-end covered overdraft credit that can be accessed by a ''credit card,'' including a debit card, would be

as proposed. This newly covered overdraft credit generally would be subject to the Regulation Z provisions applicable to credit cards if the covered overdraft credit can be accessed by a credit card. However, without further changes, the non-statutory exceptions that exclude covered overdraft from being subject to the CARD Act provisions would prevent covered overdraft credit, including newly covered overdraft credit, from being subject to the CARD Act provisions. As discussed in this section, the CFPB is proposing to update these non-statutory exceptions, which would subject certain covered overdraft credit, including certain newly covered overdraft credit, to the CARD Act provisions.

[182] *See* CARD Act sections 101, 102, 105, 106, 109, 201, 301.

[183] *See* CARD Act sections 102, 105, 109, 301.

[184] *See* 75 FR 7658, 7663–65 (Feb. 22, 2010). The Board first implemented the statutory term ''credit card account under an open-end consumer credit plan'' in its July 2009 interim final rule, which, in relevant part, exempted home equity lines of credit from certain requirements of the CARD Act. 74 FR 36077, 36083 (July 22, 2009). The Board added the new term ''credit card account under an open-end (not home-secured) consumer credit plan'' in its 2010 final rule.

[185] *See* 12 CFR 1026.4. The current overdraft-related exception in 12 CFR 1026.4(c)(3), which the CFPB is proposing to narrow in this rulemaking, does not apply to overdraft products where ''the payment of [overdrawing] items and the imposition of the charge were previously agreed upon in writing.''

[186] *See* Regulation Z comment 2(a)(15)–2.i.B.

[187] *See* 75 FR 7658, 7664 (Feb. 22, 2010).

[188] *Id.*

[189] *Id.* at 7665.

[190] *Id.*

subject to the CARD Act provisions in subpart G and subpart B if it is offered by a very large financial institution. This would include existing covered overdraft credit (currently commonly referred to as ''overdraft lines of credit'') and overdraft credit that would become covered overdraft credit, such as above breakeven overdraft credit, if the rule is finalized.

The CFPB has preliminarily determined that the exceptions are no longer appropriate. While the Board created those exceptions based on the understanding that overdraft lines of credit were not in ''wide use'' at the time and did not include features common to other credit cards, the CFPB has preliminarily determined that the prevalence or nature of a particular type of credit card should not render it beyond the scope of the CARD Act. By its plain terms, the CARD Act applies to all ''credit card account[s] under an open-end consumer credit plan,'' which, as noted above, would include open-end overdraft credit accessible by a credit card. In any event, the CFPB anticipates that the market for covered overdraft credit could react to the proposed changes in this rulemaking, if finalized, in several ways, including by offering covered overdraft credit to many consumers who currently receive non-covered overdraft credit, including subprime consumers.

Very large financial institutions could also react to the proposed changes by offering different terms on covered overdraft credit than those that have historically been offered. For example, financial institutions could start marketing covered overdraft credit as a long-term credit solution and could begin imposing different rates on different balances. In addition, consistent with the current non-covered overdraft credit market, financial institutions could allow for grace periods before imposing finance charges. Similarly, other protections, such as the requirement to assess ability to pay, the fee limitations provision, and the limits on penalty fees, may become even more important if covered overdraft credit is offered to more subprime consumers.

The CFPB also has preliminarily determined that the CARD Act provisions would provide important consumer protections to those consumers most likely to use covered overdraft credit accounts. Today, a small subset of consumers (approximately 10 percent of consumers), whom the CFPB has in the past referred to as ''frequent overdrafters,'' incur most overdraft fees. In light of the CFPB's proposed treatment of the overdraft fee that a very large financial institution may charge for non-covered overdraft, the CFPB expects that some very large financial institutions will have reduced incentives to provide non-covered overdraft credit to the subprime consumers who are frequent overdrafters and today incur the preponderance of overdraft fees. Instead of providing these consumers with non-covered overdraft credit, some very large financial institutions may provide these consumers with covered overdraft credit accounts—the accounts to which the CFPB is proposing to apply the CARD Act provisions—which would allow them the flexibility to charge more than the threshold that cannot be exceeded to remain non-covered overdraft credit.

The CFPB also has preliminarily determined that applying the CARD Act provisions as proposed could provide important benefits to subprime consumers. Many of the provisions of the CARD Act target credit card practices affecting subprime consumers. To the extent that some financial institutions would offer covered overdraft credit to more subprime consumers if the proposed rule were adopted, these CARD Act provisions would offer additional protections to consumers with a debit card that accesses overdraft credit. This will result in a consumer who uses a debit card to access overdraft credit—who often is a subprime consumer—receiving the same protections that a subprime credit card consumer receives today, consistent with the broad statutory language in the CARD Act.

To prevent the market for Regulation Z-covered overdraft from posing consumer risks after the rule goes into effect, and to carry out the purposes of TILA by promoting the informed use of credit and protecting consumers against unfair credit card practices pursuant to TILA section 105(a), and to carry out the CARD Act pursuant to section 2 of the CARD Act, the CFPB is proposing to subject covered overdraft credit to the CARD Act provisions in subpart G and subpart B when such credit can be accessed by a credit card and is offered by a very large financial institution. This would revise non-statutory exceptions so that Regulation Z's coverage more closely aligns with the plain language of the CARD Act.

The CFPB invites comment on the proposal to subject covered overdraft credit to the CARD Act provisions in subpart G and subpart B. In particular, the CFPB seeks comment on potential impacts of a finalized rule, if any, on the market for covered overdraft credit and the resulting effects of market changes on consumers. The CFPB also seeks comment on the costs and benefits to these consumers of the CARD Act protections in subpart G and subpart B. The CFPB also requests comment on whether clarification is needed or whether there are operational challenges regarding the application of specific CARD Act provisions to covered overdraft credit. The CFPB also seeks comment on what, if any, operational costs might arise as a result.

The proposed rule would subject all covered overdraft credit to the CARD Act provisions in subparts G and B if that credit is (1) open-end credit; (2) accessible by a credit card; and (3) offered by a very large financial institution. The proposed rule would also add a new definition of ''hybrid debit-credit card,'' and amend the definitions of ''credit card,'' and ''credit card account under an open-end (not home-secured) consumer credit plan.'' The proposal would also make other clarifying changes to the rule text and associated commentary. These technical and clarifying changes are discussed in more detail below.

Hybrid Debit-Credit Card (§ 1026.62(b)(5))

In proposed § 1026.62(b)(5), the CFPB is proposing to define the new term ''hybrid debit-credit card'' for clarity and ease of reference. The CFPB proposes to define ''hybrid debit-credit card'' to mean any card, plate, or other single credit device that a consumer may use to obtain covered overdraft credit from a very large financial institution. This proposed definition describes a type of credit card that has two defining characteristics: (1) the credit card must be able to access covered overdraft credit; and (2) the covered overdraft credit must be offered by a very large financial institution. This definition would include, for example, a debit card that a consumer can use to complete transactions using funds drawn from an asset account held at a very large financial institution when that device can also be used to access covered overdraft credit.

Credit Card (§ 1026.2(a)(15)(i))

TILA defines ''credit card'' as ''any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.'' [191] Section 1026.2(a)(15)(i) defines credit card as ''any card, plate, or other single credit device that may be used from time to time to obtain credit,'' which includes

[191] 15 U.S.C. 1602(l).

''a hybrid prepaid-credit card as defined in § 1026.61.'' The CFPB is proposing to amend the definition of ''credit card'' to clarify what is and is not a credit card when certain credit devices can access covered overdraft credit. These amendments would clarify that when a debit card can access covered overdraft credit, the debit card would be a credit card subject to the CARD Act provisions.

First, the CFPB is proposing various non-substantive wording revisions in § 1026.2(a)(15)(i) to clarify that a debit card that can access a covered overdraft credit account is a credit card. These changes are non-substantive because, under Regulation Z today, a debit card that can access an overdraft line of credit is a credit card.[192] Nonetheless, to make this fact—that a debit card that can access covered overdraft credit is a credit card—as clear as possible, the CFPB is proposing two textual changes for clarity. First, in § 1026.62, the CFPB proposes to define a ''hybrid debit-credit card'' as any card (including a debit card) that can access covered overdraft credit offered by a very large financial institution. Second, the CFPB proposes to amend § 1026.2(a)(15)(i) to explain that the definition of ''credit card'' includes a hybrid debit-credit card. Thus, under the proposal, a debit card that can access a covered overdraft credit account is a hybrid debit-credit card, a hybrid debit-credit card is a credit card, and a debit card that can access a covered overdraft credit account is a credit card. This is not a substantive change from the extant regulation because, as noted, under the extant regulation a debit card that can access an overdraft line of credit is a credit card.

Similarly, the CFPB is proposing to revise comment 2(a)(15)–2.i.B to clarify that a hybrid debit-credit card is a type of debit card that also accesses a credit account, such as a covered overdraft credit account.

To further clarify what is and is not a ''credit card'' in light of proposed definitions and proposed changes to the definition of ''finance charge,'' the CFPB is also proposing to amend several examples in the commentary to § 1026.2(a)(15)(i) and (ii). In comment 2(a)(15)–2.i.A, the CFPB is proposing to replace the undefined term ''overdraft line of credit'' with a new proposed term ''covered overdraft credit.'' In comment 2(a)(15)–2.ii.C, the CFPB is proposing amendments to clarify that an account number is a credit card when it can access covered overdraft credit if the account number can use the credit accessed to purchase goods and services.

The CFPB is also proposing to amend comment 2(a)(15)–2.ii.A and add comment 2(a)(15)–2.ii.E to ensure that the examples of what is not a credit card clarify that allowing a card, plate, or other single credit device to access non-covered overdraft credit does not trigger Regulation Z's credit card requirements. As explained in current § 1026.1(c)(2), where a credit card is involved, certain provisions of Regulation Z apply even if the credit is not subject to a finance charge or is not payable by a written agreement in more than four installments. However, comment 2(a)(15)–2.ii.A clarifies that a check-guarantee or debit card with no credit feature or agreement is not a credit card ''even if the creditor occasionally honors an inadvertent overdraft.'' In other words, a financial institution that allows a debit card or check-guarantee card to access non-covered overdraft—including overdraft where the financial institution does not impose a ''finance charge,'' either because it does not impose a fee or because any fee charged is not considered a finance charge under § 1026.4(c)(3)—does not have to comply with Regulation Z's credit card provisions, even though such cards would otherwise meet the definition of ''credit card.'' As discussed above, currently, § 1026.4(c)(3) provides that overdraft charges are not finance charges if the payment of such items and the imposition of the charge were not previously agreed upon in writing. Thus, financial institutions may pay an inadvertent overdraft and charge for it without complying with Regulation Z as long as the payment of the overdraft and associated charges are consistent with the provision. The CFPB is proposing to modify the exception from the definition of finance charge in § 1026.4(c)(3) so that certain overdraft-related charges are finance charges even if the financial institution does not agree in advance to pay the items. If finalized, some charges for paying overdrafts that may otherwise be characterized as occasional or inadvertent would be considered finance charges. To ensure the commentary aligns with the exception in § 1026.4(c)(3) and clarify that allowing a consumer to access non-covered overdraft credit using a debit card does not trigger credit card requirements in Regulation Z, the CFPB is proposing to: (1) amend comment 2(a)(15)–2.ii.A by deleting the phrase ''even if the creditor occasionally honors an inadvertent overdraft;'' and (2) add comment 2(a)(15)–2.ii.E to clarify that a check-guarantee or debit card that can only access non-covered overdraft credit is not a ''credit card''.

Credit Card Account Under an Open-End (Not Home-Secured) Consumer Credit Plan (§ 1026.2(a)(15)(ii))

The CFPB is proposing to amend the definition of ''credit card account under an open-end (not home-secured) consumer credit plan'' in § 1026.2(a)(15)(ii) by narrowing the two overdraft-related exceptions so that open-end covered overdraft credit offered by a very large financial institution would no longer be excepted from the definition of a ''credit card account under an open-end (not home-secured) consumer credit plan.'' Such credit offered by a very large financial institution would be subject to the CARD Act provisions in subpart G and subpart B.

Discussion of the Effect of Applying Regulation Z's CARD Act Provisions to Covered Overdraft Credit Accounts Accessed by a Hybrid Debit-Credit Card

These changes would subject all covered overdraft credit to the CARD Act provisions in subparts G and B if that credit is accessible by a credit card and offered by a very large financial institution.

The CARD Act provisions that the CFPB is proposing to apply to hybrid debit-credit cards include the following:

- The requirement in § 1026.51 to assess the consumer's ability to pay the credit extended, such as covered overdraft credit, including special rules regarding the extension of credit to persons under the age of 21. This may provide an incentive for institutions to structure and price covered overdraft credit such that consumers are better able to repay it, relative to current non-covered overdraft credit.
- The restriction in § 1026.52(a) on the amount of certain fees, such as overdraft fees, that an issuer can charge during the first year after opening of a credit account, such as a covered overdraft credit account, to 25 percent of the credit limit. This restriction does not apply to charges assessed as periodic rates. This may provide an incentive for institutions to reduce or eliminate flat fees for overdraft and to instead apply periodic rates that must be disclosed as APRs. The CFPB has preliminarily determined that this change in the manner and disclosure of overdraft credit pricing would improve consumers' ability to understand the price of the credit, and to compare it to

[192] *See* current Regulation Z comment 1026.2(a)(15)–2.i.B (stating that examples of credit cards include a debit card that also accesses a credit account).

the pricing of other forms of credit that consumers might wish to consider.

- The limit in § 1026.52(b)(1) on the amount card issuers can charge for ''back-end'' penalty fees, such as when a consumer makes a late payment or exceeds their credit limit. This may provide an incentive for institutions to rely more on non-penalty charges that are disclosed as part of the upfront price of the covered overdraft credit.
- The prohibition in § 1026.52(b)(2) on ''declined transaction fees'' and other penalty fees where there is no cost to the card issuer associated with the violation of the account agreement. As discussed below, applying this provision to a covered overdraft credit account accessed by a hybrid debit-credit card would prohibit declined debit card transaction fees on accounts with a covered overdraft credit account accessed by a hybrid debit-credit card. This provision would also prohibit declined ACH transaction fees where the card issuer declines an attempted ACH payment and would otherwise impose a fee on the cardholder for doing so. Consistent with comment 52(b)(2)(i)–4, this provision would permit a card issuer to impose a fee for declining a check that attempts to access a covered overdraft credit account because such a check is ''a check that accesses a credit card account.'' Such a fee would still be limited by § 1026.52(b)(1). The CFPB has preliminarily determined that this prohibition on declined transaction fees limit could lead institutions to shift away from back-end fees and toward upfront pricing in the form of periodic rates disclosed as APRs.
- The provisions in § 1026.53 regarding how a card issuer must allocate payments in excess of the minimum periodic payment.
- The limitation in § 1026.54 on card issuers imposing a finance charge as a result of the loss of a grace period.
- The prohibition in § 1026.55 on increases in any APR, fee, or finance charge applicable to any outstanding balance on a credit card account, with exceptions where advance notice is provided, with a requirement that the promotional rate generally cannot expire earlier than six months, and the requirement in § 1026.59 that card issuers reevaluate rate increases.
- The restriction in § 1026.56 on fees for over-the-limit transactions to one per billing cycle and the requirement that the consumer opt-in to payment of such transactions in order for the fee to be charged.
- The requirement in § 1026.57 that institutions of higher education publicly disclose agreements with card issuers and limit the marketing of credit cards on or near college campuses.
- The requirement in § 1026.58 that card issuers submit credit card agreements to the CFPB on a quarterly basis.

This proposal would also require very large financial institutions to comply with the following CARD Act-derived disclosure-related requirements in subpart B with respect to covered overdraft credit accounts accessed by a hybrid debit-credit card:

- The timing requirements in § 1026.5(b)(2)(ii)(A) for disclosures sent with respect to a credit card account under an open-end (not home-secured) consumer credit plan.
- The rate-disclosure requirements in § 1026.6(b)(2)(i)(F) for account-opening statements specific to a credit card account under an open-end (not home-secured) consumer credit plan.
- The due date disclosure, repayment disclosure, and format requirements for periodic statements specific to a credit card account under an open-end (not home-secured) consumer credit plan in § 1026.7(b)(11)(i), (b)(12)(i), (b)(13).
- The subsequent disclosure requirements specific to a credit card account under an open-end (not home-secured) consumer credit plan in § 1026.9(c)(2)(iv)(A)(8), (c)(2)(iv)(B)–(C), (g)(3)(i)(A)(*6*), (g)(3)(i)(B), (h).
- The payments-related requirements specific to a credit card account under an open-end (not home secured) consumer credit plan in § 1026.10(b)(3), (e).
- The requirements in § 1026.11(c)(1)(i) related to the timely settlement of estate debts for a credit card account under an open-end (not home-secured) consumer credit plan.

In addition to the proposed amendments to the definition of ''credit card'' and ''credit card account under an open-end (not home-secured) consumer credit plan,'' the CFPB is also proposing conforming and clarifying changes to the commentary for §§ 1026.55 and 1026.57 to reflect the changes discussed in this section. In particular, the CFPB is proposing to add comment 55(a)–5 to clarify that the limitations on increasing annual percentage rates, fees, and charges apply to fees imposed in connection with covered overdraft credit whether those fees are imposed on the covered overdraft credit account or the associated covered asset account. Finally, the CFPB is proposing to amend comment 57(a)(1)–1 so that it would continue to accurately reflect the exceptions from the definition of credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan if changes to that definition are finalized as proposed.

Limitations on Penalty Fees

Among the CARD Act provisions discussed above, one of them, § 1026.52(b), raises complex policy considerations that the CFPB believes are important to address in more detail. Section 1026.52(b) regulates the imposition of penalty fees on a credit card account under an open-end (not home secured) consumer credit plan. TILA refers to a ''penalty fee'' as a fee imposed ''in connection with any omission with respect to, or violation of, the cardholder agreement,'' and it permits only a penalty fee that is ''reasonable and proportional to the amount of such omission or violation.'' [193] Consistent with this statutory language, Regulation Z defines a ''penalty fee'' as ''any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates.'' [194] Section 1026.52(b)(1) permits a card issuer to impose a penalty fee as long as that fee represents a ''reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation'' or complies with dollar amounts specified in a safe harbor provision.[195] Section 1026.52(b)(2), meanwhile, prohibits a penalty fee that exceeds the dollar amount associated with the violation or where there is no dollar amount associated with the violation.[196] In particular, § 1026.52(b)(2)(i)(B)(*1*) prohibits any fee charged in connection with a ''transaction that a card issuer declines to authorize.''

When applied to a covered overdraft credit account accessed by a hybrid debit-credit card, § 1026.52(b)(2)(B)(*1*) would prohibit most declined transaction fees imposed with respect to a declined transaction that, if paid, would have overdrawn a particular consumer's asset account. When covered overdraft credit is accessible by a hybrid debit-credit card, the CFPB has preliminarily determined that a fee imposed when a potentially overdrawing transaction is declined, such as an nonsufficient funds (NSF) fee, is a penalty fee. A potentially overdrawing transaction initiated on a

[193] CARD Act section 102, TILA section 149, 15 U.S.C. 1665d(a).

[194] Regulation Z comment 52(b)–1.

[195] 12 CFR 1026.52(b)(1)(i)–(ii).

[196] Section 1026.52(b)(2) also bans the imposition of multiple fees for the same violation. 12 CFR 1026.52(b)(2)(ii).

consumer's asset account, would, if authorized, result in the extension of overdraft credit. Declining such a transaction, and then imposing a fee for such an attempt, is a penalty fee because, under the statutory language, it is a fee that ''a card issuer may impose with respect to a credit card account . . . in connection with any omission with respect to, or in violation of, the cardholder agreement.'' [197] Likewise, under Regulation Z, it is a fee ''imposed by a card issuer based on an act . . . that violates the terms'' of the covered overdraft credit account ''or any other requirements imposed by the card issuer with respect to'' that overdraft credit account, including any requirements relating to when overdraft credit can and cannot be accessed from an asset account.[198] Because such a transaction has been declined, no credit has been extended and there is therefore no dollar amount associated with the violation.[199] Finally, because the card issuer is the entity declining this transaction, any fee imposed with respect to this declined transaction is a fee for a ''transaction that the card issuer declines to authorize.'' [200] This is true whether the penalty is charged to the covered overdraft credit account or the covered asset account.

Thus, for a covered overdraft account accessed by a hybrid debit-credit card, 15 U.S.C. 1665d(a) and § 1026.52(b) would prohibit any fee for a potentially overdrawing transaction that the card issuer declines to authorize. This would include declined debit card transactions as well as declined ACH transactions. However, as explained in comment 52(b)(2)(i)–4, the prohibition on fees for transactions that a card issuer declines to authorize does not extend to fees imposed for declining a ''check that can access a credit card account.'' [201] The CFPB has preliminarily determined that applying § 1026.52(b) to a covered overdraft credit account accessed by a hybrid debit-credit card similarly would permit fees imposed when a card issuer declines a check on an asset account with an attached covered overdraft credit account as long as those fees satisfy the restrictions in § 1026.52(b)(1).

With respect to declined transactions other than declined check transactions, the CFPB has preliminarily determined that the Board's rationale in adopting § 1026.52(b)(2) continues to apply. That is, it appears that there is no dollar amount associated with a declined transaction and the imposition of the fee does not appear to be related to costs incurred by the card issuer. The CFPB recognizes that it may be possible that such fees could have a deterrent effect or could affect the consumer's conduct in certain limited situations. However, there does not appear to be any need for the financial institution to attempt to deter or influence the consumer's conduct in this situation, particularly in light of minimal costs and risks to the card issuer. With respect to costs, because the mechanism for authorizing or declining a transaction is generally automated, the CFPB understands that declining transactions imposes very minimal or no costs, which would not support imposing a penalty fee. The CFPB understands this to be the case across several payment channels, including for payments initiated via debit card, payments occurring on an ACH network, and other online payments. To the extent there are certain minimal costs associated with the automated authorization and declination of transactions generally, card issuers can consider whether other sources of revenue might allow them to recoup those costs.

The CFPB notes that these considerations may apply equally to declined checks. However, the CFPB is not proposing at this time to reconsider the Board's prior decision to permit some amount of a fee in connection with declining to pay a check that accesses a credit card account and would apply the same approach to checks issued in connection with a checking or other transaction account with a connected covered overdraft credit account accessible by a hybrid debit-credit card.

Accordingly, after considering the factors in 15 U.S.C. 1665d, the CFPB is not proposing any amendments to § 1026.52(b).

ii. Special Credit Card Provisions (§ 1026.12)

Existing § 1026.12 contains special rules applicable to credit cards and credit card accounts, including rules regarding the conditions under which a credit card may be issued, liability of cardholders for unauthorized use, cardholder rights to assert merchant claims and defenses against the card issuer, and the prohibition on offsets by issuers.

The proposal would revise the commentary to § 1026.12 to clarify how the special card provisions of § 1026.12 apply to hybrid debit-credit cards. Specifically, the proposal would add a sentence to comment 12–1 clarifying that paragraphs (a) through (f) of § 1026.12 apply to hybrid debit-credit cards notwithstanding paragraph (g). Paragraph (g) addresses whether Regulation Z or Regulation E controls in instances where a transaction involves both credit and electronic fund transfer aspects. The proposed revision to comment 12–1 is intended to clarify that the provisions of § 1026.12 relating to card issuance and liability apply to hybrid debit-credit cards.

As discussed in greater detail below, the proposal would provide additional guidance on unsolicited issuance in § 1026.12(a) and the right of a cardholder to assert claims or defenses against a card issuer in § 1026.12(c).

iii. Clarification to Issuance of Credit Cards (§ 1026.12(a))

TILA section 132 generally prohibits creditors from issuing credit cards except in response to a request or an application. TILA section 132 explicitly exempts credit cards issued as renewals of or substitutes for previously accepted credit cards from this prohibition.[202]

Section 1026.12(a) of Regulation Z implements TILA section 132 and provides that ''[r]egardless of the purpose for which a credit card is to be used, including business, commercial, or agricultural use, no credit card shall be issued to any person except: (1) In response to an oral or written request or application for the card; or (2) As a renewal of, or substitute for, an accepted credit card.'' The proposal would provide guidance on how the prohibition on issuing unsolicited credit cards applies to hybrid debit-credit cards.

Clarification to Explicit Request Requirement (§ 1026.12(a)(1))

Comment 12(a)(1)–1 states that ''[a] request or application for a card must be explicit'' and that ''a request for an overdraft plan tied to a checking account does not constitute an application for a credit card with overdraft checking features.'' However, as discussed in greater detail in part [IV.E.2.i], under the proposal, a hybrid debit-credit card would be a credit card that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. Therefore, the prohibition on issuing unsolicited credit cards set forth in § 1026.12(a)(1) would apply to hybrid debit-credit cards. As a result, a request for covered overdraft credit from a very large financial institution would constitute an application for a credit card with overdraft features to the extent such credit would be accessible

[197] 15 U.S.C. 1665d(a).

[198] *See* Regulation Z comment 52(b)–1.

[199] *See* 12 CFR 1026.52(b)(2)(i)(B).

[200] *See* 12 CFR 1026.52(b)(2)(i)(B)(1).

[201] Regulation Z comment 52(b)(2)(i)–4.

[202] 15 U.S.C. 1642.

through a hybrid debit-credit card. The proposal would revise comment 12(a)(1)–1 to clarify that a very large financial institution cannot issue a hybrid debit-credit card to a person without first receiving an oral or written request or application from that person for the hybrid debit-credit card.

The proposed rule also would amend comment 12(a)(1)–2. Comment 12(a)(1)–2 explains that the addition of a credit feature or plan to a non-credit card that would turn that card into a credit card constitutes issuance of a credit card. The comment then provides two examples of scenarios that would constitute issuance of a credit card. The proposed rule would amend comment 12(a)(1)–2 by adding a third example relating to hybrid debit-credit cards as comment 12(a)(1)–2.iii. Proposed comment 12(a)(1)–2.iii would state that extending covered overdraft credit through a hybrid debit-credit card as defined in § 1026.62 would constitute issuance of a credit card. For example, if a very large financial institution initially allowed a consumer to use a debit card to access overdraft credit that is not ''covered overdraft credit'' as defined in § 1026.62, the very large financial institution would be issuing a credit card if it then allowed the consumer to use the same card to access covered overdraft credit. Under that scenario, the debit card would convert into a hybrid debit-credit card subject to the requirements of § 1026.12(a).

Clarifications to Replacement Card Requirements (§ 1026.12(a)(2))

Comment 12(a)(2)–5 (the so-called ''one for one'' rule) explains that an accepted card generally may be replaced by no more than one renewal or substitute card. For example, the card issuer may not replace a credit card permitting purchases and cash advances with two cards, one for the purchases and another for the cash advances. However, comment 12(a)(2)–6 provides three exceptions to this general ''one for one'' rule. First, comment 12(a)(2)–6.i explains that the unsolicited issuance rule in § 1026.12(a) does not prohibit the card issuer from replacing a debit/credit card with a credit card and another card with only debit functions (or debit functions plus an associated overdraft capability), since the latter card could be issued on an unsolicited basis under Regulation E. Second, comment 12(a)(2)–6.ii explains that § 1026.12(a) does not prohibit a card issuer from replacing a single card that is both a prepaid card and a credit card with a credit card and a separate prepaid card where the latter card is not a hybrid prepaid-credit card as defined in § 1026.61. Finally, comment 12(a)(2)–6.iii explains that § 1026.12(a) does not prohibit a card issuer from replacing an accepted card with more than one renewal or substitute card, provided that: ''(A) No replacement card accesses any account not accessed by the accepted card; (B) For terms and conditions required to be disclosed under § 1026.6, all replacement cards are issued subject to the same terms and conditions, except that a creditor may vary terms for which no change in terms notice is required under § 1026.9(c); and (3) Under the account's terms the consumer's total liability for unauthorized use with respect to the account does not increase.''

The proposal would amend comment 12(a)(2)–6 by revising comment 12(a)(2)–6.i in two respects. First, it would explain that a hybrid debit-credit card is an example of a single card that is both a debit card and a credit card. Second, it would remove the phrase ''an associated overdraft capability'' in the parenthetical and replace it with the phrase ''an associated capability to extend overdraft credit that is not covered overdraft credit as defined in § 1026.62.'' The purpose of these proposed changes is to clarify that a very large financial institution may replace a hybrid debit-credit card with a credit card and a separate debit card so long as the separate debit card does not provide the capability to extend covered overdraft credit (*i.e.,* overdraft that is subject to a finance charge or payable by written agreement in more than four installments). Replacing the phrase ''an associated overdraft capability'' with the phrase ''an associated capability to extend overdraft credit that is not covered overdraft credit as defined in § 1026.62'' in the parenthetical would not change how the provision applies to card issuers, but rather would align terminology relating to overdraft credit across Regulation Z.

iv. Right of Cardholder To Assert Claims or Defenses Against Card Issuer (§ 1026.12(c))

When a cardholder has a dispute with a person honoring the credit card, TILA section 170 generally provides that the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction.[203] The claim or defense applies only as to unpaid balances for the goods or services and any finance or other charges imposed on that amount if the merchant honoring the card fails to resolve the dispute. The right is further limited generally to disputes exceeding $50 for purchases made in the consumer's home State or within 100 miles of the cardholder's address. Regulation Z § 1026.12(c), implements this section of TILA.

TILA does not except overdraft credit from the scope of cardholders' right to assert claims or defenses against card issuers. However, in 1981 the Board created a non-statutory exception for the use of a debit card in connection with an overdraft credit plan.[204] In doing so, the Board noted ''serious operational problems cited by commenters as arising from applying the claims and defenses provisions to check guarantee and debit card transactions.'' [205] This exception is in current comment 12(c)–3.

As discussed above, the CFPB has preliminarily determined that it would be appropriate to update exceptions in Regulation Z and thus increase consumer protections that apply to covered overdraft credit offered by very large financial institutions. The proposed rule would not change the current overdraft exceptions for financial institutions with total assets of $10 billion or less.

Accordingly, the CFPB proposes to narrow the overdraft exception in comment 12(c)–3 by adding the phrase ''other than a hybrid debit-credit card.'' As discussed above, under proposed § 1026.62(b)(5) a ''hybrid debit-credit card'' would include a debit card that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. Such cards would be covered by the consumer protections in § 1026.12(c). The CFPB has preliminarily determined that operational concerns alluded to by the Board in 1981 may no longer justify the overdraft exception in comment 12(c)–3, particularly for very large financial institutions, given advances in information technology systems over the last 40 years. The current exception would not change for financial institutions with total assets of $10 billion or less.

The CFPB further proposes conforming revisions to the commentary for § 1026.12(c)(1). First, the CFPB would revise comment 12(c)(1)–1. The current comment explains that the scope of cardholders' right to assert claims or defenses against card issuers only includes situations where the goods or services are ''purchased with the credit card.'' The comment provides examples of situations that are included and excluded. To facilitate compliance with the proposed rule, the CFPB would

[203] 15 U.S.C. 1666i.

[204] 46 FR 20848, 20865 (Apr. 7, 1981).

[205] *Id.*

revise comment 12(c)(1)–1 to provide an example illustrating that the phrase ''purchased with the credit card'' includes a purchase using a hybrid debit-credit card to access a covered overdraft credit account as defined in § 1026.62.

Second, the CFPB would revise comment 12(c)(1)–1.ii. The current comment explains that credit card protections in § 1026.12(c) do not apply to the purchase of goods or services by use of a check accessing an overdraft account and a credit card used solely for identification of the consumer. The current comment further illustrates that, if the credit card is used to make partial payment for the purchase and not merely for identification, the right to assert claims or defenses would apply to credit extended via the credit card (although not to credit extended by the overdraft line). The current comment also provides that the right would apply to credit extended through a covered separate credit feature accessible by a hybrid prepaid-credit card. To facilitate compliance with the proposed rule, the CFPB would revise comment 12(c)(1)–1.ii to provide an example illustrating that if partial payment for the purchase is made with a hybrid prepaid-credit card or a hybrid debit-credit card, the right to assert claims or defenses would apply to credit accessed from a covered separate credit feature or covered overdraft credit account, respectively.

Third, the CFPB would revise comment 12(c)(1)–1.iv. Current comment 12(c)(1)–1.iv cross-references comment 12(c)–3 and explains that credit card protections in § 1026.12(c) do not apply to purchases effected by use of either a check guarantee card or a debit card when used to draw on overdraft credit plans. The current comment further illustrates that, if a card serves both as an ordinary credit card and also as a check guarantee or debit card, a transaction will be subject to the provisions on asserting claims and defenses when used as an ordinary credit card, but not when used as a check guarantee or debit card. As discussed above, the CFPB proposes to narrow the overdraft exception in comment 12(c)–3. To reflect that proposed change, CFPB also proposes conforming revisions to comment 12(c)(1)–1.iv, which would provide that the right to assert claims or defenses would apply to purchases effected by use of a hybrid debit-credit card to access a covered overdraft credit account. The CFPB would also revise comment 12(c)(1)–1.iv to provide an example illustrating that for purchases effected by use of a hybrid debit-credit card where the transaction is partially paid with funds from the asset account, and partially paid with covered overdraft credit, the provisions of § 1026.12(c) apply only to the credit portion of the purchase transaction. The CFPB would also correct a typographical error in comment 12(c)(1)–1.iv by inserting the article ''a'' that is currently missing before ''check guarantee or debit card.''

The CFPB seeks comment on the proposed narrowing of the overdraft exception in comment 12(c)–3, including what, if any, operational issues might arise as a result. The CFPB also seeks comment on the proposed conforming revisions to the commentary for § 1026.12(c)(1).

v. Credit Card Applications and Solicitations (§ 1026.60)

Existing § 1026.60 includes certain requirements related to applications and solicitations for credit cards. Among other things, it requires certain disclosures in connection with credit card applications and solicitations and prescribes content and format of the application or solicitation. Existing § 1026.60(a)(5) excepts certain types of credit from the requirements of § 1026.60, including § 1026.60(a)(5)(ii), which excepts overdraft lines of credit tied to asset accounts accessed by check-guarantee cards or by debit cards; § 1026.60(a)(5)(iii), which excepts lines of credit accessed by check-guarantee cards or by debit cards that can be used only at automated teller machines; and § 1026.60(a)(5)(iv), which excepts lines of credit accessed solely by account numbers except for a covered separate credit feature solely accessible by an account number that is a hybrid prepaid-debit card as defined in § 1026.61.

The requirements in § 1026.60 implement provisions of the Fair Credit and Charge Card Disclosure Act of 1988.[206] The purpose of the law was to provide for more detailed and uniform disclosures of rates and other cost information in applications and in solicitations to open credit and charge card accounts. The statute applies the disclosure requirements broadly to any application to open a credit card account for any person under an open-end consumer credit plan or to a solicitation to open such an account without requiring an application. In implementing the statutory requirements, the Board narrowed the scope of coverage by adopting the exceptions in what is now § 1026.60(a)(5), determining that the requirements should apply only to ''traditional'' credit or charge accounts that are used primarily to purchase goods and services.[207]

The CFPB has preliminarily determined that, as with the CARD Act provisions, covered overdraft offered by a very large financial institution that is accessible by a card, including a debit card, should be subject to the requirements of § 1026.60. In excepting certain types of credit from those requirements, the Board noted only that the requirements should apply only to ''traditional'' credit cards that are used to purchase goods and services. However, given the expanded use of debit cards to purchase goods and services, many of which are linked to accounts that offer overdraft credit, the distinction between ''traditional'' credit cards and debit cards that can access overdraft credit appears far less clear. The CFPB has preliminarily determined that the requirements of § 1026.60 should be applied consistent with the broad statutory language to cards that can access covered overdraft credit, and that doing so will carry out the purposes of TILA by assuring a meaningful disclosure of credit terms and avoiding the uninformed use of credit.

Accordingly, the CFPB is proposing to amend § 1026.60 to narrow the exception for overdraft lines of credit. Specifically, the proposal would amend § 1026.60(a)(5)(ii), (iii), and (iv) so that those exceptions would not apply to covered overdraft credit accessed by a hybrid debit-credit card. As explained above, the CFPB is proposing to define a ''hybrid debit-credit card'' as any card (including a debit card) that can access covered overdraft credit offered by a very large financial institution. Accordingly, the proposed amendments to § 1026.60(a)(5)(ii), (iii), and (iv) would narrow the exception so that the requirements of § 1026.60 would apply to covered overdraft credit offered by a very large financial institution when that credit can be accessed by any card, including a debit card.

vi. Charge Card (§ 1026.2(a)(15)(iii))

The CFPB proposes to amend the definition of ''charge card'' in § 1026.2(a)(15)(iii) to exclude a hybrid debit-credit card from the definition. Under the proposed amendment, a hybrid debit-credit card would be subject to the same disclosure and other rules as other credit cards, rather than certain special rules for charge cards. The CFPB has preliminarily determined that consumers using hybrid debit-credit cards would benefit from the

[206] Public Law 100–583, 102 Stat. 2960 (Nov. 3, 1988).

[207] 54 FR 13855, 13856–57 (Apr. 6, 1989).

TILA and Regulation Z provisions that apply to credit cards generally.

TILA defines ''charge card'' as ''a card, plate, or other single credit device that may be used from time to time to obtain credit which is not subject to a finance charge.'' [208] Because hybrid debit-credit cards would generally access credit that is subject to a finance charge, they do not fit within the statutory definition of charge card. The term ''charge card'' was introduced into TILA with the Fair Credit and Charge Card Disclosure Act of 1988, which amended TILA to define ''charge card'' as ''a card, plate, or other single credit device that may be used from time to time to obtain credit *which is not subject to a finance charge*'' (emphasis added).[209] In its rule implementing the 1988 act, the Board expanded the definition of ''charge card'' such that, in Regulation Z, the definition includes any card on which *there is no periodic rate*.[210] In other words, a card with a finance charge that is not a periodic rate is excluded from the statutory charge card definition but is included within the Regulation Z definition of that term. The Board sought to address a perceived inconsistency between that statutory definition and the fact that some disclosure provisions that apply to charge cards reference finance charges.

Under both the statutory and regulatory definitions, a charge card is a type of credit card. Thus, where Regulation Z provisions apply to credit cards, the provisions also apply to charge cards. However, in specific provisions, which are listed in comment 2(a)(15)–3.i, the term charge card is distinguished from credit card such that different requirements apply. One example of such a provision is § 1026.7(b)(11), which, in accordance with TILA, requires on credit card periodic statements the disclosure of a payment due date and requires that that date be the same day of the month for each billing cycle. The Board in Regulation Z excluded charge cards from these requirements.[211] The CFPB has preliminarily determined, however, that these requirements should apply to a debit card that can access a covered overdraft credit account (*i.e.,* a hybrid debit-credit card). The CFPB accordingly is proposing to exclude hybrid debit-credit cards from the Regulation Z definition of charge card. This approach is consistent with TILA; in proposing to apply the TILA and Regulation Z credit card provisions to debit cards that can access covered overdraft, the CFPB is merely declining to exercise its regulatory authority to implement TILA with respect to hybrid debit-credit cards in the ways that the Board previously did with respect to charge cards.

The proposed definition of hybrid debit-credit card would encompass devices that can access overdraft credit and are subject to finance charges, including devices that are subject to fees but not a periodic interest rate. Hybrid debit-credit cards would therefore *not* fit the statutory definition of a ''charge card,'' because they are subject to finance charges. Further, the CFPB preliminarily determines that consumers using hybrid debit-credit cards would benefit from the TILA and Regulation Z provisions that apply to credit cards generally, such as § 1026.7(b)(11).

The CFPB understands that charge cards are typically offered to higher income individuals with prime or super-prime credit, and they often have no set credit limit.[212] In contrast, current users of non-covered overdraft credit often are lower-income consumers with lower credit scores.[213] Subsequent to the CFPB's proposal, many of these consumers may be offered hybrid debit-credit cards. Accordingly, consistent with TILA, and to ensure that consumers who use covered overdraft credit may benefit from the full protection of the Regulation Z credit card rules, the CFPB is proposing to amend the regulatory definition of ''charge card'' such that a 'hybrid debit-credit card' would *not* be within the credit card subset ''charge card'' but would nonetheless remain in the larger set ''credit card.'' This would ensure that a hybrid debit-credit card that accesses covered overdraft credit offered by a very large financial institution would be subject to the same disclosure and other rules as other credit cards.

3. Compulsory Use of Preauthorized Transfers (§ 1005.10(e)(1))

The CFPB proposes to apply the Regulation E compulsory-use prohibition to covered overdraft credit extended by very large financial institutions—*i.e.,* when a very large financial institution provides overdraft credit that is subject to Regulation Z. Under this proposal, a very large financial institution that provides covered overdraft credit to a consumer could not condition the extension of such covered overdraft credit on the consumer's agreement to repay it solely by preauthorized electronic fund transfer (EFT). In other words, the proposal would require a very large financial institution that provides covered overdraft credit to a consumer to offer the consumer at least one alternative repayment option in addition to a preauthorized EFT.

EFTA section 903(10) defines the term ''preauthorized electronic fund transfer'' as ''an [EFT] authorized in advance to recur at substantially regular intervals.'' [214] Regulation E § 1005.2(k) restates the statutory definition. EFTA's compulsory-use prohibition, EFTA section 913(1), prohibits any person from conditioning the extension of credit to a consumer on the consumer's repayment by means of preauthorized EFTs.[215] However, Regulation E § 1005.10(e)(1) currently includes a non-statutory exception. Specifically, that section states that ''[n]o financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, *except for* credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account'' (emphasis added).[216] The commentary explains that, as a result of the exception, a financial institution may require the automatic repayment of an overdraft credit plan.[217]

Regulation Z section 1026.12(d)(3) permits a card issuer, who obtains written authorization from the cardholder, to deduct periodically a cardholder's credit card debt from a deposit account held with the card issuer. Therefore, under the current rules, if a financial instution were to provide a consumer with overdraft credit accessible by a credit card, the financial institution could, with the consumer's written authorization, make automatic periodic deductions from the consumer's deposit account. Because periodic deductions by a creditor to obtain repayment of an overdraft credit balance occur at regular intervals, they are a form of preauthorized EFT and would be subject to the Regulation E compulsory-use prohibition, absent the extant exception for an overdraft credit plan provided by current

[208] 15 U.S.C. 1637(c)(4)(E).

[209] *See* Public Law 100–583, section 2, 102 Stat. 2960 (Nov. 3, 1988).

[210] 54 FR 13855, 13856 (Apr. 4, 1989).

[211] *See* § 1026.7(b)(11)(ii)(A); 75 FR 7658, 7672–73 (Feb. 22, 2010).

[212] *See* Fed. Trade Comm'n, *Comparing Credit, Charge, Secured Credit, Debit, or Prepaid Cards* (Dec. 2021), *https://consumer.ftc.gov/articles/comparing-credit-charge-secured-credit-debit-or-prepaid-cards.*

[213] *See* CFPB 2017 Data Point at 6.

[214] 15 U.S.C. 1693a(10).

[215] 15 U.S.C. 1693k(1).

[216] 12 CFR 1005.10(e)(1).

[217] Regulation E comment 10(e)(1)–2.

§ 1005.10(e)(1).[218] It is this exception that the CFPB is proposing to eliminate for covered overdraft credit provided by a very large financial institution.

In adopting the exception from the compulsory-use prohibition in 1981, the Board used its EFTA exception authority to exclude ''overdraft credit plans'' (*i.e.,* covered overdraft credit) from the general EFTA compulsory-use prohibition.[219] The CFPB's proposal would revise § 1005.10(e)(1) and associated commentary to update that non-statutory exception. Under the CFPB's proposal, the exception in § 1005.10(e)(1) for overdraft credit plans would no longer apply to covered overdraft credit provided by a very large financial institution, as those terms would be defined in proposed § 1026.62.

Because under the proposal the exception would no longer apply to covered overdraft credit provided by a very large financial institution, the institution would be required to offer a consumer at least one method of repaying an overdraft credit balance other than automatic repayment by preauthorized EFT. For example, in addition to the automatic repayment option, the institution could offer consumers an option to repay their outstanding overdraft credit balances by expressly authorizing (*e.g.,* on the institution's website or smartphone application) a one-time transfer of funds from the consumer's asset account.

Under the CFPB's proposal, this requirement to offer additional repayment methods would apply to any existing covered overdraft credit offered by a very large financial institution, including products that often are referred to as Regulation Z overdraft lines of credit. In other words, where such an institution today provides a consumer with an overdraft line of credit subject to Regulation Z, the institution, upon the compliance date of the CFPB's proposal (if finalized), would need to begin to offer the consumer a way for the consumer to repay the consumer's overdraft credit balances other than by preauthorized EFT. While the institution would be required to offer a repayment option other than automatic repayment, the institution (as today) may offer a reduced APR or other cost-related incentive for the consumer to choose the option of automatic repayment.[220]

Congress enacted the compulsory-use prohibition to prevent financial institutions and other persons that are creditors from mandating repayment of credit by preauthorized EFTs, such as automatic periodic deductions from consumers' accounts. In turn, in adopting an exception to that prohibition for overdraft in the early 1980s, the Board stated its belief that overdraft credit plans were popular with those consumers who had them and that those plans almost universally involved an automatic payment feature.[221] The Board also stated that it believed that the cost to institutions of providing and maintaining a nonautomatic payment option was substantial and that requiring institutions to incur that cost could have an adverse impact on consumers, such as through reduced service levels or the termination of the overdraft service altogether.[222]

Covered overdraft credit plans are currently relatively rare.[223] The CFPB has no reason to believe that these plans were available to a wider set of consumers in 1981 than they are now. Accordingly, the CFPB generally understands the Board's 1981 preamble to indicate that covered overdraft credit plans were well liked at that time by those consumers who had access to them. In addition, the CFPB has preliminarily determined that advances in information technology since the early 1980s (when the Board adopted the compulsory-use exception for overdraft) have reduced institutions' costs of obtaining repayment by means other than automatic repayment by preauthorized EFT. For example, an institution can establish at reasonable cost an internet computer or smartphone interface through which consumers may easily initiate—such as by tapping a ''button'' on a smartphone screen—monthly repayment of credit balances. Further, because applying the compulsory-use prohibition should not substantially increase institutions' costs, applying the prohibition would not necessarily reduce consumers' access to covered overdraft credit plans. At the same time, applying the compulsory-use prohibition to covered overdraft credit may allow consumers at very large financial institutions to retain better control over the funds in their asset accounts at those institutions. Specifically, applying the prohibition would better enable consumers to prioritize which of their obligations to pay. For example, when funds are deposited into the consumer's asset account (such as electronic direct deposit of the consumer's paycheck), the consumer would be able to choose to use those funds to pay their rent before subsequently repaying the consumer's overdraft balance at the institution (using additional funds from the electronic direct deposit or subsequently deposited funds). Giving the consumer this choice could also help to reduce the consumer's costs if the consumer is charged for each overdraft transaction and delaying repayment of the overdrawn amounts would allow the consumer to avoid a subsequent overdraft transaction and its associated charge.

For these reasons, the CFPB has preliminarily determined that applying the compulsory-use prohibition to covered overdraft credit provided by a very large financial institution will carry out the purposes of EFTA by safeguarding consumers' rights in electronic fund transfer systems. This preliminary determination to apply the compulsory-use prohibition is consistent with Congress's original intent. Congress passed a broad compulsory-use prohibition, which the Board then narrowed due to concerns about costs, and which the CFPB is now proposing to restore in light of changed market circumstances (*i.e.,* substantially reduced costs of alternative means of repayment).

Non-Covered Overdraft Credit

As noted, the Regulation E compulsory-use prohibition prohibits conditioning *credit* extensions on consumers' repayment by preauthorized EFT. As discussed in this proposal, *all* overdraft is credit, irrespective of whether the overdraft is or is not subject to Regulation Z. Nonetheless, the compulsory-use prohibition has historically been interpreted as not applying to overdraft credit that is not subject to the requirements of Regulation Z (notwithstanding that non-covered overdraft credit *is* credit). Specifically, in 1980 the Board stated its belief that the compulsory-use prohibition does not apply to overdraft credit that is not covered by Regulation Z because, with respect to that overdraft, banks take consumers' repayments through immediate offset (which does not occur at regular intervals), rather than through preauthorized EFTs that consumers authorize in advance to recur at

[218] *See* § 1005.3(c)(5)(iii), which excludes from the Regulation E EFT definition a transfer of funds between a consumer's account and an account of the consumer's financial institution, but which also states that these transfers remain subject to the § 1005.10(e) compulsory-use prohibition.

[219] *See* 46 FR 2972, 2973 (Jan. 13, 1981).

[220] *See* Regulation E comment 10(e)(1)–4.

[221] 46 FR 2972, 2973 (Jan. 13, 1981).

[222] *Id.*

[223] 75 FR 7657, 7664 (Feb. 22, 2010). *See also* 79 FR 77102, 77208 (Dec. 23, 2014).

substantially regular intervals.[224] Under the Board's historical reasoning, a financial institution providing non-covered overdraft credit does not need access to the above-described exception for overdraft credit plans from the compulsory-use prohibition, because the institution's non-covered overdraft credit is not subject to the compulsory-use prohibition in the first place (because the institution takes repayment at irregular intervals, whenever the next deposit is received, rather than at regular intervals).

The CFPB is not proposing to revisit this longstanding interpretation. That is, under the CFPB's proposal, it will remain the case that non-covered overdraft credit that obtains repayment through offset, such as the typical overdraft service as defined in § 1005.17(a), is not subject to the compulsory-use prohibition. Therefore, a very large institution providing non-covered overdraft at or below breakeven pricing may continue to take repayment of a consumer's overdraft balance immediately upon the institution's receipt of the next deposit to the consumer's account, just as institutions typically do today, if done in compliance with applicable law.

Under the CFPB's proposal, however, overdraft credit, including an overdraft service as that term is defined in Regulation E, that is provided by a very large financial institution, would *only* remain not covered by Regulation Z's requirements—and thus outside the Regulation E compulsory-use prohibition—if the institution provides its overdraft credit to consumers for a price that is at or below the institution's breakeven price for providing the credit. In other words, if the price of such institution's overdraft credit is *above* its costs and losses, then, under the CFPB's proposal, the credit is covered overdraft credit that is *not* excepted from Regulation Z and is therefore subject to the Regulation Z offset prohibition. Accordingly, under the CFPB's proposal, the institution would be required to obtain repayment only periodically (pursuant to the offset prohibition) and to comply with the Regulation E compulsory-use prohibition (in addition to complying with Regulation Z). As previously noted, the CFPB's proposal does not apply to non-covered or covered overdraft credit provided by an institution other than a very large financial institution. As now, where such an institution provides non-covered overdraft credit, including an overdraft service, the overdraft credit is not subject to the Regulation E compulsory-use prohibition. Further, as now, where such an institution provides an overdraft credit plan that *is* subject to Regulation Z, the institution's overdraft credit plan retains access to the current § 1005.10(e)(1) exception from the compulsory-use prohibition for overdraft credit plans.

i. The Offset Prohibition in 12 CFR 1026.12(d)(1)

While the CFPB is not proposing to amend the Regulation Z prohibition against offset, it is closely related to the Regulation E compulsory-use prohibition discussed above; thus, the CFPB briefly discusses it here for clarity.

''Offset'' is a term used to describe a practice whereby a depository institution uses funds from an incoming deposit to a consumer's asset account at the institution to immediately obtain repayment of the consumer's debt to the institution, such as an overdraft.[225] ''Offset'' is a permitted practice in the context of non-covered overdraft that is *not* subject to Regulation Z. In that context, as described above, an institution may use deposited funds immediately upon receipt to obtain repayment of, or ''offset'' against, the consumer's overdraft balance owed to the institution.

Offset is prohibited by TILA section 169(a) (15 U.S.C. 1666h(a)) and 12 CFR 1026.12(d)(1). The statutory and regulatory offset prohibition applies to a ''card issuer,'' [226] which is a person that issues a ''credit card.'' [227] When an institution offers an overdraft credit plan subject to Regulation Z, that plan is covered overdraft credit. If the covered overdraft credit is accessible by a debit card, the debit card is a credit card, the institution that provides the card is a card issuer, and the covered overdraft credit is subject to the Regulation Z prohibition against offset.

The CFPB is not proposing to amend the offset prohibition in Regulation Z. Thus, when a very large financial institution provides a covered overdraft credit account that is accessible by a card (*i.e.,* a hybrid debit-credit card), the institution must comply with the offset prohibition. In particular, 12 CFR 1026.12(d)(1) prohibits the institution (as a card issuer) from taking any action, either before or after termination of credit card privileges, to offset a consumer's indebtedness (such as an overdraft balance) that arises from a credit card plan (such as a covered overdraft credit account) against the consumer's funds (such as funds in a covered asset account) held on deposit with the institution.

Further, per comment 12(d)(1)–3, the offset prohibition applies to any indebtedness arising from transactions under a credit card plan (such as a covered overdraft credit account accessible by a hybrid debit-credit card), including accrued finance charges and other charges on the account. The prohibition also applies to balances arising from transactions not using the card itself but taking place under plans that involve a credit card. For example, if the consumer writes a check that accesses an overdraft line of credit (which is a type of covered overdraft credit account), the resulting indebtedness is subject to the offset prohibition since it is incurred through a credit card plan.[228]

ii. Periodic Deductions Permitted by 12 CFR 1026.12(d)(3)

Periodic deductions are a different practice than offset. TILA section 169(a)(1) (15 U.S.C. 1666h(a)(1)) permits a card issuer to periodically deduct all or part of a consumer's credit card debt from the consumer's asset account if the periodic deductions are in accordance with the consumer's preauthorized written agreement. This TILA provision is implemented in 12 CFR 1026.12(d)(3).

The CFPB is not proposing to amend 12 CFR 1026.12(d)(3). Thus, when a very large financial institution provides covered overdraft credit that is accessible by a card, the institution (as a card issuer) must comply with the offset prohibition (§ 1026.12(d)(1), discussed above), but may obtain a consumer's preauthorized written agreement to periodic deductions of the consumer's overdraft balances from the consumer's asset balances held at the institution. These deductions must be ''periodic'' to be permitted under

[224] *See* 45 FR 66348, 66348 (Oct. 6, 1980) (''Other [*i.e.,* non-covered] plans have automatic debiting whenever funds are deposited into the consumer's account, and do not have a fixed periodic or recurring payment schedule. It is the Board's opinion that these [non-covered] plans are already in compliance with section 913, because they do not require the consumer to agree to repayment by preauthorized transfers, which are defined in the act and regulation as transfers 'authorized in advance to recur at substantially regular intervals.''').

[225] *See* Regulation Z comment 12(d)(1)–2 (describing offset as when ''the consumer tenders funds as a deposit . . . [and] the card issuer . . . appl[ies] the funds to repay indebtedness on the consumer's credit card account'').

[226] The term ''card issuer'' is defined in 12 CFR 1026.2(a)(7) as ''a person that issues a credit card or that person's agent with respect to the card.''

[227] The term ''credit card'' is defined in 12 CFR 1026.2(a)(15)(i) as ''any card, plate, or other single credit device that may be used from time to time to obtain credit.''

[228] *See* Regulation Z comment 12(d)(1)–3.

§ 1026.12(d)(3); that is, the deductions must occur at regular intervals. Because the deductions must occur at regular intervals, they are, as discussed above, a form of preauthorized EFT and are subject to the Regulation E compulsory-use prohibition. Further, because the deductions are subject to that prohibition, under the CFPB's proposal, as discussed, a very large financial institution providing covered overdraft credit must offer consumers a means of repayment other than periodic deduction. In other words, even when a very large institution (as a card issuer) obtains a consumer's written agreement to periodic deductions as permitted by § 1026.12(d)(3), the institution may not adopt a practice of immediately taking funds from any incoming deposit in repayment of the consumer's overdraft balance, because doing so would run afoul of the offset prohibition in § 1026.12(d)(1). Moreover, when obtaining written agreement for periodic deductions, the very large financial institution must offer the consumer another repayment option, consistent with the prohibition against compulsory use discussed earlier in this section.

iii. Summary of Compliance With the Compulsory-Use Prohibition, Offset Prohibition, and Permitted Periodic Deduction Under the CFPB's Proposal

As discussed above, the CFPB is proposing to apply the Regulation E compulsory-use prohibition to covered overdraft credit provided by a very large financial institution. Further, the CFPB is not proposing to amend the Regulation Z prohibition against offset, nor is the CFPB proposing to amend the Regulation Z provision permitting periodic deductions. Therefore, when such an institution provides covered overdraft credit that is accessible by a card, the institution must comply with the Regulation E compulsory-use prohibition and the Regulation Z offset prohibition, and may obtain the consumer's voluntary agreement to repayment by periodic deduction from the consumer's asset account at the institution.

Pursuant to the Regulation Z offset prohibition, the institution may not adopt a practice of immediately taking funds from any incoming deposit in repayment of the consumer's overdraft balance. Pursuant to the Regulation Z provision permitting periodic deductions, the institution may obtain the consumer's written agreement to the institution's obtaining repayment of the consumer's overdraft balance through automatic periodic deductions from the consumer's covered asset account. However, pursuant to the Regulation E compulsory-use prohibition, the institution must provide the consumer with a repayment option *other than* automatic periodic deduction. For example, the institution could provide the repayment option of permitting the consumer to authorize one-time EFTs to make payments against their overdraft balance. Also pursuant to the compulsory-use prohibition, the institution may provide a reduced APR or other cost-related incentive for the consumer to choose the option of repayment by periodic deduction.

Request for Comment—Defining ''Periodic''

In its 2016 Prepaid Final Rule, the CFPB defined ''periodically'' in § 1026.12(d)(3) for purposes of a credit feature accessible by a hybrid prepaid-credit card to mean no more frequently than once per calendar month. The CFPB stated that it was concerned that some issuers of hybrid prepaid-credit cards would attempt to circumvent the offset prohibition in § 1026.12(d)(1) by obtaining a consumer's written authorization to deduct all or part of the cardholder's credit card debt on a daily or weekly basis from the prepaid account to help ensure that the debt is repaid.[229] The CFPB stated that issuers of hybrid prepaid-credit cards might obtain a consumer's written authorization to daily or weekly debits given the overall creditworthiness of prepaid accountholders who rely on covered separate credit features. In addition, the CFPB believed that prepaid consumers might grant the authorization more readily than other credit cardholders because these consumers may believe that providing such authorization is required. While the CFPB acknowledged that an appropriate interval for periodic deductions may depend on the facts and circumstances, the CFPB determined that § 1026.12(d)(3)—defining periodically as no more frequently than once per calendar month—would fully effectuate the intent of the compulsory-use and offset prohibitions and would allow consumers to retain control over the funds in their prepaid accounts even when a covered separate credit feature accessible by a hybrid prepaid-credit card becomes associated with that account.

The CFPB believes that similar issues are also present in the context of covered overdraft credit accounts tied to covered asset accounts. In particular, the CFPB believes that institutions providing such accounts might attempt to circumvent the offset prohibition by obtaining a consumer's written authorization to deduct all or part of the consumer's debt on a daily or weekly basis to help ensure that the debt is repaid. Further, the CFPB believes that consumers using these accounts, such as frequent overdrafters, would generally be more vulnerable than other consumers and that, in light of their vulnerability, these consumers might grant such authorization more readily than other consumers, because they believe that the authorization is required to obtain the accounts. At the same time, the CFPB acknowledges that it is possible that a periodic deduction period shorter than one month might be appropriate in some circumstances. Specifically, it is possible that some consumers might have difficulty managing repayment of credit balances and that these consumers might benefit from periodic deductions that occur more frequently than once per month.

The CFPB requests comment on whether in its final rule it should define ''periodically'' to mean no more frequently than once per calendar month or some other interval for covered overdraft credit accounts tied to covered asset accounts.

4. Definition of Overdraft Services in Regulation E (§ 1005.17(a))

Section 1005.17(a) currently defines ''overdraft service'' to mean a service under which a financial institution assesses a fee or charge on a consumer's account held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account. Section 1005.17(a)(1) also provides that the term ''overdraft service'' does not include any payment of overdrafts pursuant to a line of credit subject to Regulation Z, including transfers from a credit card account, home equity line of credit, or overdraft line of credit. The CFPB is proposing to add comment 17(a)–2 to clarify that the newly defined terms under this proposal do not change the scope of the definition of overdraft services under § 1005.17(a). Specifically, the proposed comment would clarify that covered overdraft credit, which includes above breakeven overdraft credit, is not an overdraft service under § 1005.17(a) because it is a line of credit subject to Regulation Z. When consumers at very large financial institutions are offered covered overdraft credit, that covered overdraft credit would not be subject to the Regulation E opt-in requirement for non-covered debit card overdraft.

[229] 81 FR 83934, 84213 (Nov. 22, 2016).

VI. Proposed Effective Date

Consistent with TILA section 105(d), the CFPB proposes that a final rule relating to this proposal would have an effective date of the October 1 which follows by at least six months the date it is published in the **Federal Register**.[230] The Bureau seeks comment on the proposed effective date including whether it should be at a different time, and if so, when and why.

As discussed above, the CFPB's proposed rule would, if finalized, apply only to very large financial institutions. Accordingly, financial institutions that are not very large institutions would not need to make any changes in response to the proposed rule were it to be finalized.

With respect to very large financial institutions, the changes that the proposed rule would require, if finalized, would vary depending on the very large financial institution's activities. If a very large financial institution currently offered non-covered overdraft services in compliance with existing regulations and, in response to the rule, it chose to provide those services at or below its breakeven price, it could continue to provide such services without making any operational changes in response to the rule apart from developing a process to confirm that its pricing for such services complied with either the rule's benchmark fee or breakeven standard provisions.

If a very large financial institution currently offered non-covered overdraft services in compliance with existing regulations and, in response to the rule, chose to provide above-breakeven overdraft credit, it would need to ensure that such credit complied with Regulation Z. However, if the very large financial institution were unable to bring a Regulation Z compliant above-breakeven overdraft credit program to market before the effective date of a final rule, the institution still could comply with the rule by delaying, for as long as it wishes, the point in time at which it began to offer above-breakeven overdraft credit to consumers. Finally, if a very large financial institution currently offered covered overdraft credit in compliance with Regulation Z and, in response to the rule, chose to continue offering such credit, the very large financial institution would need to comply with the rule by: (1) treating transfer fees as finance charges, or eliminating those fees, (2) offering consumers a means of repaying their overdrafts other than by preauthorized EFTs, and (3) beginning to comply with the regulatory provisions in Regulation Z that apply to credit cards that would newly apply to certain types of covered overdraft credit.

The CFPB believes that the proposed effective date should be sufficient for a very large financial institution to make these changes.

VII. Severability

The CFPB preliminarily intends that, if any provision of the proposed rule, if adopted as final, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue in effect.

VIII. CFPA Section 1022(b) Analysis

A. Overview

In developing this proposed rule, the CFPB has considered the proposed rule's potential benefits, costs, and impacts per section 1022(b)(2)(A) of the Consumer Financial Protection Act of 2010 (CFPA). The CFPB requests comment on the preliminary analysis presented below and submissions of more data that could inform the CFPB's analysis of the potential benefits, costs, and impacts. In developing the proposed rule, the CFPB has consulted or offered to consult with the appropriate prudential regulators and other Federal agencies, including about the consistency of this proposed rule with any prudential, market, or systemic objectives administered by those agencies, in accordance with section 1022(b)(2)(B) of the CFPA. The CFPB also consulted with agencies described in TILA section 149.

The goal of this proposed rule is to allow more consumers to better compare certain overdraft credit to other types of credit and to provide consumers with several substantive protections that already apply to other consumer credit, while still encouraging the availability of overdraft coverage. The section proceeds as follows. First, it describes data limitations and the quantification of benefits, costs, and impacts. Second, it presents the baseline for its analysis. Third, it goes through the potential benefits and costs, first to consumers and then to covered persons, of the proposed changes that affect charges for non-covered and covered overdraft. Fourth, the section turns to the benefits, costs, and impacts of further provisions of the proposed rule. Fifth and sixth, it summarizes specific impacts on financial institutions with $10 billion in assets or less and on consumers in rural areas, respectively.

B. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion below relies on information that the CFPB has obtained from industry, other regulatory agencies, and publicly available sources, including reports published by the CFPB. These sources form the basis for the CFPB's consideration of the likely impacts of the proposed rule. The CFPB provides estimates, to the extent possible, of the potential benefits and costs to consumers and covered persons of this proposal given available data.

Specifically, this discussion is based on the CFPB's analysis of public Call Reports and other publicly available data sources, internal data from multiple supervisory information requests, as described in part II above, as well as research reports published by the CFPB. The CFPB also consulted the academic literature and policy analyses of United Kingdom and State regulators.

The CFPB acknowledges several important limitations that prevent a full determination of benefits, costs, and impacts. Quantifying the benefits, costs, and impacts requires quantifying consumer and depository institution responses to the proposed changes, and the CFPB finds the body of knowledge on relevant behavioral responses and elasticities incomplete. In particular, the CFPB is not aware of evidence that could be used to predict how changes to overdraft pricing would affect negative balance periods or the expected substitution effects across asset accounts and between deposit accounts with overdraft coverage and other forms of credit, including the consumer harm from delaying or forgoing some transactions. Similarly, the CFPB believes there is little reliable quantitative evidence available on the cost and effectiveness of steps financial institutions might take to facilitate clients' money management or timely repayment on overdrawn accounts; reprice any of their services; remunerate their staff, suppliers, or sources of capital differently; or enter or exit any or all segments of the checking account market. Thus, while the data and research available to the CFPB provide an important basis for understanding the likely effects of the proposal, the data and research are insufficient to fully quantify the potential effects of the proposal for consumers and very large financial institutions. This reflects, in part, the fact that the effects of the proposal would depend on choices made by independent actors in response to the proposal, and the data and research available to the CFPB do not

[230] 15 U.S.C. 1604(d).

allow reliable predictions of those choices.

In light of these data limitations, the analysis below provides quantitative estimates where possible and a qualitative discussion of the proposed rule's benefits, costs, and impacts. General economic principles and the CFPB's expertise, together with the available data, provide insight into these benefits, costs, and impacts. The CFPB requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed rule.

C. Baseline for Analysis

To evaluate the proposal's benefits, costs, and impacts, the CFPB measures the proposal's benefits, costs, and impacts against a baseline in which the CFPB would take no action. This baseline assumes existing regulations remain in place and that market conditions in the overdraft market do not change from their current state.

The discussion below assumes that, without action, both the overdraft credit market and the broader consumer checking market would function in the manner understood through past CFPB research, external academic literature, and supervisory activity. The CFPB bases its prediction for the baseline on market conditions and market data from the 2022 calendar year. As a result, its baseline reflects changes to the overdraft market through 2022, including changes to checking account pricing (both fee and net interest revenue) and changes to the speed, cost, availability, and prevalence of payment systems. The CFPB sees that the market is changing rapidly and might continue to do so absent the rule, but for purposes of the baseline the CFPB generally uses data from the most recent full calendar year to characterize the status quo.

D. Potential Benefits and Costs to Consumers and Covered Persons of the Proposed Changes That Affect Charges for Non-Covered and Covered Overdraft Credit

1. Potential Benefits and Costs to Consumers

In addition to other changes discussed later in this section and to the further changes discussed in the following section, the proposal would apply Regulation Z to above breakeven overdraft credit that is currently excepted from the regulation (*i.e.,* it is currently non-covered overdraft credit). Overdraft credit is above breakeven overdraft credit when a very large financial institution imposes a charge or combination of charges for such credit that exceeds the greater of either the average of the institution's costs and losses for providing non-covered overdraft credit (as defined in the proposal) or the benchmark fee published by the CFPB. The CFPB anticipates that its proposal generally would benefit consumers in two ways. First, some very large financial institutions may reduce their fees so that they can continue offering non-covered overdraft credit. In general, lower overdraft fees for non-covered overdraft credit would benefit consumers by reducing the amount they pay through these fees. Second, some financial institutions may continue offering above breakeven overdraft credit and apply the Regulation Z regulatory framework. In general, applying the Regulation Z regulatory framework to above breakeven overdraft credit would benefit consumers by promoting their informed use of such credit and by applying TILA's substantive protections. The CFPB's analysis may underestimate or overestimate the proposal's benefits to consumers depending on how various market participants, such as financial institutions covered by the proposal, entities not covered by the proposal, and consumers, respond to the proposal. The discussion below begins with an analysis of the proposal's direct benefits to consumers assuming that very large financial institutions comply with the proposal by lowering their fees for non-covered overdraft credit. The discussion then considers how other potential responses by very large financial institutions could impact the proposal's direct benefits to consumers. Next, the discussion considers how the proposal might impact consumer behavior, including demand for both covered and non-covered overdraft credit, demand for alternative credit products, and deposit behavior. Finally, the discussion briefly considers how institutions not covered by the proposal may respond to the proposal.

i. Estimated Savings to Consumers if Very Large Financial Institutions All Use the CFPB's Proposed Benchmark Fee or Breakeven Standard

Under the proposal, overdraft credit offered by very large financial institutions that currently is non-covered overdraft credit could remain non-covered overdraft credit if the per-transaction price for such credit were less than or equal to the benchmark fee established by the CFPB. Consequently, if all very large financial institutions were to use the benchmark fee to comply with the rule, the proposal's direct benefits to consumers, assuming no change in overdraft frequency, could be as high as the difference between the total fees currently paid by consumers for non-covered overdraft credit and the total fees they would pay if non-covered overdraft credit were priced at the benchmark fee.

Today, fees for non-covered overdraft credit are generally greater than $30 per transaction.[231] Under the proposal, fees for any non-covered overdraft product provided by a very large financial institution would be substantially lower. From Call Report data, the CFPB estimates that consumers paid $5.98 billion in overdraft fees to very large banks and thrifts in 2022. For this estimate, the CFPB started with CFPB-supervised banks' total reported consumer overdraft-related service charges levied on those transaction account and non-transaction savings account deposit products intended primarily for individuals for personal, household, or family use.[232] This amount was $6.42 billion in 2022, including fee revenue from both overdraft and NSF transactions. In prior work, the CFPB has estimated that, between January 2011 through June 2012, 18.9 percent of such revenue at several very large financial institutions was NSF fee revenue.[233] However, most of the largest banks eliminated NSF fees during 2022; the CFPB estimates that nearly two-thirds of supervised banks had eliminated NSF fees by mid-2023, representing an estimated 97 percent of annual NSF fee revenue earned by those institutions.[234] For purposes of this analysis, the CFPB estimates that the NSF fee share in 2022 was half as large as the earlier 18.9 percent share, so supervised banks' overdraft fees would be 90.55 percent of the 2022 fee total, or $5.81 billion. This total does not include fee revenue from credit unions that are very large financial institutions, since credit union call reports do not include data on overdraft fee

[231] In narrative responses to supervisory information requests, financial institutions generally stated that discretionary overdraft fees are set using factors such as: (1) the direct and indirect cost of offering OD services, (2) deterrence effects, (3) positioning with respect to other competitors, (4) customer feedback, experiences, and utility, (5) regulatory requirements and (6) safety and soundness concerns. CFPB 2024 Overdraft NSF Report at 11.

[232] This information is reported in Schedule RI, Memorandum item 15.a on the FFIEC 031 and 041 forms, as of September 2023. For most institutions, this definition also includes fees associated with sustained negative balances. Few charges related to overdraft transactions are reported as net interest revenue, if any.

[233] CFPB 2014 Data Point at 10 tbl.2.

[234] CFPB October 2023 Data Spotlight.

revenue.[235] To estimate overdraft revenue earned by CFPB-supervised (very large) credit unions, the CFPB estimates the overdraft revenue earned by all credit unions and distributes that estimated revenue to credit unions above and below $10 billion in assets based on those groups' relative share of member shares and deposits. The CFPB has estimated that overdraft revenue reported by banks with over $1 billion in assets comprises approximately 77 percent of the total overdraft/NSF revenue earned by banks and credit unions combined, while credit union overdraft/NSF revenue comprises approximately 15 percent of such revenue (overdraft/NSF revenue of banks under $1 billion in assets comprises approximately 7 percent of such revenue).[236] Banks with more than $1 billion in assets reported $7.72 billion in overdraft/NSF revenue in 2022, 90.55 percent or $7.00 billion of which the CFPB estimates is overdraft revenue for reasons explained above. Assuming this $7.00 billion represents 77 percent of the market total overdraft revenue, the CFPB estimates that credit unions earned 15 percent of the total, or $1.43 billion in overdraft revenue in 2022. At the end of 2022, very large credit unions held 24.1 percent of all member shares and deposits held by federally insured credit unions. Applying this 24.1 percent to $1.43 billion, the CFPB estimates that very large credit unions earned $0.34 billion in overdraft fees in 2022, and that very large financial institutions collectively earned $6.16 billion.

From information requests by the CFPB, it estimates the average overdraft fee amount to be $32.50.[237] The CFPB initially assumes that a reduction in the fee for non-covered overdraft credit would affect neither the quantity of credit demanded nor the quantity supplied, meaning that the application of the benchmark fee across the entire market would imply mechanical savings for consumers, unaffected by behavioral responses.[238] As discussed in part V(D)(2)(v), the CFPB has proposed four alternative values for the benchmark fee—$3, $6, $7, and $14. Assuming each proposed value would effectively be the new average fee across the market, the decline of the market total revenue would be proportional to the decline in the average fee amount. Thus, using a 2022 baseline, a $3 fee would have saved consumers $5.6 billion (90.8 percent of the 2022 total) annually, a $6 fee $5.0 billion (81.5 percent of the total), a $7 fee $4.8 billion (78.5 percent of the total), and a $14 fee $3.5 billion (56.9 percent of the total) in a calendar year.

Savings from lower fees would be particularly valuable in cases when they protect liquidity at times when the consumer needs it most. Consumers with low balances may deplete their asset account less frequently if they have paid less in overdraft fees in the past, and thus their asset account recovered to a higher balance after a sufficiently large deposit. Moreover, if fees, in particular multiple or cascading fees, deplete less of the buffer the depository institution is willing to lend to the consumer (*i.e.,* the shadow line of their non-covered overdraft credit), the consumer might be able to cover more or larger transactions with it when they have depleted their asset account. The same shadow line would permit more consumption. Current users of non-covered overdraft credit would enjoy similar benefits even if they end up with substitute products like covered overdraft credit, or linked asset or credit accounts, as long as the new source of liquidity is cheaper than non-covered overdraft is currently.

A large reduction in fees for non-covered overdraft could reduce some operating costs associated with complaints, collections, and account closures. Such benefits to covered persons do not need to reflect an equal but opposite pecuniary cost to consumers. Fewer complaints, collections, or account closures can save money for both the accountholder and the depository institution, who somehow split the value that would have been spent otherwise. These gains would mitigate some losses covered persons suffer from lower fee revenue, so they lose less on net, in total. The CFPB understands from its general monitoring activities that complaints fell by 70 percent or more at depository institutions that radically decreased overdraft fees recently. With lower fees and charges, the CFPB expects more non-covered or covered overdraft credit accounts to recover from negative balance episodes.

Very large financial institutions with per-incident costs and losses traceable to overdrawing transactions above the benchmark fee would have an incentive to set fees for non-covered overdraft using the breakeven standard described at proposed § 1026.62(d)(1)(i). Consumer gains when very large financial institutions with per-incident costs and losses above the benchmark fee use the breakeven standard would be less as their fee would not drop all the way to the benchmark fee. The gains for consumers would be even smaller if the application of the breakeven standard imposes additional administrative costs on the institutions who use it, and, in turn, those institutions shift some of these costs to their customers. However, the CFPB expects these administrative costs to be small compared to revenue.

[235] Some state-charted credit unions reported substantial overdraft revenue under California's Financial Code Section 521. *See* Dep't of Fin. Prot. & Innovation, *Annual Report of Income from Fees on Nonsufficient Funds and Overdraft Charges* (Mar. 2023), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/04/Annual-Report-of-Income-from-Fees-on-Nonsufficient-Funds-and-Overdraft-Charges_2023.pdf* (DFPI 2023 Report).

[236] *See* CFPB 2021 Data Point at 7 (estimating combined overdraft/NSF revenue for credit unions and for banks with less than $1 billion in assets using 2014 data collected from core processors for the number of accounts by asset size and the overdraft/NSF revenue per account, and from 2014 call report data for distribution of institutions by asset size, and then assuming that overdraft/NSF revenue at small institutions saw the same growth from 2014 to 2019 as at large banks to arrive at the 2019 estimates). For purposes of this analysis, we assume that banks with assets over $1 billion, banks with assets below $1 billion, and all credit unions represent the same relative portions of total marketwide overdraft/NSF revenue in 2022 as they did in 2019.

[237] The CFPB requested information about some very large financial institutions' 2022 overdraft practices. For those institutions with available data on the number of instances of non-covered overdraft when the institution charged a fee, the reported weighted average fee amount was $32.50. CFPB 2024 Overdraft NSF Report. Based on the CFPB's review of publicly available information between December 2022 and July 2023, the unweighted median non-covered overdraft fee amount across all very large financial institutions was $35. Past CFPB research publications have reported the median non-covered overdraft fee as $35; this median was also based on data from very large financial institutions. A $35 fee is higher than the $25.77 fee recently reported by the New York State Department of Financial Services for 2022 based on a surveyed entities, most of which would not be subject to this proposal. *See* N.Y. State Dep't of Fin. Servs., *Consumer Fee Practices in New York* (July 14, 2023), *https://www.dfs.ny.gov/system/files/documents/2023/07/rpt_20230714_consumer_fee_practices_nys.pdf.* The Department of Financial Protection and Innovation of the State of California annually tabulates State-chartered banks' and credit unions' revenue from overdraft charges but not the fee amounts. *See* DFPI 2023 Report Note that to the extent market revenue or fees for very large financial institutions were lower by the effective date of the proposed rule, the proportional drop from a smaller market total would amount to less than these extrapolations from 2022 market revenue totals and fees. Bankrate's 2023 checking account and ATM fee survey reports that the average overdraft fee was 11 percent lower than a year before, *https://www.bankrate.com/banking/checking/checking-account-survey/* (last visited Jan. 7, 2024).

[238] This assumption approximates the situation where overdraft transactions are inadvertent (a fixed quantity demanded) and always met at the prevailing price, even after the supply curve shifts downward with the benchmark fee. As discussed elsewhere, this outcome is unlikely to hold exactly. Consumers might be less attentive to avoid overdraft when it is cheaper, though many might have larger buffers if earlier fees have depleted their account balances less than they would under the baseline. Financial institutions might also meet demand only at higher prices, applying the breakeven standard approach or offering covered overdraft credit instead.

Data produced in response to the CFPB's supervisory information requests on 2022 overdraft practices suggest that, for benchmark fee levels less than $14, at least some very large financial institutions would have traceable costs and losses per overdraft fee charged greater than the benchmark fee level, such that they could find it more advantageous to use the breakeven standard. The CFPB has less data on the costs and losses of other very large financial institutions, whose costs and losses (mostly their charge-off losses) may be higher than for some institutions in its supervisory information request collection. However, because the costs and losses of providing non-covered overdraft are driven largely by credit losses, and because these losses depend on underwriting policies, which, as discussed below, very large financial institutions likely would change in response to the proposed rule, current cost and loss levels may not be a reliable indicator of future cost and loss levels assuming the proposed rule were finalized.

Overdraft fees are incurred by consumers in an estimated 17 percent of households annually.[239] Among these, the consumers who would benefit most from the proposal are those that incur the largest number of overdraft fees. Thus, a change in fee amounts would have an outsized impact on specific groups of consumers. The CFPB collected 2022 calendar year information from entities it supervises (the group that would be affected by the proposed rule), which reinforced patterns of disparity that prior research of the CFPB and others established: [240] Overdraft and NSF fees comprised 53 percent of all fees that the institutions charged to consumer checking accounts, nearly three quarters of all fees charged to accounts with an average balance below $500 (lower balance accounts), and nearly three quarters of all fees charged to accounts where accountholders opted to authorize overdraft fees on debit card and ATM overdraft transactions (opted-in accounts). While overdraft-related fees averaged approximately $65 per year over all accounts, accountholders of opted-in accounts and accountholders of lower-balance accounts paid over $165 and $220, respectively, in total of overdraft fees per year on average. Therefore, the benefits of any fee changes driven by the proposal would be predominantly experienced by the small fraction of accountholders who had either opted-in accounts or lower-balance accounts because those accountholders paid the majority of overdraft fees. Indeed, in aggregate, across all institutions represented in the CFPB's Supervisory Information collection, one-fifth of accounts were lower-balance accounts, but these accounts paid 68 percent of per-item overdraft fees assessed. In fact, at least one institution charged over half of per-item overdraft fees to accounts that were both lower-balance accounts and opted-in accounts, even though only five percent of accounts fell into this category. Furthermore, accounts that paid for overdraft most often (twelve or more overdraft fees per year) were nearly five times as prevalent among opted-in accounts than not-opted-in accounts.

Overdraft use, and therefore the potential benefit from reduced fees, is also correlated with other consumer characteristics. As lower-income accountholders pay more fees, and minorities pay more fees even after controlling for income, these groups are more likely to benefit from the proposed changes.[241]

ii. Responses by the Depository Institutions Covered by the Proposal

Consumer gains would likely differ from the mechanical effect of lower fees on non-covered overdraft as described in the section above if some depository institutions would tailor their offering to the new environment as the proposed rule allows. The discussion in this subsection starts with the possibility that institutions might adjust underwriting standards or overdraft coverage limits for non-covered overdraft credit when the marginal profit on each non-covered overdraft transaction falls. Then the text turns to the decision of whether to waive the fees on some overdraft transactions. Next is the analysis of decisions about whether to instead extend products that substitute for non-covered overdraft, primarily covered overdraft credit but also transfers from linked asset accounts. Finally, the subsection discusses repricing of financial products, like maintenance fees on the underlying checking account.

The Availability of Non-Covered Overdraft Credit

Assuming that very large financial institutions comply with the proposal by lowering their fees for non-covered overdraft credit, these lower fees may change very large financial institutions' decisions about whether to extend non-covered overdraft credit for a given transaction on a given account. Financial institutions generally have discretion in setting overdraft policies.[242] When a financial institution decides whether to cover an overdraft transaction, it generally trades off the revenue from charging a fee against expected marginal costs and charge-off losses, although decisions about extending credit and charging or waiving a fee may also take into account their impact on the lifetime value of the customer as well as its reputation.[243] Lower potential fee revenue could impact the decision to extend non-covered overdraft credit. In addition, very large financial institutions often offer services that are substitutes for non-covered overdraft credit, including covered overdraft credit and the option of linking other asset accounts to a checking account such that those other accounts can, sometimes for a fee, be accessed in the event of a shortfall. If fees for non-covered overdraft credit were limited for very large financial institutions, they could have incentives to limit access to non-covered overdraft credit but encourage consumers to take advantage of these substitute services. Having said that, firms that use the breakeven standard and not the benchmark fee could be disincentivized from reducing overdraft transactions because to do so would necessarily reduce the firms' cost and loss basis for the next year's fee calculation for remaining overdraft customers but not yield profits over the long run.

In principle, very large financial institutions could respond to the

[239] FinHealth Spend Research Reports from 2021, 2022 and 2023 have estimated that 17 percent of responding households have paid an overdraft fee in the prior twelve months between November 2021 and January 2023. *See generally,* FHN, *Market Analysis: FinHealth Spend Research—Latest Research, https://finhealthnetwork.org/finhealth-spend-research/* (last visited Jan. 7, 2024).

[240] *See* CFPB Fall 2023 Highlight; *see also* CFPB 2014 Data; CFPB 2017 Data Point.

[241] Oz Shy & Joanna Stavins, *Who Is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees* (Fed. Rsrv. Bank of Bos., Working Paper No. 22–18, 2022), *https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/2022/wp2218.pdf.*

[242] Institutions authorize and pay transactions that they are contractually obligated to, such as ''authorize positive, settle negative'' (APSN) transactions, since under applicable payment system rules, once a transaction is authorized, the financial institution must pay the transaction. Pursuant to the CFPA, charging an overdraft fee on such transactions can be unfair.

[243] In response to supervisory information requests, financial institutions said that when setting limits for discretionary overdraft they consider factors that could be relevant both to the risk of charge off and to the lifetime value of the customer, including (1) age of the account, (2) available balance, (3) account transaction activity and history, (4) standing of the account, and (5) existence of direct deposits. CFPB 2024 Overdraft NSF Report at 8.

proposed rule's changes by underwriting non-covered overdraft credit more conservatively, by reducing credit limits (whether or not disclosed to the accountholder) for accountholders with higher expected credit losses, or even by eliminating access to non-covered overdraft credit for some consumers who currently qualify for such credit, though as discussed later, the firms may offer other products instead. Limited access to non-covered overdraft could be beneficial to consumers with access to cheaper credit options they mistakenly forgo or to consumers who would have preferred that a transaction was declined rather than incurring an overdraft fee. Consumers often overdraw their account when they have liquid funds or available cheaper credit. In these cases, consumers might benefit from using those options instead of overdraft credit. However, there are scenarios, even when there are other credit options available and overdraft is more expensive, that the prompt completion of the transaction would be more valuable to consumers than the fee charged.

The CFPB is aware of an empirical study finding that relaxing restrictions to overdraft fees may result in increased access to deposit accounts with overdraft coverage.[244] The work, not yet peer-reviewed, analyzed an episode in 2001 in which national banks' sudden exemption from State fee caps permitted some banks to increase their fees for non-covered overdraft. The study attempts to identify the effect of the regulatory change by comparing national banks (which became exempt from State fee restrictions) to State banks (which did not), and also comparing banks in States that had such restrictions to States that did not.

The authors find that the analyzed change to fee caps seems to have led to higher overdraft fees at national banks in these States, expanded overdraft coverage at these banks, and more low-income households opening deposit accounts. In the setting studied, about 56 percent of consumers in the lowest income quartile did not have checking accounts before the regulatory change, and the authors estimate that this share fell by about five percentage points after the change. The findings are consistent with the regulatory change making it more profitable, in those States affected, for national banks to provide accounts to consumers who maintain low balances. The authors do not find evidence that the newly banked consumers regretted (or at least reverted) their choice or that they suffered worse financial health.

As with most modern empirical research in economics, the study focuses attention on the internal validity of the findings, *i.e.,* the measurement of the causal effect of the policy change at the time and place that it took effect. The study design relies on relatively strong assumptions to establish causation. The study's methodology requires establishing that differential trends at national and State institutions in affected States would have continued to diverge (or converge) at the same linear rate in the absence of the rule, and establishing this is made more difficult by the relatively short five-year window that the study uses from its data source.

Even assuming the internal validity of the findings, several differences in both the economic context and the nature of the regulatory change make it unlikely that the study's findings would apply directly if the proposed rule were finalized. The authors report that for the households in their data from 2001, 34 percent of households did not have a checking account,[245] whereas the FDIC reports that the share of households without a checking or savings account has fallen steadily over the last decade and that in 2021 only 4.5 percent of households are unbanked.[246] Even if new opportunities to earn overdraft revenue gave banks meaningful incentives to expand the types of checking accounts they offered in 2001, that does not necessarily mean that reductions in overdraft revenue in the current market would lead to similar reductions in overall bank account access. The study authors concluded that while their research suggested relaxing caps was beneficial to consumers without bank accounts in 2001, they did not reach the conclusion that relaxing the caps was beneficial to consumers who already had bank accounts, which, as noted above, since the time studied, has since become an even greater proportion of the population. Moreover, the proposal would not impose limits on all overdraft fees but rather would require very large financial institutions to comply with Regulation Z when offering covered overdraft credit.

A prominent precedent for a U.S. policy change affecting overdraft fee revenue was the implementation of the opt-in rule of Regulation E in August 2010. The CFPB is not aware of a careful empirical study that isolates the effect of this change in the market. That said, there was a substantial decrease in marketwide overdraft revenue following the introduction of the opt-in rule and a smaller decrease in total service charges, which suggests less than fully offsetting price responses.[247] However, isolating the effect of the opt-in rule is made more difficult by the fact that the implementation of the cap on very large financial institutions' interchange fees on debit cards came a mere three months later, and the Great Recession might also confound the effects of the opt-in rule alone. The CFPB's market monitoring activities also indicate that some institutions ceased to offer ''free checking'' after the 2010 changes.[248] The downward trend in the share of American adults without a bank account does not seem to have broken around the time of these changes in the long-running series of the Survey of Consumer Finances, and the FDIC's Survey of Household Use of Banking and Financial Services, which started in 2009, shows a small increase in the unbanked share in 2011 before steady declines thereafter.[249]

According to the CFPB's market monitoring, recent voluntary decreases in overdraft revenue at many large American depository institutions have not coincided with conspicuous restrictions of checking offerings or increases in other fees, though this period corresponded to increases in net interest revenue on deposits resulting from a changing interest rate environment.[250]

In some cases, in response to the proposed rule, the above referenced more conservative underwriting may lead lenders to reject transactions they

[244] Jennifer L. Dlugosz et al.,*Who Pays the Price? Overdraft Fee Ceilings and the Unbanked* (Fed. Rsrv. Bank of N.Y., Staff Rep. No. 9073, June 2021), *https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr973.pdf* (revised July 2023).

[245] *Id.* at 40 tbl.7.

[246] FDIC Tables at 3 tbl.A.2.

[247] As discussed in part II above, marketwide overdraft revenue (for both banks and credit unions) is estimated at approximately $25 billion in 2009, and fell to an estimated $12 billion in 2011. According to bank call report data, total bank deposit service charges fell from $41.7 billion in 2009 to $33.1 billion in 2011 and remained at a similar level in following years. While other factors may explain part of the reduction in deposit service charges, the large and persistent decrease suggests that banks did not make up all of the lost overdraft revenue from the 2009 opt-in rule by increasing other prices.

[248] *See, e.g.,* E. Scott Reckord, *At many big banks, no more free checking,* L.A. Times (Feb. 4, 2011), *https://www.latimes.com/archives/la-xpm-2011-feb-04-la-fi-free-checking-20110204-story.html.*

[249] Paola Boel & and Peter Zimmerman. *Unbanked in America: A Review of the Literature.* Econ. Comment. 2022–07 (Fed. Rsrv. Bank of Clev.), May 26, 2002, *https://www.clevelandfed.org/publications/economic-commentary/2022/ec-202207-unbanked-in-america-a-review-of-the-literature.* Note that the increase in the FDIC measure may have been impacted by the Financial Crisis.

[250] *See* CFPB May 2023 Data Spotlight.

would not have rejected under the baseline where consumers do not have other viable options. In such cases, some consumers would no longer have the option to use non-covered overdraft as credit, which means transactions would be declined, but also, the consumers would not incur its high cost and potential risks of account closure.

Overdraft use can also decrease due to financial institution responses that cause no consumer harm. With smaller profits on each transaction, very large financial institutions could have more of an incentive to educate their depositors and help them avoid negative balance episodes.[251] Financial institutions would also have less of an incentive to inflate the number of overdraft transactions with transaction posting orders designed to increase the number of overdraft fees.

Waiver Policies

Currently, a substantial fraction of overdraft fees is waived by financial institutions, either because regulation does not allow fees on transactions that are payed per contractual obligations (such as debit APSN transactions without opt-in), pursuant to an automatic policy like a daily maximum, or at the discretion of a customer service representative or manager, often called a discretionary waiver or a reversal after the fact. Lower fee amounts would change institutions' incentives related to whether to waive the fee by policy or discretion, which is a subset of overall waivers. For this decision, the depository institution trades off the net revenue from charging the fee against the expected value of a marginally better relationship with the customer. Lower fee amounts would affect both parts of this tradeoff. Lower potential fee revenue would mean that depository institutions would have less to lose by waiving a fee, while they also imply that there is less at stake for the consumer, likely making fee waivers less important to maintaining good customer relationships.

As discussed in part V(D)(2)(v), the $3 benchmark fee, in particular, would not have covered charge-off losses for the institution with the lowest credit losses in the CFPB's data for 2022 had they applied their current waiver policy so that they charged $3 only in instances where they actually charged their current higher fee in 2022. This suggests that institutions that currently waive or reverse fees might reconsider their policies if a benchmark fee did not allow them to recoup their costs and losses on their non-covered overdraft credit product, if product-specific profit targets were more important in practice than the marginal incentives for individual waivers. Were an institution to adopt the breakeven standard, it would charge higher fees but could waive the fee on fewer or more instances than in the baseline without any impact on its profit. Institutions adopting the breakeven standard would have an incentive to tailor their waiver policies to foster customer goodwill and retention according to the accountholder's lifetime value to the institution.

A decrease in the chance of a waiver would shift the consumer experience from higher overdraft fees (as much as $35) that might be waived discretionarily, to lower overdraft fees (as low as $3) that are more predictable. On net, the CFPB expects that shift to lower costs and create more predictability for consumers. In addition, the discretionary nature of some fee waivers can lead to the potential for disparate treatment of customers, as some customers may be more likely to get an overdraft fee waived than others. This disparate treatment would amount to what has been called ''contractual inequality.''[252] A substantial decrease in discretionary waivers is likely to move towards more equality of waiver rates across underprivileged and more privileged groups.

Expanding Covered Overdraft Credit or Other Substitutes for Non-Covered Overdraft

Financial institutions may choose to offer covered overdraft credit in addition to or instead of non-covered overdraft credit. Whether consumers would choose to apply for and use covered overdraft products, and whether very large financial institutions would find it profitable to offer them, depends on a number of factors, and available evidence does not permit the CFPB to confidently predict whether or how such products would develop. In particular, it would depend on the price that the market will bear for these products in new segments, as well as the cost and time required to develop reliable underwriting and consumer acquisition systems to support such products.

Lines of credit on any such new covered overdraft product might be smaller than on existing covered overdraft lines of credit, which generally focus on premium market segments.

If underwriting these covered overdraft credit lines on the new accounts would require extensions of existing systems or new installations at many institutions, transitioning a new customer base to covered overdraft credit would take time and experimentation, even at institutions with experience underwriting credit cards or extant overdraft lines of credit. The frequent overdrafter population might be profitable to underwrite with small lines, but few financial institutions would have experience underwriting such small lines of credit for this population (either for a credit card or extant overdraft lines of credit). The effective date proposed would leave time for very large financial institutions to experiment before implementation, which could facilitate development of new covered overdraft credit offerings.

If frictions slowed the transition of consumers from non-covered to covered overdraft credit, fewer consumers would receive the new coverage at institutions that try to move some of their overdraft customers into a covered product.

Past experience offers little guidance on the extent to which very large

[251] Various pieces of evidence have bolstered the view that overdraft is a mistake for many. Stango and Zinman document that surveying consumers about overdraft makes them use it less, strongly suggesting that they overuse the service when they are paying less attention. *See* Victor Stango & Jonathan Zinman, *Limited and Varying Consumer Attention: Evidence from Shocks to the Salience of Bank Overdraft Fees,* 27 Rev. Fin. Stud. 990–1030 (2014), *https://academic.oup.com/rfs/article/27/4/990/1603971*). Alan et al. ran an experiment in Turkey, where overdraft fee discounts lowered use while messages about availability raised it, suggesting that consumers are overdrawing their account without regard to the actual fees and even a discounted price is too high for them when it draws their attention. Sule Alan et al., *Unshrouding: Evidence from Bank Overdrafts in Turkey,* 73 J. Fin. 481–522 (2018), *https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12593*). Grubb modeled the direct and indirect consequences of just-in time ''bill-shock alerts'' (*e.g.,* for debit card transactions) on consumers and finds that the overdraft market is ripe for such reminders, as people differ in how much attention they pay to their available balance. Michael D. Grubb, *Consumer Inattention and Bill-Shock Regulation,* 82 Rev. Econ. Stud. 219–57 (2015), *https://academic.oup.com/restud/article/82/1/219/1543467*). Grubb et al. indeed report on field experiments in the UK where timely text message alerts saved consumers 11 to 27 percent of overdraft fees, which also shows that many had available funds elsewhere. Michael D. Grubb et al., *Sending Out an SOS: Automatic Enrollment Experiments for Overdraft Alerts* (forthcoming in the Journal of Finance), *https://sites.google.com/bc.edu/michael-grubb/research.* Heidhues and Koszegi use overdraft as their prime example of markets where providers exploit the mistakes of some consumers. Paul Heidhues & Botond Koszegi, *Naïveté-Based Discrimination,* 132 The Q. J. of Econ. 1019, 1019–1054 (May 2017), *https://academic.oup.com/qje/article/132/2/1019/2724551?searchresult=1.* Gathergood and Olafsson find in granular administrative data some overdraft behaviors impossible to rationalize. John Gathergood & Arna Olafsson, *The Co-holding Puzzle: New Evidence from Transaction-Level Data* (Oct 10, 2023), *https://ssrn.com/abstract=3607560.*

[252] Manisha Padi, *Contractual Inequality,* 120 Mich. L. Rev. 825, at 834–40 (2021).

financial institutions would attempt to transition current non-covered overdraft transactions into a covered product. As depository institutions generally target existing covered overdraft credit as a premium product at customers with low charge-off risks and high expected lifetime value to the institution, inertia might imply that customers who are more likely to struggle to recover from a negative balance episode continue to access a non-covered overdraft product subject to the new breakeven or benchmark limits, keeping non-covered overdraft fees higher under the breakeven standard than otherwise.[253] When overdraft credit is covered overdraft credit, institutions may find it harder to quickly adjust credit limits, an advantage to institutions of non-covered overdraft credit that is more important for institutions when extending overdraft credit that is less likely to be repaid.

The disclosure provisions of Regulation Z might result in more competitive pressure on the pricing of covered overdraft credit products than currently exists for non-covered overdraft credit. An increase in competitive pressure could mean that new covered overdraft products would be less expensive than existing non-covered overdraft products for the same consumers and coverage.[254]

Consumers would also stand to gain from the availability of covered overdraft credit because meeting periodic minimum payments, which are generally lower than the full balance, would allow them to revolve their overdraft debt and cover more extended needs for liquidity. They could also pay less in per-transaction fees if their asset account, not depleted by full repayment of prior overdrafts, would cover more transactions while the credit account carries a balance. Periodic repayment saves consumers some per-transaction finance charges at the cost of somewhat higher periodic charges resulting from a credit balance remaining outstanding for longer. Furthermore, consumers who cannot repay the overdrawn amount within 60 days, when non-covered overdraft credit balances are typically charged off, might benefit from revolving their covered overdraft credit balance for a longer period of time.

Consumers who go delinquent on new covered overdraft credit accounts would have their credit negatively impacted if the delinquency is reported to consumer reporting agencies, though not necessarily with more dire consequences than with a negative report to checking account reporting companies after involuntary account closure due to a negative balance on the original asset account that would have resulted from similar behavior with non-covered overdraft credit in the absence of the proposed rule.

When consumers at very large financial institutions are offered covered overdraft credit, that covered overdraft credit would not be subject to the Regulation E opt-in requirement for non-covered debit card overdraft. However, it would be subject to Regulation Z's application and solicitation requirements and limitations on the issuance of credit cards if it can be accessed by a hybrid debit-credit card. Consumers would not separately consent, the same way as Regulation E currently requires, to overdraft charges on one-time debit card and ATM transactions. A very large financial institution would be permitted, instead, to simply give the consumer the choice to apply for covered overdraft credit that would be extended to cover any overdrawing transaction (whether it be check, ACH, debit card, ATM, or any other form). Once the account is established, the CFPB expects those covered overdraft accounts to be presented to consumers as a credit account on phone applications, accounts on websites, and periodic statements, which would call attention to the fact that covered overdraft credit is a credit product.

Consumers who choose to have covered overdraft credit that is accessible by a hybrid debit-credit card might be better off than those who are opted into non-covered overdraft credit on one-time debit card and ATM transactions today if the same amount of credit for the same transactions costs less, as discussed above, or because of the other protections included in this proposed rule. Where a financial institution only offers covered overdraft credit bundled for all transaction types, consumers who are not opted in today would gain the right to, effectively, refrain from opting into overdraft on transactions other than one-time debit and ATMs. They would lose, however, the ability to refrain from opting into overdraft for one-time debit and ATMs while intentionally keeping overdraft for other transactions. It is unclear how many consumers would prefer the default of Regulation E, particularly given evidence that consumer understanding of the Reg E opt-in right is low.[255] Loss of this choice would be an issue where the financial institution is offering covered overdraft credit and does not give consumers a choice on which transactions can access the covered overdraft.

If very large financial institutions chose to offer closed-end covered overdraft credit, such closed-end covered overdraft credit would not be subject to the substantive protections discussed above. Instead, it would be subject to the disclosure requirements that apply to closed-end credit. The CFPB believes it is unlikely that this product would be provided.

With non-covered overdraft credit less profitable for financial institutions and available to fewer consumers, both institutions and consumers would have greater incentive to take advantage of linked accounts. Institutions might offer and promote more of these opportunities. Transfer fees on linked asset accounts to cover overdrawing checking account debits can result in costs for consumers but protect them from unnecessary borrowing if they indeed have liquid assets elsewhere. Links to existing credit lines like credit cards would not have this benefit but give more control to consumers to shop for rates and decide on repayment, with potentially still lower transfer fees than fees on non-covered overdraft credit under the proposal. Transfer fees for transfers from both savings accounts and credit accounts have been less common among the largest banks in recent years than they were prior.[256]

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[253] Interest rates are similar on arranged and unarranged overdrafts in the United Kingdom, following recent regulation setting a comparable pricing structure on both. *See* Danail Vasilev et al., Fin. Conduct Auth., *Evaluation Paper 23/1: An evaluation of our 2019 overdrafts intervention* (Apr. 2023), *https://www.fca.org.uk/publications/corporate-documents/evaluation-paper-23-1-evaluation-our-2019-overdrafts-intervention* (FCA 2023)). This could suggest similar pricing for covered overdraft credit as for current non-covered overdraft credit, even if it becomes better disclosed and the credit limits are clearer than current shadow lines. However, the same British reform also resulted in expanding arranged overdraft lines and smaller unarranged lines in addition, which suggests that covered overdraft credit could also become competitive or even prevalent in the United States.

[254] Regulatory constraints may also affect the fees charged for covered overdraft credit. For example, for open-end covered overdraft credit accounts accessible with a hybrid debit credit card, the fee-harvesting provisions in § 1026.52(a) would limit some fees that very large financial institutions can charge in the first year of a new account to 25 percent of the approved credit line. Section 1026.52(a) does not, however, limit charges that are assessed as periodic rates.

[255] Pew Charitable Tr., *Overdraft Does Not Meet the Needs of Most Consumers* (Dec. 2017), *https://www.pewtrusts.org/-/media/assets/2017/12/cb_overdraft_does_not_meet_the_needs_of_most_consumers.pdf* (3 of 4 consumers do not understand they have a right to not opt in to overdraft on debit card transactions).

[256] Based on the CFPB's review of publicly available information in June 2023, of the 20 banks reporting the most in overdraft/NSF revenue in 2021, 18 were not charging a transfer fee to transfer funds from a savings account to cover an overdraft,

Offsetting Changes to Other Deposit Account Prices

As discussed above, the proposed rule would lead to reductions in non-covered overdraft revenue at many financial institutions, and it is uncertain whether that revenue would be replaced, potentially by revenue from covered overdraft or other substitute products. Overdraft provider responses to this lost revenue would affect both the sum of consumer gains and their distribution across market segments and populations. Total consumer gains will be lower if very large financial institutions make up for lost overdraft fee revenue and any potential increase in costs by raising revenue by increasing other checking account prices or decreasing rates paid on deposit accounts. Whether financial institutions would offset lost overdraft fee revenue in this way for some or all deposit accounts would depend on a number of factors, including overall profitability of deposit accounts and the nature of competition among financial institutions.

To give an upper bound on how much lost revenue might be offset on a per-account basis, the CFPB estimates the mechanically lost revenue per account from non-covered overdraft fees without any behavioral responses. While full offset of the revenue loss is not a likely scenario, calculating this upper bound provides some quantitative context for understanding the limits of potential lost revenue and corresponding changes that might result. The CFPB does not have current information on the number of active checking accounts at all very large financial institutions but requested such information for 2022 from eight very large financial institutions in a supervisory capacity. For these institutions, the overall average overdraft fee revenue from any active account-month was $3.77. Of course, the proposed rule would not eliminate all overdraft fee revenue. Were the CFPB to finalize with a $3 benchmark (and again, assuming for analytical purposes full adoption of the benchmark), financial institutions would lose approximately 90.8 percent in weighted average fee revenue (from $32.50 average fees to the $3 benchmark proposal), totalling a revenue loss of $3.42 per account per month. An 81.5 percent drop in average fee revenue (assuming a $6 benchmark) would be result in $3 of lost revenue per account per month. For a $7 benchmark, that figure is $2.96. For the $14 benchmark, that figure is $2.15.

The magnitude of these extreme upper bounds on lost revenue per account reassures the CFPB that any potential losses to banking access can remain limited. In fact, there are large financial institutions for which this proposed rule is unlikely to result in substantial reductions in revenue.[257] Furthermore, this decrease in overdraft revenue is likely to be on-par with, if not lower than, the voluntary decrease in revenue many large financial institutions already absorbed between 2019 and 2022, without apparent disruptions to checking and overdraft access.[258] The proposed fee reductions are in some ways similar to new regulations of the overdraft market in the United Kingdom in 2019, whose impacts the Financial Conduct Authority evaluated ex-post with a careful causal analysis. Their findings are generally consistent with the CFPB's expectations about limited disruption to checking and credit access and no complete offset of lost overdraft revenue.[259]

Offsetting changes in prices, if any, would limit the benefits consumers gain from the proposal (as well as the corresponding costs to covered persons), but also redistribute the burden of paying for consumer checking services in the United States. Those consumers who are currently frequent users of high-cost non-covered overdraft credit would benefit substantially from lower fees even if checking account APY or maintenance fees adjust, as those adjustments are unlikely to be similarly concentrated. Consumers who currently receive cross-subsidies from frequent (or just occasional) overdrafters, but might now receive lower net interest or pay higher maintenance fees to their checking provider, would incur only modest losses under the proposal relative to the baseline.

Under the baseline scenario for this analysis, very large financial institutions generally do not charge nonsufficient fund fees for transactions that consumers attempt to authorize in close to real time, which could include non-recurring debit card transactions or certain person-to-person transactions. Consumers with less access to overdraft credit due to this proposal would not pay fees on these types of transactions that they attempted but that were not authorized. However, the CFPB recognizes that financial institutions under the baseline could start to charge such fees in the future if they are not subject to the penalty fees limitation in § 1026.52(b). Other types of transactions can and might continue to trigger NSF fees when declined, although, as noted earlier, the significant majority of supervised entities subject to the proposal eliminated such fees during 2022 and early 2023.

iii. Responses by Consumers

A lower price for non-covered overdraft credit would lead some consumers to use the product more on the margin, assuming it remains available to them. For those who are attentive to the price of the product, who are also likely to use the product deliberately and experience liquidity and convenience benefits outweighing the cost, any additional utilization would likely provide net benefits. Inattentive consumers, for whom overdraft has already often been a mistake, would continue to be unlikely to pay attention to and rationally consider the lower cost of overdrawing their balance, and would thus be unlikely to use overdraft more even at a lower price.

Some consumers might keep a lower deposit balance as long as their overdraft protection seems sufficient but is now cheaper. As consumers with checking account balances forgo a net interest margin of 250 basis points[260] relative to short-term Treasury bill yields, on average, every $500 in deposits shifted from a checking account to an account with short-term Treasury bill yields would earn each consumer an additional average $12.50 over a year. Others might keep higher balances in their checking accounts if the proposed rule were to reduce their access to overdraft credit or if more salient use of overdraft credit made them try harder to avoid it. The cost-of-credit disclosures required for covered overdraft credit make its use more salient for the switchers than non-covered overdraft used to be. Consumers

and 16 were not charging a fee to transfer funds from a credit account.

[257] *See* CFPB, Chart of *Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported* (Feb. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-chart_2022-02.pdf.* At least one of these banks charges overdraft fees that are already less than fee benchmarks under consideration in this proposed rule.

[258] CFPB May 2023 Data Spotlight.

[259] *See* FCA 2023.

[260] The FDIC has been reporting national average interest rates on checking accounts since 2009, separately for non-jumbo and jumbo accounts until 2021. For much of this history, nominal interest rates hit the zero lower bound. For months with four-week Treasury yields below one hundred basis points, the national average (non-jumbo) checking account paid 8.3 basis points less. In other times, partly because checking account APYs have not risen as fast as short-term nominal interest rates, checking accounts paid 251.7 basis points below the four-week Treasury bill yield, on average.

who keep more in their checking account may forgo more interest on their savings if they would have otherwise kept it in higher-yielding accounts.

Some consumers may also choose different depository institutions, as account terms change as a result of the proposed rule. The ability to do so will generally increase consumer benefits and reduce consumer costs. For example, consumers who frequently overdraft at banks that are not very large financial institutions could switch to an account at a very large financial institution if non-covered overdraft credit is available there at lower cost. Conversely, a consumer at a very large financial institution that loses access to non-covered overdraft credit as a result of the rule could switch their account to another institution that is not covered by the proposed rule.

To the extent that marginal consumers could expect to pay a predictable and lower amount for checking overall, the proposal would encourage unbanked or underbanked customers to return to the banking system and gain access to FDIC insurance and the low cost payments system banks provide.

Overdraft use might also change because very large financial institutions would need to better disclose newly covered overdraft credit to consumers, which can only help them. For consumers who would use overdraft more because of this, their increased use may suggest that they would be deliberately taking advantage of a product worth its price for them. For consumers who would use overdraft less after these changes, better information might correct prior misunderstandings and prevent further mistakes.

Better disclosure would also help consumers compare the costs of different forms of credit (or other options to delay or forgo transactions), which provides direct benefits to those who are able to make more informed choices, and also provides indirect benefits to other potential users as more intensive comparison shopping would bring down prices among competitors.

Consumers currently not opting into one-time debit card transaction coverage by their non-covered overdraft service under Regulation E may be more likely to opt into such coverage under lower prices. To the extent these consumers pay particular attention to the fee and how it might affect them, they are less likely to regret when they use non-covered overdraft credit than others and are thus more likely to benefit from the proposed rule.

iv. Responses by Financial Institutions Not Covered by the Proposal

The proposal would only apply to very large financial institutions, and if finalized, would not lead to any new compliance costs for financial institutions not covered by the proposal.

The CFPB recognizes that a bank or credit union's demand for deposits (including demand and time deposits) derives from a multitude of factors, including, but not limited to, meeting expected loan demand and liquidity needs. In addition, when consumers select a deposit product, they rely on many factors unrelated to the overdraft pricing, including ATM and branch availability, interest rate, and expected customer service.

As the proposal outlines, many large financial institutions have already substantially reduced overdraft fees. During this time, there was no major shift in the total share of deposits from small financial institutions to very large financial institutions.

The CFPB acknowledges that is difficult to predict with certainty as to how very large financial institutions would evolve their business models over time. Of course, as with any change in business strategies by market participants with substantial market shares, this may ultimately lead to evolving industry dynamics with uncertain benefits and costs.

2. Potential Benefits and Costs to Covered Persons

This proposed rulemaking would affect the consumer business of certain depository institutions with more than $10 billion in assets. At the end of calendar year 2022, used for some tabulations here, this list included 176 depository institutions.

For covered persons, costs and benefits mostly mirror the existence and extent of each respective pecuniary benefit or cost to their customers, as detailed above, net of offsetting changes. By the very nature of this relationship, the CFPB has considered the various causes, mediating channels and modulating responses affecting costs and benefits to covered persons as carefully as for consumers, and much of the discussion of the factors and mechanisms affecting potential consumer pecuniary benefits and costs in the previous section also applies to the potential costs and benefits, respectively, of the proposed rule for covered persons.

In particular, the proposed rule would reduce the revenue of very large financial institutions from non-covered overdraft credit, and these institutions may be able to offset this lost revenue in various ways, including expanding their offerings of covered overdraft or other services that substitute for non-covered overdraft credit. The extent to which depository institutions will be able to pass the price changes of checking accounts under the proposed rule onto input prices depends on the pricing pressures on capital, labor, and intermediary goods, and services that very large financial institutions pay for. Due to their complexity, the CFPB has not modeled them in detail.

The operating cost of offering covered overdraft may be higher than the cost of providing similar non-covered overdraft credit. This arises from the costs of complying with Regulations Z and E, and potentially other laws. The covered persons might bear these costs if market forces do not let them pass some of them on to the consumer.

Very large financial institutions already have to provide disclosures per Regulations DD and E for non-covered overdraft credit. If they chose to continue offering non-covered overdraft credit, they would need to update these systems to make sure they accurately disclose and charge the new lower fees. If they decided to offer covered overdraft credit instead to any customer, then the disclosures would follow Regulation Z. The one-time cost of setting up a new covered overdraft program or transitioning consumers to existing covered overdraft programs could be substantial. The compulsory use prohibition would impose an administrative burden on the institution to offer another form of payment to the covered overdraft credit customer, as well as the operating cost of collecting the payment.

As discussed in the previous section, mechanical application of the benchmark fee amount to existing non-covered overdraft could reduce revenue of very large financial institutions by $3.5 billion to $5.6 billion, depending on the benchmark fee amount. This revenue impact on covered persons is limited by the proposal's design, which allows depository institutions to collect their costs and losses in overdraft fees. Part V.C.3.ii details why the CFPB believes that the benchmark fee number would allow some very large financial institutions to cover their costs and losses. Where the benchmark fee number would not allow this, fees set based on the breakeven standard would allow institutions to recover their costs and losses over time. This mechanism ensures that even entities that would see less revenue due to this proposal need not take losses on overdraft credit, unless they charge lower fees than the proposal would allow. And financial institutions whose per-transaction traceable costs and losses are lower than the benchmark fee could charge that fee and thereby make a profit on overdraft.

The CFPB finds it plausible that a different revenue model for checking in the U.S. that may result from the proposed rule will have broader implications on counterparties, competitors, or new entrants, or elsewhere in the economy. Such considerations would be too speculative for this impact analysis.

E. Potential Benefits and Costs to Consumers and Covered Persons of Further Provisions of the Proposed Rule

The CFPB is also proposing to apply the Regulation E compulsory-use prohibition to covered overdraft credit provided by a very large financial institution. The CFPB is not proposing to amend the Regulation Z prohibition against offset, nor is the CFPB proposing to amend the Regulation Z provision permitting periodic deductions. The proposal's approach to these provisions would affect the costs and benefits for consumers and covered persons of consumers potentially switching from non-covered overdraft to covered overdraft. Consumers who have access to covered overdraft credit but consciously avoid pre-authorized EFTs to repay covered overdraft credit are likely to benefit from the compulsory use prohibition, which would give them additional control over their finances, though they might be overoptimistic about their future repayment discipline, and mistakenly turn down automatic payments, to their detriment. Consumers who forget to repay can incur additional costs, including late fees, default interest rates or negative credit reporting after a period of delinquency. Some consumers might not be able to switch to covered overdraft credit if their depository institution was on the margin of offering it and they deem the consumer too prone to delinquency without a pre-authorized EFT for repayment. It is less likely that existing users of covered overdraft credit would be impacted for the same reason, as they are typically premium customers not on the margin of profitability.

Covered persons should not incur substantial cost from establishing repayment options in addition to a preauthorized EFTs. They can feasibly establish processes for consumers to have the repayment option of authorizing individual EFTs. Covered overdraft credit accounts that are not accessible via a hybrid debit-credit card would not be subject to the no-offset provision of Regulation Z.

Consumers with covered overdraft who do not repay their balance with frequent preauthorized EFTs pay either more interest from debt held longer or the hassle cost of making unscheduled repayments more often.

On covered overdraft credit accounts accessible via a debit card (a hybrid debit-credit card), financial institutions cannot automatically offset the credit balance against a positive balance on the associated asset account after a deposit. Therefore, consumers would be able to pay new debit transactions from the asset account before they repay the credit account. As discussed above, this flexibility in when to repay debt will generally give consumers better opportunities to manage their finances, although in practice the extent of any benefit to consumers from being able to delay repayment depends on finance charges for the credit and whether delaying repayment out of the asset account allows them to avoid higher additional credit charges for new transactions.

Consumers making purchases by using hybrid debit-credit cards that access covered overdraft credit would also benefit from the proposed rule's effect on dispute resolution for such purchases. The CFPB expects the burden on covered persons from this occasional service to be minimal.

The CFPB is also proposing to require very large financial institutions that provide covered overdraft credit to do so through a credit account that is separate from the associated asset account. These provisions would clarify that a very large financial institution must treat existing deposit accounts with overdraft credit that is currently non-covered overdraft credit, but that the institution chooses to provide as above breakeven covered overdraft credit subsequent to the rule, as a new credit account for purposes of Regulation Z. Consumers with hybrid debit-credit cards able to access a covered overdraft credit account, and the very large financial institutions that provide these accounts, would then be subject to the CARD Act protections in subpart G of Regulation Z.

Section 1026.51 would require card issuers to consider consumers' ability to make the required minimum periodic payments under the terms of the account. This could generally reduce the amount of credit available to some consumers, and some consumers may benefit from this requirement if it makes it less likely that they are burdened with covered overdraft debt for which they are unlikely to be able to make required minimum periodic payments. Because the safe harbor requires lenders to estimate whether consumers can repay the minimum payment and all fees assuming full use of the credit line, this could result in firms setting more concrete and less fluid credit limits, could result in lower credit limits, and firms might institute minimum payment formulas that do not require full payment of overdrafted amounts every month.

Section 1026.52(a) would limit fees charged in the first year a covered overdraft credit account is open to 25 percent of the account's credit limit. (Section 1026.52(a) does not restrict charges attributable to periodic interest rates; see comment 1026.52(a)(2)–1.) This could benefit consumers with hybrid debit-credit cards able to access a covered overdraft credit account in the first year the account is open. Any reduction in fees paid by consumers as a result of 1026.52(a) would result in a corresponding cost to covered persons from decreased fee revenue. Developing and implementing pricing strategies for covered overdraft products that comply with these requirements could impose costs on the covered persons providing these products, though the CFPB does not expect these costs to impose a substantial direct burden.

Penalty fees, like declined transaction fees, for violating the terms of the covered overdraft credit account would be subject to limitations under § 1026.52(b), providing further benefits to consumers who would have paid such fees. For example, § 1026.52(b) would restrict NSF fees from being charged on ACH transactions on accounts that have covered overdraft credit that is accessible by a hybrid debit-credit card. Consumers that would have been charged penalty fees, including NSF fees on debit card or ACH transactions, would benefit by not being charged these fees. Similarly, financial institutions that would have received NSF fee revenue from these transactions would see a decrease in revenue. Yet, the CFPB understands that NSF fees are currently rarely charged on debit card transactions and, as discussed above, most of the largest banks have already eliminated all NSF fees. This suggests that the benefits to consumers and costs to covered persons from this restriction are likely to be limited.

Very large financial institutions would be required to provide credit account opening disclosures and comply with other requirements of credit account opening in connection with tying covered overdraft credit to deposit accounts that already exist.

Applying new credit account opening requirements in connection with deposit accounts of consumers who already have existing non-covered overdraft credit that the institution chooses to replace with covered overdraft credit under the proposal will impose some costs on the depository institution.

Under the proposed rule, above breakeven overdraft credit would no longer qualify as ''incidental credit'' under § 1002.3 and thus would be newly subject to certain requirements under Regulation B, including with respect to providing notice and record-keeping. These obligations would have costs to covered persons.

The proposed changes, including proposed changes to the definition of finance charge, may affect other legal requirements under various Federal and State laws, including the Military Lending Act, usury limits, capital requirements, and interchange fees. The CFPB acknowledges that some or all of these legal requirements might also affect charges for non-covered and covered overdraft credit indirectly. However, the CFPB has not attempted to quantify the effects of such changes because it is not responsible for interpreting those laws and regulations and therefore cannot provide the detailed predictions about their effects that would be required for quantification; moreover, the CFPB does not predict the extent to which very large financial institutions will choose to offer covered overdraft credit that is subject to those rules. The CFPB seeks comment on the extent to which these considerations should affect its analysis.

F. Potential Specific Impacts of the Proposed Rule on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in CFPA Section 1026

As this proposed rule applies only to financial institutions with more than $10 billion in total assets, the CFPB expects no specific impact on small entities directly. Subsection VIII.D.1.iv above discusses how the CFPB understands the proposed rule's indirect impact on these entities.

G. Potential Specific Impacts of the Proposed Rule on Consumer Access to Credit and on Consumers in Rural Areas

As discussed above, the proposed rule would likely lead to an increase in overdraft credit regulated by TILA and Regulation Z, and for remaining non-covered overdraft credit, a decrease in the fee.

To the extent that consumers in rural areas bank with institutions other than very large financial institutions, the impact of the proposed rule on these areas will be limited.

The CFPB has limited insight into overdraft practices in rural areas specifically. It is not aware of reasons to suggest more adverse or particular impacts in rural areas.

The CFPB has tabulated the share of the unbanked in lowest fifth of the income distribution in ZIP codes that the Census classified as urban, rural, or with a fraction rural.[261] With this precise measurement, both fully urban or fully rural areas see 74 percent of those with lowest incomes with a bank account, with slight variations in the ratio for the mixed ZIP codes in between. This makes the CFPB expect that urban and rural areas have similar exposure to overdraft fees, and would likely experience similar impacts from the proposed rule.

The CFPB has also tabulated the average credit score in each ZIP code, in the latest year available in a public dataset released by researchers at the Federal Reserve Board.[262] Fully rural ZIP codes have higher credit scores (719.6 on average) than fully urban ZIP codes (713.7), though with even higher averages scores in mostly urban areas and the lowest averages for fairly rural areas. This again suggests that on average, rural areas would have as much access to newly underwritten covered overdraft credit as the rest of the United States.

IX. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (SISNOSE). The CFPB is also subject to specific additional procedures under the RFA involving convening a panel to consult with small business representatives before proposing a rule for which an IRFA is required. An IRFA is not required for this proposal because the proposal, if adopted, would not have a SISNOSE.

Small institutions, for the purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, are defined by the Small Business Administration. Effective March 17, 2023, financial institutions with less than $850 million in total assets are determined to be small.[263]

As this proposed rule only applies to financial institutions with more than $10 billion in total assets, it affects no small entities.

Accordingly, the Director hereby certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel is required for this proposal. The CFPB requests comment on the analysis above.

X. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are generally required to seek the Office of Management and Budget's (OMB's) approval for information collection requirements prior to implementation.

Under the PRA, the CFPB may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The proposed rule amends 12 CFR 1005 (Regulation E), which implements the Electronic Funds Transfer Act, which is assigned OMB control number 3170–0014, which expires 5/31/2025, as well as 12 CFR 1026 (Regulation Z), which implements the Truth in Lending Act and is assigned OMB Control number 3170–0015, which expires 05/31/2025. However, this proposed rule may, in addition to the information collection requirements of Regulation Z, affect the information collection requirements contained in 12 CFR part 1002 (Regulation B), which implements ECOA, which is assigned OMB Control number 3170–0013 which expires 08/31/2026. A full description of those changes and the estimated burdens thereof can be found in the Supporting Statements for each affected regulation that have been filed with OMB in connection with this proposed rule and are available as part of its public docket.

The CFPB has a continuing interest in the public's opinions regarding this determination. At any time, comments regarding this determination may be

[261] Cox et al. (2022) identified the unbanked in the universe of tax records as those not listing an account for rebates or payment over a ten-year period, focusing on the 50–59 age group in 2019 (Cox et al., *Financial Inclusion Across the United States,* available for download at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934498* (last revised Apr. 24, 2023)). The Census links ZCTAs to an urban area (or none).

[262] *See* Jesse Bricker & Geng Li, FRS, Finance and Economics Discussion Series, 2023–048, *Your Friends Your Credit: Social Capital Measures Derived From Social Media and the Credit Market* (2023), *https://www.federalreserve.gov/econres/feds/files/2023048pap.pdf.*

[263] *See* U.S. Small Bus. Admin., *Table of size standards, https://www.sba.gov/document/support-table-size-standards* (last updated Oct. 25, 2023).

sent to: The Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, or by email to *CFPB_Public_PRA@cfpb.gov.*

List of Subjects

12 CFR Part 1005

Banks, Banking, Consumer protection, Credit unions, Electronic fund transfers, National banks, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 1026

Advertising, Banks, Banking, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth-in-lending.

Authority and Issuance

For the reasons set forth in the preamble, the CFPB proposes to amend Regulation E, 12 CFR part 1005, and Regulation Z, 12 CFR part 1026, as set forth below:

PART 1005—ELECTRONIC FUND TRANSFER ACT (REGULATION E)

■ 1. The authority citation for part 1005 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1693b. Subpart B is also issued under 12 U.S.C. 5601 and 15 U.S.C. 1693o–1.

Subpart A—General

■ 2. Section 1005.10 is amended by revising paragraph (e)(1) to read as follows:

§ 1005.10 Preauthorized transfers.

* * * * *

(e) *Compulsory use*—(1) *Credit.* No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account. This exception does not apply to a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in Regulation Z, 12 CFR 1026.61. This exception also does not apply to covered overdraft credit extended by very large financial institutions as those terms are defined in Regulation Z, 12 CFR 1026.62.

* * * * *

■ 3. In Supplement I to Part 1005—Official Interpretations:

■ a. Under *Section 1005.10—Preauthorized Transfers, 10(e)(1) Credit* is revised.

■ b. Under *Section 1005.17—Requirements for Overdraft Services, 17(a) Definition* is revised.

The revisions read as follows:

Supplement I to Part 1005—Official Interpretations

* * * * *

Section 1005.10—Preauthorized Transfers

* * * * *

10(e) Compulsory Use

10(e)(1) Credit

1. *General rule for loan payments.* Creditors may not require repayment of loans by electronic means on a preauthorized, recurring basis.

2. *Overdraft credit plans not accessible by hybrid prepaid-credit cards and covered overdraft credit extended by very large financial institutions.*

i. Section 1005.10(e)(1) provides an exception from the general rule for an overdraft credit plan other than for a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in Regulation Z, 12 CFR 1026.61 and for covered overdraft credit extended by very large financial institutions as those terms are defined in Regulation Z, 12 CFR 1026.62. A financial institution may therefore require the automatic repayment of an overdraft credit plan, other than a covered separate credit feature accessible by a hybrid prepaid-credit card or covered overdraft credit extended by very large financial institutions, even if the overdraft extension is charged to an open-end account that may be accessed by the consumer in ways other than by overdrafts.

ii. Credit extended through a negative balance on the asset feature of a prepaid account that meets the conditions of Regulation Z, 12 CFR 1026.61(a)(4), is considered credit extended pursuant to an overdraft credit plan for purposes of § 1005.10(e)(1). Thus, the exception for overdraft credit plans in § 1005.10(e)(1) applies to this credit.

3. *Applicability to covered separate credit features accessible by hybrid prepaid-credit cards.*

i. Under § 1005.10(e)(1), creditors may not require by electronic means on a preauthorized, recurring basis repayment of credit extended under a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in Regulation Z, 12 CFR 1026.61. The prohibition in § 1005.10(e)(1) applies to any credit extended under such a credit feature, including preauthorized checks. See Regulation Z, 12 CFR 1026.61, and comment 61(a)(1)–3.

ii. Under Regulation Z, 12 CFR 1026.12(d)(1), a card issuer may not take any action, either before or after termination of credit card privileges, to offset a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer. Under Regulation Z, 12 CFR 1026.12(d)(3), with respect to covered separate credit features accessible by hybrid prepaid-credit cards as defined in 12 CFR 1026.61, a card issuer generally is not prohibited from periodically deducting all or part of the cardholder's credit card debt from a deposit account (such as a prepaid account) held with the card issuer under a plan that is authorized in writing by the cardholder, so long as the card issuer does not make such deductions to the plan more frequently than once per calendar month. A card issuer is prohibited under Regulation Z, 12 CFR 1026.12(d), from automatically deducting all or part of the cardholder's credit card debt under a covered separate credit feature from a deposit account (such as a prepaid account) held with the card issuer on a daily or weekly basis, or whenever deposits are made to the deposit account. Section 1005.10(e)(1) further restricts the card issuer from requiring payment from a deposit account (such as a prepaid account) of credit card balances of a covered separate credit feature accessible by a hybrid prepaid-credit card by electronic means on a preauthorized, recurring basis.

4. *Incentives.* A creditor may offer a program with a reduced annual percentage rate or other cost-related incentive for an automatic repayment feature, provided the program with the automatic payment feature is not the only loan program offered by the creditor for the type of credit involved. Examples include:

i. Mortgages with graduated payments in which a pledged savings account is automatically debited during an initial period to supplement the monthly payments made by the borrower.

ii. Mortgage plans calling for preauthorized biweekly payments that are debited electronically to the consumer's account and produce a lower total finance charge.

* * * * *

Section 1005.17—Requirements for Overdraft Services

17(a) Definition

1. *Exempt securities- and commodities-related lines of credit.* The definition of ''overdraft service'' does not include the payment of transactions in a securities or commodities account pursuant to which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

2. *Covered overdraft credit.* Under § 1005.17(a)(1), a line of credit subject to Regulation Z (12 CFR 1026) is not an overdraft service. Covered overdraft credit as that term is defined in 12 CFR 1026.62, is a line of credit subject to Regulation Z and is therefore not an overdraft service. Covered overdraft credit includes above breakeven overdraft credit extended by a very large financial institution as those terms are defined in 12 CFR 1026.62. Above breakeven overdraft credit extended by a very large financial institution is therefore not an overdraft service under § 1005.17(a).

* * * * *

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 4. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart A—General

■ 5. Section 1026.2 is amended by revising paragraph (a)(15) to read as follows:

§ 1026.2 Definitions and rules of construction.

(a) * * *

(15)(i) *Credit card* means any card, plate, or other single credit device that may be used from time to time to obtain credit. The term *credit card* includes both a hybrid prepaid-credit card as defined in § 1026.61 and a hybrid debit-credit card as defined in § 1026.62.

(ii) *Credit card account under an open-end (not home-secured) consumer credit plan* means any open-end credit account that is accessed by a credit card, except:

(A) A home-equity plan subject to the requirements of § 1026.40 that is accessed by a credit card; or

(B) A covered overdraft credit account as defined in § 1026.62 offered by a creditor other than a very large financial institution as defined in § 1026.62 that is accessed by a debit card or account number.

(iii) *Charge card* means a credit card on an account for which no periodic rate is used to compute a finance charge. The term does not include a hybrid debit-credit card as defined in § 1026.62.

(iv) *Debit card* means any card, plate, or other single device that may be used from time to time to access an asset account other than a prepaid account as defined in § 1026.61. The term *debit card* does not include a prepaid card as defined in § 1026.61.

* * * * *

■ 6. Section 1026.4 is amended by revising paragraph (b)(2), adding paragraph (b)(12), and revising paragraph (c)(3) to read as follows:

§ 1026.4 Finance charge.

* * * * *

(b) * * *

(2) Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account (except a prepaid account as defined in § 1026.61 or a covered asset account as that term is defined in § 1026.62) to the extent that the charge exceeds the charge for a similar account without a credit feature.

* * * * *

(12) With regard to a covered asset account as that term is defined in § 1026.62(b)(2):

(i) Any service, transaction, activity, or carrying charge imposed on the separate credit account required by § 1026.62(c); and

(ii) Any service, transaction, activity, or carrying charge imposed on the covered asset account to the extent that the charge exceeds a comparable charge imposed on a checking or other transaction account that does not have overdraft credit.

(iii) For purposes of paragraph (b)(12)(ii) of this section, the following charges imposed on a checking or other transaction account without covered overdraft credit are not comparable to charges imposed on a covered asset account. Thus, to determine pursuant to paragraph (b)(12)(ii) of this section the amount of a charge on a covered asset account that is a finance charge, the following fees and charges on a checking or other transaction account that does not have covered overdraft credit may not be subtracted from the amount of the charge on the covered asset account.

(A) A charge for authorizing or paying a transaction that overdraws the checking or other transaction account.

(B) A charge for declining to authorize or pay a transaction.

(C) A charge for returning a transaction unpaid.

(D) A charge for transferring funds into the checking or other transaction account from any credit account.

(E) A charge for transferring funds into the checking or other transaction account from any other asset account.

* * * * *

(c) * * *

(3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing. This paragraph (c)(3) does not apply to credit offered in connection with a prepaid account as defined in § 1026.61. This paragraph (c)(3) also does not apply to above breakeven overdraft credit as defined in § 1026.62.

* * * * *

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

* * * * *

■ 7. Section 1026.60 is amended by revising paragraph (a)(5) to read as follows:

§ 1026.60 Credit and charge card applications and solicitations.

(a) * * *

(5) *Exceptions.* This section does not apply to:

(i) Home-equity plans accessible by a credit or charge card that are subject to the requirements of § 1026.40;

(ii) Covered overdraft credit as defined in § 1026.62 tied to asset accounts accessed by check-guarantee cards or by debit cards other than hybrid debit-credit cards as defined in § 1026.62;

(iii) Lines of credit accessed by check-guarantee cards or by debit cards, other than covered overdraft credit accessed by hybrid debit-credit cards, that can be used only at automated teller machines;

(iv) Lines of credit accessed solely by account numbers except for a covered separate credit feature solely accessible by an account number that is a hybrid prepaid-credit card as defined in § 1026.61 or covered overdraft credit accessible by an account number that is a hybrid debit-credit card;

(v) Additions of a credit or charge card to an existing open-end plan;

(vi) General purpose applications unless the application, or material accompanying it, indicates that it can be used to open a credit or charge card account; or

(vii) Consumer-initiated requests for applications.

* * * * *

■ 8. Section 1026.62 is added to read as follows:

§ 1026.62 Overdraft Credit.

(a) *In general*—(1) Overdraft credit is subject to this section and this part as specified below.

(2) *Overdraft credit* is any consumer credit extended by a financial institution to pay a transaction from a checking or other transaction account (other than a prepaid account as defined in § 1026.61) held at the financial institution when the consumer has insufficient or unavailable funds in that account. The term overdraft credit includes, but is not limited to, any such consumer credit extended through a transfer from a credit card account or overdraft line of credit. The term does not include credit exempt from this part pursuant to § 1026.3.

(b) *Definitions.* For purposes of this section and this part, the following definitions apply:

(1) *Above Breakeven Overdraft Credit* means overdraft credit extended by a very large financial institution to pay a transaction on which, as an incident to or a condition of the overdraft credit, the very large financial institution imposes a charge or combination of charges exceeding the average of its costs and charge-off losses for providing non-covered overdraft credit as described in § 1026.62(d).

(2) *Covered Asset Account* means a checking or other transaction account (other than a prepaid account as defined in § 1026.61) provided by a very large financial institution that is tied to overdraft credit provided by the very large financial institution.

(3) *Covered Overdraft Credit* means overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments.

(4) *Covered Overdraft Credit Account* means a credit account through which a financial institution extends or can extend covered overdraft credit. For example, the term includes any line of credit, credit card account, credit feature, credit plan, or credit subaccount through which the financial institution extends or can extend covered overdraft credit.

(5) *Hybrid Debit-Credit Card* means any card, plate, or other single credit device that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution.

(6) *Non-Covered Overdraft Credit* means overdraft credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.

(7) *Overdraft credit* has the meaning set out in § 1026.62(a)(2).

(8) *Very Large Financial Institution* means an insured depository institution or an insured credit union that has total assets of more than $10,000,000,000 and any affiliate thereof, as determined under 12 U.S.C. 5515(a).

(c) *Structure of covered overdraft credit.* A very large financial institution shall not structure covered overdraft credit as a negative balance on a checking or other transaction account. The very large financial institution shall structure covered overdraft credit as a separate credit account. The separate credit account is a covered overdraft credit account. The tied checking or other transaction account is a covered asset account.

(d) *Charges exceeding the average of its costs and charge-off losses for providing non-covered overdraft credit*—(1) *General rule.* For purposes of paragraph 62(b)(1) of this section, any charge or combination of charges to pay a transaction exceeds the average of a very large financial institution's costs and charge-off losses for providing non-covered overdraft credit if the charge or combination of charges exceeds the greater of:

(i) The pro rata share of the very large financial institution's total direct costs and charge-off losses for providing non-covered overdraft credit in the previous year, calculated in accordance with this paragraph; or

(ii) [$3/$6/$7/$14].

(2) *Cost and loss calculation.* When calculating the pro rata share of the very large financial institution's total direct costs and charge-off losses for providing non-covered overdraft credit in the previous year, a very large financial institution may consider only those costs and charge-off losses specifically traceable to its provision of non-covered overdraft credit in the previous year. Such costs and charge-off losses include, but are not limited to, its cost of funds, its net charge-off losses, and operating expenses for its non-covered overdraft credit program. Such costs and charge-off losses do not include general overhead costs or charge-off losses due to unauthorized use, EFT errors, billing errors, returned deposit items, or rescinded provisional credit.

■ 9. In Supplement I to Part 1026—Official Interpretations:

■ a. Under *Section 1026.2—Definitions and Rules of Construction:*

■ i. *2(a)(14) Credit* is revised.

■ ii. *Paragraph 2(a)(15)* is revised.

■ iii. *2(a)(20) Open-End Credit* is revised.

■ b. Under *Section 1026.4—Finance Charge:*

■ i. *Paragraph 4(b)(2)* is revised.

■ ii. *Paragraph 4(b)(12)* is added.

■ iii. *Paragraph 4(c)(3)* is revised.

■ c. Under *Section 1026.12—Special Credit Card Provisions:*

■ i. Introductory paragraph 1 is revised.

■ ii. *12(a)(1)* is revised.

■ iii. *12(a)(2)* is revised.

■ iv. *12(c)* is revised.

■ v. *12(c)(1) General Rule* is revised.

■ d. Under *Section 1026.55—Limitations on increasing annual percentage rates, fees, and charges,* revise *55(a).*

■ e. Under *Section 1026.57—Reporting and Marketing Rules for College Student Open-End Credit,* revise *57(a)(1).*

The revisions and addition read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart A—General

* * * * *

Section 1026.2—Definitions and Rules of Construction

* * * * *

2(a)(14) Credit

1. *Exclusions.* The following situations are not considered credit for purposes of the regulation:

i. Layaway plans, unless the consumer is contractually obligated to continue making payments. Whether the consumer is so obligated is a matter to be determined under applicable law. The fact that the consumer is not entitled to a refund of any amounts paid towards the cash price of the merchandise does not bring layaways within the definition of credit.

ii. Tax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy. However, third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation.

iii. Insurance premium plans that involve payment in installments with each installment representing the payment for insurance coverage for a certain future period of time, unless the consumer is contractually obligated to continue making payments.

iv. Home improvement transactions that involve progress payments, if the consumer pays, as the work progresses, only for work completed and has no contractual obligation to continue making payments.

v. Borrowing against the accrued cash value of an insurance policy or a pension account, if there is no independent obligation to repay.

vi. Letters of credit.

vii. The execution of option contracts. However, there may be an extension of credit when the option is exercised, if there is an agreement at that time to defer payment of a debt.

viii. Investment plans in which the party extending capital to the consumer risks the loss of the capital advanced. This includes, for example, an arrangement with a home purchaser in which the investor pays a portion of the downpayment and of the periodic mortgage payments in return for an ownership interest in the property, and shares in any gain or loss of property value.

ix. Mortgage assistance plans administered by a government agency in which a portion of the consumer's monthly payment amount is paid by the agency. No finance charge is imposed on the subsidy amount, and that amount is due in a lump-sum payment on a set date or upon the occurrence of certain events. (If payment is not made when due, a new note imposing a finance charge may be written, which may then be subject to the regulation.)

2. *Payday loans; deferred presentment.* Credit includes a transaction in which a cash advance is made to a consumer in exchange for the consumer's personal check, or in exchange for the consumer's authorization to debit the consumer's deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer's deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ''payday loan'' or ''payday advance'' or ''deferred-presentment loan.'' A fee charged in connection with such a transaction may be a finance charge for purposes of § 1026.4, regardless of how the fee is characterized under state law. Where the fee charged constitutes a finance charge under § 1026.4 and the person advancing funds regularly extends consumer credit, that person is a creditor and is required to provide disclosures consistent with the requirements of Regulation Z. (*See* § 1026.2(a)(17).)

3. *Transactions on the asset features of prepaid accounts when there are insufficient or unavailable funds.* Credit includes authorization of a transaction on the asset feature of a prepaid account as defined in § 1026.61 where the consumer has insufficient or unavailable funds in the asset feature of the prepaid account at the time the transaction is authorized to cover the amount of the transaction. It also includes settlement of a transaction on the asset feature of a prepaid account where the consumer has insufficient or unavailable funds in the asset feature of the prepaid account at the time the transaction is settled to cover the amount of the transaction. This includes a transaction where the consumer has sufficient or available funds in the asset feature of a prepaid account to cover the amount of the transaction at the time the transaction is authorized but insufficient or unavailable funds in the asset feature of the prepaid account to cover the transaction amount at the time the transaction is settled. See § 1026.61 and related commentary on the applicability of this regulation to credit that is extended in connection with a prepaid account.

4. *Overdraft credit.* Funds extended by a financial institution to a consumer to pay transactions that overdraw a checking or other transaction account held at the financial institution are credit whenever the consumer has a contractual obligation to repay the funds.

Paragraph 2(a)(15)

1. *Usable from time to time.* A credit card must be usable from time to time. Since this involves the possibility of repeated use of a single device, checks and similar instruments that can be used only once to obtain a single credit extension are not credit cards.

2. *Examples.*

i. Examples of credit cards include:

A. A card that guarantees checks or similar instruments, if the asset account is also tied to covered overdraft credit or if the instrument directly accesses a line of credit.

B. A debit card (other than a debit card that is solely an account number) that also accesses a credit account (that is, a debit-credit card or hybrid debit-credit card as defined in § 1026.62). See comment 2(a)(15)–2.ii.C for guidance on whether a debit card that is solely an account number is a credit card.

C. An identification card that permits the consumer to defer payment on a purchase.

D. An identification card indicating loan approval that is presented to a merchant or to a lender, whether or not the consumer signs a separate promissory note for each credit extension.

E. A card or device that can be activated upon receipt to access credit, even if the card has a substantive use other than credit, such as a purchase-price discount card. Such a card or device is a credit card notwithstanding the fact that the recipient must first contact the card issuer to access or activate the credit feature.

F. A prepaid card that is a hybrid prepaid-credit card as defined in § 1026.61.

ii. In contrast, credit card does not include, for example:

A. A check-guarantee or debit card with no credit feature or agreement.

B. Any card, key, plate, or other device that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.

C. An account number that accesses a credit account, unless the account number can access an open-end line of credit to purchase goods or services or as provided in § 1026.61 with respect to a hybrid prepaid-credit card. An account number that can access an open-end line of credit to purchase goods or services includes an account number that can access a covered overdraft credit account offered by a very large financial institution. For example, if a creditor provides a consumer with an open-end line of credit that can be accessed by an account number in order to transfer funds into another account (such as an asset account with the same creditor), the account number is not a credit card for purposes of § 1026.2(a)(15)(i). However, if the account number can also access the line of credit to purchase goods or services (such as an account number that can be used to purchase goods or services on the internet), the account number is a credit card for purposes of § 1026.2(a)(15)(i), regardless of whether the creditor treats such transactions as purchases, cash advances, or some other type of transaction. Furthermore, if the line of credit can also be accessed by a card (such as a debit card), that card is a credit card for purposes of § 1026.2(a)(15)(i).

D. A prepaid card that is not a hybrid prepaid-credit card as defined in § 1026.61.

E. A check-guarantee or debit card that can access non-covered overdraft credit as defined in § 1026.62 and cannot access any other form of credit.

3. *Charge card.*

i. Charge cards are credit cards where no periodic rate is used to compute the finance charge. The term *charge card* does not include a hybrid debit-credit card as defined in § 1026.62. Thus, covered overdraft credit extended by a very large financial institution through a hybrid debit-credit card is not subject to special charge card rules.

A. Under the regulation, a reference to credit cards generally includes charge cards. In particular, references to credit card accounts under an open-end (not home-secured) consumer credit plan in subparts B and G generally include charge cards.

B. The term *charge card* is, however, distinguished from credit card or credit card account under an open-end (not home-secured) consumer credit plan in §§ 1026.6(b)(2)(xiv), 1026.7(b)(11) (except as described in comment 2(a)(15)–3.ii below), 1026.7(b)(12), 1026.9(e), 1026.9(f), 1026.28(d), 1026.52(b)(1)(ii)(C), 1026.60, and appendices G–10 through G–13.

ii. A hybrid prepaid-credit card as defined in § 1026.61 is a charge card with respect to a covered separate credit feature if no periodic rate is used to compute the finance charge in connection with the covered separate credit feature. Unlike other charge card accounts, the requirements in § 1026.7(b)(11) apply to a covered separate credit feature accessible by a hybrid prepaid-credit card that is a charge card when that covered separate credit feature is a credit card account under an open-end (not home-secured) consumer credit plan. Thus, under § 1026.5(b)(2)(ii)(A), with respect to a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer of a hybrid prepaid-credit card that meets the definition of a charge card because no periodic rate is used to compute a finance charge in connection with the covered separate credit feature must adopt reasonable procedures for the covered separate credit feature designed to ensure that

(1) periodic statements are mailed or delivered at least 21 days prior to the payment due date disclosed on the statement pursuant to § 1026.7(b)(11)(i)(A); and

(2) the card issuer does not treat as late for any purposes a required minimum periodic payment received by the card issuer within 21 days after mailing or delivery of the periodic statement disclosing the due date for that payment.

4. *Credit card account under an open-end (not home-secured) consumer credit plan.*

i. An open-end consumer credit account is a credit card account under an open-end (not home-secured) consumer credit plan for purposes of § 1026.2(a)(15)(ii) if:

A. The account is accessed by a credit card, as defined in § 1026.2(a)(15)(i); and

B. The account is not excluded under § 1026.2(a)(15)(ii)(A) or (B).

ii. The exclusion from credit card account under an open-end (not home-secured) consumer credit plan provided by § 1026.2(a)(15)(ii)(B) for covered overdraft credit offered by a creditor that is not a very large financial institution does not apply to a covered separate credit feature accessible by a hybrid prepaid-credit card (including a hybrid prepaid-credit card that is solely an account number) as defined in § 1026.61.

* * * * *

2(a)(20) Open-End Credit

1. *General.* This definition describes the characteristics of open-end credit (for which the applicable disclosure and other rules are contained in Subpart B), as distinct from closed-end credit. Open-end credit is consumer credit that is extended under a plan and meets *all 3* criteria set forth in the definition.

2. *Existence of a plan.*

i. The definition requires that there be a plan, which connotes a contractual arrangement between the creditor and the consumer.

ii. With respect to a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in § 1026.61, a plan means a program where the consumer is obligated contractually to repay any credit extended by the creditor. For example, a plan includes a program under which a creditor routinely extends credit from a covered separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner where the prepaid card can be used from time to time to draw, transfer, or authorize the draw or transfer of credit from the covered separate credit feature in the course of authorizing, settling, or otherwise completing transactions conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers, and the consumer is obligated contractually to repay those credit transactions. Such a program constitutes a plan notwithstanding that, for example, the creditor has not agreed in writing to extend credit for those transactions, the creditor retains discretion not to extend credit for those transactions, or the creditor does not extend credit for those transactions once the consumer has exceeded a certain amount of credit. See § 1026.61(a) and related commentary for guidance on the applicability of this regulation to credit accessible by hybrid prepaid-credit cards.

iii. Some creditors offer programs containing a number of different credit features. The consumer has a single account with the institution that can be accessed repeatedly via a number of sub-accounts established for the different program features and rate structures. Some features of the program might be used repeatedly (for example, an overdraft line) while others might be used infrequently (such as the part of the credit line available for secured credit). If the program as a whole is subject to prescribed terms and otherwise meets the definition of open-end credit, such a program would be considered a single, multifeatured plan.

iv. With respect to covered overdraft credit as defined in § 1026.62, a plan means a program where the consumer is obligated contractually to repay any credit extended by the creditor. Such a program constitutes a plan notwithstanding that, for example, the creditor has not agreed in writing to extend credit for those transactions, the creditor retains discretion not to extend credit for those transactions, or the creditor does not extend credit for those transactions once the consumer has exceeded a certain amount of credit.

3. *Repeated transactions.* Under this criterion, the creditor must reasonably contemplate repeated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with consumers under the credit plan as a whole and need not believe a consumer will reuse a particular feature of the plan. The determination of whether a creditor can reasonably contemplate repeated transactions requires an objective analysis. Information that much of the creditor's customer base with accounts under the plan make repeated transactions over some period of time is relevant to the determination, particularly when the plan is opened primarily for the financing of infrequently purchased products or services. A standard based on reasonable belief by a creditor necessarily includes some margin for judgmental error. The fact that particular consumers do not return for further credit extensions does not prevent a plan from having been properly characterized as open-end. For example, if much of the customer base of a clothing store makes repeat purchases, the fact that some consumers use the plan only once would not affect the characterization of the store's plan as open-end credit. The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with its customers. For example, it would be more reasonable for a bank or depository institution to contemplate repeated transactions with a customer than for a seller of aluminum siding to

make the same assumption about its customers.

4. *Finance charge on an outstanding balance.*

i. The requirement that a finance charge may be computed and imposed from time to time on the outstanding balance means that there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. A plan may meet the definition of open-end credit even though a finance charge is not normally imposed, provided the creditor has the right, under the plan, to impose a finance charge from time to time on the outstanding balance. For example, in some plans, a finance charge is not imposed if the consumer pays all or a specified portion of the outstanding balance within a given time period. Such a plan could meet the finance charge criterion, if the creditor has the right to impose a finance charge, even though the consumer actually pays no finance charges during the existence of the plan because the consumer takes advantage of the option to pay the balance (either in full or in installments) within the time necessary to avoid finance charges.

ii. With regard to a covered separate credit feature and an asset feature on a prepaid account that are both accessible by a hybrid prepaid-credit card as defined in § 1026.61, any service, transaction, activity, or carrying charges imposed on the covered separate credit feature, and any such charges imposed on the asset feature of the prepaid account to the extent that the amount of the charge exceeds comparable charges imposed on prepaid accounts in the same prepaid account program that do not have a covered separate credit feature accessible by a hybrid prepaid-credit card, generally is a finance charge. *See* § 1026.4(a) and (b)(11). Such charges include a periodic fee to participate in the covered separate credit feature, regardless of whether this fee is imposed on the credit feature or on the asset feature of the prepaid account. With respect to credit from a covered separate credit feature accessible by a hybrid prepaid-credit card, any service, transaction, activity, or carrying charges that are finance charges under § 1026.4 constitute finance charges imposed from time to time on an outstanding unpaid balance as described in § 1026.2(a)(20) if there is no specific amount financed for the credit feature for which the finance charge, total of payments, and payment schedule can be calculated.

iii. Regardless of whether the financial institution assesses such charges on the deposit account itself or a separate credit account, any service, transaction, activity, or carrying charges imposed by a financial institution for paying a transaction that overdraws a consumer's deposit account held at the financial institution are finance charges unless they are excluded from the definition of finance charge by § 1026.4(c). *See* § 1026.4(a), (b)(12), and (c). Additionally, such charges would constitute finance charges imposed from time to time on an outstanding unpaid balance, as described in § 1026.2(a)(20), if there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated.

5. *Reusable line.* The total amount of credit that may be extended during the existence of an open-end plan is unlimited because available credit is generally replenished as earlier advances are repaid. A line of credit is self-replenishing even though the plan itself has a fixed expiration date, as long as during the plan's existence the consumer may use the line, repay, and reuse the credit. The creditor may occasionally or routinely verify credit information such as the consumer's continued income and employment status or information for security purposes but, to meet the definition of open-end credit, such verification of credit information may not be done as a condition of granting a consumer's request for a particular advance under the plan. In general, a credit line is self-replenishing if the consumer can take further advances as outstanding balances are repaid without being required to separately apply for those additional advances. A credit card account where the plan as a whole replenishes meets the self-replenishing criterion, notwithstanding the fact that a credit card issuer may verify credit information from time to time in connection with specific transactions. This criterion of unlimited credit distinguishes open-end credit from a series of advances made pursuant to a closed-end credit loan commitment. For example:

i. Under a closed-end commitment, the creditor might agree to lend a total of $10,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full $10,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt. (*See* § 1026.2(a)(17)(iv) for disclosure requirements when a credit card is used to obtain the advances.)

ii. This criterion does not mean that the creditor must establish a specific credit limit for the line of credit or that the line of credit must always be replenished to its original amount. The creditor may reduce a credit limit or refuse to extend new credit in a particular case due to changes in the creditor's financial condition or the consumer's creditworthiness. (The rules in § 1026.40(f), however, limit the ability of a creditor to suspend credit advances for home equity plans.) While consumers should have a reasonable expectation of obtaining credit as long as they remain current and within any preset credit limits, further extensions of credit need not be an absolute right in order for the plan to meet the self-replenishing criterion.

6. *Verifications of collateral value.* Creditors that otherwise meet the requirements of § 1026.2(a)(20) extend open-end credit notwithstanding the fact that the creditor must verify collateral values to comply with Federal, state, or other applicable law or verifies the value of collateral in connection with a particular advance under the plan.

7. *Open-end real estate mortgages.* Some credit plans call for negotiated advances under so-called open-end real estate mortgages. Each such plan must be independently measured against the definition of open-end credit, regardless of the terminology used in the industry to describe the plan. The fact that a particular plan is called an open-end real estate mortgage, for example, does not, by itself, mean that it is open-end credit under the regulation.

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Section 1026.4—Finance Charge

* * * * *

Paragraph 4(b)(2)

1. *Checking or transaction account charges.* A charge imposed in connection with a credit feature on a checking or transaction account (other than a prepaid account as defined in § 1026.61 or a covered asset account as that term is defined in § 1026.62) is a finance charge under § 1026.4(b)(2) to the extent the charge exceeds the charge for a similar account without a credit feature and the charge is not addressed by § 1026.4(b)(12). If a charge for an account with a credit feature does not exceed the charge for an account without a credit feature, the charge is not a finance charge under § 1026.4(b)(2). To illustrate:

i. A $5 service charge is imposed on an account with an overdraft line of credit (where the institution has agreed in writing to pay an overdraft), while a $3 service charge is imposed on an account without a credit feature; the $2 difference is a finance charge. (If the difference is not related to account activity, however, it may be excludable as a participation fee. See the commentary to § 1026.4(c)(4).)

ii. A $5 service charge is imposed for each item that results in an overdraft on an account with an overdraft line of credit, while a $25 service charge is imposed for paying or returning each item on a similar account without a credit feature; the $5 charge is not a finance charge.

2. *Prepaid accounts.* Fees or charges related to credit offered in connection with prepaid accounts as defined in § 1026.61 are discussed in §§ 1026.4(b)(11) and 1026.61 and related commentary.

* * * * *

Paragraph 4(c)(3)

1. *Assessing interest on an overdraft balance.* Except with respect to credit offered in connection with a prepaid account as defined in § 1026.61, a charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items.

2. *Credit accessed in connection with a prepaid account.* See comment 4(b)(11)–1 for guidance on when fees imposed with regard to credit accessed in connection with a prepaid account as defined in § 1026.61 are finance charges.

3. *Credit accessed in connection with a covered asset account.* See 12 CFR 1026.4(b)(12) for guidance on when fees imposed on a covered asset account as defined in § 1026.62 are finance charges.

* * * * *

Section 1026.12—Special Credit Card Provisions

1. *Scope.* Sections 1026.12(a) and (b) deal with the issuance and liability rules for credit cards, whether the card is intended for consumer, business, or any other purposes. Sections 1026.12(a) and (b) are exceptions to the general rule that the regulation applies only to consumer credit. (See §§ 1026.1 and 1026.3.) Notwithstanding paragraph (g) of this section or Regulation E, 12 CFR 1005.12(a), paragraphs (a) through (f) of this section apply to hybrid debit credit cards.

2. *Definition of ''accepted credit card''.* For purposes of this section, ''accepted credit card'' means any credit card that a cardholder has requested or applied for and received, or has signed, used, or authorized another person to use to obtain credit. Any credit card issued as a renewal or substitute in accordance with § 1026.12(a) becomes an accepted credit card when received by the cardholder.

12(a) Issuance of Credit Cards

Paragraph 12(a)(1)

1. *Explicit request.* A request or application for a card must be explicit. For example, a request for an overdraft plan tied to a checking account does not constitute an application for a credit card with overdraft checking features. Therefore, a very large financial institution cannot issue a hybrid debit-credit card to a person without first receiving an oral or written request or application for the hybrid debit-credit card. The term *hybrid debit-credit* card has the same meaning as provided in § 1026.62.

2. *Addition of credit features.* If the consumer has a non-credit card, including a prepaid card, the addition of a credit feature or plan to the card that would make the card into a credit card under § 1026.2(a)(15)(i) constitutes issuance of a credit card. For example, the following constitute issuance of a credit card:

i. Granting overdraft privileges on a checking account when the consumer already has a check guarantee card; or

ii. Allowing a prepaid card to access a covered separate credit feature that would make the card into a hybrid prepaid-credit card as defined in § 1026.61 with respect to the covered separate credit feature.

iii. Extending covered overdraft credit through a hybrid debit-credit card as defined in § 1026.62.

3. *Variance of card from request.* The request or application need not correspond exactly to the card that is issued. For example:

i. The name of the card requested may be different when issued.

ii. The card may have features in addition to those reflected in the request or application.

4. *Permissible form of request.* The request or application may be oral (in response to a telephone solicitation by a card issuer, for example) or written.

5. *Time of issuance.* A credit card may be issued in response to a request made before any cards are ready for issuance (for example, if a new program is established), even if there is some delay in issuance.

6. *Persons to whom cards may be issued.* A card issuer may issue a credit card to the person who requests it, and to anyone else for whom that person requests a card and who will be an authorized user on the requester's account. In other words, cards may be sent to consumer A on A's request, and also (on A's request) to consumers B and C, who will be authorized users on A's account. In these circumstances, the following rules apply:

i. The additional cards may be imprinted in either A's name or in the names of B and C.

ii. No liability for unauthorized use (by persons other than B and C), not even the $50, may be imposed on B or C since they are merely users and not cardholders as that term is defined in § 1026.2 and used in § 1026.12(b); of course, liability of up to $50 for unauthorized use of B's and C's cards may be imposed on A.

iii. Whether B and C may be held liable for their own use, or on the account generally, is a matter of state or other applicable law.

7. *Issuance of non-credit cards.*

i. *Issuance of non-credit cards other than prepaid cards.*

A. Under § 1026.12(a)(1), a credit card cannot be issued except in response to a request or an application. (See comment 2(a)(15)–2 for examples of cards or devices that are and are not credit cards.) A non-credit card other than a prepaid card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan; a credit feature may be added to a previously issued non-credit card other than a prepaid card only upon the consumer's specific request.

B. *Examples.* A purchase-price discount card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan. An issuer demonstrates that it proposes to connect the card to a credit plan by, for example, including promotional materials about credit features or account agreements and disclosures required by § 1026.6. The issuer will violate the rule against unsolicited issuance if, for example, at the time the card is sent a credit plan can be accessed by the card or the recipient of the unsolicited card has been preapproved for credit that the recipient can access by contacting the issuer and activating the card.

ii. *Issuance of a prepaid card.* Section 1026.12(a)(1) does not apply to the issuance of a prepaid card where an issuer does not connect the card to any covered separate credit feature that would make the prepaid card into a hybrid prepaid-credit card as defined in § 1026.61 at the time the card is issued and only opens a covered separate credit feature, or provides an application or solicitation to open a covered separate credit feature, or allows an existing credit feature to become a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in § 1026.61 in compliance with § 1026.61(c). A covered separate credit feature may be added to a previously issued prepaid card only upon the consumer's application or specific request and only in compliance with § 1026.61(c). An issuer does not connect a prepaid card to a covered separate credit feature that would make the card into a credit card simply by providing the disclosures required by Regulation E, 12 CFR 1005.18(b)(2)(x), (b)(4)(iv), and (vii), with the prepaid card. See § 1026.12(a)(2) and related commentary for when a hybrid prepaid-credit card as defined in § 1026.61 may be issued as a replacement or substitution for another hybrid prepaid-credit card. See also Regulation E, 12 CFR 1005.5 and 1005.18(a), and related commentary, governing issuance of access devices under Regulation E.

8. *Unsolicited issuance of PINs.* A card issuer may issue personal identification numbers (PINs) to existing credit cardholders without a specific request from the cardholders, provided the PINs cannot be used alone to obtain credit. For example, the PINs may be necessary if consumers wish to use their existing credit cards at automated teller machines or at merchant locations with point of sale terminals that require PINs.

Paragraph 12(a)(2)

1. *Renewal.* Renewal generally contemplates the regular replacement of existing cards because of, for example, security reasons or new technology or systems. It also includes the re-issuance of cards that have been suspended temporarily, but does not include the opening of a new account after a previous account was closed.

2. *Substitution—examples.* Substitution encompasses the replacement of one card with another because the underlying account relationship has changed in some way—such as when the card issuer has:

i. Changed its name.

ii. Changed the name of the card.

iii. Changed the credit or other features available on the account. For example, the original card could be used to make purchases and obtain cash advances at teller windows. The substitute card might be usable, in addition, for obtaining cash advances through automated teller machines. (If the substitute card constitutes an access device, as defined in Regulation E, then the Regulation E issuance rules would have to be followed.) The substitution of one card with another on an unsolicited basis is not permissible, however, where in conjunction with the substitution an additional credit card account is opened and the consumer is able to make new purchases or advances under both the original and the new account with the new card. For example, if a retail card issuer replaces its credit card with a combined retailer/bank card, each of the creditors maintains a separate account, and both accounts can be accessed for new transactions by use of the new credit card, the card cannot be provided to a consumer without solicitation.

iv. Substituted a card user's name on the substitute card for the cardholder's name appearing on the original card.

v. Changed the merchant base, provided that the new card is honored by at least one of the persons that honored the original card. However, unless the change in the merchant base is the addition of an affiliate of the existing merchant base, the substitution of a new card for another on an unsolicited basis is not permissible where the account is inactive. A credit card cannot be issued in these circumstances without a request or application. For purposes of § 1026.12(a), an account is inactive if no credit has been extended and if the account has no outstanding balance for the prior 24 months. (See § 1026.11(b)(2).)

3. *Substitution—successor card issuer.* Substitution also occurs when a successor card issuer replaces the original card issuer (for example, when a new card issuer purchases the accounts of the original issuer and issues its own card to replace the original one). A permissible substitution exists even if the original issuer retains the existing receivables and the new card issuer acquires the right only to future receivables, provided use of the original card is cut off when use of the new card becomes possible.

4. *Substitution—non-credit-card plan.* A credit card that replaces a retailer's open-end credit plan not involving a credit card is not considered a substitute for the retailer's plan—even if the consumer used the retailer's plan. A credit card cannot be issued in these circumstances without a request or application.

5. *One-for-one rule.* An accepted card may be replaced by no more than one renewal or substitute card. For example, the card issuer may not replace a credit card permitting purchases and cash advances with two cards, one for the purchases and another for the cash advances.

6. *One-for-one rule—exceptions.* The regulation does not prohibit the card issuer from:

i. Replacing a single card that is both a debit card and a credit card, such as a hybrid debit-credit card as defined in § 1026.62, with a credit card and a separate debit card with only debit functions (or debit functions plus an associated capability to extend overdraft credit that is not covered overdraft credit as defined in § 1026.62), since the latter card could be issued on an unsolicited basis under Regulation E.

ii. Replacing a single card that is both a prepaid card and a credit card with a credit card and a separate prepaid card where the latter card is not a hybrid prepaid-credit card as defined in § 1026.61.

iii. Replacing an accepted card with more than one renewal or substitute card, provided that:

A. No replacement card accesses any account not accessed by the accepted card;

B. For terms and conditions required to be disclosed under § 1026.6, all replacement cards are issued subject to the same terms and conditions, except that a creditor may vary terms for which no change in terms notice is required under § 1026.9(c); and

C. Under the account's terms the consumer's total liability for unauthorized use with respect to the account does not increase.

7. *Methods of terminating replaced card.* The card issuer need not physically retrieve the original card, provided the old card is voided in some way, for example:

i. The issuer includes with the new card a notification that the existing card is no longer valid and should be destroyed immediately.

ii. The original card contained an expiration date.

iii. The card issuer, in order to preclude use of the card, reprograms computers or issues instructions to authorization centers.

8. *Incomplete replacement.* If a consumer has duplicate credit cards on the same account (Card A—one type of bank credit card, for example), the card issuer may not replace the duplicate cards with one Card A and one Card B (Card B—another type of bank credit card) unless the consumer requests Card B.

9. *Multiple entities.* Where multiple entities share responsibilities with respect to a credit card issued by one of them, the entity that issued the card may replace it on an unsolicited basis, if that entity terminates the original card by voiding it in some way, as described in comment 12(a)(2)–7. The other entity or entities may not issue a card on an unsolicited basis in these circumstances.

* * * * *

12(c) Right of Cardholder To Assert Claims or Defenses Against Card Issuer

1. *Relationship to § 1026.13.* The § 1026.12(c) credit card ''holder in due course'' provision deals with the consumer's right to assert against the card issuer a claim or defense concerning property or services purchased with a credit card, if the merchant has been unwilling to resolve the dispute. Even though certain merchandise disputes, such as non-delivery of goods, may also constitute ''billing errors'' under § 1026.13, that section operates independently of § 1026.12(c). The cardholder whose asserted billing error involves undelivered goods may institute the error resolution procedures of § 1026.13; but whether or not the cardholder has done so, the cardholder may assert claims or defenses under § 1026.12(c). Conversely, the consumer may pay a disputed balance and thus have no further right to assert claims and defenses, but still may assert a billing error if notice of that billing error is given in the proper time and manner. An assertion that a particular transaction resulted from unauthorized use of the card could also be both a ''defense'' and a billing error.

2. *Claims and defenses assertible.* Section 1026.12(c) merely preserves the consumer's right to assert against the card issuer any claims or defenses that can be asserted against the merchant. It does not determine what claims or defenses are valid as to the merchant; this determination must be made under state or other applicable law.

3. *Transactions excluded.* Section 1026.12(c) does not apply to the use of a check guarantee card or a debit card (other than a hybrid debit-credit card) in connection with an overdraft credit plan, or to a check guarantee card used in connection with cash-advance checks.

4. *Method of calculating the amount of credit outstanding.* The amount of the claim or defense that the cardholder may assert shall not exceed the amount of credit outstanding for the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the existence of the claim or defense. However, when a consumer has asserted a claim or defense against a creditor pursuant to § 1026.12(c), the creditor must apply any payment or other credit in a manner that avoids or minimizes any reduction in the amount subject to that claim or defense. Accordingly, to determine the amount of credit outstanding for purposes of this section, payments and other credits must be applied first to amounts other than the disputed transaction.

i. For examples of how to comply with §§ 1026.12 and 1026.53 for credit card accounts under an open-end (not home-secured) consumer credit plan, see comment 53–3.

ii. For other types of credit card accounts, creditors may, at their option, apply payments consistent with § 1026.53 and comment 53–3. In the alternative, payments and other credits may be applied to: Late charges in the order of entry to the account; then to finance charges in the order of entry to the account; and then to any debits other than the transaction subject to the claim or defense in the order of entry to the account. In these circumstances, if more than one item is included in a single extension of credit, credits are to be distributed pro rata according to prices and applicable taxes.

5. *Prepaid cards.*

i. Section 1026.12(c) applies to property or services purchased with the hybrid prepaid-credit card that accesses a covered separate credit feature as defined in § 1026.61. The following examples illustrate when a hybrid prepaid-credit card is used to purchase property or services:

A. A consumer uses a hybrid prepaid-credit card as defined in § 1026.61 to make a purchase to obtain goods or services from a merchant and credit is drawn directly from a covered separate credit feature accessed by the hybrid prepaid-credit card without transferring funds into the asset feature of the prepaid account to cover the amount of the purchase. For example, assume that the consumer has $10 of funds in the asset feature of the prepaid account and initiates a transaction with a merchant to obtain goods or services with the hybrid prepaid-credit card for $25. In this case, $10 is debited from the asset feature and $15 of credit is drawn directly from the covered separate credit feature accessed by the hybrid prepaid-credit card without any transfer of funds into the asset feature of the prepaid account to cover the amount of the purchase. In this case, the consumer is using credit accessed by the hybrid prepaid-credit card to purchase property or services where credit is drawn directly from the covered separate credit feature accessed by the hybrid prepaid-credit card to cover the amount of the purchase.

B. A consumer uses a hybrid prepaid-credit card as defined in § 1026.61 to make a purchase to obtain goods or services from a merchant and credit is transferred from a covered separate credit feature accessed by the hybrid prepaid-credit card into the asset feature of the prepaid account to cover the amount of the purchase. For example, assume the same facts as above, except that the $15 will be transferred from a covered separate credit feature to the asset feature, and a transaction of $25 is debited from the asset feature of the prepaid account. In this case, the consumer is using credit accessed by the hybrid prepaid-credit card to purchase property or services because credit is transferred to the asset feature of the prepaid account to cover the amount of a purchase made with the card. This is true even though the $15 credit transaction is treated as ''nonsale credit'' under § 1026.8(b). *See* comments 8(a)–9.ii and 8(b)–1.vi.

ii. For a transaction at point of sale where a hybrid prepaid-credit card is used to obtain goods or services from a merchant and the transaction is partially paid with funds from the asset feature of the prepaid account, and partially paid with credit from the covered separate credit feature, the amount of the purchase transaction that is funded by credit generally would be subject to the requirements of § 1026.12(c). The amount of the transaction funded from the prepaid account would not be subject to the requirements of § 1026.12(c).

12(c)(1) General Rule

1. *Situations excluded and included.* The consumer may assert claims or defenses only when the goods or services are ''purchased with the credit card.'' This would include when the goods or services are purchased by a consumer using a hybrid prepaid-credit card to access a covered separate credit feature as defined in § 1026.61 or using a hybrid debit-credit card to access a covered overdraft credit account as defined in § 1026.62. This could include mail, the internet or telephone orders, if the purchase is charged to the credit card account. But it would exclude:

i. Use of a credit card to obtain a cash advance, even if the consumer then uses the money to purchase goods or services. Such a transaction would not involve ''property or services purchased with the credit card.''

ii. The purchase of goods or services by use of a check accessing an overdraft account and a credit card used solely for identification of the consumer. (On the other hand, if the credit card is used to make partial payment for the purchase and not merely for identification, the right to assert claims or defenses would apply to credit extended via the credit card, although not to credit extended by the overdraft line. If partial payment for the purchase is made with a hybrid prepaid-credit card or a hybrid debit-credit card, the right to assert claims or defenses would apply to credit accessed from a covered separate credit feature or covered overdraft credit account, respectively.)

iii. Purchases made by use of a check guarantee card in conjunction with a cash advance check (or by cash advance checks alone). (*See* comment 12(c)–3.) A cash advance check is a check that, when written, does not draw on an asset account; instead, it is charged entirely to an open-end credit account.

iv. Purchases effected by use of either a check guarantee card or a debit card (other than a hybrid debit-credit card) when used to draw on overdraft credit plans. (*See* comment 12(c)–3.) The debit card exemption applies whether the card accesses an asset account via point of sale terminals, automated teller machines, or in any other way, and whether the card qualifies as an ''access device'' under Regulation E or is only a paper based debit card. If a card serves both as an ordinary credit card and also as a check guarantee or debit card, a transaction will be subject to this rule on asserting claims and defenses when used as an ordinary credit card (including when used as a hybrid debit-credit card to access a covered overdraft credit account), but not when used as a check guarantee or debit card. For purchases effected by use of a hybrid debit-credit card where the transaction is partially paid with funds from the asset account, and partially paid with covered overdraft credit, the provisions of § 1026.12(c) apply only to the credit portion of the purchase transaction.

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Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(a) General Rule

1. *Increase in rate, fee, or charge.* Section 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). Except as specifically provided in § 1026.55(b), this prohibition applies even if the circumstances under which an increase will occur are disclosed in advance. The following examples illustrate the general application of § 1026.55(a) and (b). Additional examples illustrating specific aspects of the exceptions in § 1026.55(b) are provided in the commentary to those exceptions.

i. *Account-opening disclosure of non-variable rate for six months, then variable rate.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The card issuer also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. Furthermore, the card issuer discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. Finally, the card issuer discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment. The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

A. *Change-in-terms rate increase for new transactions after first year.* On January 15 of year one, the consumer uses the account to make a $2,000 purchase and a $500 cash advance. No other transactions are made on the account. At the start of each quarter, the card issuer may adjust the variable rate that applies to the $500 cash advance consistent with changes in the index (pursuant to § 1026.55(b)(2)). All required minimum periodic payments are received on or before the payment due date until May of year one, when the payment due on May 25 is received by the creditor on May 28. At this time, the card issuer is prohibited by § 1026.55 from increasing the rates that apply to the $2,000 purchase, the $500 cash advance, or future purchases and cash advances. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $2,000 purchase at the previously-disclosed variable rate determined using an 8-point margin (pursuant to § 1026.55(b)(1)). Because no other increases in rate were disclosed at account opening, the card issuer may not subsequently increase the variable rate that applies to the $2,000 purchase and the $500 cash advance (except due to increases in the index pursuant to § 1026.55(b)(2)). On November 16, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 12 percentage points). On December 15, the consumer makes a $100 purchase. On January 1 of year two, the card issuer may increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points (pursuant to § 1026.55(b)(3)). However, § 1026.55(b)(3)(ii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to the $2,000 purchase balance. Furthermore, although the $100 purchase occurred more than 14 days after provision of the § 1026.9(c) notice, § 1026.55(b)(3)(iii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to that purchase because it occurred during the first year after account opening. On January 15 of year two, the consumer makes a $300 purchase. The card issuer may apply the variable rate determined using the 12-point margin to the $300 purchase.

B. *Account becomes more than 60 days delinquent during first year.* Same facts as above except that the required minimum periodic payment due on May 25 of year one is not received by the card issuer until July 30 of year one. Because the card issuer received the required minimum periodic payment more than 60 days after the payment due date, § 1026.55(b)(4) permits the card issuer to increase the annual percentage rate applicable to the $2,000 purchase, the $500 cash advance, and future purchases and cash advances. However, § 1026.55(b)(4)(i) requires the card issuer to first comply with the notice requirements in § 1026.9(g). Thus, if the card issuer provided a § 1026.9(g) notice on July 25 stating that all rates on the account would be increased to the 30% penalty rate, the card issuer could apply that rate beginning on September 8 to all balances and to future transactions.

ii. *Account-opening disclosure of non-variable rate for six months, then increased non-variable rate for six months, then variable rate; change-in-terms rate increase for new transactions after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases will increase as follows: A non-variable rate of 5% for six months; a non-variable rate of 10% for an additional six months; and thereafter a variable rate that is currently 15% and will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index not under the card issuer's control. The payment due date for the account is the fifteenth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On January 15 of year one, the consumer uses the account to make a $1,500 purchase. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $1,500 purchase at the previously-disclosed 10% non-variable rate (pursuant to § 1026.55(b)(1)). On September 15, the consumer uses the account for a $700 purchase. On November 16, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 8 percentage points). One year after account opening (January 1 of year two), the card issuer may begin accruing interest on the $2,200 purchase balance at the previously-disclosed variable rate determined using a 5-point margin (pursuant to § 1026.55(b)(1)). Section 1026.55 does not permit the card issuer to apply the variable rate determined using the 8-point margin to the $2,200 purchase balance. Furthermore, § 1026.55 does not permit the card issuer to subsequently increase the variable rate determined using the 5-point margin that applies to the $2,200 purchase balance (except due to increases in the index pursuant to § 1026.55(b)(2)). The card issuer may, however, apply the variable rate determined using the 8-point margin to purchases made on or after January 1 of year two (pursuant to § 1026.55(b)(3)).

iii. *Change-in-terms rate increase for new transactions after first year; penalty rate increase after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the card issuer's control. The card issuer also discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 15 (calculated by using the same index and an increased margin of 8 percentage points). On June 14, the consumer makes a $500 purchase. On June 15, the consumer makes a $200 purchase. On July 1, the card issuer has not received the payment due on June 15 and provides the consumer with a notice pursuant to § 1026.9(g) stating that the 28% penalty rate will apply as of August 15 to all transactions made on or after July 16 and that, if the consumer becomes more than 60 days late, the penalty rate will apply to all balances on the account. On July 17, the consumer makes a $300 purchase.

A. *Account does not become more than 60 days delinquent.* The payment due on June 15 of year two is received on July 2. On July 16, § 1026.55(b)(3)(ii) permits the card issuer to apply the variable rate determined using the 8-point margin disclosed in the § 1026.9(c) notice to the $200 purchase made on June 15 but does not permit the card issuer to apply this rate to the $1,500 purchase balance. On August 15, § 1026.55(b)(3)(ii) permits the card issuer to apply the 28% penalty rate disclosed at account opening and in the § 1026.9(g) notice to the $300 purchase made on July 17 but does not permit the card issuer to apply this rate to the $1,500 purchase balance (which remains at the variable rate determined using the 6-point margin) or the $200 purchase (which remains at the variable rate determined using the 8-point margin).

B. *Account becomes more than 60 days delinquent after provision of § 1026.9(g) notice.* Same facts as above except the payment due on June 15 of year two has not been received by August 15. Section 1026.55(b)(4) permits the card issuer to apply the 28% penalty rate to the $1,500 purchase balance and the $200 purchase because it has not received the June 15 payment within 60 days after the due date. However, in order to do so, § 1026.55(b)(4)(i) requires the card issuer to first provide an additional notice pursuant to § 1026.9(g). This notice must be sent no earlier than August 15, which is the first day the account became more than 60 days' delinquent. If the notice is sent on August 15, the card issuer may begin accruing interest on the $1,500 purchase balance and the $200 purchase at the 28% penalty rate beginning on September 29.

2. *Relationship to grace period.* Nothing in § 1026.55 prohibits a card issuer from assessing interest due to the loss of a grace period to the extent consistent with § 1026.5(b)(2)(ii)(B) and § 1026.54. In addition, a card issuer has not reduced an annual percentage rate on a credit card account for purposes of § 1026.55 if the card issuer does not charge interest on a balance or a portion thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 1026.55.

3. *Fees in connection with covered separate credit features accessible by hybrid prepaid-credit cards.* With regard to a covered separate credit feature and an asset feature on a prepaid account that are both accessible by a hybrid prepaid-credit card as defined in § 1026.61 where the credit feature is a credit card account under an open-end (not home-secured) consumer credit plan, § 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). This is true regardless of whether these fees or annual percentage rates are imposed on the asset feature of the prepaid account or on the credit feature.

4. *Fees imposed on the asset feature of a prepaid account that are not charges imposed as part of the plan.* Section 1026.55(a) does not apply to any fee or charge imposed on the asset feature of the prepaid account that is not a charge imposed as part of the plan under § 1026.6(b)(3). See § 1026.6(b)(3)(iii)(D) and (E) and related commentary regarding fees imposed on the asset feature of the prepaid account that are not charges imposed as part of the plan under § 1026.6(b)(3) with respect to covered separate credit features accessible by hybrid prepaid-credit cards and non-covered separate credit features as those terms are defined in § 1026.61.

5. *Fees in connection with covered overdraft credit.* With regard to covered overdraft credit accessible by a hybrid debit-credit card, § 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). This is true regardless of whether these fees or annual percentage rates are imposed on the covered asset account associated with the covered overdraft credit or on the covered overdraft credit account.

* * * * *

Section 1026.57—Reporting and Marketing Rules for College Student Open-End Credit

57(a) Definitions

57(a)(1) College Student Credit Card

1. *Definition.* The definition of college student credit card excludes home-equity lines of credit accessed by credit cards and covered overdraft credit accounts as defined in 1026.62 offered by a creditor other than a very large financial institution as defined in 1026.62 that is accessed by a debit card or account number. A college student credit card includes a college affinity card within the meaning of TILA section 127(r)(1)(A). In addition, a card may fall within the scope of the definition regardless of the fact that it is not intentionally targeted at or marketed to college students. For example, an agreement between a college and a card issuer may provide for marketing of credit cards to alumni, faculty, staff, and other non-student consumers who have a relationship with the college, but also contain provisions that contemplate the issuance of cards to students. A credit card issued to a student at the college in connection with such an agreement qualifies as a college student credit card. The definition of college student credit card includes a hybrid prepaid-credit card as defined by § 1026.61 that is issued to any college student where the card can access a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan. The definition of college student credit card also includes a prepaid account as defined in § 1026.61 that is issued to any college student where a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined by § 1026.61 may be added in the future to the prepaid account.

*   *   *   *   *

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–01095 Filed 2–22–24; 8:45 am]

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FEDERAL REGISTER

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Part IV

Department of Homeland Security

Coast Guard

33 CFR Part 117

Drawbridge Operation Regulation; Long Creek, Nassau County, NY;
Drawbridge Operation Regulation; Sloop Channel, Nassau County, NY;
Temporary Final Rules

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0530]

RIN 1625–AA09

Drawbridge Operation Regulation; Long Creek, Nassau County, NY

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily modifying the operating schedule that governs the Loop Parkway Bridge across Long Creek, mile 0.7, Nassau County, NY. The bridge owner, New York State Department of Transportation (NYSDOT), submitted a request to operate the bridge under single leaf openings to perform bridge deck replacement.

DATES: This temporary final rule is effective March 25, 2024, until May 16, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number (USCG–2023–0530) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 571–608–5676, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
SNPRM Supplemental notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code
NYSDOT New York State Department of Transportation

II. Background Information and Regulatory History

On September 19, 2023, the Coast Guard issued a general deviation to NYSDOT, allowed the bridge owner, NYSDOT, to deviate from the current operating schedule in 33 CFR 117.799(f) for the Loop Parkway Bridge. This deviation allowed the bridge to operate under single leaf operations from September 20, 2023, to March 17, 2024, in order to perform bridge deck replacement.

Since the actual scope of the work would take longer than the allowable time limit of the General Deviation, the Coast Guard published a notice of proposed rulemaking on October 3, 2023, entitled ''Drawbridge Operation Regulation; Long Creek, Nassau County, NY,'' in the **Federal Register** (88 FR 68031). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to the rehabilitation of the Loop Parkway Bridge. During the comment period that ended November 2, 2023, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 499. The Loop Parkway Bridge will continue to operate under its regular operating schedule found in 33 CFR 117.799(f). However, this rule will allow the bridge to operate under single leaf openings from March 25, 2024, until May 16, 2024. For vessels that are too large for single leaf openings NYSDOT has identified an alternate route. Vessels that can pass without requesting a bridge opening may do so. NYSDOT has reached phase 2 of the project which requires replacing the bridge deck. This rule will allow the project to progress while minimizing impact on mariners.

IV. Discussion of Comments, Changes and the Temporary Final Rule

The Coast Guard published an NPRM on October 3, 2023, providing a comment period of 30 days and no comments were received.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the ability that vessels can still transit the bridge through the single leaf openings and vessels that are too large to make passage through single leaf openings have alternate routes which they can make passage.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

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

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

The Coast Guard published an NPRM on October 3, 2023, providing a comment period of 30 days and no comments were received.

E. Unfunded Mandates Reform Act

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

The Coast Guard published an NPRM on October 3, 2023, providing a comment period of 30 days and no comments were received.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. In § 117.799:

■ a. Paragraph (f) is stayed; and

■ b. Paragraph (j) is added.

The addition reads as follows:

§ 117.799 Long Island, New York Inland Waterway from East Rockaway Inlet to Shinnecock Canal.

* * * * *

(j) The draw of the Loop Parkway Bridge across Long Creek, mile 0.7, shall operate on single leaf openings from March 25, 2024, to May 16, 2024. The draw will open for commercial vessels engaged in commerce and shall open Monday thru Friday from 6:20 a.m. to 9:50 a.m. and 3:20 p.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times. For all other vessels, the draw shall open on Monday through Friday from 6:20 a.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and the draw shall open on Saturday, Sunday, and Federal Holidays from 7:20 a.m. to 8:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times.

Dated: February 13, 2024.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2024–03463 Filed 2–22–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0532]

RIN 1625–AA09

Drawbridge Operation Regulation; Sloop Channel, Nassau County, NY

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily modifying the operating schedule that governs the Meadowbrook State Parkway Bridge, mile 12.8, across Sloop Channel, Nassau County, NY. The bridge owner, New York State Department of Transportation (NYSDOT), submitted a request to operate the bridge under single leaf openings to perform bridge deck replacement.

DATES: This temporary final rule is effective March 25, 2024, until May 16, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number (USCG–2023–0532) in the ‘‘SEARCH’’ box and click ‘‘SEARCH’’. In the Document Type column, select ‘‘Supporting & Related Material.’’

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 571–608–5676, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
SNPRM Supplemental notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code
NYSDOT New York State Department of Transportation

II. Background Information and Regulatory History

On September 19, 2023, the Coast Guard issued a general deviation to NYSDOT allowing the bridge owner, NYSDOT, to deviate from the current operating schedule in 33 CFR 117.799(h) for the Meadowbrook State

Parkway Bridge. This deviation allowed the bridge to operate under single leaf operations from September 20, 2023, to March 17, 2024, in order to perform bridge deck replacement.

Since the actual scope of the work would take longer than the allowable time limit of the General Deviation, the Coast Guard published a notice of proposed rulemaking on October 3, 2023, entitled ''Drawbridge Operation Regulation; Sloop Channel, Nassau County, NY,'' in the **Federal Register** (88 FR 68033). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to the rehabilitation of the Meadowbrook State Parkway Bridge. During the comment period that ended November 2, 2023, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 499. The Meadowbrook State Parkway Bridge will continue to operate under its regular operating schedule found in 33 CFR 117.799(h). However, this rule will allow the bridge to operate under single leaf openings from March 25, 2024, until May 16, 2024. For vessels that are too large for single leaf openings NYSDOT has identified an alternate route. Vessels that can pass without requesting a bridge opening may do so. NYSDOT has reached phase 2 of the project which requires replacing the bridge deck. This rule will allow the project to progress while minimizing impact on mariners.

IV. Discussion of Comments, Changes and the Temporary Final Rule

The Coast Guard published an NPRM on October 3, 2023, providing a comment period of 30 days and no comments were received. This temporary rule will allow for completion of the bridge rehabilitation.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the ability that vessels can still transit the bridge through the single leaf openings and vessels that are too large to make passage through single leaf openings have alternate routes which they can make passage.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

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

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

The Coast Guard published an NPRM on October 3, 2023, providing a comment period of 30 days and no comments were received.

E. Unfunded Mandates Reform Act

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

The Coast Guard published an NPRM on October 3, 2023, providing a comment period of 30 days and no comments were received.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. In § 117.799:
■ a. Paragraph (h) is stayed; and
■ b. Paragraph (k) is added.

The addition reads as follows:

§ 117.799 Long Island, New York Inland Waterway from East Rockaway Inlet to Shinnecock Canal.

* * * * *

(k) The draw of the Meadowbrook State Parkway Bridge across Sloop Channel, mile 12.8, shall operate on single leaf openings from March 25, 2024, to May 16, 2024. The draw will open for commercial vessels engaged in commerce and shall open Monday through Friday from 6:20 a.m. to 9:50 a.m. and 3:20 p.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times. For all other vessels, the draw shall open on Monday thru Friday from 6:20 a.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and the draw shall open on Saturday, Sunday, and Federal Holidays from 7:20 a.m. to 8:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times.

Dated: February 13, 2024.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2024–03462 Filed 2–22–24; 8:45 am]

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FEDERAL REGISTER

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Part V

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 433, 447, 455, et al.

Medicaid Program; Disproportionate Share Hospital Third-Party Payer Rule; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 433, 447, 455, and 457

[CMS–2445–F]

RIN 0938–AV00

Medicaid Program; Disproportionate Share Hospital Third-Party Payer Rule

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule primarily addresses recent legislative changes to the Social Security Act as a result of the Consolidated Appropriations Act, 2021 changes to the hospital-specific limit on Medicaid disproportionate share hospital (DSH) payments. This final rule affords States and hospitals more clarity on how the limit, the changes that took effect on October 1, 2021, will be calculated. Additionally, this final rule enhances administrative efficiency by making technical changes and clarifications to the DSH program.

DATES:

Effective date: These regulations are effective on April 23, 2024.

Applicability date: Sections 447.295(b) and (d), 447.299(c)(6), (7), (10), and (16), and 455.304(d)(1), (3), (4), and (6) are applicable as of October 1, 2021 (see section III. of this final rule for additional information).

FOR FURTHER INFORMATION CONTACT: Lia Adams, (410) 786–8258, Charlie Arnold, (404) 562–7425, Richard Cuno, (410) 786–1111, Stuart Goldstein, (410) 786–0694, Charles Hines, (410) 786–0252, and Mark Wong, (415) 744–3561, for Medicaid Disproportionate Share Hospital Payments and Overpayments.

Jennifer Clark, (410) 786–2013, for Children's Health Insurance Program (CHIP).

SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

Title XIX of the Social Security Act (the Act) established the Medicaid program as a Federal-State partnership for the purpose of providing and financing medical assistance to specified groups of eligible individuals. States have considerable flexibility in designing their programs but must abide by requirements specified in the Federal Medicaid statute and regulations. Each State is responsible for administering its Medicaid program in accordance with an approved State plan, which specifies the scope of covered services, groups of eligible individuals, payment methodologies, and all other information necessary to assure the State plan describes a comprehensive and sound structure for operating the Medicaid program, and ultimately, provides a clear basis for claiming Federal matching funds.

Section 1902(a)(13)(A)(iv) of the Act requires that States consider the situation of hospitals that serve a disproportionate share of low-income patients with special needs, in a manner consistent with section 1923 of Act, in determining payments. The purpose of the proposed rule [1] and this final rule is to update the regulatory requirements of the disproportionate share hospital (DSH) program in response to the Consolidated Appropriations Act, 2021 (herein, referred to as the CAA 2021) (Pub. L. 116–260, December 27, 2020) and to further improve upon the program. More specifically, the provisions of this final rule seek to implement the DSH-related provisions of the CAA 2021 concerning the treatment of third-party payments for purposes of calculating Medicaid hospital-specific DSH limits. We note that the CAA 2021 also created new supplemental payment reporting requirements through the addition of section 1903(bb) of the Act; however, DSH payments were specifically excluded from these requirements, and we have issued guidance on those requirements.[2]

This final rule also revises regulatory payment and financing definitions and other regulatory language that could be subject to misinterpretation, refines administrative procedures used by States to comply with Federal regulations, and removes regulatory requirements that have been difficult to administer and do not further the program's objectives.

We are finalizing all provisions as proposed, although we note that the regulations have some minor phrasing changes for consistency with current style guidelines. For the CAA 2021-related provisions of this final rule, we are finalizing an applicability date of October 1, 2021, to align with the effective date in the statute. This information is noted in each of the CAA 2021-related provision sections and discussed in section III. of this final rule. The remaining provisions of this final rule are effective 60 days after publication of the final rule.

B. Disproportionate Share Hospital (DSH) Payments

1. Background

States are statutorily required to make DSH payments to qualifying hospitals that serve patients who are uninsured and enrolled in the Medicaid program, as described in section 1923(d) of the Act. States generally have flexibility regarding the specific hospitals to which they make payments and how they determine the amount of those payments, within certain parameters. Section 1902(a)(13)(A)(iv) of the Act requires that States consider the situation of hospitals that serve a disproportionate number of low-income patients with special needs, in a manner consistent with section 1923 of the Act. DSH payments are not considered part of base payments or supplemental payments to providers, as they are made under distinct statutory authority. Section 1923 of the Act contains specific requirements related to DSH payments, including aggregate annual State-specific DSH allotments that limit Federal financial participation (FFP) for Statewide total DSH payments under section 1923(f) of the Act, and hospital-specific limits on DSH payments under section 1923(g) of the Act. Under the statutory hospital-specific limits, a hospital's DSH payments may not exceed the costs incurred by that hospital in furnishing inpatient and outpatient hospital services during the year to certain Medicaid beneficiaries and the uninsured, less payments received under title XIX (other than section 1923 of the Act) and payments by uninsured patients. In addition, section 1923(a)(2)(D) of the Act requires States to provide an annual report to the Secretary describing the DSH payment adjustments made to each DSH.

Section 1001(d) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173, December 8, 2003) added section 1923(j) of the Act to require States to report additional information about their DSH programs. Section 1923(j)(1) of the Act requires States to submit an annual report including an identification of each hospital that received a DSH payment adjustment during the preceding fiscal year (FY) and the amount of such adjustment, and such other information as the Secretary determines necessary to ensure the appropriateness of the DSH payment

[1] 88 FR 11865.

[2] "New Supplemental Payment Reporting and Medicaid Disproportionate Share Hospital Requirements under the Consolidated Appropriations Act, 2021," State Medicaid Director Letter #21–006, December 10, 2021. Available at *https://www.medicaid.gov/federal-policy-guidance/downloads/smd21006.pdf.*

adjustments for such FY. Additionally, section 1923(j)(2) of the Act requires States to submit an independent certified audit of the State's DSH program, including specified content, annually to the Secretary.

2. Consolidated Appropriations Act, 2021 (CAA 2021) DSH Requirements

The CAA 2021 was enacted on December 27, 2020. It modified the Medicaid statute in several ways, including by updating section 1923 of the Act. Specifically, Division CC, Title II, section 203 of the CAA 2021 (herein referred to as section 203) amended section 1923(g) of the Act, which describes the methodology for calculating hospital-specific Medicaid DSH limits. This provision took effect October 1, 2021. For purposes of calculating the hospital-specific DSH limit, section 203 of the CAA 2021 modified the calculation of the Medicaid portion of the hospital-specific DSH limit to include only costs and payments for services furnished to beneficiaries for whom Medicaid is the primary payer for such services, as specified in section 1923(g)(1)(B)(i) of the Act. Accordingly, the limit excludes costs and payments for services provided to Medicaid beneficiaries with other sources of coverage, including Medicare and commercial insurance. Section 1923(g) of the Act, as modified by the CAA 2021, includes an exception to this methodology for hospitals in and above the 97th percentile of all hospitals with respect to inpatient days made up of patients who, for such days, were entitled to Medicare Part A benefits and to supplemental security income (SSI) benefits (97th percentile hospitals). This exception, as described in section 1923(g)(2)(B) of the Act, applies to hospitals that are in or above the 97th percentile, either with respect to the number of inpatient days or percentage of total inpatient days that were made up of such days. The exception provides qualifying hospitals with a hospital-specific limit that is the higher of that calculated under the methodology in which costs and payments for Medicaid patients are counted only for beneficiaries for whom Medicaid is the primary payer, or the methodology in effect on January 1, 2020. From June 2, 2017, to the passage of the CAA 2021, payments made by all third-party payers (TPP), such as Medicare, other insurers, and beneficiary cost sharing, would all be included in the calculation of hospital-specific DSH limits, in accordance with the ''DSH Payments—Treatment of Third-Party Payers in Calculating Uncompensated Care Costs'' final rule in the April 3, 2017, **Federal Register** (82 FR 16114), which delineated the treatment of TPP and the calculation of hospital-specific DSH limits.

We acknowledge there are data limitations, which we describe later in this rule, that have delayed CMS' ability to clarify which hospitals qualify for the exception for 97th percentile hospitals. We proposed how we would determine which hospitals qualify for this exception and are finalizing as proposed.

3. Annual DSH Audits and Overpayments

The ''Medicaid Program; Disproportionate Share Hospital Payments'' final rule published in the December 19, 2008, **Federal Register** (73 FR 77904) (and herein referred to as the 2008 DSH audit final rule) sets forth the data elements necessary to comply with the requirements of section 1923(j) of the Act related to auditing and reporting of DSH payments under State Medicaid programs. The regulations at 42 CFR 447.299(c) finalized in the 2008 DSH audit final rule outline 18 data elements States must submit to CMS, at the same time as the State submits the completed audit required under 42 CFR 455.304, to permit CMS verification of the appropriateness of such payments. One such data element is the total uncompensated care cost, which equals the total cost of care for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third-party coverage for the hospital services they receive, less the sum of other payment sources listed in § 447.299(c)(16). Despite the robust data, potential data gaps may exist as a result of an auditor identifying an area, or areas, in which documentation is missing or unavailable for certain costs or payments that are required to be included in the calculation of the total eligible uncompensated care costs.

Consequently, at times we are unable to determine whether a DSH overpayment to a provider has occurred, the root causes of any overpayments, and the amount of the overpayments associated with each cause. In current practice, an auditor may include a finding (or ''caveat'') in the audit, stating that the missing information may impact the calculation of total eligible uncompensated care costs, rather than making a determination of the actual financial impact of the identified issue. This lack of transparency results in uncertainty even if costs are ultimately correct and restricts CMS' and States' ability to ensure proper recovery of all FFP associated with DSH overpayments identified through annual DSH audits in instances where errors did occur.

In the past, the Office of Inspector General (OIG) and the Government Accountability Office (GAO) have raised concerns similar to ours regarding oversight of the Medicaid DSH program. The 2008 DSH audit final rule addressed concerns raised by OIG [3] by implementing in regulations the independent certified audit requirements under section 1923(j) of the Act, by requiring States to include data elements as specified in § 447.299(c) with their annual audits. In 2012, GAO published the report ''Medicaid: More Transparency of and Accountability for Supplemental Payments are Needed.'' [4] Although Medicaid DSH payments are not ''supplemental payments,'' as described previously, they are akin to supplemental payments, and thus, GAO's report did not focus on supplemental payments exclusively. As part of the report, GAO analyzed the 2010 DSH audits for 2007 DSH payments and found DSH payments that did not comply with the audit requirements specified in part 455, subpart D. For each of the required DSH audit elements, there were a number of hospitals for which GAO could not determine compliance due to data reliability or documentation issues. For example, GAO could not determine compliance with the requirement that uncompensated care costs are accurately calculated for 33.7 percent of hospitals analyzed by GAO. The report highlights that, although the independent certified audit requirements have allowed us to identify various compliance issues and quantify some provider overpayments, in some instances, findings remain unquantified.

We agree with the report that more transparency is needed, but to obtain the necessary overpayment amounts under current reporting processes, CMS or the State would have to conduct a secondary review or audit, which would be burdensome and largely redundant. By requiring States to submit to CMS in the annual reports described in § 447.299(c) a dollar estimate of any Medicaid DSH provider overpayments, we ensure this calculation occurs with the primary audit and eliminates redundancy in reviewing documentation. As discussed further in section II. of this final rule, this is intended to further enhance our

[3] Audit of Selected States' Medicaid Disproportionate Share Hospital Programs,'' March 2006 (A–06–03–00031), *https://www.oig.hhs.gov/oas/reports/region6/60300031.pdf.*

[4] *https://www.gao.gov/assets/660/650322.pdf.*

oversight to better ensure the integrity of hospital-specific limit calculations.

Amounts in excess of the hospital-specific limit are regarded as overpayments to providers, under 42 CFR part 433, subpart F. Section 1903(d)(2)(C) of the Act provides that, when an overpayment by a State is discovered, the State has a 1-year period to recover or attempt to recover the overpayment before an adjustment is made to FFP to account for the overpayment. FFP is not available for DSH payments that are found in the independent certified audit to exceed the hospital-specific limit. Currently, regulations in § 433.316 provide for determining the date of discovery of an overpayment, which is necessary to determine the statutory 1-year period, but it does not specify how this relates to the independent certified DSH audits required under section 1923(j)(2) of the Act and 42 CFR part 455, subpart D.

Accordingly, the discovery of overpayments necessitates the return of the Federal share, or redistribution by the State of the overpaid amounts to other qualifying hospitals, in accordance with the State's approved Medicaid State plan. While the preamble to the 2008 DSH audit final rule generally addressed the return or redistribution of provider overpayments identified through DSH audits, it did not include specific procedural requirements for returning or redistributing overpayments. Therefore, we have identified this area as an opportunity to strengthen program oversight and integrity protections, specifically with respect to the overpayment and redistribution reporting process and requirements for identifying the financial impact of audit findings. In the proposed rule, we proposed requirements to enhance these areas, which we are now finalizing as proposed.

4. DSH Health Reform Reduction Methodology

Section 2551 of the Affordable Care Act [5] (ACA) amended section 1923(f) of the Act to require aggregate reductions to State Medicaid DSH allotments annually from FY 2014 through FY 2020, to account for the then-anticipated decrease in uncompensated care resulting from expansions of coverage authorized by the ACA. The ACA specified in section 1923(f)(7)(B) of the Act certain factors CMS must consider in implementing these reductions and left certain components of the methodology to the Secretary of Health and Human Services to define (as described later in this section). The methodology is referred to as the DSH Health Reform Methodology (DHRM). We published a final rule in October 2013 that delineated a methodology to implement the annual reductions only for FY 2014 and FY 2015 to accommodate data refinement and methodology improvement for later reduction years. However, Congress has since modified section 1923(f)(7) of the Act several times such that the reductions have never taken effect. In the September 25, 2019, **Federal Register**, we published a final rule [6] (2019 final rule) delineating a revised methodology for the calculation of DSH allotment reductions, which at that time were scheduled to begin in 2020. Congress has since further delayed the start of these reductions until FY 2024. The CAA 2021 modified section 1923(f) of the Act such that the reductions occur from FY 2024 through FY 2027, in the amount of $8 billion each year.

Section 1923(f)(7) of the Act requires the Secretary to develop a methodology to determine the annual, State-by-State DSH allotment reduction amounts based on five factors: uninsured factor (UPF); Medicaid volume factor (HMF); uncompensated care factor (HUF); low DSH State factor (LDF); and the budget neutrality factor (BNF). The 2019 final rule assigned weights to the annual reduction amount for the three core factors: UPF, HMF, and HUF. The remaining two factors, the LDF and the BNF, affect the allocation of the reduction amounts within the three core factors. The LDF accomplishes this allocation at the front end of the calculations by shifting a portion of the reduction amount specified under section 1923(f)(7)(A)(ii) of the Act to non-low DSH States. Following this step, we determine the reduction calculations prescribed by the three core factors. We then perform additional reductions associated with the BNF within the HMF and HUF for States that divert DSH allotment amounts under section 1115 demonstrations. We then reallocate these reduction amounts away from States that do not divert DSH allotment amounts under section 1115 demonstrations, to comply with the aggregate reduction amounts specified under statute at section 1923(f)(7)(A)(ii) of the Act. The five factors are specified in section 1923(f)(7)(B) of the Act as follows:

- UPF—The statute requires that States with *lower* uninsurance rates receive *higher* percentage DSH reductions. Calculations performed under this factor utilize Census Bureau data that is subject to a 1-year lag.
- HMF—The statute requires that States that target DSH payments to hospitals with high Medicaid volume receive a *lower* percentage reduction in their DSH allotment. Calculations performed under this factor utilize DSH audit data that is on a 3-year lag.
- HUF—As required by statute, States that target DSH payments to hospitals with high levels of uncompensated care receive a *lower* percentage reduction in their DSH allotment. Calculations performed under this factor utilize DSH audit data that is on a 3-year lag.
- Low DSH State factor—Section 1923(f)(7)(B)(ii) of the Act requires that statutorily defined "low DSH States" [7] receive a lower overall DSH reduction percentage than non-low DSH States. To accomplish this, low DSH States and non-low DSH States are separated into two cohorts before applying the reduction methodology.
- BNF—DSH allotment amounts diverted for coverage expansion under section 1115 demonstrations approved as of July 31, 2009, receive a limited protection from reduction.

5. Modernizing the Publication of Annual DSH and Children's Health Insurance Program (CHIP) Allotments

Section 447.297 provides a process and timeline for us to publish preliminary and final annual DSH allotments and national expenditure targets in the **Federal Register**. The current requirements specify that we publish DSH preliminary allotments and national expenditure targets by October 1 of each Federal fiscal year (FFY) and publish the final allotments and national expenditure targets by April 1 of that FFY. We have found the current regulatory **Federal Register** publication process to be time consuming and administratively burdensome for us, and ultimately unnecessary in light of more timely notification practices already taking place.

Similarly, section 2104 of the Act provides appropriations for FY CHIP allotments for FYs 1998 through 2029. Regulations at 42 CFR 457.609 describe the process for calculating State CHIP

[5] Patient Protection and Affordable Care Act of 2010, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111–152.

[6] 84 FR 50308.

[7] Section 1923(f)(5)(B) describes low DSH States as "State[s] in which the total expenditures under the State plan (including Federal and State shares) for [DSH] adjustments under this section for fiscal year 2000, as reported to the Administrator of the Centers for Medicare and Medicaid Services as of August 31, 2003, is greater than 0 but less than 3 percent of the State's total amount of expenditures under the State plan for medical assistance during the fiscal year."

allotments for a FY after FY 2008. Section 457.609(h) provides that CHIP allotments for a FY may be published as preliminary or final allotments in the **Federal Register** as determined by the Secretary. Similar to the current DSH allotment publication process, we have found the current FY CHIP allotment publication regulations administratively burdensome and less efficient than other means of notification. We proposed to codify the process already taking place while eliminating inefficient and duplicative publication requirements, and we are finalizing those proposals in this final rule.

II. Provisions of the Final Rule and Responses to Comments

A. When Discovery of Overpayment Occurs and Its Significance (§ 433.316)

Section 1903(d)(2)(C) of the Act provides that, when an overpayment by a State is discovered, the State has a 1-year period to recover or attempt to recover the overpayment before an adjustment is made to FFP to account for the overpayment. Currently, regulations in § 433.316 provide for determining the date of discovery of an overpayment to a provider, which is necessary to determine the statutory 1-year period, in three distinct cases: (1) when the overpayment results from a situation other than fraud, under § 433.316(c); (2) when the overpayment results from fraud, under § 433.316(d); and (3) when the overpayment is identified through a Federal review, under § 433.316(e). It is not explicitly clear in the current regulations how the date of discovery is determined when an overpayment is discovered through the annual DSH independent certified audit required under § 455.304. Therefore, we believe a regulatory change is appropriate to specify the date of discovery of overpayments, as it relates to the annual DSH independent certified audit.

Accordingly, we proposed to redesignate paragraphs (f) through (h) of § 433.316 as paragraphs (g) through (i), respectively, and to add a new paragraph (f). In the new paragraph (f), we proposed that, in the case of an overpayment identified through the DSH independent certified audit required under part 455, subpart D, we would consider the overpayment as discovered on the earliest of either the date that the State submits the DSH independent certified audit report required under § 455.304(b) to CMS, or of any of the dates specified in § 433.316(c): paragraph (c)(1) (the date on which any Medicaid agency official or other State official first notifies a provider in writing of an overpayment and specifies a dollar amount that is subject to recovery); paragraph (c)(2) (the date on which a provider initially acknowledges a specific overpaid amount in writing to the Medicaid agency); and paragraph (c)(3) (the date on which any State official or fiscal agent of the State initiates a formal action to recoup a specific overpaid amount from a provider without having first notified the provider in writing). We noted that this change would afford more clarity concerning the independent certified DSH audit and the requirements on States based on those audits.

We received public comments on this proposal. The following is a summary of the public comments we received and our responses. Because of its relationship with the proposed provisions at § 447.299(f) and (g), which pertain to the treatment of overpayments, these topics overlapped in the comments received. Here, we specifically address comments that referenced the date of discovery, the aspect specific to this proposal, but recommend that the reader review and consider the comments received and our responses on all three provisions (that is, §§ 433.316(f) and 447.299(f) and (g)) in tandem.

Comment: A couple commenters were opposed to the date an overpayment is considered ''identified'' as being the date of audit submission. They cited issues such as a need to perform additional review and secondary auditing, or to adequately account for redistributions of Medicaid DSH payments in excess of the hospital-specific limit (if provided for under the State plan), or to compute alternate payment methodologies for specialty hospitals that exceed the hospital-specific DSH limit.

Response: We are finalizing this provision as proposed. We understand the concern expressed by the commenters but disagree that the method for determining the date of discovery of an overpayment should be changed from the proposal. Finalizing the date of discovery to include the date the audit is submitted is consistent with our approach to determining the date that other overpayments are discovered as described in § 433.316(c). Specifically, § 433.316(c)(1) and (3) refer to the date on which a State official (or fiscal agent) first notifies a provider in writing of a specific overpayment amount subject to recovery or begins a formal action to recoup that amount without prior written notification. Section 433.316(c)(2) refers to the date on which a provider acknowledges a specific overpaid amount in writing to the State Medicaid agency. Each of these focuses on the date the State provides, or receives from a relevant third party, written notification (or initiates a recoupment action without prior written notification to the provider) of a specific overpaid amount. Similarly, the independent certified audit formalizes the identification of a specific overpayment amount when it is submitted.

We also note that finalizing the date of State submission of the independent certified audit to CMS as an available date for discovery of an overpayment, as opposed to the date the State's auditor first identifies an amount to the State before the State submits the audit to CMS, affords the State an opportunity to review and make appropriate adjustments, as is typical with similar audit data. The State has up to 90 days after receipt of the independent certified audit to review it before it must be submitted to CMS in accordance with § 455.304(b) which we believe is ample time to review DSH audit findings and resolve any disagreement with the audit's contents and/or with overpayment determinations by working with the State's auditor.

In addition, we believe the concerns expressed by commenters are mitigated by other provisions we are finalizing in this rule at § 447.299(f) and (g). Specifically, by clarifying under § 447.299(f) that amounts identified in DSH audits that exceed the hospital-specific DSH limit are to be treated as overpayments, States are afforded the opportunities provided under other overpayment circumstances, which includes the opportunity for a downward adjustment of an overpayment amount under § 433.320(c) as appropriate. This addresses concerns about the fact that the overpayment amount identified in an audit may be subject to change. In addition, we note that States have 2 years to complete redistributions under the provision we are finalizing at § 447.299(g), when in other circumstances, such as returning Federal share, a State only has 1 year to take action on an overpayment. This affords States ample time to compute and perform redistributions of payments to particular hospitals in excess of the hospital-specific DSH limit. Finally, if a State plans to utilize an alternate payment methodology to address circumstances when a hospital may exceed its DSH limit, such as by decreasing supplemental payments, this methodology would need to be reflected in the State plan. Like DSH payment redistribution methodologies, a State should have this methodology in place well in advance of identifying DSH overpayments for a given year. We note that, in our experience, payment adjustments necessary to implement an alternate payment methodology typically are performed far in advance of the timing of the DSH audit for the relevant year. Nevertheless, if a State intends to utilize an alternate payment methodology in the event that overpayments are identified in a DSH audit, and that State has this methodology reflected in its State plan, we do not anticipate that the work necessary to implement the alternative payment methodology would be any more complex or burdensome than the work necessary to implement DSH overpayment redistribution methodologies; as such, we do not agree the possible existence of an alternate payment methodology would require more time for States once an overpayment is identified.

B. DSH Health Reform Reduction Methodology (§ 447.294)

As discussed in section I.B.4. of this final rule, section 1923(f)(7)(B)(iii) of the Act requires that the methodology for calculating each State's Medicaid DSH allotment reduction, as first established by the ACA, consider the extent to which the DSH allotment for a State was included in the budget neutrality calculation for a coverage expansion approved under section 1115 (that is, a section 1115 demonstration to provide coverage to individuals not otherwise eligible for Medicaid) as of July 31, 2009. In the 2019 final rule, we finalized a policy to exclude from DSH allotment reductions the amount of DSH allotment States had approved as of July 31, 2009, under a coverage expansion section 1115 demonstration. Any DSH allotment amounts included in budget neutrality calculations for non-coverage expansion purposes (for example, where DSH allotment amounts included in budget neutrality calculations have been used to match State expenditures for approved delivery system reform initiatives) under approved section 1115 demonstrations are still subject to reduction regardless of when they were approved. Further, the preamble to the 2019 final rule indicates that for any section 1115 demonstrations not approved as of July 31, 2009, these DSH allotment amounts included in budget neutrality calculations, whether for coverage expansion or otherwise, would also be subject to reduction. We note that all section 1115 demonstrations approved as of or before July 31, 2009, have expired and the protection does not apply to renewals or extensions of those section 1115 demonstrations. Therefore, there no longer exist any amounts related to coverage expansion to be excluded from future DSH allotment reductions scheduled to begin in FY 2024.

In the absence of DSH audit data relating to how States expend DSH allotment amounts diverted under section 1115 demonstrations, we propose to assign average HUF and HMF reduction percentages to these amounts.[8] We believe this approach is a reasonable method to determine reductions for the HUF and HMF factors, given the absence of relevant, hospital-specific DSH payment data for these payments. We considered using alternative percentages higher or lower than the average but settled on average percentages due to concerns that alternative percentages might provide an unintended benefit or penalty to these States for DSH diversions approved under a demonstration under section 1115 of the Act.

While the provisions of § 447.294(e)(12) are clear that we will assign average reductions to amounts associated with non-coverage expansion purposes in effect as of July 31, 2009, only the preamble to the 2019 final rule addresses the amounts diverted under a section 1115 demonstration approved after July 31, 2009. Additionally, the regulations are not specific regarding how these amounts are determined and accounted for in the DSH allotment reduction methodology. As such, we proposed to update the regulations at § 447.294(e)(12) to clearly specify that amounts diverted under a section 1115 demonstration approved after July 31, 2009, are subject to average reductions under the HUF and HMF so that the regulation may better reflect the policy finalized in the 2019 final rule preamble.

In addition, we proposed to remove the language, ''for the specific fiscal year subject to reduction'' in § 447.294(e)(12) introductory text and (e)(12)(i), because we are concerned that the current regulatory language could lead to anomalous results, as discussed later in this section. We proposed that the determination of diverted amounts that are subject to average reductions under the HUF and HMF would align with the State plan rate year (SPRY) for the DSH audits utilized in the DSH allotment reduction calculations, as specified in § 447.294(d), rather than the fiscal year subject to reduction. For example, when calculating the statutorily required DSH allotment reductions for FY 2024 (the fiscal year subject to reduction), we would utilize data from each State's SPRY 2019 DSH audit data because this would be the most recent data available to us. For States that do not divert their entire DSH allotment, we would include the amount of each State's DSH allotment diverted under a section 1115 demonstration for the time period that aligns with the associated SPRY (in this example, SPRY 2019). A discussion of States that divert their entire DSH allotment follows this discussion. Each State would then be assigned the average HUF and HMF reduction amounts for the State's respective State group based on this diverted amount.

Section 477.294(e)(12) introductory text and (e)(12)(i) currently align the amount of DSH allotment diverted under a section 1115 demonstration for a fiscal year with the fiscal year of the DSH allotment subject to reduction under section 1923(f)(7)(A)(ii) of the Act. We recognize that this non-alignment between the SPRY 2019 DSH audit data that we would use to determine the HUF and HMF, and the FY 2024 section 1115 demonstration budget neutrality calculation diversion amount that would be used under the current regulation, could result in inappropriate and illogical outcomes. For example, in a case where a State claimed all or almost all of its DSH allotment amount for DSH expenditures for the SPRY DSH audit utilized in the DHRM (here, SPRY 2019), but later diverted a large portion of its DSH allotment amount under a section 1115 demonstration during a year subject to DSH allotment reductions (here, FY 2024), the State could receive a reduction on an amount (including both DSH payments and DSH allotment diverted under a section 1115 demonstration) that is excess of the amount available under its current DSH allotment subject to reductions. Therefore, we stated our belief that our proposed approach is reasonable because in the absence of DSH audit data relating to how States expend DSH allotment amounts diverted under section 1115 demonstrations, CMS will assign average HUF and HMF reduction percentages to these diverted amounts. As such, it is appropriate that the amounts diverted under section 1115 demonstrations should align with the SPRY of the DSH audit used in the DHRM and that the amounts subject to reduction do not exceed what States could have expended, either through DSH payments or diverted DSH allotment amounts, during the associated SPRY. We considered leaving the current regulatory text unchanged.

[8] 84 FR 50308 at 50328, wherein we discuss the policy to assign average amounts in the 2019 final rule.

However, we stated our belief it is important to update the current regulation in the interest of clarity and transparency and to avoid a potential outcome wherein a State might receive an inappropriately large reduction due to a misalignment of time periods for elements of the reduction methodology. Accordingly, we proposed to revise § 477.294(e)(12) introductory text to remove language indicating that the BNF and budget neutrality calculations are applied to each State's amount of DSH allotment diverted under a section 1115 demonstration ''for the specific fiscal year subject to reduction.'' Further, we proposed to amend § 477.294(e)(12)(ii) to specify that the budget neutrality calculations are performed on the amount of each State's DSH allotment diverted under an approved section 1115 demonstration during the period that aligns with the associated SPRY DSH audit utilized in the DSH allotment reductions.

For States that divert their entire DSH allotment, and as such do not complete DSH audits, we are unable to use a DSH audit SPRY. Therefore, we proposed to apply reductions under the HMF and HUF to the DSH allotment that the State would have had available during the demonstration year (DY) coinciding with the SPRY DSH audits utilized in the DHRM. We also proposed to prorate the FFY allotment amount to determine this reduction in cases where the DY of the section 1115 demonstration crosses two FFYs. For example, as stated previously we would use SPRY 2019 DSH audit data for FFY 2024 DSH allotment reductions. However, if a State that diverts its entire DSH allotment has a DY that begins July 1, 2018, and ends June 30, 2019, we would have to determine the reduction amount associated with the diverted DSH allotment to reflect the amount of the FFY 2018 DSH allotment available from July 1, 2018, through September 30, 2018, and the amount of FFY 2019 DSH allotment available from October 1, 2018, through June 30, 2019. We stated that we did not believe it would be appropriate to calculate the reduction associated with the diverted DSH allotment using the full FFY 2019 DSH allotment because the diverted DSH funds would not have been available for the full DY ending June 30, 2019. For a State that diverts part of its DSH allotment, it would have a SPRY DSH audit already utilized in the DHRM. We would use the diverted DSH amount from the same SPRY, which may also involve prorating diverted DSH amounts from a DY, depending on whether the DY as specified in the section 1115 demonstration aligns with the SPRY. In previous rulemaking, we proposed and finalized a policy to utilize the most recent year available for all data sources and to align the SPRY of data sources whenever possible.[9] Providing this clarification in regulation through this rulemaking would accomplish this goal.

We received public comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: One commenter suggested that CMS use hospital-specific section 1115 supplemental payment data in measuring DSH targeting factors for diversion funds as the commenter was concerned that using averages would not encourage States to target DSH payments to the hospitals that need them the most. The commenter also added that CMS is statutorily required to collect hospital-specific data under section 1115 demonstrations in accordance with division CC, title II, section 202 of the CAA, 2021 (herein referred to as section 202). The commenter appears to be under the impression that the supplemental payment reporting requirement under section 202 applies to DSH payments.

Response: We thank the commenter for the suggestion. However, this recommendation is outside the scope of the proposed rule, so implementing it would require further rulemaking. Our current regulations at § 447.294(e)(12) and (13) specify that DSH diversion amounts paid under a section 1115 demonstration will receive average reduction amounts, for the respective State group (that is, low DSH and non-low DSH), under the HMF and HUF. We did not propose to amend this aspect of § 447.294(e)(12) and (13), so changes to this calculation are beyond the scope of this rule. Further, the detailed supplemental reporting required under section 202 would not apply to the demonstration year DSH diversion payments that we proposed to align with the SPRY DSH audit data for use in the DHRM for DSH allotment reductions for several years. The new reporting requirements in section 1903(bb)(1)(B) of the Act, as amended by section 202 of the CAA 2021, do not apply to payments made before October 1, 2021. We will calculate the statutorily required DSH allotment reductions utilizing the most recently available DSH audit information and will align amounts diverted under section 1115 demonstrations with the SPRY of the DSH audit used in the DHRM. Therefore, the detailed supplemental payment reporting data required under section 202 will be available starting with the FY 2022, which would align with the SPRY 2022 DSH audit data. Given the timelines associated with the submission of the independent certified audit, which must be completed by September 30 of the year ending three years from the respective Medicaid SPRY and submitted to CMS by December 31 of that year, we could not utilize this required data any earlier than to calculate the DSH allotment reductions scheduled for FY 2027, the last year of currently scheduled DSH allotment reductions. As such, we would not have this reporting information available to calculate the DSH allotment reductions for FY 2024 through FY 2026. Moreover, the HUF calculations require additional information which is not required under section 202 but that is available in the SPRY DSH audits.

We are finalizing the provision as proposed, with a minor phrasing change to § 447.294(e)(12) replacing ''pursuant to'' with ''in accordance with'' to align with current style guidelines.

C. Hospital-Specific Disproportionate Share Hospital Payment Limit (§ 447.295)

From June 2, 2017 to October 1, 2021 (the effective date of the CAA 2021), costs and payments for hospital services furnished to beneficiaries who were eligible for Medicaid, even when there was a third-party payer such as Medicare or other insurer that pays primary to Medicaid for inpatient and outpatient hospital services, would all be included in the calculation of Medicaid shortfall portion of the hospital-specific DSH limits in accordance with the ''DSH Payments—Treatment of Third-Party Payers in Calculating Uncompensated Care Costs'' final rule in the April 3, 2017, **Federal Register**. Since October 1, 2021, the amendments to section 1923(g) of the Act made by section 203 of the CAA 2021 changed the methodology for calculating the Medicaid shortfall portion (Medicaid costs less Medicaid payments) of the hospital-specific DSH limit to only include costs and payments for hospital services furnished to beneficiaries for whom Medicaid is the primary payer. Additionally, the CAA 2021 amended section 1923(g)(2) of the Act to provide an exception for certain hospitals that are in the 97th percentile or above of all hospitals with respect to the number of Medicare SSI days (that is, inpatient days made up of patients who, for such days, were entitled to Medicare Part A benefits and to SSI benefits) or percentage of Medicare SSI days to total inpatient

[9] 82 FR 35155 at 35157; 84 FR 50308 at 50322.

days. In § 447.295(b), we proposed to add the definition of ''97th percentile hospital'' to mean a hospital that is in at least the 97th percentile of all hospitals nationwide with respect to the hospital's number of Medicare SSI days or percentage of inpatient days that are Medicare SSI days, for the hospital's most recent cost reporting period. For hospitals that meet this criteria, section 1923(g)(2)(A) of the Act specifies that the hospital-specific DSH limit is the higher of the amount determined under the methodology as amended by section 203 of the CAA 2021 or the amount determined under the methodology in effect on January 1, 2020 (described previously), which we proposed to implement in paragraph (3) of the definition of hospital-specific DSH limit calculation in § 447.295(d). As further discussed later in this section, we also proposed in the definition of 97th percentile hospital that CMS would identify the 97th percentile hospitals, for each Medicaid SPRY beginning on or after October 1, 2021, using Medicare cost reporting and claims data sources, as well as supplemental security income eligibility data provided by the Social Security Administration. We stated that we would publish lists identifying each 97th percentile hospital annually in advance of October 1 of each year and would revise a published list only to correct a mathematical or other similar technical error that is identified to CMS during the one-year period beginning on the date the lists are published.

We also explained in the preamble to the proposed rule that we interpreted these new requirements to be applicable for SPRYs ''beginning on or after'' October 1, 2021, the effective date of the CAA 2021. Previously, certain statutory references to ''fiscal year,'' such as in section 1923(g)(1) and (2) and (j)(1) of the Act, have also been interpreted as referring to each State's SPRY, instead of the FFY, when establishing requirements for the hospital-specific DSH limit (and audit requirements to ensure that payments comply with hospital-specific DSH limits). In the 2008 DSH audit final rule, CMS indicated that this interpretation was in ''recognition of varying fiscal periods between hospitals and States'' and that ''[t]he Medicaid [SPRY] is the period which each State has elected to use for purposes of DSH payments and other payments made in reference to annual limits.'' Further, we stated our belief that interpreting this provision to be applicable on an FFY basis would impose an excessive burden on States and hospitals. In particular, we explained our belief that such an interpretation would create a significant burden in situations when a hospital would qualify to meet the exception for 97th percentile hospitals for a portion of its SPRY, but not for the full SPRY, if qualification were determined on the basis of the FFY. This result would be likely to occur, given that the majority of States have SPRYs that do not align with the FFY. In these instances, States would need to prorate the uncompensated care costs, for affected hospitals, within a SPRY accordingly since the methodology for calculating the Medicaid shortfall portion of the hospital-specific DSH limit may not be consistent for the entire SPRY if the hospital qualified as a 97th percentile hospital for only a portion of the SPRY. As such, we proposed that section 203 of the CAA 2021, including the 97th percentile exception, be effective starting with each State's first SPRY beginning on or after October 1, 2021. For example, if a State's SPRY begins July 1, then the amendments made by section 203 of the CAA 2021 would be effective starting with the SPRY beginning July 1, 2022. Conversely, if a State's SPRY begins each year on October 1, then such amendments would be effective starting with the SPRY beginning October 1, 2021.

Hospitals meeting the definition of a 97th percentile hospital, and therefore, qualifying for the 97th percentile exception will, by statute, calculate their hospital-specific DSH limit using the higher value of either the hospital-specific DSH limit amount determined for the hospital under section 1923(g)(1)(A) of the Act as amended by section 203 of the CAA 2021, or the amount determined for the hospital under section 1923(g)(1)(A) of the Act as in effect on January 1, 2020. Where section 1923(g)(2)(A)(ii) of the Act, as amended by section 203 of the CAA 2021, refers to ''the amount determined for the hospital under paragraph (1)(A) as in effect on January 1, 2020,'' we interpret this to refer to the hospital-specific limit calculation methodology that was in effect on January 1, 2020, and not the specific dollar amount that was applicable on that date.

We proposed to revise § 447.295(d) to reflect the statutory changes made by section 203 of the CAA 2021 to update the methodology for the calculation of the hospital-specific DSH limit to only include costs and payments for hospital services furnished to beneficiaries for whom Medicaid is the primary payer. In addition, we proposed to revise § 447.295(d) to specify the methodology that hospitals meeting the exception for 97th percentile hospitals would utilize in the calculation of the hospital-specific DSH limit. Specifically, in § 447.295(d)(1), we proposed to specify that for each State's Medicaid SPRYs beginning prior to October 1, 2021 and subject to proposed paragraph (d)(3), only costs incurred in providing inpatient hospital and outpatient hospital services to Medicaid individuals, and revenues received with respect to those services, and costs incurred in providing inpatient hospital and outpatient hospital services, and revenues received with respect to those services, for which a determination has been made in accordance with § 447.295(c) that the services were furnished to individuals who have no source of third-party coverage for the specific inpatient hospital or outpatient hospital service are included when calculating the costs and revenues for Medicaid individuals and individuals who have no health insurance or other source of third-party coverage for purposes of section 1923(g)(1) of the Act.

In § 447.295(d)(2), we proposed to specify the applicable costs and revenues associated with services furnished to Medicaid individuals and individuals who have no health insurance or other source of third-party coverage for purposes of determining the hospital-specific DSH limit under section 1923(g)(1) of the Act. We proposed that for each State's first Medicaid SPRY beginning on or after October 1, 2021, and thereafter, subject to proposed paragraph (d)(3), only costs incurred in providing inpatient hospital and outpatient hospital services to Medicaid individuals when Medicaid is the primary payer for such services, and revenues received with respect to those services, would be included in the Medicaid shortfall portion of the hospital-specific DSH limit calculation. Furthermore, we proposed to specify that only costs and revenues for which a determination has been made in accordance with § 447.295(c) that the services were furnished to individuals who have no source of third-party coverage for the specific inpatient hospital or outpatient hospital service would be included in the uninsured shortfall portion of hospital-specific DSH limit calculation.

As noted previously, we proposed to implement the 97th percentile hospital exception in proposed § 447.295(d)(3), which would specify that, effective for each State's first Medicaid SPRY beginning on or after October 1, 2021, and thereafter, the hospital-specific DSH limit for a 97th percentile hospital defined in proposed paragraph (b) would be the higher of the values from the calculations described in proposed paragraphs (d)(1) and (2).

We also proposed to develop a data set (compiling cost report, claims, and eligibility data) to determine which hospitals, ranked on a national level, qualify to meet the statutory 97th percentile hospital exception. We proposed to publish these data for use in determining which hospitals qualify as a 97th percentile hospital on an annual basis, electronically or in another format as determined by CMS, prior to the SPRY to which the data would apply. We would determine which hospitals qualify as a 97th percentile hospital on an annual basis prior to each SPRY beginning on or after October 1. In this way, we explained that we would be able to qualify hospitals on the basis of SPRYs, while also accounting for non-alignment of SPRYs across States. Again, this would not be done on the basis of the FFY, but rather would be an annual process to qualify hospitals for each SPRY. We indicated that we would publish these data once a year, prior to October 1. Each State could then use these data to determine which hospitals qualify for the 97th percentile hospital exception for the State's SPRY that begins between that October 1 and September 30 of the following calendar year.

We proposed to determine a hospital's qualification for the 97th percentile exception for each SPRY on a prospective basis. We explained our belief that this is a reasonable interpretation in that the statute specifically refers to the ''most recent cost reporting period'' in determining a hospital's qualification ''for the fiscal year,'' which, as noted, we interpret to mean SPRY. That is, we believe it is reasonable to interpret the reference to the ''most recent cost reporting period'' in section 1923(g)(2)(B) of the Act to mean the most recent cost reporting period for which there is a cost report available before the beginning of the SPRY for which the 97th percentile hospitals are being identified.

By applying this exception prospectively, we eliminate the need to retroactively rank and qualify hospitals based on actual Medicare SSI days and ratios for services furnished during the SPRY. This application would allow for States and hospitals to know prior to the beginning of the SPRY which hospitals qualify for the exception. That knowledge would allow States and hospitals to gauge how payments should be made and measured against hospital-specific DSH limits and provide greater payment predictability than a retroactive application. We believe this interpretation to also be the most feasible from an operational standpoint for CMS, States, and hospitals.

To compile this source of data, we explained that we would use data originating from various systems and sources, including the Healthcare Cost Report Information System (HCRIS) and Medicare Provider Analysis and Review (MEDPAR) files, and SSI eligibility data from the Social Security Administration (SSA). Utilizing HCRIS, we would identify the universe of hospitals that have filed a Medicare cost report and each hospital's most recent cost reporting period, including acute care hospitals paid under the inpatient prospective payment system (IPPS), critical access hospitals, inpatient rehabilitation facilities, and inpatient psychiatric facilities.

We explained that we would then determine each hospital's Medicare SSI days for discharges occurring in the hospital's most recent cost reporting period, regardless of the length of that cost reporting period, using a data set that combines MEDPAR claims data and SSI eligibility data. We would utilize Medicare SSI days for discharges occurring in the cost reporting period, rather than Medicare SSI days occurring within the cost reporting period because the MEDPAR data show the Medicare SSI day count for each inpatient stay as a whole. This approach is consistent with how Medicare uses these data to develop the Medicare SSI days ratios for Medicare DSH purposes. Section 1886(d)(5)(F)(vi) of the Act, in describing the Medicare SSI percentage within the Medicare ''disproportionate patient percentage,'' refers to the ''number of such hospital's patient days for such period.'' Then, the implementing regulations at 42 CFR 412.106 describe the Medicare SSI days used for Medicare DSH as patient days that ''are associated with discharges that occur during that period.'' This approach means if an inpatient stay begins in one cost reporting period but ends in the next cost reporting period, we would not count any of the inpatient stay's days toward the day count for the first cost reporting period, but instead count all of this inpatient stay's days toward the day count for the second cost reporting period. This approach does not favor the counting of days in one cost reporting period over others. On average, exclusion of days for inpatient stays that straddle between one cost reporting period and the hospital's next cost reporting period would be offset by any inclusion of days for inpatient stays that straddle between that one cost reporting period and the hospital's previous cost reporting period. Therefore, we can ensure we do not overinclude or underinclude Medicare SSI days for inpatient stays that straddle two cost-reporting periods.

To determine each hospital's percentage of Medicare SSI days to total inpatient days, we proposed that we would divide the Medicare SSI days by each hospital's total inpatient days for that same cost reporting period from HCRIS to obtain a percentage. We would then compile two lists—one that ranks the hospitals based on the absolute number of Medicare SSI days and another that ranks them by the percentage of inpatient days that are Medicare SSI days, respectively. A hospital may qualify to meet the 97th percentile exception based on its rankings on either of the two lists.

We proposed to utilize the Medicare SSI days and total inpatient days data to mathematically determine a threshold of acceptance to identify hospitals meeting the 97th percentile exception. The array includes either the values of Medicare SSI days or the percentage of inpatient days that are Medicare SSI days, for the universe of hospitals nationwide identified through this data process. For the Medicare SSI days, the 97th percentile threshold would be rounded to the nearest whole number, with x.5 or higher rounded up, and less than x.5 rounded down. Any hospital with Medicare SSI days for its most recent cost reporting period greater than or equal to the 97th percentile threshold would qualify as a 97th percentile hospital. For the percentage of inpatient days that are Medicare SSI days, all values would be rounded to the fourth decimal place (0.xxxx, alternatively stated as xx.xx percent), including each hospital's own percentage and the 97th percentile threshold. Values of 0.xxxx5 or higher would be rounded up, and less than 0.xxxx5 would be rounded down. Any hospital that has a percentage of total inpatient days that are Medicare SSI days from its most recent cost reporting period that is greater than or equal to the 97th percentile threshold would qualify as a 97th percentile hospital. We proposed that the ranking would be on a national level, as the statutory language under section 203 of the CAA 2021 refers to ''97th percentile of all hospitals,'' which we believe is most consistent with a national, rather than a State-level ranking.

To follow the statutory requirement to utilize information from the most recent cost reporting period, we proposed to utilize each hospital's most recent cost reporting period for which there is a filed cost report in HCRIS, at a particular point in time in advance of the SPRY to which the 97th percentile qualification would apply. A filed cost report would first have an ''as submitted'' status in HCRIS, which subsequently would change to ''amended,'' ''settled without audit,'' ''settled with audit,'' or ''reopened'' status, which indicates a final report that was previously reopened and re-settled. We considered utilizing the most recent settled cost reporting period, but we explained that we had determined that the use of the as-submitted cost report would result in the use of more current and more consistent reporting periods across hospitals, consistent with the statutory directive to rely on ''the most recent cost reporting period.'' Moreover, we explained that we had determined that the total inpatient days seldom change between the as-submitted and the settled cost reports. The total inpatient days count is the primary data element needed from the cost report in order for us to determine which hospitals meet the 97th percentile exception. However, if the most recent cost reporting period for which there is an as-submitted cost report happens to already have an amended cost report, a settled cost report, or a reopened cost report as of the date that CMS obtains data from HCRIS for use in determining which hospitals meet the 97th percentile hospital exception, we proposed that we would use the total inpatient day count from the amended cost report, settled cost report, or reopened cost report for that period because that is the most updated information available for that period.

In the proposed rule, we described the cost report status changes, from the cost report's initial submission to its potential reopening after settlement. Consistent with that expected workflow, when there is more than one cost report for a hospital for its most recent cost reporting period in the HCRIS database as of the snapshot date, we will select the latest cost report based on the following order of the cost report status codes as they appear in HCRIS, from earliest to latest: 1 (as submitted), 5 (amended), 2 (settled without audit) or 3 (settled with audit), 4 (reopened). If there happens to be both a ''settled without audit'' cost report record and a ''settled with audit'' cost report record for a hospital for the same cost reporting period in the HCRIS database, we will determine the later of the two based on the date that record is processed into HCRIS, consistent with our stated intention to use the most up-to-date information available as of the snapshot date. We also noted that we have observed in rare cases that, for a given cost reporting period, a hospital may have one or more versions of the cost report (that is, ''amended,'' ''settled without audit,'' ''settled with audit,'' and/or ''reopened'') without having the initial version of the cost report (''as submitted'') in the HCRIS database as of the snapshot date. Regardless, as long as the cost reporting period is the most recent period for which a cost report record exists for the hospital in the HCRIS database, we will follow the sorting order described above in choosing the latest cost report from the relevant cost reporting period.

We proposed to utilize both covered and non-covered Medicare Part A days when collecting data and calculating hospital percentiles. The statutory language in section 1923(g)(2)(B)(i) of the Act as modified by section 203 of the CAA 2021 specifically refers to patients who were entitled to benefits under part A of title XVIII. A patient's status as entitled to benefits under part A of title XVIII does not depend on whether payment for a particular inpatient day was available under Medicare Part A payment principles, and a qualifying Medicare beneficiary remains entitled to benefits under Part A even if Medicare payment is not available with respect to a particular inpatient day.[10] As such, we believe the calculations must include all Medicare Part A inpatient days, whether covered or non-covered. Further, this is consistent with CMS' use of covered and non-covered days in the Medicare SSI days ratio calculations for Medicare DSH payment purposes under section 1886(d)(5)(F)(vi)(I) of the Act, which describes a hospital's inpatient days for patients who were entitled to benefits under part A of title XVIII and were entitled to SSI benefits under title XVI of the Act.

Hospitals may provide acute inpatient hospital services, as well as other inpatient hospital services, in distinct part units of the hospital. The distinct part units of a hospital that provide inpatient hospital services, which are reported separately on the hospital's Medicare cost report, are rehabilitation distinct part units and psychiatric distinct part units. We proposed to include all inpatient days for inpatient hospital services reported on each hospital's Medicare cost report, including days furnished in distinct part units of the hospital that provide inpatient hospital services, for purposes of determining a hospital's Medicare SSI days and total inpatient days. We note that Medicare pays for services furnished in these distinct part units under different payment systems from the acute care inpatient hospital services provided by the hospitals. However, for Medicaid purposes, the DSH uncompensated care costs of the hospital are inclusive of the costs of inpatient and outpatient hospital services furnished by the hospital, including those furnished in these distinct parts. Therefore, we believe the hospital's Medicare SSI days and total inpatient days should be inclusive of these distinct part unit days and not limited to acute inpatient hospital days. In this final rule, we are also clarifying that days in which a swing bed in a hospital, including a critical access hospital, is used for skilled nursing facility or nursing facility services are not to be included in determining a hospital's Medicare SSI days and total inpatient days, because those days are for nursing facility services rather than inpatient hospital services.

In determining when we can begin to collect and assemble the necessary data prior to the beginning of each upcoming SPRY that begins on or after October 1 each year, we proposed to use HCRIS data as it exists as of March 31, in advance of October 1 of that same calendar year. Using the HCRIS data as of March 31, we explained that we would identify each hospital's most recent cost reporting period for which the hospital has an available cost report and also identify the total inpatient days from the latest cost report available for that most recent cost reporting period. We also proposed to use the latest available MEDPAR files and SSI eligibility data, as of the same March 31 date, to determine the Medicare SSI days data that correspond to that same most recent cost reporting period for each hospital.

For example, for the 97th percentile determination applicable to SPRYs beginning October 1, 2023, through September 30, 2024, (that is, SPRYs beginning during FFY 2024), we explained that we would determine a hospital's most recent cost reporting period in which it has a cost report in HCRIS as of March 31, 2023. For instance, if a hospital's most recent cost reporting period with a cost report in HCRIS as of March 31, 2023, is from July 1, 2021, to June 30, 2022, we would take the total inpatient day count from that cost report. Then we would utilize the MEDPAR files and SSI eligibility data available as of March 31, 2023, to determine the hospital's Medicare SSI days for the discharges occurring in that same cost reporting period of July 1, 2021, to June 30, 2022.

We explained that using the most recently available data as of March 31 in

[10] *See Becerra* v. *Empire Health Found., for Valley Hosp. Med. Ctr.,* 142 S. Ct. 2354 (2022).

advance of October 1 each year would allow us a reasonable 6-month timeframe to pull data from each of these data sources, address any potential data issues, complete the necessary compiling and calculations, perform any data integrity checks, determine the 97th percentile and the hospitals meeting the threshold based either on the Medicare SSI days or the percentage of total inpatient days that are Medicare SSI days, and make the results available prior to October 1. States would then have the 97th percentile results applicable to the State's SPRY that begins between October 1 of that calendar year and September 30 of the following calendar year. The March 31 date would establish a snapshot for a point in time each year that is reasonably close to October 1 of that same calendar year that we would use to determine what is the ''most recent'' data available for application to the upcoming SPRYs, while allowing us sufficient time to process the data and make the results available before the start of those SPRYs. We want to make clear that the March 31 snapshot date is not the actual date we will be pulling the cost report data from HCRIS, but rather the date by which a cost report must be processed into HCRIS to be captured. Prospectively, we may pull the cost report data anytime over the 6 months following the March 31 snapshot date. Similarly, for the Medicare SSI days, we will use MEDPAR claims data with matched SSI eligibility data for claims processed through the March 31 snapshot date. Again, prospectively, we may pull the Medicare SSI days data from this MEDPAR snapshot for each hospital's relevant cost reporting period anytime over the 6 months following the March 31 snapshot date. Note, for the 97th percentile determination for SPRYs beginning during FFYs 2022, 2023, and 2024, we are pulling the data at the time we are finalizing this rule, to allow for public release of the 97th percentile hospital lists shortly after the issuance of this final rule.

Given the timing of this rulemaking and the October 1, 2021, effective date of the amendments made by section 203 of the CAA 2021, we proposed to produce the 97th percentile hospital data for both SPRYs beginning during FFY 2022 and SPRYs beginning during FFY 2023 using the necessary Medicare SSI days and cost report information as it would have been available to us under the timelines in the proposed rule. For example, for the data necessary to determine hospitals meeting the 97th percentile exception for SPRYs beginning during FFY 2022, we proposed that we would obtain a snapshot of the HCRIS, MEDPAR, and SSI eligibility data as would have been available on March 31, 2021.

While we proposed to include all hospitals that provide Medicaid-covered inpatient services and file a Medicare cost report in our data set, we noted that there would be circumstances resulting in some hospitals being omitted from the data set. We explained that we would begin gathering all necessary data after March 31 of each year, based on the data availability described previously, to develop the data set to rank and indicate which hospitals qualify to meet the 97th percentile hospital exception for each State's upcoming SPRY that begins on or after October 1 of that year. In accordance with 42 CFR 413.24(f)(2), cost reports are generally due 5 months from the end of each hospital's cost-reporting period. For example, a hospital with a cost reporting year end of September 30 would generally be expected to file a cost report by the end of February the following year, while a hospital with a cost reporting year end of June 30 would generally be expected to file its cost report by the end of November of that year. However, we also wanted to build in a reasonable window for late filing and cost report processing into HCRIS. Therefore, we proposed to include in the data set any hospital that has filed a cost report dating back to at least September 30, 3 years prior to capture as many hospitals as possible in our data set. We explained that it is unlikely that there would be a delay greater than 3 years from when a hospital's cost report is generally due to when that cost report is captured in HCRIS. For example, when we begin the data development process for data available through March 2023, we would exclude a hospital from the data set that does not have a cost report in HCRIS from a cost reporting period ending by September 30, 2020, or later. We proposed this cutoff to capture as many hospitals in our data set as possible, but to also prevent significant variability in the cost-reporting periods by excluding Medicare hospitals whose most recent cost-reporting period for which there is a cost report in HCRIS dates back more than 3 years. This cutoff is intended to help exclude hospitals that may be inactive or terminated from our data set.

As noted earlier in this section, we also proposed to include in the data set only hospitals that file a Medicare cost report. Because the Medicare cost report data are the source of total inpatient days, it is necessary for a hospital to file a Medicare cost report to calculate a hospital's Medicare SSI day as a percentage of total inpatient days. We explained that we cannot perform the calculations without this cost report information. Therefore, we proposed to include only hospitals that file a Medicare cost report in the data set. Section 1923(g)(2)(B) of the Act recognizes the necessity of the Medicare cost report for the implementation of the 97th percentile exception by basing the qualification for the exception on the number or percentage of Medicare SSI days for the ''most recent cost reporting period.'' Therefore, we explained our belief that it is appropriate and consistent with the statutory requirements to include only these hospitals that have submitted Medicare cost reports in the data set for both 97th percentile exception lists. We noted that we did not anticipate this to be a problem, since any hospital serving Medicaid patients but that does not file a Medicare cost report, would not qualify for the 97th percentile hospital exception. In accordance with § 413.24(f), Medicare-participating hospitals are required to file cost reports, which are generally due 5 months after the close of each cost reporting period. In accordance with Medicare Provider Reimbursement Manual, Part II, Section 110, hospitals with no Medicare utilization do not need to file a cost report, and hospitals meeting low Medicare utilization thresholds may file a less than full cost report with limited information. Because a hospital would only qualify for the 97th percentile hospital exception with a relatively high volume of Medicare SSI days, a hospital with no or low Medicare utilization, and therefore, with no cost report or with a less than full cost report which would not have inpatient days data, would not qualify for the 97th percentile hospital exception.

Given that we proposed to use snapshot cost report, claims, and eligibility data in advance of October 1 each year to produce nationwide lists applicable for each State's upcoming SPRY beginning on or after that October 1, we proposed that we would not modify the 97th percentile qualification results based on a request by one or more individual hospitals (or by one or more States, with respect to one or more individual hospitals) to update or reconsider hospital cost report, claims, or eligibility data. The snapshot approach recognizes that, at a given point in time, a hospital's most recent cost reporting period for which there is a cost report available in HCRIS, as well as the hospital's number of total inpatient days as reported in that most recent cost report and number of Medicare SSI days as determined from MEDPAR and SSI eligibility data sources, may be subject to future revision. However, to determine qualification for the 97th percentile hospital exception, we must select a point in time to capture snapshot data, and the resulting lists must provide reasonable certainty to hospitals and States nationwide regarding which hospitals qualify for the exception. We do not believe it would be prudent or reasonable to continuously revisit the 97th percentile hospital qualifications based on changing cost report, claims, or eligibility data, outside of the snapshot parameters established in this final rule.

Nonetheless, we recognized in the proposed rule that there is a possibility of a mathematical or other similar technical error by CMS that could lead to a misidentification of the hospitals that qualify for the 97th percentile exception. In such a circumstance, we noted our belief that it would be appropriate for us to correct our error, recognizing that this could result in some hospitals being determined eligible for the 97th percentile hospital exception that previously (erroneously) were not so listed, and other hospitals losing their previous (erroneous) designation as qualifying for the exception. At the same time, we observed that we must balance this consideration with the recognition that the published lists will be relied upon by States and hospitals for identifying which hospitals qualify for the exception, hospital-specific limits will be set accordingly, and DSH payments will be made; all interested parties (including hospitals, the States, and CMS) have an interest in finality for these payments after a reasonable time. Accordingly, we proposed to allow 1 year from the posting of the 97th percentile hospital lists for States, hospitals, CMS, or other interested parties to identify any mathematical or other similar technical error made by CMS, according to instructions that would appear on the published lists. Upon CMS verification that an error occurred that affected the hospitals appearing on a list of 97th percentile hospitals for a given year, we would determine and publish a revised list as soon as practicable. We noted our belief that 1 year is a reasonable timeline for identifying any mathematical or other similar technical error made by CMS and would also allow a corrected qualifying list to be available in advance of the start of the independent DSH audit for the respective SPRY in most instances. For example, if we publish the qualifying lists in 2023 for application retroactively to a SPRY that begins October 1, 2021 (that is, SPRY 2022), we would post a corrected qualifying list, if necessary, sometime in 2024. Then, when the independent audit is performed for that SPRY in 2025, the final 97th percentile qualification lists would be available and not subject to any further changes. Accordingly, in paragraph (2) of the proposed definition of 97th percentile hospital in § 447.295(b), we proposed that CMS would publish lists identifying each 97th percentile hospital annually in advance of October 1 of each year. We proposed that CMS would revise a published list only to correct a mathematical or other similar technical error made by CMS that is identified to CMS during the one-year period beginning on the date the list is published.

We proposed that the effective date for this and other CAA 2021-related proposals, noted in the respective sections, be applicable to fiscal years beginning on or after October 1, 2021, to align with the effective date of the CAA 2021.

We received public comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: Many commenters expressed opposition to the statutory changes required under section 203 of the CAA 2021. Commenters expressed concerns regarding the financial impact to hospitals that anticipated decreases in the hospital-specific DSH limits will have on hospitals and their ability to provide services. Two commenters indicated that the exception for 97th percentile hospitals was not adequate to protect financially vulnerable hospitals. A commenter indicated that they believe the 97th percentile threshold is arbitrary. Another commenter expressed the opinion that the methodology specified under section 203 of the CAA 2021 incorrectly assumes that hospitals receive the entirety of a Medicare or Medicaid payment rate, and explained that, due to how a particular State may limit Medicaid payment of Medicare cost sharing amounts, hospitals are not paid the full payment for care provided to patients dually eligible for Medicare and Medicaid. A commenter noted the projected financial loss that would be incurred under the new methodology in which costs and payments for Medicaid patients are counted only for beneficiaries for whom Medicaid is the primary payer for hospitals that care for a high number of Medicaid/SSI-eligible beneficiaries with complicated health care needs. The commenter pointed out that many of those Medicaid eligible individuals who are disabled will also become eligible for Medicare after a 2-year waiting period, making the costs associated with their care ineligible for inclusion in the new hospital-specific DSH limit calculation. Commenters urged CMS to monitor the financial impacts to hospitals and to work with Congress to mitigate the potential negative effects of section 203 of the CAA 2021.

Response: We appreciate the impact that the statutory changes made by section 203 of the CAA 2021 may have on hospitals. States' policies for Medicaid payment of Medicare cost sharing amounts for dually eligible beneficiaries do vary, and we acknowledge that there could be uncompensated care costs after all applicable Medicare and Medicaid payments; with the statutory changes, such uncompensated care costs would not be included in the hospital-specific DSH limit to the extent that Medicare, not Medicaid, is the primary payer of such services. However, we are required by statute to implement the new methodology for determining hospital-specific DSH limits, including the exception for 97th percentile hospitals, as specified under section 1923(g) of the Act. We do note that, despite the statutory changes made by section 203 of the CAA 2021, there remains considerable flexibility for States in setting DSH State plan payment methodologies to the extent that these methodologies are consistent with section 1923(c) of the Act and all other applicable statutes and regulations. However, we intend to continue to monitor the financial impact that these statutory changes have on hospitals and provide information and technical assistance as Congress may request, as necessary to address any negative impact on providers.

Comment: Several commenters expressed support for the proposals to implement the amendments made by section 203 of the CAA 2021, to the hospital-specific DSH limit calculations for the Medicaid shortfall calculation to include only Medicaid costs and payments when Medicaid is the primary payer. One commenter commended CMS for engaging in rulemaking to address the statutory requirements.

Response: We appreciate the support.

Comment: Several commenters requested clarification regarding how CMS defines ''primary payer'' and when Medicaid is considered to be the primary payer for inpatient and outpatient hospital services provided to Medicaid beneficiaries.

Response: This rule does not change existing rules related to Medicaid's status as primary payer for a particular service. This rule addresses the calculation of hospital-specific limits as amended by section 203 of the CAA 2021. This limits the Medicaid shortfall to the costs and payments associated with inpatient and outpatient services where Medicaid is the primary payer, providing an exception for 97th percentile hospitals. We will continue to rely on existing rules governing third party liability and when Medicaid is a primary payer, such as those at section 1902(a)(25)(A) of the Act and §§ 433.135 through 433.154. Medicaid is generally the ''payer of last resort,'' meaning that Medicaid only pays claims for covered items and services if there are no other liable third-party payers for the same items and services, which concept is implied in the above statute and regulations.[11]

In the proposed rule, we also stated that for purposes of calculating the hospital-specific DSH limit, section 203 of the CAA modified the calculation of the Medicaid portion of the hospital-specific DSH limit to include only costs and payments for services furnished to beneficiaries for whom Medicaid is the primary payer for such services, as specified in section 1923(g)(1)(B)(i) of the Act.[12] Accordingly, the limit generally excludes costs and payments for services provided to Medicaid beneficiaries with other sources of coverage, including Medicare and commercial insurance. Through previous rulemaking, we established, for the purpose of the hospital-specific DSH limit, how to determine whether third party coverage exists for a hospital service. In the December 3, 2014, **Federal Register**, CMS published the final rule entitled ''Medicaid Program; Disproportionate Share Hospital Payments—Uninsured Definition'' (Uninsured Rule).[13] In that final rule, we indicated that we would apply a single, service-specific determination of third-party coverage status for an entire hospital service for purposes of hospital-specific DSH limit calculations.[14] While the Uninsured Rule focused on the determination of whether an individual is insured for a particular hospital service, the statutory changes made by section 203 of the CAA now call for a similar, single, service-specific determination to be made with respect to services provided to individuals with Medicaid coverage, to ascertain whether Medicaid is the primary payer for the service.

Before the statutory amendments made by section 203 of the CAA 2021, section 1923(g)(1)(A) of the Act included in the Medicaid shortfall portion of the hospital-specific DSH limit calculation costs and payments of individuals ''eligible for medical assistance under the State plan.'' As discussed in the Uninsured Rule, costs and payments associated with the provision of inpatient and outpatient hospital services for all Medicaid eligible individuals would have been captured in the Medicaid shortfall portion of the calculation, regardless of whether that individual's Medicaid benefit was exhausted, or a Medicaid coverage limit had been reached for the associated inpatient or outpatient hospital service.[15] Similarly, due to the previous statutory language indicating that individuals need only to have Medicaid eligibility without regard to Medicaid coverage for the particular service, inpatient and outpatient hospital services for Medicaid eligible individuals should have been captured in the Medicaid shortfall, even where the individual's Medicaid benefits were limited and did not extend to inpatient or outpatient hospital services at all. Because the individual was eligible for some Medicaid coverage during the service period, the individual would have been included in the Medicaid shortfall portion of the hospital-specific DSH limit, not in the uninsured shortfall portion.

However, section 1923(g)(1)(B)(i) of the Act, as amended by section 203 of the CAA 2021, now specifies that the Medicaid shortfall portion of the hospital-specific DSH limit will be limited to costs and payments of furnishing hospital services to ''[i]ndividuals who are eligible for medical assistance under the State plan or under a waiver of such plan and for whom the State plan or waiver is the primary pay[e]r for such services.'' We interpret the statutory change specifying that Medicaid must be the primary payer ''for such services'' to direct a service-specific approach to determining Medicaid's status as primary payer, consistent with how, under the Uninsured Rule, we determine an individual's status as uninsured for a particular hospital service.

Following the service-specific approach to determining an individual's insured status as outlined in the Uninsured Rule,[16] to similarly determine whether Medicaid is the primary payer for a given hospital service furnished to a Medicaid beneficiary, the beneficiary must have Medicaid coverage for the hospital service, and there must not be any third-party coverage that is primary for the particular hospital service, and Medicaid must be the primary payer for the service. When Medicaid is determined to not be the primary payer for that service, then the associated costs and payments for that specific hospital service would not be included in the calculation of the hospital-specific DSH limit (unless so provided for a qualifying hospital under the 97th percentile exception).

Comment: One commenter questioned whether Medicaid would be considered the primary payer or if a patient would be considered uninsured if the patient has some Medicaid coverage but does not have Medicaid coverage for the particular inpatient and outpatient hospital services.

Response: As discussed previously in this final rule, only costs and payments for inpatient and outpatient hospital services for which Medicaid is the primary payer under a single, service-specific determination can be included in the Medicaid shortfall portion of the hospital-specific DSH limit. Specifically, the statute now requires that Medicaid be the ''primary pay[e]r for such services'' (meaning ''hospital services'' as stated in section 1923(g)(1)(A)(i) of the Act) furnished to an individual eligible under the Medicaid State plan or waiver, for costs and payments associated with the services to be included in the Medicaid shortfall portion of the hospital-specific DSH limit calculation. Medicaid would not be considered the primary payer for hospital services, for purposes of the calculation of the hospital-specific DSH limit, for an individual who had Medicaid coverage for inpatient and/or outpatient hospital services but had reached coverage limits or otherwise exhausted the Medicaid hospital benefit prior to obtaining these services. As a result, such an individual, as long as there is not third-party coverage for the inpatient and/or outpatient hospital services, would be considered uninsured for those hospital services and the associated costs and payments would be captured in the uninsured portion of the hospital-specific DSH limit calculation. Similarly, the costs

[11] See discussion at pages 20–22 of the Coordination of Benefits and Third-Party Liability In Medicaid Handbook: 2020, available at: *https://www.medicaid.gov/sites/default/files/2020-08/COB-TPL-Handbook.pdf.*

[12] 88 FR 11865 at 11688.

[13] 79 FR 71679.

[14] 79 FR 71679 at 71683.

[15] 79 FR 71679 at 71682.

[16] 79 FR 71679 at 71683.

and payments associated with the provision of hospital services provided to an individual with a limited Medicaid benefit package, which does not cover such inpatient and/or outpatient hospital services, would also be captured in the uninsured portion of the hospital-specific DSH limit calculation, provided they do not have third-party coverage for such services. Hospitals qualifying to meet the exception for 97th percentile hospitals would calculate the hospital-specific limit that is the higher value of that calculated under the methodology in which costs and payments for Medicaid patients are counted in the Medicaid shortfall calculation only for services furnished to beneficiaries for whom Medicaid is the primary payer, or the methodology in effect on January 1, 2020.

For purposes of the methodology in effect on January 1, 2020, costs and payments associated with the universe of Medicaid eligible individuals would be captured in the Medicaid portion of the hospital-specific DSH limit calculation regardless of whether or not the individual had Medicaid coverage for inpatient and/or outpatient hospital services and regardless of whether any such coverage had been exhausted. We note that while the change in policy as a result of the amendments made by section 203 of the CAA 2021 results in different treatment of some Medicaid eligible individuals for purposes of calculating hospital-specific DSH limits (based on whether the individual's Medicaid benefits include coverage of inpatient and/or outpatient hospital services, and whether the individual's Medicaid benefits for hospital services have been exhausted or coverage limits have been reached), this change does not affect the costs and payments captured in hospital-specific DSH limit calculations overall, provided that the individual has no other health insurance or other source of third-party coverage for inpatient and/or outpatient hospital services, as relevant. Rather, the change merely affects whether particular costs and payments are captured in the Medicaid or uninsured shortfall portion of the hospital-specific DSH limit calculation.

Comment: Some commenters had specific questions regarding who is considered the primary payer in cases involving dually eligible individuals when coverage limits, whether through Medicare or private insurance, have been reached or have otherwise been exhausted. Commenters inquired about the scenarios when third-party coverage has reached its limit or is exhausted prior to an individual obtaining an inpatient or outpatient hospital service versus when the third-party insurer's coverage limit is reached, or coverage otherwise exhausted at some point during the provision of the service. One commenter questioned if Medicaid would be considered the primary payer for patients residing in an institution for mental diseases who are dually eligible for Medicare and Medicaid whose Medicare benefits are exhausted during the stay. Commenters questioned whether Medicaid actually has to pay on the claim for Medicaid to be considered the primary payer.

Response: As discussed in the Uninsured Rule, we determine whether an individual is insured for a particular service based on whether that individual has third party coverage for the single, specific inpatient hospital service, regardless of whether that individual was insured for the full service or service period or only a portion (for example, due to coverage limits being reached or coverage otherwise exhausted).[17] In the Uninsured Rule, we explained that the single, service-specific approach means, for the purpose of the hospital-specific DSH limit, third party coverage is determined for a given hospital stay, without separating the component parts of the inpatient hospital services of that hospital stay. The single, service-specific approach also applies here to determine whether Medicaid is the primary payer for a particular hospital stay; we will look to whether there is third party coverage that pays primary over Medicaid for the inpatient hospital services of the stay. For example, if an individual has Medicare or private insurance that only provided coverage for the first 5 out of 10 days of a hospital inpatient stay (whether in a hospital that is an institution for mental diseases or not), Medicaid would not be considered the primary payer for any portion of that inpatient stay, even after the Medicare or private insurance coverage limit has been reached in the middle of the stay. However, if the dually eligible individual is either not insured for or has exhausted their Medicare or other third-party coverage prior to obtaining the inpatient or outpatient hospital service, Medicaid may be considered the primary payer for such services because there is no third-party coverage that pays primary over Medicaid for the particular stay. As we stated in the Uninsured Rule, services beyond health insurance coverage limits, including annual lifetime limits, will not be considered to be within a covered benefit package.[18] We note that real-life cases can be much more complex, and that States and providers should refer to existing third party liability rules and policies, such as section 1902(a)(25)(A) of the Act and §§ 433.135 through 433.154, when determining third-party liability, and to existing DSH rules and policies such as those described in the Uninsured Rule to determine how each case should be evaluated for third party coverage for the purpose of the hospital-specific DSH limit. Finally, as we stated in the Uninsured Rule, the determination of which payer is primary with respect to a single, specific hospital service is based on the existence of coverage and does not depend on the hospital receiving payment from a particular payer.[19]

Comment: Some commenters inquired about the treatment of third-party payments related to services provided to Medicaid eligible individuals. Some commenters wanted to know whether a claim associated with a Medicaid eligible individual should have third-party payments removed or if the entire claim should not be considered in the calculation of the hospital-specific DSH limit. One commenter requested that CMS provide an example of a third-party payment associated with services furnished to a beneficiary with Medicaid as primary payer.

Additionally, commenters inquired about cases where an individual had no Medicare Part A coverage but had certain charges covered and paid by Medicare Part B during an inpatient stay. Similarly, commenters also inquired if Medicaid would be considered the primary payer for an inpatient stay in cases where the individual has third-party coverage for ancillary services but no coverage for routine inpatient hospital services, inquiring whether the inpatient routine portion of the stay would be includable in the Medicaid shortfall calculation of the hospital-specific DSH limit. Commenters questioned whether the individuals in these scenarios would be considered to have third party coverage, be uninsured, or if Medicaid could be considered the primary payer for these inpatient hospital services.

Response: As discussed previously, based on section 1902(a)(25)(A) of the Act and §§ 433.135 through 433.154, Medicaid is generally the payer of last resort. In general, an individual who has third-party coverage for inpatient hospital services provided during a hospital stay, with very limited

[17] 79 FR 71679 at 71683.

[18] 79 FR 71679 at 71691.

[19] Id.

exceptions, would be considered to have third-party coverage that is primary over Medicaid for the inpatient hospital services. Under the single, service-specific determination, we do not separate out components of the inpatient hospital services furnished during a particular inpatient stay. As such, when it is determined that there is third-party coverage for inpatient hospital services that is primary over Medicaid for a particular inpatient stay, none of the inpatient hospital service costs and payments associated with this inpatient stay, including third-party payments, may be included in the Medicaid shortfall calculation of the hospital-specific DSH limit.

Under existing third-party liability rules, there are limited exceptions to the general rule that Medicaid is the payer of last resort, and these exceptions typically apply to federally administered health programs. For a federally administered health program to be an exception to the general status of Medicaid as the payer of last resort, the statute creating the program must expressly state that it pays for a service after Medicaid, such as the Ryan White Fund under 42 U.S.C. 300ff *et seq.*[20] If those other programs that are exceptions to the general status of Medicaid as the payer of last resort do cover and make payment for the same inpatient hospital services that Medicaid is the primary payer for, then such payments from the other programs would be treated as cost offsets when the costs and payments of the inpatient hospital services are included in the calculation of the Medicaid shortfall. This is an example of third-party payments associated with services furnished to a beneficiary with Medicaid as the primary payer.

However, commenters also specifically inquired about unique circumstances where, in addition to Medicaid, a hospital inpatient has Medicare Part B only (that is, the patient is not also entitled to or enrolled in Medicare Part A, or has already exhausted their Medicare Part A benefits), which pays for limited services in certain circumstances for a beneficiary who is an inpatient, or has other third-party coverage that is only for ancillary services. In general, we consider ancillary services to be services provided by a hospital that are separate from routine services[21] such as room and board, nursing, and support services; ancillary services may include x-ray, drug, laboratory, or other services, associated with an inpatient hospital stay.[22]

Regardless of whether the ancillary services are covered by Medicare Part B or another third-party payer, such as a private insurance policy, we will defer to States to determine whether that third-party coverage is considered coverage for inpatient hospital services. The Medicare program generally is structured to pay for inpatient hospital services under Part A, *see* section 1812(a)(1) of the Act, whereas Part B generally pays for specified services other than inpatient hospital services, *see* section 1832 of the Act. Given this structure, even where a beneficiary with Medicaid and Medicare Part B only coverage has payment made on their behalf by Part B for ancillary services that fall within the State's Medicaid definition of inpatient hospital services during an inpatient hospital stay, we believe that the State reasonably could determine that Medicaid—not Medicare Part B—will be considered to be the primary payer for the inpatient hospital stay. This approach would avoid a potentially anomalous outcome where Medicaid would pay for the majority of services, but a small Medicare Part B payment for an ancillary service would result in the exclusion of all costs and payments for the stay from the hospital-specific DSH limit.

Regarding the comment inquiring about other third-party coverage that only pays for ancillary services but not routine services, we do not have enough information about who this payer would be or what it would cover to give guidance on whether that third-party coverage would be regarded as coverage for inpatient hospital services and therefore would be considered primary to Medicaid. Again, in this case, we will defer to the State to make a reasonable determination of whether such third-party coverage provides coverage for inpatient hospital services that will be considered to be the primary payer for the inpatient hospital stay.

In this scenario, whether the payer in addition to Medicaid is Medicare Part B or another third-party payer, we further note that since individuals have coverage for inpatient hospital services (whether Medicaid, Medicare, or another third party), they would not be considered uninsured for purposes of inclusion in the hospital-specific DSH limit. As mentioned, we acknowledge that, where a State does determine that Medicare Part B or another third-party payer is the primary payer for inpatient hospital services where it only makes payments for ancillary services furnished during the stay, the inpatient hospital service costs and payments for the entire inpatient stay would be excluded from the hospital-specific DSH limit, and this could result in the exclusion of some Medicaid costs and payments. We will monitor for State handling of these scenarios once the rule is in effect to ascertain whether the rule is resulting in unexpected outcomes, and we may undertake additional rulemaking in the future if necessary to address the issue.

Comment: One commenter inquired about the 2008 DSH audit final rule and associated protocol's instructions to use MMIS paid claims data. The commenter questioned whether States now will be required to change their MMIS systems to provide reports that remove the Medicaid ''no-pays'' for the DSH audits where there is a third-party payer.

Response: For any State plan rate year beginning or after October 1, 2021, States and hospitals must have procedures in place to ensure the Medicaid data used in the hospital-specific DSH limit calculation complies with the amendments made by section 203 of the CAA 2021 by determining when Medicaid is the primary payer for inpatient and outpatient hospital services. While the General DSH Audit and Reporting Protocol released with the 2008 DSH audit final rule does call for MMIS to be the source of Medicaid fee for service utilization and payment data, CMS is not specifically requiring any changes to MMIS to implement the amendments made by section 203 of the CAA 2021 or the provisions of this final rule. We generally would expect States' current MMIS would have the ability to support compliance with the

[20] See, for example, 42 U.S.C. 300ff–15(a)(6), 42 U.S.C. 300ff–27(b)(7)(F), 42 U.S.C. 300ff–64(f), 42 U.S.C. 300ff–71(i). See also discussion at pages 20–22 of the Coordination of Benefits and Third-Party Liability In Medicaid Handbook: 2020, available at *https://www.medicaid.gov/sites/default/files/2020-08/COB-TPL-Handbook.pdf.*

[21] The Medicare Provider Reimbursement Manual, Part I, Section 2202.6 defines ''routine services'' as, ''Inpatient routine services in a hospital or skilled nursing facility generally are those services included in by the provider in a daily service charge—sometimes referred to as the ''room and board'' charge. Routine services are composed of two board components: (l) general routine services, and (2) special care units (SCU's), including coronary care units (CCU's) and intensive care Units (ICU's). Included in routine services are the regular room, dietary and nursing services, minor medical and surgical supplies, medical social services, psychiatric social services, and the use of certain equipment and facilities for which a separate charge is not customarily made.''

[22] The Medicare Provider Reimbursement Manual, Part I, Section 2202.8 defines ancillary services as, ''Ancillary services in a hospital or SNF include laboratory, radiology, drugs, delivery room (including maternity labor room), operating room (including postanesthesia and postoperative recovery rooms), and therapy services (physical, speech, occupational). Ancillary services may also include other special items and services for which charges are customarily made in addition to a routine service charge.''

requirements. However, States with legacy systems may require some configuration changes. For States that require MMIS system changes, CMS is available to work with them. To the extent that MMIS data on its own is not sufficient to identify Medicaid data needed to calculate the hospital-specific DSH limit, States are able to supplement MMIS data with other auditable data.

Comment: One commenter inquired about provisions of the February 28, 2023, proposed rule entitled ''Medicare Program; Medicare Disproportionate Share Hospital (DSH) Payments: Counting Certain Days Associated With Section 1115 Demonstrations in the Medicaid Fraction'' (88 FR 12623). The commenter referenced statements by CMS indicating that section 1115 demonstration waivers that provide health insurance or premium coverage for inpatient hospital services will be included in Medicaid days for Medicare DSH calculations. As such, the commenter questioned if CMS considers coverage provided under these section 1115 demonstrations for inclusion in the Medicaid hospital-specific DSH limit calculations.

Response: We note the Medicare DSH program and the Medicaid DSH program are separate programs authorized by different sections of the statute and with different purposes and goals. However, as stated in the February 2023 proposed rule, which appeared in the February 24, 2023, **Federal Register** (88 FR 11865) if an individual receives health insurance for inpatient hospital care directly provided by a section 1115 demonstration, or if a patient buys insurance for inpatient hospital care with premium assistance provided by a section 1115 demonstration for which the demonstration pays 100 percent of the premium cost to the individual, and in either case the cost of the insurance or premium assistance is paid for with title XIX dollars, the individual is regarded as eligible for Medicaid under the Medicare DSH statute. Similarly, this individual would be considered a Medicaid eligible individual for Medicaid DSH purposes. As such, costs and payments associated with covered inpatient and outpatient hospital services provided to this individual may be considered in the calculation of the hospital-specific DSH limit, depending on the determination of primary payer status and the provisions of section 1923(g) of the Act.

Comment: Two commenters expressed support of our proposal of the October 1, 2021, effective date of the amendments to section 1923(g) of the Act made by section 203 of the CAA 2021, to be applicable for SPRYs beginning on or after the October 1, 2021, effective date. One commenter stated that the plain language of the law indicated that the effective date should apply to services furnished on or after October 1, 2021. One commenter requested that CMS confirm whether the application of the amendments to section 1923(g) of the Act made by section 203 of the CAA 2021 will apply on the basis of the Federal fiscal year or the SPRY. The commenter also urged CMS to allow an effective date prior to October 1, 2021, by applying the statutory changes to cost reporting periods beginning on or before the October 1, 2021, date and rebasing DSH using FY 2021 cost reports. This commenter stated that this application would allow for a consistent way to gauge how hospital systems benefited from the DSH program. The commenter also indicated that CMS should be cognizant of the difference in State-to-State distribution of DSH funds.

Response: We appreciate the commenters' support of our effective date proposal and disagree with the other commenter that our interpretation conflicts with the plain language of the statute. To align the statutory amendments made by section 203 of the CAA 2021 with how the Medicaid DSH program has been historically operationalized across States, we proposed to interpret the October 1, 2021, effective date to apply the statutory changes to SPRYs beginning on or after October 1, 2021. As discussed in the proposed rule and earlier in this final rule, this is consistent with past interpretations of statutory provisions that have been codified in rulemaking, such as in the 2008 DSH final rule, and further explained in sub-regulatory guidance. Moreover, CMS does not have the statutory authority to apply the effective date of the amendments made by section 203 of the CAA 2021 to periods before October 1, 2021. These provisions do not ''rebase'' DSH payments, per se, but rather change the definition of the hospital-specific limit for DSH payments.

We do not agree with the comment that changing the effective date to coincide with hospitals' cost reporting periods would provide a consistent view of how each hospital system benefits from DSH. We acknowledge that hospital cost reports, and internal audits of such cost reports, may not align with the State's SPRY. However, the DSH independent certified audit requirement at section 1923(j) of the Act, as implemented in the 2008 DSH final audit rule, requires States to conduct an audit of their DSH programs and identify DSH payments made against hospital-specific DSH limits on the basis of each State's SPRY.[23] As we indicated in the proposed rule, this was in ''recognition of varying fiscal periods between hospitals and States'' and that ''[t]he Medicaid [SPRY] is the period which each State has elected to use for purposes of DSH payments and other payments made in reference to annual limits.'' [24] We believe that the DSH independent certified audit, which within each State looks at all hospitals' uncompensated care costs and DSH payments based on that State's SPRY, provide for a consistent way to gauge how hospitals that receive DSH payments benefit from the DSH program.

Further, we believe interpreting this provision to be applicable on a FFY basis would impose an excessive burden on States and hospitals, in particular with the application of the exception for 97th percentile hospitals. We note that the majority of States have SPRYs that do not align with the FFY. In these instances, if we were to apply section 203 of the CAA 2021 to the FFY beginning on October 1, 2021, and thereafter, States would need to prorate the uncompensated care costs for affected hospitals within a SPRY accordingly, since the methodology for calculating the Medicaid shortfall portion of the hospital-specific DSH limit may not be consistent for the entire SPRY. If the hospital qualified as a 97th percentile hospital for only a portion of the SPRY, this proration would be on top of the proration that would already be necessary to account for differences between a hospital's cost reporting period and the State's SPRY.

Finally, we believe the commenter who requested that we be cognizant of the difference in State-to-State distribution of DSH funds was pointing out that each State operates its DSH program differently, and that there is variation in how States distribute their DSH payments to eligible providers within their State DSH allotments. We acknowledge that States have flexibility in the operation of their DSH programs, subject to Federal requirements, including section 1923(g) of the Act on the hospital-specific DSH limit. This final rule does not affect the existing flexibility each State has in how it operates its DSH program or distributes its DSH payment in accordance with its State plan, but this rule does address the changes to the hospital-specific DSH limit as required by section 203 of the CAA. We also acknowledge that while

[23] 42 CFR 455.304(d)(2).

[24] 88 FR 11865 at 11870.

the statutory changes to the hospital-specific DSH limit are applicable to all States, the actual impact on hospitals can vary by States based on how DSH payments are distributed by each State. In developing this rule, we considered that each State operates its own DSH program. For example, we considered proposing to determine the 97th percentile hospital exception qualification on a State-specific level, rather than on a national level; however, as we explained in the proposed rule, we do not believe this would be consistent with the statutory language referring to ''97th percentile of all hospitals.'' Applying section 1923(g) of the Act, as amended, on a SPRY basis is aligned with how States operate their DSH programs and distribute their DSH funds, which are on a State-elected SPRY basis. As such, we are finalizing this requirement to apply the October 1, 2021, effective date to the applicable SPRY beginning on or after October 1, 2021, as proposed.

Comment: One commenter indicated that CMS should provide guidance on a SPRY audit year that includes the October 1, 2021, effective date, and direction on how hospital-specific DSH limits and associated overpayments should be calculated.

Response: As indicated previously in this final rule, we are finalizing this rule to apply the October 1, 2021, effective date to the applicable SPRY beginning on or after the October 1, 2021, effective date. To calculate hospital-specific DSH limits, hospitals routinely utilize two separate cost reports to cover the entire period associated with the applicable SPRY, in cases where the hospital's cost reporting period does not correspond exactly to the SPRY. We have released guidance to answer specific questions related to addressing these misaligned periods.[25]

In the Additional Information on DSH Reporting and Auditing Requirement Part 2—Question 21, we discussed cost report proration in calculating a hospital's uncompensated care costs (UCC) for a SPRY using more than one cost report, when a hospital's cost reporting period does not align with the State's SPRY.[26] Similar proration was discussed when applying the ''DSH Payments—Treatment of Third-Party Payers in Calculating Uncompensated Care Costs'' final rule (82 FR 16114) in the August 18, 2020, CMCS Informational Bulletin entitled ''Treatment of Third Party Payers (TPP) in Calculating Uncompensated Care Costs (UCC).'' [27]

We expect that activities required for the implementation of the amendments made by section 203 of the CAA 2021 to follow the same proration approach to conform hospitals' cost reporting periods to the SPRY. For example, if a SPRY is from July 1, 2022 to June 30, 2023, and a hospital's cost report year end is December 31, regardless of the amendments made by section 203 of the CAA 2021, there is a need to prorate the hospital's cost report data from both its December 31, 2022 and December 31, 2023 cost reports to determine the hospital's hospital-specific DSH limit for the SPRY from July 1, 2022 to June 30, 2023. In using the December 31, 2022, and December 31, 2023, cost report data to prorate to this SPRY, which is the State's first SPRY that begins on or after October 1, 2021, the hospital and the State would need to follow section 1923(g) of the Act, as amended by section 203 of the CAA 2021, and this final rule in determining the hospital-specific limit. As is consistent with 2008 DSH audit final rule, an overpayment is identified when the DSH payment received by a hospital for the SPRY is in excess of its hospital-specific limit for the same SPRY.

Comment: Several commenters expressed support of our proposal to determine a hospital's qualification for the 97th percentile exception for each SPRY on a prospective basis.

Response: We appreciate the support and are finalizing the determination of a hospital's qualification for the 97th percentile exception for each SPRY on a prospective basis. This application allows for States and hospitals to know prior to the beginning of the SPRY which hospitals qualify for the exception. This allows States and hospitals to gauge how payments should be made and measured against hospital-specific DSH limits and provides greater payment predictability than a retroactive application.

Comment: One commenter expressed support for the proposal that CMS would produce two lists for qualifying hospitals to meet the exception for 97th percentile hospitals, based on either the percentage or total number of inpatient days for patients who were entitled to both Medicare Part A benefits and SSI benefits. One commenter commended CMS for determining the number of Medicare Part A SSI days for the most recent cost reporting period based on the days associated with discharges occurring during the cost reporting period.

Response: We appreciate the support. We have followed the statutory language at section 1923(g)(2)(B)(i) and (ii) of the Act that specifies that hospitals may qualify on the basis of total number of inpatient days for patients who were entitled to both Medicare Part A benefits and SSI benefits or the percentage of such days. Further, we appreciate the support for our proposal to determine the number of Medicare Part A SSI days for the most recent cost reporting period based on the days associated with discharges occurring during the cost reporting period and are finalizing the methodology as proposed.

Comment: Several commenters urged CMS to release the 97th percentile exception lists, including those applicable to SPRY 2022, as soon as possible. Several hospital associations and hospitals expressed that delays in the release may impact their ability to plan for future DSH payments with respect to anticipated decreased hospital-specific DSH limits. Two commenters recommended that CMS release the 97th percentile exception lists at least 60 days prior to the October 1 date to which the exception lists will apply. Another commenter indicated that releasing the list at least 60 days prior to the October 1 date would allow the State and hospitals sufficient time to work within the time frames established in the State laws that govern how interim DSH payments are calculated and made to providers to make any necessary adjustments to DSH payments based on the 97th percentile exception lists.

Response: We understand the commenters' concerns. Unfortunately, we cannot commit to publishing the 97th percentile exception lists at least 60 days prior to the October 1 date to which the exception lists will apply. Given the dates that the necessary data become available, and the time needed for CMS to produce and publish the 97th percentile hospital exception qualification lists, we cannot be certain of our ability to meet this deadline. However, we are committed to releasing the exception lists as soon as possible, after March 31 of each year, in advance of the October 1 date. Due to the timing of this final rule, we will be releasing the exception lists retroactively for the first three years (that is, for SPRYs beginning on or after October 1, 2021, to September 30, 2024). For SPRYs beginning on or after October 1, 2024, we will follow the established timeline so that States and hospitals will have the exception lists prior to October 1 each year, followed by a correction list

[25] *https://www.medicaid.gov/sites/default/files/2020-01/part-2-additional-info-on-dsh-reporting-and-auditing.pdf.*

[26] Id.

[27] *https://www.medicaid.gov/sites/default/files/2020-08/cib081820.pdf.*

if needed, as discussed earlier in this final rule.

Comment: Many commenters requested that CMS release the rankings and associated data for all hospitals in the universe of providers used to determine the qualification for the exemption for 97th percentile hospitals, rather than just those hospitals that qualify for the exemption. Commenters indicated that this would provide for greater transparency and also be informative to hospitals so that they know where they stand in the rankings. One commenter inquired whether CMS would release the underlying data used in compiling the 97th percentile hospital exception lists to allow for validation of CMS's calculations. One commenter indicated that the qualifying lists should be readily accessible for use by State Medicaid agencies, hospitals, and other interested parties.

Response: We intend to make available the data necessary for CMS to calculate the rankings of hospitals in the dataset. This data may include hospital names, Medicare provider numbers, cost report record numbers, cost reporting period, cost report status, SSI/Part A days, and total inpatient days for each hospital and its distinct part psychiatric and rehabilitation units, if applicable, in this universe of data. We will publish these data on an annual basis, electronically or in another format as determined by CMS, prior to the SPRY to which the associated 97th percentile hospital exception lists will apply.

Comment: Several commenters pointed to the ''all hospital'' language in section 203 of the CAA 2021 and opposed CMS' proposal to exclude hospitals that do not file Medicare cost reports from the dataset used to determine which hospitals meet the exception for 97th percentile hospitals. Commenters indicated that this omission would result in fewer hospitals qualifying to meet the 97th percentile exception by merit of shrinking the pool of hospitals in the dataset. Commenters requested that CMS include these hospitals in the datasets using zero values in the calculations. Commenters indicated that requiring the submission of the Medicare cost report to determine qualification to meet the exception for 97th percentile hospitals would be burdensome, urging CMS to consider less administratively burdensome alternatives.

Response: We understand and appreciate the commenters' concerns. We have worked to identify and include as many hospitals as possible in the list of hospitals used to determine the 97th percentile hospital exception. While we understand that the statute refers to hospitals that are ''in at least the 97th percentile of all hospitals'' and that not all hospitals submit a Medicare cost report, the statute directs us to make the 97th percentile exception qualification determination based on each hospital's ''most recent cost reporting period.'' We continue to believe it is reasonable to interpret ''all hospitals'' in this context to mean all hospitals with cost reports and to look to HCRIS, an existing CMS cost report data source, to identify a hospital's ''most recent cost reporting period'' for which a hospital has a cost report. We are not imposing any additional cost reporting requirements on hospitals for the purpose of implementing the 97th percentile hospital exception. Furthermore, we believe it is reasonable and appropriate to use these data to build the hospital dataset and obtain each hospital's total inpatient days, and to establish a cutoff for how far back we would look within the HCRIS database to reduce the inclusion of terminated, inactive hospitals. We again note that we proposed to include any hospital that has in HCRIS a cost report with an end date dating back to at least September 30, 3 years prior to the snapshot date we are using to extract data. For example, for the 97th percentile qualification for SPRYs beginning during FFY 2024, the snapshot date is March 31, 2023, and we would include any hospital that has in HCRIS a cost report with a cost reporting period end date of September 30, 2020, or later.

We selected the 3-year cutoff based on timing of cost report submissions but also considering cost report filing delays and HCRIS processing lags. As long as a hospital has a cost report in the HCRIS database that meets the criteria on March 31, the snapshot date we are establishing to allow us to timely generate the 97th percentile hospital exception lists each year, the hospital will be included in the dataset. We are also including Medicare cost reports that are filed as low- or no-Medicare utilization cost reports as long as they exist in the HCRIS database and meet the specified timing criteria. Where there is no total inpatient day information or the total patient day is reported as zero in a cost report included in our dataset, we will use a zero value for the percentage of total inpatient days that are Medicare Part A SSI days for the purpose of the 97th percentile hospital ranking.

As discussed in the proposed rule, even if we were to consider an alternative mechanism outside of the existing Medicare cost report data to collect total inpatient days from hospitals without Medicare cost reports in HCRIS, there would not be a way to define the most recent cost reporting period for those hospitals that would be consistent with how we are defining it for hospitals that do have a cost report. As such, we are finalizing the rule as proposed to exclude hospitals with no Medicare cost report from the dataset we will use to determine the lists of hospitals qualifying for the exception for 97th percentile hospitals.

Comment: One commenter expressed support for the March 31 HCRIS snapshot date. The commenter indicated this will provide CMS proper time to ensure validity and uniformity of the database.

Response: We agree; we thank the commenter for their support and are finalizing as proposed.

Comment: A commenter indicated that under certain circumstances, there could be multiple hospitals that file under a single Medicare cost report and provider number. The commenter questioned if a Medicare hospital provider number qualified to meet the 97th percentile exception, would all hospitals associated with that provider number qualify to meet the 97th percentile exception.

Response: Yes, this would qualify all hospitals under this CMS Certification Number (CCN) to meet the exception for 97th percentile hospitals. Our 97th percentile hospital exception determination uses each Medicare-participating hospital's cost report and the inpatient days for the relevant cost reporting period, all associated with the hospital's CCN as stated on the cost report and inclusive of the CCN of any psychiatric and/or rehabilitation distinct parts that provide hospital services. Therefore, the 97th percentile hospital exception qualification would apply to the Medicare-participating hospital as a whole. If there are circumstances where a State Medicaid agency recognizes a Medicare-participating hospital, identified on our 97th percentile hospital list as a single hospital, as multiple hospitals, then the 97th percentile exception hospital qualification of the single Medicare-participating hospital would apply to those multiple hospitals recognized under Medicaid.

Comment: One commenter indicated support for broadening the 97th percentile exception to a universe that includes all hospitals, despite initially believing that the exception applied only to inpatient prospective payment system (IPPS) hospitals.

Response: We appreciate the support. We recognize that not only IPPS hospitals receive Medicaid DSH payments, but critical access, rehabilitation, and psychiatric hospitals also may qualify to receive DSH payments. Further, section 1923(g)(2)(B) of the Act, as amended by section 203 of the CAA 2021 statute specifies that a hospital must be in ''at least the 97th percentile of all hospitals'' to qualify to meet the exception. As such, we will produce the qualification lists inclusive of all hospital types and all hospitals with a Medicare cost report in HCRIS that satisfies the timing criteria discussed earlier in this final rule.

Comment: One commenter was supportive of CMS' proposal to allow hospitals to identify data issues resulting from mathematical or other similar technical errors. However, the commenter noted that the 1-year period may not be sufficient, particularly given the retroactive application of the initial datasets. Further, the commenter insisted that the identification of issues should not be limited to mathematical or other similar technical errors.

Response: We appreciate the support but disagree with the need to extend the 1-year period to identify issues resulting from mathematical or other similar technical errors. In addition, we disagree that the scope should be broader than issues resulting from mathematical or other similar technical errors. Any dispute over the underlying Medicare cost report and claims data is outside of this process. We will not attempt to resolve disputes on Medicare cost report and claims data, nor amend the underlying cost report and claims data as they existed in the database, as of the snapshot date.

The process and procedures that we are establishing for the 97th percentile hospital exception relies on existing Medicare data in the CMS cost report and claims systems as of a particular snapshot date each year. We will ensure that we are extracting the correct values from those systems and compiling them accurately in accordance with the procedures we are establishing in this final rule and proposed to allow for an opportunity to make corrections where mathematical or other similar technical errors may occur in these steps. As such, we proposed to give States and interested parties 1 year from the release of the 97th percentile hospital lists and dataset, including those for retroactive periods back to the first SPRYs beginning on or after October 1, 2021, to bring forward issues resulting from mathematical or other similar technical errors made by CMS in the steps of extracting and compiling the data and determining the 97th percentile hospital exception qualification. We believe that not only is this timeframe appropriate for addressing the narrow scope of errors we would expect could arise in this process but also extending the timeframe out further would extend the period of uncertainty for States and hospitals relying on timely, finalized data.

Comment: One commenter requested that in instances where CMS issues a revised qualifying list, any hospital that qualified to meet the exception for 97th percentile hospitals on the initial list should retain that status regardless of its ranking on the revised list. The commenter indicated that this policy would mitigate any financial disruption to hospitals.

Response: We understand the commenter's concern. However, in the unlikely case that an initially qualified hospital would fall below the 97th percentile threshold upon issuance of a corrected list of qualifying hospitals, that hospital would not qualify to meet the exception for 97th percentile hospitals. The statutory language at section 1923(g)(2)(B) of the Act is clear that to qualify to meet the exception, the hospital must be in at least the 97th percentile of all hospitals for the most recent cost reporting period with respect to the total number of inpatient days for the period that were made up of patients entitled to Medicare Part A and SSI benefits, or the percentage of total inpatient days made up of such days. As such, we have no authority to allow an unqualified hospital to receive the 97th percentile hospital exception due to a mathematical or other similar technical error that resulted in its erroneous inclusion on an initial list of qualifying hospitals. We are finalizing all aspects of the error correction process as proposed.

D. Limitations on Aggregate Payments for DSHs Beginning October 1, 1992 (§ 447.297)

We proposed to eliminate the § 447.297(c) requirement to publish annual DSH allotments in the **Federal Register** and to provide that the Secretary would post preliminary and final national expenditure targets and State DSH allotments in the Medicaid Budget and Expenditure System/State Children's Health Insurance Program Budget and Expenditure System (MBES/CBES) and at *Medicaid.gov* (or similar successor system or website). Current regulations require us to publish the annual DSH allotments in the **Federal Register**. We have found this process to be time consuming and administratively burdensome for us and are concerned that it makes providing the information to States and other interested parties less timely and accessible. Additionally, because we currently notify States directly regarding annual allotment amounts and make such information publicly available outside of the **Federal Register** on a routine basis, we find that it is duplicative and unnecessary to go through the process of publishing in the **Federal Register**. Therefore, by eliminating the § 447.297(c) requirement to publish annual DSH allotments in the **Federal Register**, we explained that we would be removing the administratively burdensome task, which would allow us to focus our efforts on providing the information in a timely and easily accessible manner through the MBES/CBES and at *Medicaid.gov* (or similar successor system or website).

Additionally, we proposed in § 447.297(b) and (d)(1) to remove the date on which final national targets and allotments are published, currently specified as April 1, and revise this timeframe to as soon as practicable. In § 447.297(d)(1), we also proposed to remove the phrase ''prior to the April 1 publication date,'' and to add in its place the phrase, ''prior to the posting date'' for consistency with the new timeframe. We proposed to remove the April 1 publication date to allow for Medicaid expenditures associated with the FFY DSH allotment to be finalized. CMS utilizes these amounts in the calculations of the 12 percent limit under section 1923(f)(3)(B)(ii) of the Act. Finally, we proposed to remove § 447.297(c), which consists of redundant publication requirements already identified in § 447.297(b), (c), and (d), in its entirety, to align with our proposed changes § 447.297(c).

We received public comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: Several commenters commented on this proposal, and with one exception, commenters were not supportive of this proposal. The commenters cited concerns about transparency, as the MBES/CBES systems where we would publish amounts are not accessible to the general public. They also cited concerns about accountability, as *Medicaid.gov* is less formal than a **Federal Register** publication, and the latter ensures a static record for historicity.

Response: While we appreciate the concerns of commenters, we are finalizing as proposed. We will ensure ongoing transparency by publishing final amounts on a publicly accessible page on *Medicaid.gov* instead of simply distributing to States through MBES/CBES. This step ensures that hospitals, researchers, oversight entities, and others will have timely access to the data as well. We also believe posting to *Medicaid.gov* can provide sufficient accountability regarding the accuracy of the final amounts. We already publish many important documents and guidance on our website, and we will ensure the postings are clear with respect to the date they are published, and with versions for any necessary changes.

Comment: A couple commenters specifically opposed the removal of the ''April 1'' date from the regulatory language and did not want the final allotments published any later than that date.

Response: We are also finalizing as proposed the regulatory language removing the ''April 1'' date specification and replacing it with ''as soon as practical.'' Our reasoning is twofold. First, we already currently send States information prior to when the **Federal Register** publication occurs. This change will not alter our existing practice of providing information to States as soon as we have it available. Second, this change is important to allow us flexibility when some States are late reporting their expenditure data, causing a delay in calculating final allotments. By removing the April 1 language, we can ensure that the publicly available final report is more accurate.

We acknowledge this change in publication location and uncertainty of dates could make it difficult for non-State entities to know when the final allocation report is available. We intend to communicate through multiple channels, such as emails, list servs, and calls with interested parties, when the *Medicaid.gov* publication will be available, and once it is posted.

E. Reporting Requirements (§ 447.299)

1. Calculating Medicaid Shortfall

We proposed to revise § 447.299(c)(6), (7), (10), and (16) to reflect the statutory changes made by section 203 of the CAA 2021 to update the methodology for calculating the Medicaid shortfall portion (Medicaid costs less Medicaid payments) of the hospital-specific DSH limit to only include costs and payments for hospital services furnished to beneficiaries for whom Medicaid is the primary payer, effective for the SPRY beginning on or after October 1, 2021, and subsequent years, and to include the statutory exception for 97th percentile hospitals. Hospitals meeting this exception will calculate their hospital-specific DSH limit using the higher value of either the hospital-specific DSH limit calculated per the methodology which includes only costs and payments associated with beneficiaries for whom Medicaid is the primary payer or the hospital-specific DSH limit calculated per the methodology in effect on January 1, 2020. We reviewed the other data elements in § 447.299(c) to determine if additional updates were necessary to account for the changes made by section 203 of the CAA 2021. However, we noted our belief that these are the only data elements requiring updates because these are the only elements that will differ based on whether statutory requirements provide for the consideration of all Medicaid eligible individuals or only those for whom Medicaid is the primary payer. Therefore, we explained that it was only necessary to revise § 447.299(c)(6), (7), (10), and (16) to account for the statutory changes made by section 203 of the CAA 2021.

Accordingly, we proposed to revise § 447.299(c)(6), which specifies that this data element should include inpatient and outpatient Medicaid fee-for-service (FFS) basic rate payments paid to hospitals, ''not including DSH payments or supplemental/enhanced Medicaid payments, for inpatient and outpatient services furnished to Medicaid eligible individuals.'' We proposed this change because, for most hospitals, for SPRYs beginning on or after October 1, 2021, only those FFS payments for Medicaid eligible individuals for whom Medicaid is the primary payer will be counted in the calculation of the hospital-specific DSH limit. Therefore, we proposed to revise § 447.299(c)(6) to remove the reference to Medicaid eligible individuals and update the regulatory text to indicate that FFS payments for inpatient and outpatient hospital services furnished to Medicaid individuals in accordance with § 447.295(d) should be included in this data element.

We also proposed to revise § 447.299(c)(7), which specifies that this data element includes payments made to the hospitals ''by Medicaid managed care organizations for inpatient hospital and outpatient hospital services furnished to Medicaid eligible individuals.'' We proposed this change because for most hospitals, for SPRYs beginning on or after October 1, 2021, only payments made by Medicaid managed care organizations for Medicaid eligible individuals for whom Medicaid is the primary payer will be counted in the calculation of the hospital-specific DSH limit. Therefore, we proposed to revise § 447.299(c)(7) to remove the reference to Medicaid eligible individuals and update the regulatory text to indicate that Medicaid managed care payments for inpatient and outpatient hospital services furnished to Medicaid individuals in accordance with § 447.295(d) should be included in this data element.

We also proposed to revise § 447.299(c)(10), which specifies that this data element includes ''costs incurred by each hospital for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals.'' We proposed this change because for most hospitals, for SPRYs beginning on or after October 1, 2021, only costs incurred on behalf of Medicaid eligible individuals for whom Medicaid is the primary payer will be counted in the calculation of the hospital-specific DSH limit. Therefore, we proposed to revise § 447.299(c)(10) to remove the reference to Medicaid eligible individuals and update the regulatory text to indicate that costs incurred by each hospital for furnishing inpatient hospital and outpatient hospital services to Medicaid individuals as determined in accordance with § 447.295(d) should be included in this data element.

Finally, we proposed to revise § 447.299(c)(16), which currently specifies the calculation of uncompensated care costs to include ''the total cost of care for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals'' and the uninsured, which are to be offset by ''Medicaid FFS rate payments, Medicaid managed care organization payments, supplemental/enhanced Medicaid payments, uninsured revenues, and section 1011 payments for inpatient and outpatient hospital services.'' Therefore, we proposed to revise § 447.299(c)(16) to remove the reference to ''Medicaid eligible individuals'' and update the regulatory text to indicate that total annual uncompensated care cost equals the total cost of care for furnishing inpatient hospital and outpatient hospital services to ''Medicaid individuals as determined in accordance with § 447.295(d) and to individuals with no source of third-party coverage for the hospital services they receive,'' less the sum of payments received on their behalf, should be included in this data element.

We proposed that this and other CAA 2021-related proposals, noted in the respective sections, be applicable to fiscal years beginning on or after October 1, 2021, to align with the effective date of the amendments made by section 203 of the CAA 2021.

We received public comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: A few commenters indicated that the DSH audit should indicate which hospitals met the exception for 97th percentile hospitals and which methodology had a higher hospital-specific DSH limit: the limit including only costs and payments for Medicaid patients for whom Medicaid is the primary payer in the Medicaid portion of the hospital-specific limit calculation, or the methodology in effect on January 1, 2020. Commenters indicated that this information would be beneficial for informing future policy decisions.

Response: We agree that this would be useful information and suggest that auditors provide this information in the independent certified audit. Because we did not propose to include this element as a required part of the independent certified audit, future rulemaking would be necessary to impose this as a requirement. We are finalizing the provisions as proposed.

2. Reporting DSH Overpayments

To improve the accuracy of identification of provider overpayments discovered through the DSH audit process, we proposed to add an additional reporting requirement for annual DSH audit reporting required by § 447.299. We proposed to redesignate § 447.299(c)(21) as paragraph (c)(22) of that section, and to add a proposed new § 447.299(c)(21) to require an additional data element for the required annual DSH audit reporting. The new data element we proposed would require auditors to quantify the financial impact of any finding, including any impact resulting from incomplete or missing data, lack of documentation, non-compliance with Federal statutes or regulations, or other deficiencies identified in the independent certified audit, which may affect whether each hospital has received DSH payments for which it is eligible within its hospital-specific DSH limit.

Currently, audits may include a caveat indicating the auditors are unable to quantify the financial impact of an identified audit finding. We proposed that, for purposes of § 447.299, audit finding means an issue identified in the independent certified audit required under § 455.304 concerning the methodology for computing the hospital-specific DSH limit or the DSH payments made to the hospital, including compliance with the hospital-specific DSH limit as defined in § 447.299(c)(16). For example, an audit may identify that a hospital was unable to satisfactorily document the outpatient services it provided to Medicaid eligible patients, resulting in the exclusion of associated costs and payments from the Medicaid shortfall calculation. Based on this lack of documentation, the audit may include a caveat noting the auditor's finding that the hospital's total uncompensated care cost may be misstated as a result of this exclusion, with unknown impact on the hospital-specific DSH limit. Given this lack of quantification of the financial impact of this finding, CMS and the State would be unable to determine whether an overpayment has resulted related to this audit finding, and if so, the amount. We believe that requiring the quantification of such findings would limit the burden on States and CMS of performing follow-up reviews or audits. Specifically, conducting a secondary review or audit after the independent auditors have completed theirs would lengthen the review process, and therefore, delay the results of the audit. It would also require additional time, personnel, and resources by CMS, States, and hospitals to participate in a secondary review or audit, which would largely duplicate aspects of the audit already conducted by the independent auditor. If finalized, the new data element would help ensure appropriate recovery and redistribution, as applicable, of all DSH overpayments in excess of the hospital-specific limit. Adding this requirement to the submission would also ensure auditors provide the additional information at the time they are already reviewing the applicable data, reducing the labor burden as opposed to a later, secondary audit.

We explained that auditors would be afforded the professional discretion and the flexibility to determine how to best quantify these amounts in the audit findings. For example, auditors would be able to use alternative source documentation, utilize a methodology to estimate the financial impact in terms of the dollar amount at risk, or provide an estimated range of financial impact if a determination of an exact dollar amount is not possible. However, we also noted our understanding that, due to the complexity of issues that may arise, the actual financial impact of an audit finding may not always be calculable. Therefore, we proposed that, in the expectedly rare event that the actual financial impact cannot be calculated, a statement of the estimated financial impact for each audit finding identified in the independent certified audit that is not reflected in the other data elements identified in § 447.299(c) would be required. We proposed that actual financial impact would mean the total amount associated with audit findings calculated using the documentation sources identified in § 455.304(c). Estimated financial impact would mean the total amount associated with audit findings calculated on the basis of the most reliable available information to quantify the amount of an audit finding in circumstances where complete and accurate information necessary to determine the actual financial impact is not available from the documentation sources identified in § 455.304(c). The estimated financial impact would use the most reliable available information (for example, related source documentation such as data from State systems, hospitals' audited financial statements, and Medicare cost reports) to quantify an audit finding as accurately as possible. We noted our belief that this additional data reporting element is necessary to better enable our oversight of the Medicaid DSH program to better ensure compliance with the hospital-specific DSH limit in section 1923(g) of the Act.

Additionally, we proposed to add § 447.299(f), which would codify our existing policy for how overpayments identified through the annual independent certified DSH audits required under part 455, subpart D, must be handled and reported to CMS. Specifically, we proposed that DSH payments found in the independent certified audit process under part 455, subpart D, to exceed hospital-specific limits are provider overpayments for which FFP must be returned to the Federal Government in accordance with the requirements in 42 CFR part 433, subpart F, or redistributed by the State to other qualifying hospitals, if redistribution is provided for under the approved State plan. We proposed that overpayment amounts returned to the Federal Government must be separately reported on the Form CMS–64 as a decreasing adjustment which corresponds to the fiscal year DSH allotment and Medicaid SPRY of the original DSH expenditure claimed by the State.

We further proposed to add § 447.299(g), which would establish reporting requirements concerning the redistribution of DSH overpayments in accordance with a State's redistribution methodology in its Medicaid State plan, as applicable. Specifically, we proposed that, as applicable, States would be required to report any overpayment redistribution amounts on the Form CMS–64 within 2 years from the date of discovery that a hospital-specific limit has been exceeded, as determined under § 433.316(f) in accordance with a redistribution methodology in the approved Medicaid State plan. The State would be required to report redistribution of DSH overpayments on the Form CMS–64 as separately identifiable decreasing adjustments reflecting the return of the overpayment as specified in § 447.299(f) and increasing adjustments representing the redistribution by the State. Both adjustments must correspond to the fiscal year DSH allotment and Medicaid SPRY of the related original DSH expenditure claimed by the State. These proposed additions of paragraphs (f) and (g) to § 447.299 would memorialize our current policy concerning the return of FFP in or redistribution of Medicaid DSH payments in excess of the hospital-specific limit in regulation, and thereby promote clarity and transparency, avoid misunderstanding, and enhance oversight of the Medicaid DSH program.

We explained that these proposals for the independent certified audit and DSH-related claims reporting would enhance Federal oversight of the Medicaid DSH program and improve the accuracy of DSH audit overpayments identified and collected through annual DSH audits. We invited comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: A few commenters expressed concerns about the language regarding auditors' ability to provide an estimate of the financial impact. One commenter opposed the provision on the basis that overpayment determinations would be based on estimates. Another commenter sought clarity on how an auditor would be able to submit an estimated range of impact.

Response: We want to clarify our language around the use of estimates and financial impact ranges, and our expectation for how States should handle estimated financial impacts. First and foremost, we emphasize that we expect auditors to calculate an actual financial impact of their audit findings wherever possible. Experience has shown that currently, some States' contracts with auditors do not require any quantification of overpayments, leaving this critical activity incomplete following completion of the audit. By finalizing this new data element proposal, we intend to require that State contracts with auditors must require the auditor to take the extra step of quantifying the financial impact of their findings, based on the audit work already being performed. We intend to stop the practice of a State's acceptance of auditor ''caveats'' unaccompanied by a statement of actual or estimated financial impact, which leaves unnecessary duplicative and burdensome work to the State and CMS to determine any associated overpayment amount. We believe the additional cost and burden associated with the new data element would be minimal given that auditors are already engaged in a focused review of available documentation to quantify the aggregate amounts that comprise each of the existing data elements required under § 447.299(c).

However, as stated in the proposed rule, we acknowledge that even where State contracts with auditors require the auditor to quantify the actual or estimated financial impact of any findings, there are rare circumstances where the financial impact of an identified issue cannot be quantified. As commenters noted, we would allow the auditor to submit an estimated impact in these expectedly rare circumstances. We want to clarify that the reference to an ''estimated range of financial impact'' [28] in the proposed rule was intended to refer to this circumstance. We also want to clarify that we do not require that States treat an estimate an auditor produces in this context as a determination of an overpayment amount. Consistent with our characterization of overpayments in § 433.316(c)(1) through (3), an estimate would reflect an inability to calculate a specific amount and would not represent a quantified overpayment. It is our expectation that more auditors, by employing appropriate methods at their professional discretion, have the ability to quantify these amounts, than are currently being required to do so under their contracts with the relevant State. If an auditor is truly unable to quantify a finding or caveat using its best professional efforts, the auditor should recommend specific corrective action in its audit report. We expect that the States will submit a corrective action plan as part of the final audit report for CMS approval. Additionally, we remind States that under 42 CFR 431.992, a corrective action plan may be required for possible payment error in association with the Payment Error Rate Measurement process described at 42 CFR 431.950 *et seq.* We realize that given the independent certified DSH audit and report is not due to us until the end of the calendar year 3 years following the end of each SPRY, there may be a significant lag between when an auditor identifies an issue and when the State and hospitals are able to implement corrective action. We intend to take this lag into consideration in determining whether the State's annual audit and DSH payments meet Federal requirements. We may use the deferral and/or disallowance of FFP per § 447.299(e) to ensure timely compliance with Federal DSH reporting requirements.

Comment: One commenter requested that CMS provide standardized guidance for how to calculate and quantify any errors and overpayment amounts. They were concerned that variations in methodology would result in disparate and possibly inequitable impacts from the new data element.

Response: We understand the desire for standardized guidance, and we did consider this option. However, we are finalizing as proposed and will continue to evaluate the need for additional CMS guidance. We expect auditors to utilize their professional discretion to determine how to best quantify errors and overpayment amounts. Allowing this flexibility acknowledges the potential variability in issues an auditor may identify. In addition, auditors are not wholly without guidance on this issue. Auditors should utilize the source documents discussed throughout the 2008 DSH audit final rule to develop their calculations.[29] Finally, as always, we are available to assist any States seeking to develop or enhance their instructions to auditors.

Comment: A few commenters expressed concerns on burden and auditors' ability to quantify data caveats. Specifically, one commenter opposed the proposed new data element because the requirement to quantify data caveats would present a significant burden on States to pay for that level of audit. They recommended that instead CMS should target States with the highest DSH allotments for this new requirement or that CMS should hire a vendor to perform all audits. Another commenter stated that CMS lacked data supporting the assertion that auditors could easily quantify their findings, or that it would be rare for an auditor to need to provide an estimate.

Response: We disagree that this new requirement will constitute a significant burden increase. If an auditor is already completing a full review of DSH documentation, then the information needed to calculate amounts should be readily available and the calculation of associated amounts would not create a significantly burdensome additional step. In other words, if an auditor is performing a review of all available documentation in order to produce the

[28] 88 FR 11865 at 11876.

[29] See for example 73 FR 77904 at 77917 for types of source documentation, which can include hospital cost reports, hospital financial statements, and other hospital accounting records.

audit, then they have the documentation that will inform how payments were made and whether claims for FFP are supported, which should allow the auditor to identify and calculate any possible overpayments. If a State is finding there is a significant change in effort to meet this additional requirement, it could be an indication that previous audit contracts were too limited to result in an independent certified audit sufficient to identify whether DSH payments to hospitals were consistent with each provider's hospital-specific DSH limit. In addition, because we are allowing flexibility in methodology, an auditor could (and should) utilize an approach that minimizes unnecessary burden while still arriving at a mathematically valid final calculation. As discussed in a previous response, experience has shown that some States have limited contracts with their auditors to meet minimum requirements, which results in audit reports that rely heavily on data caveats and are limited in their usefulness for identifying overpayment amounts.

The DSH audits are statutorily required under section 1923(j) of the Act, which places the requirement on the States to perform the audit. All States that make DSH payments must comply with the independent certified audit requirements as a condition of receipt of FFP in their DSH payments. We do not believe the statute contemplates applying more stringent audit standards only to some States. We believe this new requirement is important to ensuring that payments are being made properly, regardless of the potential amount of overpayment that could have occurred in a given State.

Additionally, section 1923(j) of the Act requires States, not CMS, to submit an independent certified audit. We therefore established in the 2008 DSH final rule the requirement for States to contract with an independent auditor to meet this requirement; CMS does not have authority to hire a vendor to perform all independent certified audits, and to do so would duplicate a requirement that Congress has placed on the States. We note that FFP is available in States' allowable administrative expenditures for their audit contracts.

Lastly, regarding the comment stating CMS lacked data supporting the assertion auditors could easily quantify their findings, we have heard from various auditors directly that they can provide more data but are not presently being requested by States to do so. This information about auditors' experiences is why we are confident it would be unlikely that an auditor would need to provide an estimated financial impact amount in more than rare circumstances. Therefore, we are finalizing this required data element with the expectation that States will contract with auditors to take the appropriate steps to quantify findings for which some States' auditors have been including data caveats.

Comment: A few commenters expressed concern in regard to the implementation of the new data element and its interplay with the other data elements. One commenter requested that CMS clarify how the new data element would be used. They specifically inquired if CMS would calculate a new total annual UCC since the commenter perceived that the new data element quantifying any overpayments would not necessarily be reproducible from the other data elements already included in the audit. On the other hand, another commenter questioned whether an amount quantified under this new requirement would not be already accounted for in other data elements of the audit and expressed concern about duplication of effort.

Response: The intent of the new data element, to the extent an auditor has provided actual calculations of impacts, is for States to treat it as an identified overpayment amount. It relates to a quantification of errors, and errors should not be represented in the other data elements of the report, as amounts inclusive of errors would presumably be unsupported by documentation, inaccurate, or otherwise inappropriate. A State's calculated UCC or hospital-specific DSH limit should not include errant or unsupported data, and therefore the quantification included in the new data element should not impact the UCC/hospital-specific DSH limit or necessitate a change.

If the State plan methodology allows for redistribution that would result in changes to DSH audit data elements, we would expect the State to reflect the redistribution-related changes to applicable data elements in relevant CMS–64s and in revised data element reports. The impacts calculated under the new data element should not duplicate any other data elements in content, but should be consistent with and may be calculated based on other required data elements, as determined by the auditor. Additionally, we are finalizing at § 447.299(c)(21) language that specifically states the amount for the new data element should include amounts ''not otherwise reflected in data elements described in this paragraph (c).''

Comment: A few commenters express concern on the parameters of the new data element. Specifically, one commenter questioned if ''disclosures'' should be regarded as the types of data caveats and errors that an auditor would be required to quantify under this new requirement. Another requested an exception to the requirement when a State is aware an addendum is forthcoming on an audit.

Response: We are unsure precisely what the commenter meant by their use of ''disclosure.'' If ''disclosure'' is being used synonymously with data caveat and is included in lieu of providing a calculated impact where it would be possible to state the actual or estimated financial impact of an identified issue, then this information would be covered by the new requirement we are finalizing in this rule. If the ''disclosure'' is merely to make CMS aware of a qualitative circumstance that, by nature, could not be associated with a quantified financial impact, we would not expect an auditor to attempt to produce an actual or estimated impact.

There is no exception to this data requirement, or independent certified audit deadlines in general, when a State or auditor knows a change or addendum to the audit report is forthcoming. Existing regulations at § 433.320(c) contemplate scenarios where an overpayment amount is subsequently adjusted and provides the requirements and procedures for how to address those changes. In addition, frequently asked question (FAQ) #17 of the ''Additional Information on the DSH Reporting and Audit Requirements'' guidance [30] explains that States have 3 years beyond the applicable FFY for ongoing report and audit submission, in recognition of potential delays in obtaining needed information. Based on the audit and reporting deadlines, the requirement in § 447.45(d) for provider claims to be filed within a year from the date of service and promptly paid by the State, and the 2-year timely claim filing requirement in 45 CFR 95.7, we explained in FAQ #17 that there should not be a significant adjustment to Medicaid payments that would warrant a corrected audit and report. However, we acknowledge there is still a possibility that a significant adjustment to Medicaid payment may occur for which the State claims Federal matching dollars (or returns Federal matching dollars) as a prior period adjustment, falling outside the timely claims filings we would expect to be

[30] *https://www.medicaid.gov/medicaid/downloads/part-1-additional-info-on-dsh-reporting-and-auditing.pdf.*

reflected in original audit submissions. In these instances, the State should submit corrected audits and data element reports in the same manner as the originals, indicating post-audit adjustments to Medicaid and DSH payments that are reflected in the audit or report (or uncompensated care costs if Medicaid payment adjustments affect the Medicaid shortfall) once those adjustments have been made.

Comment: One commenter expressed concern about the disparate impact this requirement may have for hospitals that disproportionately experience certain data issues outside of a State's or hospital's control, such as a hospital with a high volume of out-of-State patients that cause delays in obtaining necessary documentation.

Response: We want to emphasize that, although we hope this new requirement will compel action by States to contract for, ensure the completion of, and submit thorough DSH audits, there is still flexibility for those limited scenarios where an auditor simply cannot obtain the data or employ appropriate mathematical methods to quantify the financial impact of an identified issue. We proposed that auditors would be able to provide an estimated financial impact in these situations. We also note that under existing policy and as finalized in this section of this final rule, States have 3 years beyond the applicable FFY to submit audits, and 2 years following the identification of an overpayment to perform redistributions, as applicable under the State plan. The regulations at § 433.320, as mentioned previously, also contemplate subsequent adjustments to identified overpayment amounts.

Comment: A few commenters requested changes or sought clarity around the scope of the overpayment policy in § 447.299(f). Specifically, one commenter requested an exception to the requirement to recoup or redistribute an identified overpayment as described in § 447.299(f) if the State knows an audit modification is forthcoming in the near future that would require a revised redistribution or recoupment. Another comment requested clarification about how States should handle an underpayment identified in the new DSH data element if the State had not paid out its entire DSH allotment initially and its approved DSH payment methodology called for additional payments to one or more DSH hospitals with room under the hospital-specific DSH limit.

Response: We are finalizing the § 447.299(f) provision as proposed and without an exception to this provision when a State knows a change to the independent certified audit report is likely to be forthcoming. As mentioned in a previous response, we already allow States 3 years beyond the applicable FFY for ongoing report and audit submission under § 455.304(b). In addition, if an overpayment is discovered later, then that overpayment would be subject to the same requirements as any other State Medicaid overpayment, and should be handled in accordance with part 433, subpart F. While we appreciate that there may be rare circumstances when certain information is not available in time to meet these deadlines, we think the time allowed is more than adequate for the vast majority of cases and do not believe that an extension or indefinite timeframe for the independent certified audit and report would be appropriate.

States retain considerable flexibility to design a payment adjustment methodology for DSH hospitals. If States choose to pay up to a hospital's UCC (the full extent of its hospital-specific DSH limit, subject to available funds within the State's Federal Medicaid DSH allotment), in some instances, the DSH audit may identify hospitals that were not paid up to their uncompensated care cost as provided in the State's approved DSH payment methodology. If the State plan outlines an interim payment methodology, the State may be able to make additional DSH payments or redistribute amounts from hospitals that received excess DSH payments (over their hospital-specific DSH limits) to these hospitals with remaining uncompensated care costs through a reconciliation process to address the ''underpayment.''

Comment: One commenter sought clarification regarding how the effective date of the rule would impact States with respect to § 447.299(g); for example, the commenter sought clarification on how this new requirement would impact States currently performing redistributions on amounts from more than 2 years prior. The commenter also inquired from what date related to a discovered overpayment a State would have 2 years to redistribute.

Response: We are finalizing § 447.299(g) as proposed. The 2-year policy for redistribution will apply for overpayments identified from the effective date of this final rule, onward. However, this policy has already been communicated directly to States, which have been aware of the two-year timeframe for performing redistributions provided for under the State's approved DSH payment methodology; this final rule merely codifies this existing policy in regulation. If a State is currently processing older redistributions, then the State should make every effort to come into compliance within the timeframes established in this final rule as expeditiously as possible. Regarding the date of discovery of an overpayment, we intend the 2-year timeframe for redistribution to be determined consistent with the policy we are finalizing at § 433.316(f), where we define the date of discovery of a DSH audit overpayment.

Comment: One commenter was in favor of the redistribution provisions in proposed § 447.299(f) and (g) for the clarity they would provide States on an issue that had multiple reasonable interpretations, but suggested CMS collect hospital-specific data following any redistributions.

Response: We thank the commenter for their suggestion. When our analysts who perform reviews of State-submitted CMS–64s receive a CMS–64 that indicates redistributions, and a State has not otherwise provided updated hospital-specific data in a revised data elements report after the submission of the independent certified audit for the relevant year, we perform outreach to confirm the new hospital-specific payment amounts and hospital-specific DSH limits and to instruct the State to submit a revised data elements report reflecting these new amounts.

We are finalizing the provisions to § 447.299 as proposed, with minor phrasing changes to § 447.299(c)(6), (c)(10) introductory text, (c)(10)(ii), and (c)(16) replacing ''pursuant to'' with ''in accordance with'' to align with current style guidelines.

F. Definitions (§ 455.301)

We proposed to revise the definition of the ''independent certified audit'' to include the requirement for auditors to quantify the financial impact of each audit finding, or caveat, on an individual basis, for each hospital, per the reporting requirement in proposed § 447.299(c)(21) and under section 1923(j)(1)(B) of the Act. We explained that updating this definition is consistent with the goals of the updates to § 447.299(c)(21) to facilitate our determination of whether the State made DSH payments that exceeded any hospital's specific DSH limit in the Medicaid SPRY under audit. Specifically, as discussed in item five of the proposed provisions, we proposed to add to annual DSH reporting required under § 447.299(c) a requirement for States to report the financial impact of audit findings identified by the State's independent auditor. To align with this proposal, we proposed to revise the definition of the independent certified audit under § 455.301 to include the auditor's certification of ''a quantification of the financial impact of each audit finding on a hospital-specific basis.'' As previously discussed, based on current independent certified DSH audit submissions, we are at times unable to determine whether a DSH overpayment to a provider has occurred, the underlying cause of any overpayment, and the amount of the overpayment(s) associated with each cause. This is the result of an auditor including audit findings or caveats indicating that missing information or other issues may have an impact on the calculation of total uncompensated care costs (that is, the hospital-specific DSH limit), while not making a determination of the actual (or estimated) financial impact of the identified issue. As such, we noted our belief that revising the definition to include a quantification of the financial impact of any issues identified in the audit is necessary to better ensure proper oversight and integrity of the DSH program.

We solicited comments related to the proposed change. We did not receive public comments on this provision and are finalizing as proposed these changes to § 455.301.

G. Condition for Federal Financial Participation (FFP) (§ 455.304)

We proposed to revise § 455.304(d)(1), (3), (4), and (6) to reflect the proposed revisions to the independent certified data elements at § 447.299(c)(6), (7), (10), and (16). The revisions would reflect the statutory changes made by section 203 of the CAA 2021, updating the independent certified audit verifications as they relate to the treatment of Medicaid eligibles and third-party payers. We reviewed the other independent certified audit verifications in § 455.304(d) to determine if additional updates were necessary to account for the changes made by section 203 of the CAA 2021. However, we noted our belief that these are the only verifications requiring updates because these are the verifications that consider the treatment of Medicaid eligibles for purposes of the independent certified audit. Therefore, it is only necessary to revise § 455.304(d)(1), (3), (4), and (6) to account for the statutory changes made by section 203 of the CAA 2021.

Accordingly, we proposed to revise § 455.304(d)(1), which specifies that auditors should verify that each qualifying hospital that receives DSH payments, associated with the provisions of services to ''Medicaid eligible individuals and individuals with no source of third-party coverage,'' is allowed to retain that payment. We proposed this change because for most hospitals, for SPRYs beginning on or after October 1, 2021, the methodology by which these DSH payments are calculated and paid will be reflective of Medicaid costs and payments associated with Medicaid eligible individuals for whom Medicaid is the primary payer. Therefore, we proposed to revise § 455.304(d)(1) to remove the reference to Medicaid eligible individuals and update the regulatory text to indicate that the DSH payments are associated with inpatient hospital and outpatient hospital services provided to Medicaid individuals as determined in accordance with § 447.295(d).

We also proposed to revise § 455.304(d)(3), which specifies that ''[o]nly uncompensated care costs of furnishing inpatient and outpatient hospital services to Medicaid eligible individuals'' and the uninsured should be included in the calculation of the hospital-specific DSH limit. We proposed this change because for most hospitals, for SPRYs beginning on or after October 1, 2021, only costs incurred on behalf of Medicaid eligible individuals for whom Medicaid is the primary payer will be counted in the calculation of the hospital-specific DSH limit. Therefore, we proposed to revise § 455.304(d)(3) to remove the reference to Medicaid eligible individuals and update the regulatory text to indicate that uncompensated care costs for furnishing inpatient hospital and outpatient hospital services to Medicaid individuals is determined in accordance with § 447.295(d). We also proposed to revise § 455.304(d)(3) to streamline this provision by removing a redundant reference to section 1923(g)(1)(A) of the Act.

Further, we proposed to revise § 455.304(d)(4), which specifies that Medicaid payments, including FFS, supplemental/enhanced, and Medicaid managed care payments made to a hospital ''for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals,'' should be included in the calculation of the hospital-specific DSH limit. We proposed this change because for most hospitals, for SPRYs beginning on or after October 1, 2021, only costs incurred on behalf of Medicaid eligible individuals for whom Medicaid is the primary payer will be counted in the calculation of the hospital-specific DSH limit. Therefore, we proposed to revise § 455.304(d)(4) to remove the reference to Medicaid eligible individuals and update the regulatory text to indicate that the DSH payments associated with inpatient hospital and outpatient hospital services provided to Medicaid individuals as determined in accordance with § 447.295(d) are included in the calculation of hospital-specific DSH limit.

Finally, we proposed to revise § 455.304(d)(6), which requires that auditors include a description of the methodology for calculating each hospital's hospital-specific DSH limit, including ''how the State defines incurred inpatient hospital and outpatient hospital costs for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals.'' We proposed this change because for most hospitals, for SPRYs beginning on or after October 1, 2021, the methodology by which these DSH payments were calculated and paid will be reflective of Medicaid costs and payments associated with Medicaid eligible individuals for whom Medicaid is the primary payer. Therefore, we proposed to revise § 455.304(d)(6) to remove the reference to Medicaid eligible individuals and update the regulatory text to indicate that inpatient hospital and outpatient hospital services provided to Medicaid individuals are determined in accordance with § 447.295(d).

We proposed that these and other CAA 2021-related proposals, noted in the respective sections, be applicable to fiscal years beginning on or after October 1, 2021, to align with the effective date of the CAA 2021.

We solicited comments on these proposed changes. We did not receive public comments on the proposed changes to § 455.304 and are finalizing them as proposed, with minor phrasing changes to § 455.304(d)(1), (3), (4), and (6) replacing ''pursuant to'' with ''in accordance with'' to align with current style guidelines.

H. Process and Calculation of State Allotments for FYs After FY 2008 (§ 457.609)

We have not published CHIP allotments in the **Federal Register** since the FY 2013 CHIP allotments. Each year following FY 2013, States have been notified of their CHIP allotments through email notifications or MBES/CBES. We proposed to remove from § 457.609(h), which references our discretionary option to publish in the **Federal Register** the national CHIP allotment amounts as determined on an annual basis for the FYs specified in statute. Instead, we proposed to post CHIP allotments in the MBES/CBES and at *Medicaid.gov* (or similar successor systems or websites) annually. We noted our belief that posting the CHIP allotment amounts at *Medicaid.gov* and in the MBES/CBES is an efficient way to increase transparency by making the information more easily accessible to interested parties and would be less administratively burdensome for us.

We solicited comments related to this proposed change and received public comments. The following is a summary of the public comments we received and our responses.

Comment: Several commenters mentioned the CHIP **Federal Register** publication. Most of these comments were combined with the comments on the DSH allotment publication proposal, discussed earlier in this final rule. The concerns cited in those comments were related to the lack of transparency of MBES/CBES publications because those are not available to the public, and the accountability of a report being posted on *Medicaid.gov,* because a website can be changed while the **Federal Register** produces static, dated publications. One comment opposed the removal of the April 1 target publication date for CHIP allotments.

Response: We are finalizing this policy as proposed. Although the CHIP allotment publication proposal and the DSH allotment publication proposal may appear similar, the CHIP proposal is distinct in that the prior regulation already afforded CMS discretion whether or not to publish the CHIP allotments in the **Federal Register**, which CMS has not done since FFY 2013. Please refer to the response in section II.A.4. of this rule, ''Limitations on Aggregate Payments for DSHs Beginning October 1, 1992,'' for a response to the DSH allotment publication comments. A couple comments received that referenced CHIP but requested we continue to publish in the **Federal Register** are not actually relevant to CHIP, since CHIP allotments have not been published in the **Federal Register** in recent years.

We also note that the new regulation commits us to publishing final CHIP allotments on *Medicaid.gov,* which is not currently done, thereby increasing transparency for CHIP allotments. We also note that the current CHIP allotment regulation does not include the April 1 date; that was only part of the similar DSH allotment publication policy we are finalizing in this rule. However, we note the lack of the target date would not affect States receiving their necessary information, a concern cited by the commenter. As with the DSH allotments, we inform States as soon as information is available about their respective allotment amounts. Removing the target date for a final, public report simply affords CMS room to finalize data in instances where a State is late submitting data to CMS.

III. Retroactive Application of the Rule

The amendments made by section division CC, title II, section 203 of the CAA 2021, require that the changes to the calculations of Medicaid hospital-specific DSH limits take effect on October 1, 2021, and apply to payment adjustments made under section 1923 of the Act during fiscal years beginning on or after that date. Accordingly, the CAA 2021 provisions finalized in this rule at §§ 447.295(b) and (d), 447.299(c)(6), (7), (10), and (16), and 455.304(d)(1), (3), (4), and (6) will apply retroactively as set out in statute.

Comment: One commenter expressed concern on the retroactive application of the rule. The commenter requested that we limit the retroactive application to only those provisions that require such an application by statute.

Response: As proposed, we are limiting the retroactive application to those provisions related to the CAA 2021 changes.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a ''collection of information'' requirement is submitted to the Office of Management and Budget (OMB) for review and approval. For the purpose of the PRA and this section of the preamble, collection of information is defined under 5 CFR 1320.3(c) of the PRA's implementing regulations.

To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Our effort to minimize the information collection burden on the affected public, including the use of automated collection techniques.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In the February 24, 2023 (88 FR 11865) proposed rule, we solicited public comment on each of the aforementioned issues for the sections of the rule that contained information collection requirements. We did not receive any such comments.

A. Wage Estimates

To derive average costs, we used data from the U.S. Bureau of Labor Statistics' (BLS) May 2022 National Occupational Employment and Wage Estimates for all salary estimates (*https://www.bls.gov/oes/2022/may/oes_nat.htm*). In this regard, Table 1 presents BLS' mean hourly wage, our estimated cost of fringe benefits and other indirect costs (calculated at 100 percent of salary), and our adjusted hourly wage.

TABLE 1: National Occupational Employment and Wage Estimates

Occupation Title	Occupation Code	Mean Hourly Wage ($/hr)	Fringe Benefits and Other Indirect Costs ($/hr)	Adjusted Hourly Wage ($/hr)
Accountants and auditors	13-2011	41.70	41.70	83.40
Financial Specialist all other	13-2099	40.18	40.18	80.36
Managers all other	11-9199	67.88	67.88	135.76

As indicated, we are adjusting our employee hourly wage estimates by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer, and because methods of estimating these costs vary widely from study to study. Nonetheless, we believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

B. Information Collection Requirements (ICR)

The following ICR section sets out requirements and burden that are subject to OMB review and approval under the authority of the PRA.

The provisions that are not discussed in this section (IV) of the preamble are not associated with any information collection requirements. In that regard they are not subject to the requirements of the PRA. For this rule's full burden implications, please see the Regulatory Impact Analysis under section V. of this preamble.

1. ICRs Regarding DSH Reporting Requirements (§ 447.299)

The following changes will be submitted to OMB for approval under control number 0938–0746 (CMS–R–266).

Under § 447.299 as finalized in this rule, States will be required to provide an additional data element as part of their annual DSH audit reports. This additional element will require a State auditor to quantify the financial impact of any audit finding not captured within any other data element under § 447.299(c), which may affect whether each hospital has received DSH payments for which it is eligible within its hospital-specific DSH limit.

The additional data element requires auditors to indicate the financial impact of all findings rather than indicating that the financial impact of any finding is unknown.

The burden consists of the time it would take each State to quantify any audit finding identified during the independent certified audit required under section 1923(j)(2) of the Act. As we rarely receive audits with no identified findings, we assume (for the purposes of this estimate) that all applicable States will complete this work. The territories have been excluded from this requirement since they do not receive a DSH allotment under section 1923(f) of the Act. We have also excluded Massachusetts from the total burden estimate, as it currently does not complete DSH audits because its entire DSH allotment amount is diverted for payments under a section 1115 demonstration project.

We believe the additional burden associated with the new data element would be 2 hours given that auditors are already engaged in a focused review of available documentation to quantify the aggregate amounts that comprise each of the existing data elements required under § 447.299(c). We estimate that the 2 hours would consist of 1 hour at $80.36/hr for a financial specialist to add the additional data to the report and 1 hour at $135.76/hr for management and professional staff to review the additional data in the report. In aggregate we estimate an annual burden of 100 hours (50 States × 2 hr/response × 1 response/year) at a cost of $10,806 (50 States × [(1 hr × $135.76/hr) + (1 hr × $80.36/hr)]).

If the auditor is unable to determine the actual financial impact amount of an audit finding, the auditor would be required to provide a statement of the estimated financial impact for each audit finding identified in the independent certified audit. For the purposes of this burden estimate, we assume that every State may have some quantifiable findings and some unquantifiable findings. As such, we anticipate that a State auditor would have to spend an additional 1 hour at $83.40/hr quantifying the financial impact of DSH findings that are classified as unknown. In aggregate, we estimate an annual burden of 50 hours (50 States × 1 hr) at a cost of $4,170 (50 hr × $83.40/hr).

When taking into account the 50 percent Federal administrative match, we estimate an annual cost of $7,488 ([$10,806 + $4,170] × 0.5).

C. Summary of Annual Burden Estimates

Table 2 summarizes the burden for the provisions.

TABLE 2: Annual Recordkeeping and Reporting Requirements

Regulation Section(s) under title 42 of the CFR	OMB Control Number (CMS ID Number)	Respondents	Responses (per State)	Total Responses	Time per Response (hours)	Total Annual Time (hours)	Labor Costs ($/hr)	Total Cost ($)	State Share ($)
§ 447.299 DSH audit	0938-0746 (CMS-R-266)	50	1	50	2	100	varies	10,806	5,403
		50	1	50	1	50	83.40	4,170	2,085
Total		50	2	100	varies	150	varies	14,976	7,488

In this rule our proposed burden estimates have been adjusted by using BLS' most recent wage estimates (May 2022 vs May 2021) and by accounting for 50 respondents, instead of the 51 respondents that was accounted for in our proposed rule to remove Massachusetts as it currently does not complete DSH audits because its entire DSH allotment amount is diverted for payments under a section 1115 demonstration project.

V. Regulatory Impact Analysis

A. Statement of Need

This final rule will codify in Federal regulations the statutory requirements of division CC, title II, section 203 of the CAA 2021, which relate to Medicaid shortfall and third-party payments. These changes are necessary to align with Federal statute and to provide States and hospitals an understanding of how qualifying hospitals' DSH payments may be impacted by the CAA 2021. These changes are necessary in order to reflect the statutory changes to section 1923(g) of the Act to update the methodology for calculating the Medicaid shortfall portion of the hospital-specific DSH limit to only include costs and payments for hospital services furnished to beneficiaries for whom Medicaid is the primary payer, and to codify the exception for certain hospitals that are in the 97th percentile or above of all hospitals with respect to the number of Medicare SSI days or percentage of Medicare SSI days to total inpatient days.

Since we were required to engage in rulemaking to codify the statutory changes made under the CAA 2021, we also took the opportunity to update certain DSH regulations to provide additional clarity and efficiency. The changes to the BNF and associated calculations performed under the DHRM will provide better clarity for States that divert all or a portion of their DSH allotment under an approved section 1115 demonstration. We are also adding additional specificity to the reporting requirements of the annual DSH audit conducted by an independent auditor, which will enhance Federal oversight of the Medicaid DSH program. Additionally, we will improve the accurate identification and collection of overpayments identified through the annual DSH independent certified audits by specifying the date of discovery and standards for return of FFP or redistribution of DSH payments made to providers in excess of the hospital-specific limit. Finally, this final rule will alleviate the administrative burden of publishing the annual DSH and CHIP allotments in the **Federal Register**, of which we also notify States directly by providing notification through other, more practical means.

B. Overall Impact

We have examined the impacts of this final 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), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (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)(1) 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 OMB's 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 regulatory impact analysis (RIA) must be prepared for major rules with significant regulatory action/s and/or with significant effects as per section 3(f)(1) ($200 million or more in any 1 year). Based on our estimates using a ''no action'' baseline, OIRA has determined that this rulemaking is ''significant'' under section 3(f)(1) and meets the criteria set forth in 5 U.S.C. 804(2) under subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act)''.

C. Detailed Economic Analysis

Some amendments made by the CAA 2021 required us to propose regulatory updates, but there are statutory changes that are effective regardless of our actions. Typically, under OMB Circular A–4, our analysis for instances such as this would utilize a ''pre-statute'' baseline. However, we are unable to assess the impact of the statutory changes in a meaningful way due to the potential for variation in the Medicare cost reporting and claims data, as well as supplemental security income eligibility data, that inform the new standard. Additionally, the ranking created by those data whereby an unknown 3 percent of entities would have the higher of two options, further inhibited our ability to estimate the impact in a meaningful way. Therefore, for the assessment of incremental economic impact that appears below, we compare the effects of this rulemaking against a ''no action'' baseline. This baseline incorporates the statutory changes made by the CAA 2021 that do not require rulemaking to be in effect, such as the change to the definition of Medicaid shortfall. This will be the focus of our analysis.

Similarly, for the non-CAA 2021-required or related DSH provisions in the proposed rule, our analytical baseline is a direct comparison between the proposed provisions and not finalizing this rule.

Because the impact of our rule depends on downstream impacts of changes created in statute unaffected by this rulemaking, such as the change to only include Medicaid costs and payments in the hospital-specific DSH limit when Medicaid is the primary payer, calculating financial cost and transfer impacts specific to this rulemaking presents challenges which we will discuss further in those sections.

1. Benefits

The policies in this final rule will enhance Federal oversight of the Medicaid DSH program, improve the accuracy of DSH audit overpayments identified through and collected as a result of annual DSH audits, and provide clarity on certain existing Medicaid DSH policies. This final rule will codify certain existing CMS policies, including that the date of discovery of DSH overpayments is determined according to the earliest of the date on which the State submits its annual DSH independent certified audit to CMS, or any of the dates specified in § 433.316(c). Further, this final rule will provide additional transparency regarding the DSH allotment reductions calculated under the DHRM, specifically regarding the BNF, by updating the applicable regulations to specify that amounts diverted under a section 1115 demonstration approved after July 31, 2009, or approved as of that date but for a purpose other than coverage expansion, are subject to reduction under the HMF and HUF. Further, these regulatory updates will provide transparency regarding how the amounts diverted under a section 1115 demonstration are to be determined and applied in the DHRM. In addition, this final rule includes specific details related to the development and application of the data set used to determine the qualification for the exception for 97th percentile hospitals. This final rule details how hospital-specific DSH limits should be calculated under section 1923(g) of the Act and reported in the independent certified audit, as specified in § 447.299(c). Further, the additional data reporting element in § 447.299(c)(21) will strengthen CMS oversight of the Medicaid DSH program and better ensure compliance with the hospital-specific DSH limit under section 1923(g) of the Act. Finally, this final rule will also allow CMS to provide annual DSH and CHIP allotment information in a timely and accessible manner while reducing unnecessary administrative burden by eliminating the §§ 447.297(c) and 457.609 requirement and option, respectively, to publish these annual allotments in a **Federal Register** notice.

2. Costs

Under § 447.299, this final rule will require States to determine the hospital-specific DSH limit for hospitals meeting the exception for 97th percentile hospitals. For these hospitals, the hospital-specific DSH limit is calculated using the higher value of either the hospital-specific DSH limit amount determined for the hospital under section 1923(g)(1)(A) of the Act as amended by section 203 of the CAA 2021 or the amount determined for the hospital under section 1923(g)(1)(A) of the Act as in effect on January 1, 2020. This amount will be captured under the reporting element at § 447.299(c)(10). While we proposed that CMS will produce the source of data used to identify hospitals qualifying to meet the exception for 97th percentile hospitals, this will require a State auditor to calculate two separate hospital-specific DSH limits and determine the higher value thereof for hospitals meeting this exception. Given this exception applies to a limited number of hospitals and that the identity of these hospitals and the information required to determine their hospital-specific DSH limit amounts under both calculations would be based on readily available information, we believe the additional burden associated with determining the hospital-specific DSH limit for hospitals qualifying under this exception to be minimal.

To estimate the overall burden of adding this requirement for the calculation of the hospital-specific DSH limit for hospitals meeting the exception for 97th percentile hospitals, we considered the number of annual independent certified audits received by CMS in addition to the limited number of hospitals that will qualify under this exception. In order for States to assess which hospitals meet the exception, we estimate that it would take approximately 2 hours, consisting of: 1 hour at $80.36/hr for a financial specialist to prepare the aforementioned spreadsheet report, and 1 hour at $135.76/hr for management and professional staff to review the report. In the aggregate, we estimate an ongoing annual burden of 100 hours (50 States × 2 hr/response × 1 response/year) at a cost of $10,806 (50 States × [(1 hr $135.76/hr) + (1 hr × $80.36/hr)] or $216.12 per State [$10,806/50 States]). Additionally, we anticipate that a State auditor would have to spend an additional hour verifying the hospital-specific DSH limits for hospitals meeting the exception for 97th percentile hospitals. The estimated annual burden would be 1 hour per State (50 States × 1 hour) 50 hours × $83.40/hr for auditors to complete the audit at a cost of $4,170 per year (50 States × 1 hour × $83.40 per hour). The total cost of this provision of the proposed rule would be $14,976 ($10,806 + $4,170) and 150 hours, or $299.52 and 3 hours per State.

As described in section IV.C.1. of this final rule, the additional DSH audit data reporting element creates a burden of 150 hours at a cost of $14,976, with an average of 3 hours ($299.52 hr/50 States) at a cost of $299.52 per State Medicaid agency per year ($14,976/50 States).

We do not estimate there will be a cost impact related to the DHRM BNF proposal. This proposal merely provides clarification regarding how amounts are determined, and the impact of the policy itself was accounted for the in the 2019 final rule that finalized the factor amounts. Therefore, the only costs would be associated with review of this rule, which are accounted for in part 4 of this section.

Similarly, there will be no cost impact related to the proposals to publish DSH and CHIP allotments through an alternative means. Under current CMS practice, States are already informed of their allotment amounts prior to the **Federal Register** publication, so the removal of that step will not require a change in entities' practices or systems.

3. Transfers

Although the policies discussed in this final rule would affect the calculation of the hospital-specific DSH limit established at section 1923(g) of the Act and some providers may see a decrease in their historic hospital-specific DSH limits, these effects are a direct result of statutory changes rather than the proposals in this rule. In addition, some providers may see an increase in their historic hospital-specific DSH limits, again as a result of the changes made by statute. Further, lower hospital-specific DSH limits for some hospitals may result in States choosing to distribute higher DSH payments to hospitals that historically had not been paid at higher levels. We note that this rule would not affect the considerable flexibility afforded States in setting DSH State plan payment methodologies to the extent that these methodologies are consistent with section 1923(c) of the Act and all other applicable statutes and regulations. Therefore, we cannot predict whether and how States would exercise their flexibility in setting DSH payments to account for changes in historic hospital-specific DSH limits and how this would affect individual providers or specific groups of providers. We invited comments from State agencies and hospitals providing information or data for the calculation of these estimates. We did not receive any data that would aid in calculating a more accurate estimate. We made minor adjustments to correct the total number of States whose DSH programs would be impacted by the provisions of this rule and to reflect the latest BLS wage data, but otherwise and generally we are finalizing the estimates as proposed.

4. Regulatory Review Cost Estimation

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this final rule, we estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will review the rule, we assume that States, Medicaid DSH hospitals, and independent auditors will likely be reviewers of this final rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule. It is possible that not all Medicaid DSH hospitals will choose to review individually, or that State agencies will have multiple people in different roles review. Nevertheless, we thought the entities directly or indirectly impacted by this rule served as the best basis. As such, we will assume half of the approximately 2,700 Medicaid DSH hospitals will review the rule, in addition to at least one person from each of the 50 State agencies impacted by this rule, and at least one person from the independent DSH auditor for each of the 50 States, resulting in 1,450 total entities. We welcomed comments on the approach in estimating the number of entities which will review this final rule.

Although this rule has a number of provisions, they more or less all relate to DSH, and we assume entities with DSH equities will review the entire rule. Using the 2022 wage information from the BLS, *https://www.bls.gov/oes/current/oes119111.htm,* for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is $123.06 per hour, including overhead and other indirect costs. We estimate that it would take approximately 2 hours for the staff to review this final rule. For each entity that reviews the rule, the estimated cost is $246.12 (2 hours × $123.06). Therefore, we estimate that the total one-time cost of reviewing this regulation is $356,874 ($246.12 × 1,450).

D. Alternatives Considered

In developing this final rule, the following alternatives were considered:

1. Not Finalizing the Rule

Despite the effort involved in developing a proposed rule, we still consider whether the effort of finalizing the proposed rule, in general, is worthwhile and necessary additional effort to meet policy goals. As with the proposed rule, we concluded that, due to the changes to regulatory language necessitated by the legislation, rulemaking was necessary. Accordingly, once the decision to issue a final rule was reached, the additional DSH-related provisions were discrete decisions and not part of the calculus of whether to issue a final rule.

2. The Most Recent Cost Reporting Period Reports

As discussed in section II.A.3. of this final rule, we performed additional work to consider where data anomalies that exist in the status of available cost reports should impact our proposal to use the total inpatient days from the cost report with the most updated cost report status, for the most recent cost reporting period, available on the day that the data are pulled, in determining the hospitals that meet the 97th percentile threshold. However, through our additional review we determined our proposal was most in line with the statutory requirement to use the most recent cost reporting period and that anomalies in the status of the most recent reports did not create issues that would affect our decision.

3. Lookback Period for Cost Reporting

CMS considered various alternatives for making the determination regarding how far back the time period of a hospital's cost report could relate in order to be included in the data set for the calculation of hospitals that meet the 97th percentile threshold exception. We proposed not including any cost report ending earlier than September 30, 3 years prior to the March 31 snapshot date for compiling the data set. For the proposed rule, we considered a shorter cutoff, such as excluding any cost report ending earlier than September 30, 2 years prior to the March 31 snapshot date. However, we were concerned that establishing too short of a cutoff could exclude a material number of hospitals due to either delays in hospitals filing cost reports or delays in the transmitting and processing of cost report files into HCRIS. At that time, we also considered a longer cutoff than 3 years, but we were concerned this could create too much variability in the cost reporting periods and would also capture in the data set hospitals that are currently inactive or terminated. While the proposed rule was out for comment, we continued assessing whether expanding to 4 years would be a net positive for DSH hospitals. However, our additional testing did not demonstrate a benefit in expanding to 4 years and therefore we did not amend the proposal in this final rule. We believe the 3-year cutoff is equitable in ensuring there is general consistency in the cost reporting periods used, conforms with the use of ''most recent cost reporting period,'' and is practical for implementation purposes.

E. Accounting Statement and Table

As required by OMB Circular A–4 (available at *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf*), we have prepared an accounting statement in Table 3 showing the classification of the costs associated with the provisions of this final rule.

TABLE 3: Accounting Statement--Classification of Estimated Effects

Category	**Estimates**	Units		
		Year	Discount Rate	Period Covered
Annualized Monetized ($million/year)	0.01	2021	7%	2022 - 2032
	0.01	2021	3%	2022- 2032
Transfers (From Whom to Whom)	**Federal to States**			
Annualized Monetized ($million/year)	0.04	2021	7%	2022
	0.04	2021	3%	2022
Costs	**Regulatory Review Costs**			

F. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the Small Business Administration definition of a small business (having revenues of less than $9.0 million to $47 million in any 1 year). Individuals and States are not included in the definition of a small entity. As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5 percent. We do not believe that this threshold will be reached by the provisions in this final rule.

This rule establishes requirements that are solely the responsibility of State Medicaid agencies, which are not small entities. Therefore, the Secretary certifies this final rule would not, if issued, have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Unfunded Mandates Reform Act (UMRA)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies 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. In 2024, that threshold is approximately $183 million. This rule does not contain mandates that will impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, in excess of the threshold.

H. Federalism

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

I. Conclusion

The policies in this final rule will enable CMS to implement statutory changes, strengthen financial oversight, clarify existing financial management policies, and reduce unnecessary administrative burden.

The analysis in this section V., together with the rest of this preamble, provides a regulatory impact analysis. In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

Chiquita Brooks-LaSure,
Administrator of the Centers for Medicare & Medicaid Services, approved this document on February 15, 2024.

List of Subjects

42 CFR Part 433

Administrative practice and procedure, Child support, Claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs—health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

42 CFR Part 455

Fraud, Grant programs—health, Health facilities, Health professions, Investigations, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 457

Administrative practice and procedure, Grant programs—health, Health insurance, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 433—STATE FISCAL ADMINISTRATION

■ 1. The authority citation for part 433 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 2. Amend § 433.316 by—
■ a. Redesignating paragraphs (f) through (h) as paragraphs (g) through (i), respectively; and
■ b. Adding a new paragraph (f).

The addition reads as follows:

§ 433.316 When discovery of overpayment occurs and its significance.

* * * * *

(f) *Overpayments identified through the disproportionate share hospital (DSH) independent certified audit.* In the case of an overpayment identified through the independent certified audit required under part 455, subpart D, of this chapter, CMS will consider the overpayment as discovered on the earliest of the following:

(1) The date that the State submits the independent certified audit report required under § 455.304(b) of this chapter to CMS.

(2) Any of the dates specified in paragraph (c)(1), (2), or (3) of this section.

* * * * *

PART 447—PAYMENTS FOR SERVICES

■ 3. The authority citation for part 447 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1396r–8.

■ 4. Amend § 447.294 by revising paragraphs (e)(12) introductory text and (e)(12)(i) and (ii) to read as follows:

§ 447.294 Medicaid disproportionate share hospital (DSH) allotment reductions.

* * * * *

(e) * * *

(12) *Section 1115 budget neutrality factor (BNF) calculation.* This factor is only calculated for States for which all or a portion of the DSH allotment was included in the calculation of budget neutrality under a section 1115 demonstration in accordance with an approval on or before July 31, 2009. CMS will calculate the BNF for qualifying States by the following:

(i) For States in which the State's DSH allotment was included in the budget neutrality calculation for a coverage expansion that was approved under section 1115 as of July 31, 2009, determining the amount of the State's DSH allotment included in the budget neutrality calculation for coverage expansion. This amount is not subject to reductions under the HMF and HUF calculations. DSH allotment amounts included in the budget neutrality calculation for purposes other than coverage expansion for a demonstration project under section 1115 that was approved as of July 31, 2009, are subject to reduction as specified in paragraphs (e)(12)(ii) through (iv) of this section. For States whose DSH allotment was included in the budget neutrality calculation for a demonstration project that was approved under section 1115 after July 31, 2009, whether for coverage expansion or otherwise, the entire DSH allotment amount that was included in the budget neutrality calculation is subject to reduction as specified in paragraphs (e)(12)(ii) through (iv) of this section.

(ii) Determining the amount of the State's DSH allotment included in the budget neutrality calculation subject to reduction. The amount to be assigned reductions under paragraphs (e)(12)(iii) and (iv) of this section is the total of each State's DSH allotment diverted under an approved 1115 demonstration during the period that aligns with the associated State plan rate year DSH audit utilized in the DSH allotment reductions.

* * * * *

■ 5. Amend § 447.295 by adding a definition for ''97th percentile hospital'' in alphanumerical order in paragraph (b) and revising paragraph (d) to read as follows:

§ 447.295 Hospital-specific disproportionate share hospital payment limit: Determination of individuals without health insurance or other third-party coverage.

* * * * *

(b) * * *

97th percentile hospital means a hospital that is in at least the 97th percentile of all hospitals nationwide with respect to the hospital's number of inpatient days or the hospital's percentage of total inpatient days, for the hospital's most recent cost reporting period, made up of patients who were entitled to benefits under part A of title XVIII and supplemental security income benefits under title XVI (excluding any State supplementary benefits paid).

(i) CMS will identify the 97th percentile hospitals, for each Medicaid

State plan rate year beginning on or after October 1, 2021, using Medicare cost reporting and claims data sources, as well as supplemental security income eligibility data provided by the Social Security Administration.

(ii) CMS will publish lists identifying each 97th percentile hospital annually in advance of October 1 of each year. CMS will revise a published list only to correct a mathematical or other similar technical error that is identified to CMS during the one-year period beginning on the date the list is published.

* * * * *

(d) *Hospital-specific DSH limit calculation.* (1) For each State's Medicaid State plan rate years beginning prior to October 1, 2021 and subject to paragraph (d)(3) of this section, only costs incurred in providing inpatient hospital and outpatient hospital services to Medicaid individuals, and revenues received with respect to those services, and costs incurred in providing inpatient hospital and outpatient hospital services, and revenues received with respect to those services, for which a determination has been made in accordance with paragraph (c) of this section that the services were furnished to individuals who have no source of third-party coverage for the specific inpatient hospital or outpatient hospital service are included when calculating the costs and revenues for Medicaid individuals and individuals who have no health insurance or other source of third-party coverage for purposes of section 1923(g)(1) of the Act.

(2) For each State's first Medicaid State plan rate year beginning on or after October 1, 2021, and thereafter, subject to paragraph (d)(3) of this section, only costs incurred in providing inpatient hospital and outpatient hospital services to Medicaid individuals when Medicaid is the primary payer for such services, and revenues received with respect to those services, and costs incurred in providing inpatient hospital and outpatient hospital services, and revenues received with respect to those services, for which a determination has been made in accordance with paragraph (c) of this section that the services were furnished to individuals who have no source of third-party coverage for the specific inpatient hospital or outpatient hospital service are included when calculating the costs and revenues for Medicaid individuals and individuals who have no health insurance or other source of third-party coverage for purposes of section 1923(g)(1) of the Act.

(3) Effective for each State's first Medicaid State plan rate year beginning on or after October 1, 2021, and thereafter, the hospital-specific DSH limit for a 97th percentile hospital defined in paragraph (b) of this section is the higher of the values from the calculations described in paragraphs (d)(1) and (2) of this section.

§ 447.297 [Amended]

■ 6. Amend § 447.297 by:

■ a. In paragraph (b), removing the phrase ''published by April 1 of each Federal fiscal year,'' and adding in its place the phrase ''posted as soon as practicable,'';

■ b. In paragraph (c)—

■ i. Removing the phrase ''publish in the **Federal Register**'' and adding in its place the phrase ''post in the Medicaid Budget and Expenditure System/State Children's Health Insurance Program Budget and Expenditure System and at Medicaid.gov (or similar successor system or website)''; and

■ ii. Removing the phrase ''publish final State DSH allotments by April 1 of each Federal fiscal year,'' and adding in its place the phrase ''post final State DSH allotments as soon as practicable for each Federal fiscal year,''; and

■ c. In paragraph (d)(1)—

■ i. Removing the phrase ''by April 1 of each Federal fiscal year'' and adding in its place the phrase ''as soon as practicable for each Federal fiscal year''; and

■ ii. Removing the phrase ''prior to the April 1 publication date'' and adding in its place the phrase ''prior to the posting date''; and

■ d. Removing paragraph (e).

■ 7. Amend § 447.299 by—

■ a. Revising paragraphs (c)(6) and (7), (c)(10) introductory text, (c)(10)(ii), and (c)(16);

■ b. Redesignating paragraph (c)(21) as paragraph (c)(22); and

■ c. Adding new paragraph (c)(21) and paragraphs (f) and (g).

The revisions and additions read as follows:

§ 447.299 Reporting requirements.

* * * * *

(c) * * *

(6) *IP/OP Medicaid fee-for-service (FFS) basic rate payments.* The total annual amount paid to the hospital under the State plan, including Medicaid FFS rate adjustments, but not including DSH payments or supplemental/enhanced Medicaid payments, for inpatient and outpatient hospital services furnished to Medicaid individuals, as determined in accordance with § 447.295(d).

(7) *IP/OP Medicaid managed care organization payments.* The total annual amount paid to the hospital by Medicaid managed care organizations for inpatient hospital and outpatient hospital services furnished to Medicaid individuals, as determined in accordance with § 447.295(d).

* * * * *

(10) *Total cost of care for Medicaid IP/OP services.* The total annual costs incurred by each hospital for furnishing inpatient hospital and outpatient hospital services to Medicaid individuals as determined in accordance with § 447.295(d). The total annual costs are determined on a hospital-specific basis, not a service-specific basis. For purposes of this section, costs—

* * * * *

(ii) Must capture the total burden on the hospital of treating Medicaid patients as determined in accordance with § 447.295(d), not including payment by Medicaid. Thus, costs must be determined in the aggregate and not by estimating the cost of individual patients. For example, if a hospital treats two Medicaid patients at a cost of $2,000 and receives a $500 payment from a third party for each individual, the total cost to the hospital for purposes of this section is $1,000, regardless of whether the third-party payment received for one patient exceeds the cost of providing the service to that individual.

* * * * *

(16) *Total annual uncompensated care costs.* The total annual uncompensated care cost equals the total cost of care for furnishing inpatient hospital and outpatient hospital services to Medicaid individuals as determined in accordance with § 447.295(d), and to individuals with no source of third-party coverage for the hospital services they receive, less the sum of regular Medicaid FFS rate payments, Medicaid managed care organization payments, supplemental/enhanced Medicaid payments, uninsured revenues, and section 1011 payments for inpatient and outpatient hospital services. This should equal the sum of paragraphs (c)(9), (12), and (13) of this section subtracted from the sum of paragraphs (c)(10) and (14) of this section.

* * * * *

(21) *Financial impact of audit findings.* The total annual amount associated with each audit finding. If it is not practicable to determine the actual financial impact amount, state the estimated financial impact for each audit finding identified in the independent certified audit that is not otherwise reflected in data elements described in this paragraph (c). For

purposes of this paragraph (c), audit finding means an issue identified in the independent certified audit required under § 455.304 of this chapter concerning the methodology for computing the hospital-specific DSH limit or the DSH payments made to the hospital, including, but not limited to, compliance with the hospital-specific DSH limit as defined in paragraph (c)(16) of this section. Audit findings may be related to missing or improper data, lack of documentation, non-compliance with Federal statutes or regulations, or other deficiencies identified in the independent certified audit. Actual financial impact means the total amount associated with audit findings calculated using the documentation sources identified in § 455.304(c) of this chapter. Estimated financial impact means the total amount associated with audit findings calculated on the basis of the most reliable available information to quantify the amount of an audit finding in circumstances where complete and accurate information necessary to determine the actual financial impact is not available from the documentation sources identified in § 455.304(c) of this chapter.

* * * * *

(f) DSH payments found in the independent certified audit process under part 455, subpart D, of this chapter to exceed hospital-specific cost limits are provider overpayments which must be returned to the Federal Government in accordance with the requirements in part 433, subpart F, or redistributed by the State to other qualifying hospitals, if redistribution is provided for under the approved State plan. Overpayment amounts returned to the Federal Government must be separately reported on the Form CMS–64 as a decreasing adjustment which corresponds to the fiscal year DSH allotment and Medicaid State plan rate year of the original DSH expenditure claimed by the State.

(g) As applicable, States must report any overpayment redistribution amounts on the Form CMS–64 within 2 years from the date of discovery that a hospital-specific limit has been exceeded, as determined under § 433.316(f) of this chapter in accordance with a redistribution methodology in the approved Medicaid State plan. The State must report redistribution of DSH overpayments on the Form CMS–64 as separately identifiable decreasing adjustments reflecting the return of the overpayment as specified in paragraph (f) of this section and increasing adjustments representing the redistribution by the State. Both adjustments must correspond to the fiscal year DSH allotment and Medicaid State plan rate year of the related original DSH expenditure claimed by the State.

PART 455—PROGRAM INTEGRITY: MEDICAID

■ 8. The authority citation for part 455 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 9. Amend § 455.301 by revising the definition of ''Independent certified audit'' to read as follows:

§ 455.301 Definitions.

* * * * *

Independent certified audit means an audit that is conducted by an auditor that operates independently from the Medicaid agency or subject hospitals and is eligible to perform the DSH audit. Certification means that the independent auditor engaged by the State reviews the criteria of the Federal audit regulation and completes the verification, calculations and report under the professional rules and generally accepted standards of audit practice. This certification includes a review of the State's audit protocol to ensure that the Federal regulation is satisfied, an opinion for each verification detailed in the regulation, a determination of whether or not the State made DSH payments that exceeded any hospital's hospital-specific DSH limit in the Medicaid State plan rate year under audit, and a quantification of the financial impact of each audit finding on a hospital-specific basis. The certification also identifies any data issues or other caveats or deficiencies that the auditor identified as impacting the results of the audit.

* * * * *

■ 10. Amend § 455.304 by revising paragraphs (d)(1), (3), (4), and (6) to read as follows:

§ 455.304 Condition for Federal financial participation (FFP).

* * * * *

(d) * * *

(1) *Verification 1.* Each hospital that qualifies for a DSH payment in the State is allowed to retain that payment so that the payment is available to offset its uncompensated care costs for furnishing inpatient hospital and outpatient hospital services during the Medicaid State plan rate year to Medicaid individuals as determined in accordance with § 447.295(d) of this chapter, and individuals with no source of third-party coverage for the services, in order to reflect the total amount of claimed DSH expenditures.

* * * * *

(3) *Verification 3.* Only uncompensated care costs of furnishing inpatient and outpatient hospital services to Medicaid individuals as determined in accordance with § 447.295(d) of this chapter, and individuals with no third-party coverage for the inpatient and outpatient hospital services they received are eligible for inclusion in the calculation of the hospital-specific disproportionate share limit payment limit, as described in section 1923(g)(1)(A) of the Act.

(4) *Verification 4.* For purposes of this hospital-specific limit calculation, any Medicaid payments (including regular Medicaid fee-for-service rate payments, supplemental/enhanced Medicaid payments, and Medicaid managed care organization payments) made to a disproportionate share hospital for furnishing inpatient hospital and outpatient hospital services to Medicaid individuals as determined in accordance with § 447.295(d) of this chapter, which are in excess of the Medicaid incurred costs of such services, are applied against the uncompensated care costs of furnishing inpatient hospital and outpatient hospital services to individuals with no source of third-party coverage for such services.

* * * * *

(6) *Verification 6.* The information specified in paragraph (d)(5) of this section includes a description of the methodology for calculating each hospital's payment limit under section 1923(g)(1) of the Act. Included in the description of the methodology, the audit report must specify how the State defines incurred inpatient hospital and outpatient hospital costs for furnishing inpatient hospital and outpatient hospital services to Medicaid individuals as determined in accordance with § 447.295(d) of this chapter, and individuals with no source of third-party coverage for the inpatient hospital and outpatient hospital services they received.

* * * * *

PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 11. The authority for part 457 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 12. Amend § 457.609 by revising paragraph (h) to read as follows:

§ 457.609 Process and calculation of State allotments for a fiscal year after FY 2008.

* * * * *

(h) *CHIP fiscal year allotment process.* The national CHIP allotment and State CHIP allotments will be posted in the Medicaid Budget and Expenditure System/State Children's Health Insurance Program Budget and Expenditure System and at *Medicaid.gov* (or similar successor system or website) as soon as practicable after the allotments have been determined for each Federal fiscal year.

Xavier Becerra,

Secretary, Department of Health and Human Services.

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Part VI

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Chapter 1

Federal Acquisition Regulations; Interim and Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2024–0051, Sequence No. 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2024–03; Introduction

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

ACTION: Summary presentation of an interim and final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2024–03. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

DATES: For effective dates see the separate documents, which follow.

ADDRESSES: The FAC, including the SECG, is available at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

RULES LISTED IN FAC 2024–03

Item	Subject	FAR case	Analyst
I	Certification of Service-Disabled Veteran-Owned Small Businesses	2022–009	Moore.
II	Trade Agreements Thresholds	2023–012	Jackson.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these summaries. FAC 2024–03 amends the FAR as follows:

Item I—Certification of Service-Disabled Veteran-Owned Small Businesses (FAR Case 2022–009)

This interim rule amends the Federal Acquisition Regulation to implement the Governmentwide certification requirement for service-disabled veteran-owned small business (SDVOSB) concerns seeking sole-source and set-aside awards under the SDVOSB Program. Beginning January 1, 2024, SDVOSB concerns must either be certified by the Small Business Administration (SBA), or have both submitted an application for certification to SBA on or before December 31, 2023, and represented that it is an SDVOSB in the System for Award Management (SAM), in order to be eligible for sole-source or set-aside awards under the SDVOSB Program. This rule also requires that an SDVOSB concern update its status in the System for Award Management no later than two days after the date of a final determination that the concern does not meet the requirements of the status the concern claims to hold, and provides new SDVOSB protest and appeal procedures. The interim rule will not have a significant economic impact on a substantial number of small entities because the rule simply implements the requirements of SBA's regulations and does not impose any additional compliance burden on entities.

Item II—Trade Agreements Thresholds (FAR Case 2023–012)

This final rule amends the FAR to adjust the thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements as determined by the United States Trade Representative, according to predetermined formulae under the agreements.

William F. Clark,

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

Federal Acquisition Circular (FAC) 2024–03 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2024–03 is effective February 23, 2024.

John M. Tenaglia,
Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,
Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Karla Smith Jackson,
Assistant Administrator for Procurement, Senior Procurement Executive/Deputy CAO, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 6, 9, 18, 19, and 52

[FAC 2024–03, FAR Case 2022–009; Item I; Docket No. FAR–2022–0009; Sequence No. 1]

RIN 9000–AO46

Federal Acquisition Regulation: Certification of Service-Disabled Veteran-Owned Small Businesses

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement the final rules published by the Small Business Administration to implement sections of the National Defense Authorization Acts for Fiscal Years 2021 and 2022.

DATES:

Effective date: February 23, 2024.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before April 23, 2024, to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAC 2024–03, FAR Case

2022–009 to the Federal eRulemaking portal at *https://www.regulations.gov* by searching for ''FAR Case 2022–009''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2022–009''. Follow the instructions provided on the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2022–009'' on your attached document. If your comment cannot be submitted using *https://www.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 ''FAR Case 2022–009'' in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at *https://www.regulations.gov/faq*). To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Carrie Moore, Procurement Analyst, at 571–300–5917, or by email at *carrie.moore@gsa.gov.* For information pertaining to status or publication schedules, or alternative instructions for submitting comments if *https://www.regulations.gov* cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2024–03, FAR Case 2022–009.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule to implement section 862 of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283; 15 U.S.C. 657f). Section 862 transfers the verification of small business concerns owned and controlled by veterans or service-disabled veterans from the Department of Veterans Affairs (VA) to SBA as of January 1, 2023, and creates a certification requirement for service-disabled veteran-owned small business (SDVOSB) concerns seeking sole-source and set-aside awards under the SDVOSB Program across the Federal Government. Section 862 provides for a one-year grace period after the transfer date for SDVOSBs to submit an application for certification to SBA. During the one-year grace period, SDVOSBs may continue to self-represent their socioeconomic status in the System for Award Management (SAM).

To implement section 862, SBA published a final rule on November 29, 2022, at 87 FR 73400. SBA also issued a final rule on July 3, 2023, at 88 FR 42592, to correct its final rule published on November 29, 2022, to modify the effect of a protest decision. In its final rule published on November 29, 2022, SBA removed SDVOSB requirements from 13 CFR part 125 and established 13 CFR part 128 to implement the requirement for SDVOSB concerns to be certified by SBA in order to be eligible for set-aside or sole-source awards under the SDVOSB Program. SBA's final rule also specifies that concerns that submit a complete application for certification to SBA on or before December 31, 2023, and represent their SDVOSB status in SAM are eligible for awards made under the SDVOSB Program until SBA makes a final eligibility determination. Beginning January 1, 2024, SDVOSBs that are not certified by SBA, and do not have a pending application for certification, will not be eligible to receive sole-source or set-aside awards under the SDVOSB Program but may continue to self-represent their status for awards outside of the SDVOSB Program.

When determining a concern's eligibility for a set-aside or sole-source award under the SDVOSB Program, contracting officers must review the concern's SAM record for its designation as an SDVOSB certified by SBA. If the concern's SAM record does not reflect an SDVOSB certification by SBA, contracting officers shall verify that the concern has represented that it is an SDVOSB concern and submitted an application for certification to SBA on or before December 31, 2023. Contracting officers will verify the concern's application status through SBA's Veteran Small Business Certification Program database. The need to check this database for pending applications is expected to diminish as SBA reviews and dispositions the applications received on or before the deadline. It is anticipated that the review of all such applications will be completed by the time this rule is finalized and, if they are, the requirement to check the SBA database for pending applications may be removed from the final rule.

As explained in SBA's final rule at 87 FR 73400, concerns verified by VA prior to the transfer date are considered to be certified by SBA during the time that remains in the concern's three-year term of eligibility. In addition, the SBA Administrator may extend a participant's eligibility period up to one year. Further, to facilitate the transition of those concerns already verified by the VA prior to January 1, 2023, that have an eligibility period that expires within the first year of the SDVOSB certification program, SBA will extend the eligibility of those concerns for a period of up to one year.

As indicated in SBA's final rule and prior to the transfer of the certification program to SBA, veteran-owned small businesses (VOSBs) and SDVOSBs had to be verified by the VA's Center for Verification and Evaluation. There was no Governmentwide SDVOSB certification program, and firms seeking to be awarded SDVOSB sole-source or set-aside contracts with Federal agencies other than the VA were only required to self-represent their status in SAM; therefore, this rule amends the FAR to implement this Governmentwide SDVOSB certification program.

This interim rule also partially implements section 863 of the NDAA for FY 2022 (Pub. L. 117–81; 15 U.S.C. 634(i)), as implemented by SBA in its final rule published on April 27, 2023, at 88 FR 26164. Section 863 requires that a small business concern update its status in SAM no later than two days after the date of a final determination that the concern does not meet the requirements of the status the concern claims to hold. Section 863 also requires that SBA update such a concern's status in SAM if the concern fails to do so. This interim rule implements this requirement for SDVOSB concerns. The implementation of section 863 for the other socioeconomic programs in FAR part 19 will be addressed in a separate case.

II. Discussion and Analysis

The changes to the FAR and the rationale are summarized as follows:

—Update the definition of SDVOSB concern in parts 2 and 52, in applicable provisions and clauses, and add that the service-disabled veteran is registered in the Beneficiary Identification and Records Locator Subsystem; update the definition of veteran-owned small business concerns to clarify that such a concern is not less than 51 percent owned ''and controlled'' by one or more veterans; add a definition for SDVOSB concern eligible under the SDVOSB Program to specify that a concern must: (1) be designated in SAM as certified by SBA; or (2) represent in SAM that it is an

SDVOSB concern and have submitted a complete application for certification to SBA on or before December 31, 2023, in order to be eligible for awards made pursuant to the SDVOSB Program; and add a definition for the SDVOSB Program;

—Modify FAR part 19 to update citations to SBA's regulations regarding SDVOSB concerns from 13 CFR part 125 to 13 CFR parts 128 and 134;

—Modify FAR parts 6, 9, 18, and 19 to update SDVOSB Program terminology and clarify the eligibility of SDVOSB concerns for set-asides under the SDVOSB Program;

—Modify 19.307 to: (1) add a definition of ''interested party'' to align with SBA's regulations at 13 CFR 134.1002(b); (2) update SDVOSB protest procedures in accordance with SBA's regulations at 13 CFR part 128 and 13 CFR 134.1001 through 134.1013; (3) require a concern to remove its designation as an SDVOSB in SAM within two days of a SBA Office of Hearings and Appeals (OHA) decision that the concern is not an eligible SDVOSB concern, and notify concerns that SBA will update the concern's status in SAM if the concern fails to do so; and (4) upon receipt of an OHA decision that a concern is not an eligible SDVOSB concern, specify that the concern shall not submit an offer as an SDVOSB concern, or an SDVOSB concern eligible under the SDVOSB Program, until the concern is certified by SBA; and (5) remove SDVOSB status protest appeals in accordance with SBA's regulations at 13 CFR 134.1013;

—Modify FAR subpart 19.14 to: (1) implement SBA's regulations regarding SDVOSB certification requirements and joint venture eligibility requirements at 13 CFR part 128; and (2) notify contracting officers of the requirement to verify SDVOSB eligibility for sole-source or set-aside awards under the SDVOSB Program;

—Modify FAR provision 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services, FAR clause 52.219–28, Post-Award Small Business Program Representation, and FAR provision 52.219–1, Small Business Program Representations, to revise definitions and add a representation for an SDVOSB joint venture eligible under the SDVOSB Program to align with the changes to FAR subpart 19.14;

—Modify FAR clause 52.219–8, Utilization of Small Business Concerns, to revise definitions, and remove the specification that a joint venture qualifies as a service-disabled veteran-owned small business concern if it complies with the requirements in 13 CFR part 125;

—Modify FAR clause 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, to revise definitions and specify SDVOSB certification requirements;

—Modify FAR clause 52.219–28, Post-Award Small Business Program Representation, to add a representation for SDVOSB joint ventures eligible under the SDVOSB program; and

—Make other changes to correct typographical errors and revise the title of FAR 19.302 to clarify that the section provides procedures for small business size protests.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-The-Shelf (COTS) Items) or for Commercial Services

This rule amends the following provisions and clauses at FAR: 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services; 52.212–5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services; 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services); 52.219–1, Small Business Program Representations; 52.219–8, Utilization of Small Business Concerns; 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside; 52.219–28, Post-Award Small Business Program Rerepresentation; and 52.244–6, Subcontracts for Commercial Products and Commercial Services. These provisions and clauses continue to apply to acquisitions at or below the SAT and to acquisitions for commercial products, including COTS items, and commercial services.

This rule applies section 862 of the NDAA for FY 2021 and section 863 of the NDAA for FY 2022, as implemented by this interim rule, to contracts at or below the SAT and/or for commercial products (including COTS items) or commercial services.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

The statute at 41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the Federal Acquisition Regulation (FAR) Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law. The FAR Council has made a determination to apply this statute to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Products and Commercial Services, Including Commercially Available Off-The-Shelf (COTS) Items

The statute at 41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services, and is intended to limit the applicability of laws to contracts for the acquisition of commercial products and commercial services. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial contracts, the provision of law will apply to contracts for the acquisition of commercial products and commercial services.

The statute at 41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items. The FAR Council has made a determination to apply this statute to acquisitions for commercial products and commercial services. The Administrator for Federal Procurement Policy has made a determination to apply this statute to acquisitions for COTS items.

IV. Expected Impact of the Rule

This interim rule is expected to impact Government and contractor operations.

As a result of this interim rule, effective January 1, 2024, contracting officers will be required to check SAM to verify that a concern is designated as an SDVOSB certified by SBA for sole-source or set-aside awards under the SDVOSB Program. If the concern is not designated in SAM as a certified SDVOSB, the contracting officer will be required to check SBA's Veteran Small Business Certification Program database to determine if the concern submitted an application for certification to SBA on or before December 31, 2023. If a concern submitted an application for certification to SBA on or before December 31, 2023, and represented its status as an SDVOSB concern in SAM, contracting officers may rely on a concern's representation in SAM.

A small business concern that pursues a sole-source or set-aside award under the SDVOSB program will be required to be certified by SBA effective January 1, 2024, or the concern must have both submitted a complete application for certification to SBA on or before December 31, 2023, and represented its status as an SDVOSB concern in SAM. A small business concern that submits a complete application for certification to SBA on or before December 31, 2023, may continue to represent its status as an SDVOSB in SAM until SBA makes its final eligibility determination. This interim rule will not impact current participants in the VA's VIP Verification Program as the requirements for the new SBA certification program are nearly identical to those of the VA. The only change that will impact small businesses is the certification requirement for SDVOSB concerns. As indicated in SBA's final rule, SBA does not anticipate the requirement for SBA certification to significantly impact small business concerns seeking SDVOSB certification. To minimize the potential impact on small businesses, SDVOSB concerns previously certified by the VA are reflected as certified in the SBA Veteran Small Business Certification Program database during the time that remains in the firm's three-year term of eligibility. To facilitate the transition of those firms already verified by the VA prior to the transfer date that have an eligibility period that expires in the first year of the Program, SBA extended the eligibility of those verified firms for an additional period of one year. The one-year grace period allows concerns that are not yet certified by the SBA to continue to represent their status as an SDVOSB in SAM while preparing their applications for SDVOSB certification. Furthermore, SBA did not change the documentation requirements for certification. Additionally, firms that represent their status in SAM likely have the documentation necessary for certification as that documentation is necessary to be able to represent their status as an SDVOSB in SAM. Therefore, concerns will only have to enter the information already in hand to apply to be included in SBA's Veteran Small Business Certification Program database.

The public cost associated with obtaining SDVOSB certification is accounted for under SBA's final rule implementing the certification requirements (87 FR 73400). SBA's final rule advises concerns that, effective January 1, 2024, only a certified SDVOSB or a concern that has submitted a complete application for certification to SBA on or before December 31, 2023, may seek a set-aside or sole-source award under the SDVOSB Program. SBA estimates it will take a concern approximately one hour to complete the application process.

Small business concerns will also be required to update SAM within two days of an SBA determination of ineligibility. Small business concerns are already required to update representations in SAM at least annually and ensure that representations are current, accurate, and complete. SBA's final rule published on April 27, 2023, at 88 FR 26164, advised small business concerns of the requirement to remove their designation from SAM within two days of an SBA decision regarding ineligibility.

Given SBA's notice to small business concerns, the cost to the public associated with the FAR implementation of SBA's final rules is de minimis and is limited to the cost of regulatory familiarization.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 (as amended by E.O 14094) and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

Pursuant to the Congressional Review Act, DoD, GSA, and NASA will send this rule to each House of the Congress and to the Comptroller General of the United States. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this rule does not meet the definition in 5 U.S.C. 804(2).

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612, because this rule simply implements the requirements of SBA's regulations and does not impose any additional compliance burden on applicable small business entities. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published on November 29, 2022, at 87 FR 73400, and a correction published on July 3, 2023, at 88 FR 42592, to implement section 862 of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283; 15 U.S.C. 657f); and April 27, 2023, at 88 FR 26164 to implement section 863 of the NDAA for FY 2022 (Pub. L. 117–81; 15 U.S.C. 634).

The objective of this rule is to implement SBA's Governmentwide certification program for SDVOSB concerns, update SDVOSB protest procedures, and to require an SDVOSB concern determined ineligible by SBA to update its status in the System for Award Management (SAM) within two days of the eligibility determination. Promulgation of the FAR is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113. The legal basis for this rule is as stated in the preceding paragraph.

This interim rule impacts small business concerns that seek a sole-source or set-aside award under the SDVOSB Program. Effective January 1, 2024, an SDVOSB concern must be certified as an SDVOSB concern by SBA, or have both represented that it is an SDVOSB concern in SAM and submitted a complete application for certification to SBA on or before December 31, 2023, in order to be eligible for these types of awards. SBA has minimized the impact on SDVOSB concerns by accepting verifications of eligibility already determined by the Department of Veterans Affairs (VA). SBA granted a one-year extension on certification for VA verified firms and by providing firms that represent their status in SAM a one-year grace period to apply for certification. In addition, this rule impacts SDVOSB concerns that SBA determines are not eligible for SDVOSB certification, as these concerns will be ineligible for set-aside and sole-source awards under the SDVOSB Program. A concern determined ineligible for SDVOSB certification, however, may continue to represent its SDVOSB status in SAM and be eligible for set-aside and sole-source awards outside of the SDVOSB Program.

The cost to concerns seeking SDVOSB certification should be de minimis because the eligibility documentation requirements currently exist under the VA's verification program. In addition, the initial application, program examination, and recertification requirement will remain the same under

SBA's management of the program. Firms likely have the documentation required for application, examination, and recertification through the transferred program because either such documentation was already required for certification through the VA's verification program, or such documentation is likely needed for a firm to represent its status as an SDVOSB in SAM. Further, SBA anticipates that the application process should only require one hour of the concern's time. The cost to concerns to update their status in SAM is de minimis as concerns are already responsible for maintaining their representations in SAM to ensure that they are current, accurate, and complete.

According to SAM, there are 32,284 concerns registered as SDVOSBs. Of the 32,284 SDVOSB concerns registered in SAM, 10,635 are already verified SDVOSBs in VA's verification program, which leaves 21,649 SDVOSB concerns that represent their socioeconomic status in SAM. Of the 21,649 that represent their socioeconomic status as an SDVOSB in SAM, 181 are veteran-owned small business concerns that are SDVOSB certified in the VA's certification database. Therefore, there are 21,468 SDVOSBs that represent their status in SAM that are not currently in the VA's verification program and that may submit an application for certification to SBA. However, the number of SDVOSB concerns that will submit applications for certification is unknown as is the number of potential new SDVOSB entrants; therefore, the number of small business entities impacted by this rule may be greater than or less than the 21,468 SDVOSBs that currently represent their status in SAM.

Effective January 1, 2024, this interim rule requires small business concerns that submit an offer for a set-aside or sole-source requirement under the SDVOSB Program to either be certified by SBA, or have both submitted an application for certification to SBA on or before December 31, 2023, and represented their SDVOSB status in SAM. Concerns found ineligible to be a certified SDVOSB by SBA must update their status in SAM within two days of the eligibility determination. SDVOSB protests will be decided by OHA instead of SBA's Director of Government Contracting.

SBA implemented a certification and information collection platform that replicates the VA's Center for Verification and Evaluation currently approved information collection and recordkeeping requirements under OMB Control Number 2900–0675.

The interim rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the interim rule which would accomplish the stated objectives of the applicable statutes and which would minimize any significant economic impact of this interim rule on small entities, as the economic impact is not anticipated to be significant.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2022–009), in correspondence.

VIII. Paperwork Reduction Act

This interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521). These changes to the FAR do not impose additional information collection requirements to the associated paperwork burdens previously approved under Office of Management and Budget (OMB) Control Numbers 2900–0675, VETBIZ Vendor Information Pages Verification Program; 9000–0136, Commercial Acquisitions; FAR Sections Affected: 52.212–3(b)(2); 9000–0034, Examination of Records by Comptroller General and Contract Audit: FAR Section(s) Affected: 52.212–5(d), 52.214–26, 52.215–2; and 9000–0163, Small Business Size Rerepresentation; FAR Sections Affected: 19.301 and 52.219–28.

IX. Determination To Issue an Immediately Effective Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule effective immediately without prior opportunity for public comment, see 41 U.S.C. 1707(d). This action is necessary because section 862 of the William M. (Mac) Thornberry National Defense Authorization Act for FY 2021 (Pub. L. 116–283; 15 U.S.C. 657f): (1) transferred the responsibility for verifying the status of small business concerns owned and controlled by veterans or service-disabled veterans from the Department of Veterans Affairs (VA) to the Small Business Administration (SBA) as of January 1, 2023; and (2) established a Governmentwide certification requirement for service-disabled veteran-owned small businesses (SDVOSB) concerns seeking sole-source and set-aside contract awards under the SDVOSB Program beginning on January 1, 2024. The transfer of this responsibility also requires that all SDVOSB protests now be decided by a judge.

SBA published a final rule on November 29, 2022, and a correction to its final rule on July 3, 2023, to implement section 862 and codify these requirements in their agency regulations at title 13 of the Code of Federal Regulations. SBA's rule was published for public comment and SBA considered those public comments in the drafting of their final rule. As of January 1, 2023, SBA is processing applications for SDVOSB certification in accordance with their regulations.

Beginning January 1, 2024, contracting officers can only award set-aside or sole-source contracts to SDVOSB concerns that have been certified by SBA, or have both submitted a complete application for certification to SBA on or before December 31, 2023, and represented their SDVOSB status in SAM. For these types of awards, contracting officers will no longer be able to accept an offeror's representation in SAM that they are an SDVOSB concern. Additionally, all SDVOSB protests will be handled in accordance with SBA's updated regulations, which require SBA's Office of Hearings and Appeals (OHA) to decide SDVOSB protests.

Current guidance in the Federal Acquisition Regulation (FAR) regarding SDVOSB set-aside and sole-source requirements and SDVOSB protest procedures is not aligned with the current statute and SBA's regulations. The FAR permits contracting officers to accept an offeror's self-representation that they are an SDVOSB concern, which conflicts with section 862 and SBA's regulations, which impose the Governmentwide SDVOSB certification requirement on offerors and contract awards beginning January 1, 2024.

FAR guidance on SDVOSB protests and appeals is also not aligned with section 862 and SBA's regulations. Currently, the FAR advises contracting officers and offerors that SDVOSB status protests should be submitted to and will be decided by SBA's Director, Office of Government Contracting. This guidance conflicts with the SBA regulations that require OHA to now hear and decide these protests. The FAR also provides processes and procedures to offerors and contracting officers on SDVOSB status protest appeals; however, this guidance also conflicts with SBA's revised regulations, which do not have a process to appeal an SDVOSB status protest decision, as OHA's decisions are final, and no appeal process is available to protesters.

Rulemaking is necessary to align the FAR with the statute and SBA's regulations; however, the rulemaking process cannot facilitate a proposed and final rule by the statutory deadline of January 1, 2024. To properly implement the statute, the rulemaking must be sequential. The SBA regulations must be implemented first, followed by FAR regulatory changes that reflect the requirements of SBA.

The consequences of missing the statutory deadline would be significant. If the FAR is not updated to implement the statute and SBA's regulations, individual agencies will implement the new requirements on their own. Having each agency implement its own interpretation of section 862 and SBA's SDVOSB regulations may result in an inconsistent application of these requirements across the Federal Government. Inconsistency in the application of these regulations will:

(1) Put agencies at a high risk for protests of SDVOSB awards if an award is made to an SDVOSB that is no longer eligible for an award under SBA regulations, but appears eligible under FAR or agency guidance;

(2) Negate, minimize, or put at risk SDVOSB status protest rights of interested parties through the dissemination of inaccurate or incomplete information;

(3) Cause undue confusion and frustration for small businesses attempting to win an SDVOSB award, protest the SDVOSB status of an awardee, or appeal a protest decision of an awardee's SDVOSB status due to inconsistent application of the statute and regulations across the Federal Government;

(4) Harm small businesses eligible for an SDVOSB set-aside or sole-source award through an increase in improper awards to entities no longer eligible for such awards, as well as the loss of opportunity, income, and experience that comes with a Federal contract;

(5) Jeopardize the ability of the Government to meet its mission needs and, for DoD, impact the ability to meet the needs of the warfighter to deter war and ensure the security of the United States, because an increase in granted protests of an awardee's SDVOSB status will delay contract awards due to the need for the Government to resolicit and re-evaluate offers; and

(6) Negatively impact agency small business goals due to improper awards and inconsistent application of statute, SBA regulations, FAR regulations, and agency guidance.

Issuing an interim rule will allow the Government to issue, in a timely manner, a single set of policies and procedures that accurately and thoroughly implement the SDVOSB certification requirement that takes effect on January 1, 2024, which will ensure consistent implementation across the entirety of the Federal Government. An interim rule will ensure the Government and small businesses avoid the negative impacts discussed above, while providing the public an opportunity to review and comment on the rule during its implementation.

The public reviewed and commented on SBA's implementation of section 862 and SBA considered those comments in finalizing their rule. This rule simply implements SBA's requirements, so there is little risk that the interim rule will impose a requirement on the public that they have not already had the opportunity to comment on. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), the Department of Defense, General Services Administration, and National Aeronautics and Space Administration will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 2, 6, 9, 18, 19, and 52

Government procurement.

William F. Clark,

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 6, 9, 18, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 6, 9, 18, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 by—

■ a. Removing paragraphs (a) and (b) and adding introductory text in their place;

■ b. Removing the definition of ''Service-disabled veteran-owned small business concern'' and adding the definition of ''Service-disabled veteran-owned small business (SDVOSB) concern'' in its place;

■ c. Adding in alphabetical order the definitions of ''Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program'' and ''Service-disabled veteran-owned small business (SDVOSB) Program''; and

■ d. Revising paragraph (1) of the definition ''Veteran-owned small business concern''.

The revisions and additions read as follows:

2.101 Definitions.

A word or a term, defined in this section, has the same meaning throughout this chapter (the Federal Acquisition Regulation (FAR)) unless the context in which the word or term is used clearly requires a different meaning or another FAR part, subpart, or section provides a different definition for the particular part or portion of the part. If a word or term that is defined in this section is defined differently in another part, subpart, or section of this chapter, the definition in this section includes a cross-reference to the other definitions and that part, subpart, or section applies to the word or term when used in that part, subpart, or section.

* * * * *

Service-disabled veteran-owned small business (SDVOSB) concern means a small business concern—

(1)(i) Not less than 51 percent of which is owned and controlled by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

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

(2) A small business concern eligible under the SDVOSB Program in accordance with 13 CFR part 128 (see subpart 19.14).

(3) *Service-disabled veteran,* as used in this definition, means a veteran as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16), and who is registered in the Beneficiary Identification and Records Locator Subsystem, or successor system that is maintained by the Department of Veterans Affairs' Veterans Benefits Administration, as a service-disabled veteran.

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that—

(1) Effective January 1, 2024, is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted a complete application for certification to SBA on or before December 31, 2023.

Service-disabled veteran-owned small business (SDVOSB) Program means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to SDVOSB concerns eligible under the SDVOSB Program.

* * * * *

Veteran-owned small business concern * * *

(1) Not less than 51 percent of which is owned and controlled by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

* * * * *

PART 6—COMPETITION REQUIREMENTS

■ 3. Amend section 6.206 by—

■ a. Revising the section heading; and

■ b. Removing from paragraphs (a) and (b) ''small business concerns'' and adding ''small business concerns eligible under the SDVOSB Program'' in its place.

The revision reads as follows:

6.206 Set-asides for service-disabled veteran-owned small business (SDVOSB) concerns eligible under the SDVOSB Program.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 4. Amend section 9.104–3 by revising paragraph (d)(2) to read as follows:

9.104–3 Application of standards.

* * * * *

(d) * * *

(2) *Limitations on subcontracting.* A small business that is unable to comply with the limitations on subcontracting may be considered nonresponsible (see 52.219–3, Notice of HUBZone Set-Aside or Sole-Source Award; 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns; 52.219–14, Limitations on Subcontracting; 52.219–27, Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program; 52.219–29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and 52.219–30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program). A small business that has not agreed to comply with the limitations on subcontracting may be considered nonresponsive.

PART 18—EMERGENCY ACQUISITIONS

18.116 [Amended]

■ 5. Amend section 18.116 by removing ''concerns on a sole'' and adding ''concerns eligible under the SDVOSB Program on a sole'' in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.000 [Amended]

■ 6. Amend section 19.000 by removing from paragraph (a)(3) ''veteran-owned small business concerns'' and adding ''veteran-owned small business (SDVOSB) concerns eligible under the SDVOSB Program'' in its place.

19.201 [Amended]

■ 7. Amend section 19.201 by removing from paragraph (c)(10) ''subpart 19.14 as a'' and ''set-aside, or under subpart 19.15'' and adding ''subpart 19.14 as a set-aside for'' and ''(SDVOSB) concerns eligible under the SDVOSB Program, or under subpart 19.15'' in their place, respectively.

■ 8. Amend section 19.202–6 by revising paragraph (a)(4) to read as follows:

19.202–6 Determination of fair market price.

(a) * * *

(4) Set-asides for SDVOSB concerns eligible under the SDVOSB Program (*see* subpart 19.14); and

* * * * *

■ 9. Amend section 19.203 by—

■ a. In paragraph (a):

■ i. Adding a heading; and

■ ii. Removing the word ''Procurement''; and

■ b. Removing from the end of paragraph (c) ''125, and 126'' and adding ''126, 127, and 128'' in its place.

The addition reads as follows:

19.203 Relationship among small business programs.

(a) *General.* * * *

* * * * *

19.304 [Amended]

■ 10. Amend section 19.304 by removing from paragraph (b) ''52.212–3(c)(4)'' and adding ''52.212–3(c)(5)'' in its place.

■ 11. Amend section 19.307 by—

■ a. Adding paragraph (a);

■ b. Revising paragraphs (b), (d)(1) introductory text, and (d)(1)(i);

■ c. Removing the period at the end of paragraph (d)(1)(iii) and adding ''; or'' in its place;

■ d. Adding paragraph (d)(1)(iv);

■ e. Removing from paragraph (d)(2) ''SBA (see 13 CFR 125.25(b))'' and adding ''OHA (see 13 CFR 134.1005)'' in its place;

■ f. Revising the introductory text of paragraph (e)(1);

■ g. Removing from the end of paragraph (e)(1)(i) ''or'';

■ h. Removing from the end of paragraph (e)(1)(ii) ''offeror for negotiated acquisitions).'' and adding ''offeror (for negotiated acquisitions);'' in its place;

■ i. Adding paragraphs (e)(1)(iii) and (iv);

■ j. Revising paragraph (e)(2);

■ k. Adding a heading for paragraph (f);

■ l. Revising paragraph (f)(1);

■ m. Removing from the paragraph (f)(2) introductory text ''SBA'' and adding ''OHA'' in its place;

■ n. Removing from paragraph (f)(2)(ii) ''fax number,'';

■ o. Removing from paragraph (f)(2)(vi) ''offer'' and adding ''initial offer that included price'' in its place;

■ p. Revising paragraphs (g), (h), and (i); and

■ q. Removing paragraphs (j) through (m).

The revisions and additions read as follows:

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

(a) *Definition. Interested party,* as used in this section, has the meaning given in 13 CFR 134.1002(b).

(b) *General.* (1) For sole source acquisitions, the contracting officer, the Department of Veterans Affairs (VA), or SBA may protest the apparently successful offeror's service-disabled veteran-owned small business (SDVOSB) status. For all other acquisitions, any interested party may protest the apparently successful offeror's service-disabled veteran-owned small business status.

(2) SBA's protest regulations are found in 13 CFR 128.500 and 13 CFR part 134.

* * * * *

(d) * * *

(1) OHA will consider protests challenging the SDVOSB status or the ownership and control of a concern if—

(i) For status protests, the protester presents evidence supporting the contention that the owner(s) cannot provide documentation from the VA to show that they meet the definition of ''service-disabled veteran'' or ''service-disabled veteran with a permanent and severe disability'' as set forth in 13 CFR 128.102; or

* * * * *

(iv) For joint venture protests, the protester presents evidence that the managing SDVOSB joint venture partner does not meet the requirements at 13 CFR 128.402.

* * * * *

(e) * * * (1) An interested party (except contracting officers should see paragraph (f)(1) of this section) shall submit its protest to the contracting officer—

* * * * *

(iii) To be received by close of business on the fifth business day after notification by the contracting officer of the intended awardee for an order that is set aside for SDVOSBs under a multiple-award contract that was not totally or partially set aside or reserved for SDVOSB concerns. This paragraph (e)(1)(iii) does not apply to an order issued under a Federal Supply Schedule (FSS) contract; or

(iv) To be received by the close of the fifth business day after notification by the contracting officer of the intended awardee for a blanket purchase agreement that is set aside for SDVOSBs under a multiple-award contract that was not totally or partially set aside or reserved for SDVOSB concerns. This paragraph (e)(1)(iv) does not apply to a blanket purchase agreement issued under a FSS contract.

(2) Any protest received after the designated time limits is untimely, except—

(i) The VA or SBA may file an SDVOSB status protest at any time; and

(ii) The contracting officer, SBA, or VA may file an SDVOSB status protest at any time after the apparent awardee has been identified or after bid opening, whichever applies.

(f) *Forwarding protests to SBA.* (1) The contracting officer shall forward all protests to the U.S. Small Business Administration, Office of Hearings and Appeals, 409 Third Street SW, Washington, DC 20416, or by email at *OHAfilings@sba.gov,* marked ''Attn: SDVOSB Status Protest''.

* * * * *

(g) *Notification by OHA.* OHA will notify the protester, the protested concern, SBA's Director of Government Contracting (D/GC), SBA Counsel, and the contracting officer of the date OHA received the protest.

(h) *Before OHA decision.* (1) After receiving a protest involving the apparent successful offeror's status as an SDVOSB concern, the contracting officer shall either—

(i) Withhold award of the contract until OHA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before OHA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest. The contracting officer shall notify OHA and SBA D/GC in writing of the determination and a copy shall be included in the contract file.

(2) OHA will determine the merits of the status protest.

(3) OHA does not have a standard timeline for issuing decisions.

(i) *After OHA decision.* OHA will notify the contracting officer, the protester, and the protested concern of its decision. The decision is effective immediately and is final.

(1) If the contracting officer has withheld contract award and OHA has determined that the protested concern is an eligible SDVOSB or dismissed all protests against the protested concern, then the contracting officer may award the contract to the protested concern.

(2) If the contracting officer has withheld contract award, and OHA has sustained the protest and determined that the concern is not an SDVOSB, then the contracting officer shall not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with paragraph (h)(1)(ii) of this section, the contract has been awarded, and the OHA decision to sustain the protest is received after award—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update FPDS to reflect the final OHA decision; and

(iii) The concern must remove its designation in the System for Award Management (SAM) as an SDVOSB concern within 2 days of the OHA decision. SBA will update the concern's SDVOSB status in SAM if the concern fails to do so. The concern shall not submit an offer as a SDVOSB concern or an SDVOSB concern eligible under the SDVOSB Program, until the concern is designated as an SDVOSB by SBA in the SBA Veteran Small Business Certification Program database at *https://veterans.certify.sba.gov.*

(4) A concern found to be ineligible may not submit future offers as an SDVOSB concern until the concern is designated as an SDVOSB by SBA in the SBA Veteran Small Business Certification Program database at *https://veterans.certify.sba.gov.*

19.308 [Amended]

■ 12. Amended section 19.308 by removing from the introductory text of paragraph (i) ''SBA's Office of Hearings and Appeals (OHA)'' and adding ''OHA'' in its place.

19.502–8 [Amended]

■ 13. Amend section 19.502–8 by removing from paragraph (b) ''19.1405(d)'' and adding ''19.1405(e)'' in its place.

■ 14. Amend section 19.702 by revising the introductory text to read as follows:

19.702 Statutory requirements.

Any contractor receiving a contract with a value greater than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business (VOSB), service-disabled veteran-owned small business (SDVOSB), HUBZone small business, small disadvantaged business (SDB), and women-owned small business (WOSB) concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business, VOSB concerns, SDVOSB concerns, HUBZone small business concerns, SDB concerns, and WOSB concerns.

* * * * *

■ 15. Revise subpart 19.14 heading to read as follows:

Subpart 19.14—Service-Disabled Veteran-Owned Small Business Program

* * * * *

19.1401 [Amended]

■ 16. Amend section 19.1401 by—

■ a. Removing from paragraph (a) ''(SDVOSB) Procurement Program'' and adding ''(SDVOSB) Program'' in its place; and

■ b. Removing from paragraph (b) ''Service-Disabled Veteran-Owned

Small Business Program'' and adding ''SDVOSB Program'' in its place.

■ 17. Revise section 19.1403 to read as follows:

19.1403 Status.

(a) Status as an SDVOSB concern is determined by SBA in accordance with 13 CFR part 128; also see 19.307.

(b) For an SDVOSB concern that seeks an SDVOSB set-aside or sole-source contract, the contracting officer shall verify that the offeror—

(1) Effective January 1, 2024, is designated in the System for Award Management (SAM) as an SDVOSB concern certified by SBA; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted an application for certification to SBA on or before December 31, 2023. Pending applications for certification are in the SBA Veteran Small Business Certification Program database at *https://veterans.certify.sba.gov.*

(c) If there is a decision issued by SBA as a result of a current eligibility examination finding that the concern did not qualify as an SDVOSB concern eligible under the SDVOSB Program or SBA denies a concern's application for SDVOSB certification, the concern must update its SDVOSB status in SAM within 2 days of SBA's final decision to reflect that the concern is not an eligible SDVOSB. SBA will update the concern's SDVOSB status in SAM within 2 days of the concern's failure to make the update.

(d) Effective January 1, 2024, a joint venture may be considered an SDVOSB concern eligible under the SDVOSB Program if—

(1) The joint venture qualifies as small under 19.301–1(a)(2)(i);

(2) The managing SDVOSB joint venture partner—

(i) Is designated in SAM as an SDVOSB concern certified by SBA; or

(ii) Has represented that it is an SDVOSB concern in SAM and submitted an application for certification to SBA on or before December 31, 2023. Pending applications for certification are in the SBA Veteran Small Business Certification database at *https://veterans.certify.sba.gov;* and

(3) The joint venture complies with the requirements of 13 CFR 128.402.

■ 18. Amend section 19.1405 by—

■ a. Revising the section heading and paragraph (b);

■ b. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e) and adding a new paragraph (c);

■ c. Revising newly redesignated paragraph (d); and

■ d. Removing from the second sentence of newly redesignated paragraph (e) ''service-disabled veteran-owned small business'' and adding ''SDVOSB'' in its place.

The revisions and addition read as follows:

19.1405 Set-aside procedures.

* * * * *

(b) A contracting officer may restrict competition to SDVOSB concerns eligible under the SDVOSB Program if there is a reasonable expectation based on market research that—

(1) Two or more SDVOSB concerns eligible under the SDVOSB Program will submit offers; and

(2) Award will be made at a fair market price.

(c) Effective January 1, 2024, the contracting officer shall—

(1) Verify that offers received are eligible for consideration for award by checking if the offeror—

(i) Is designated in SAM as an SDVOSB concern certified by SBA; or

(ii) Has represented that it is an SDVOSB concern in SAM and submitted an application for certification to SBA on or before December 31, 2023. Pending applications for certification are in the SBA Veteran Small Business Certification database at *https://veterans.certify.sba.gov;*

(2) Proceed with the offer evaluation, if the offeror meets the criteria in paragraph (c)(1)(i) or (ii) of this section; or

(3) Remove the offeror from consideration, if the offeror does not meet the criteria in paragraph (c)(1)(i) or (ii) of this section, as the offeror is not eligible for award.

(d) If the contracting officer receives only one acceptable offer from an SDVOSB concern eligible under the SDVOSB Program in response to a set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from SDVOSB concerns eligible under the SDVOSB Program, the SDVOSB set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (see 19.203).

* * * * *

■ 19. Amend section 19.1406 by—

■ a. Revising the section heading;

■ b. Redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b); and

■ c. Revising newly redesignated paragraph (c).

The revisions and addition read as follows:

19.1406 Sole-source awards.

* * * * *

(b) Effective January 1, 2024, a contracting officer shall only award a sole-source contract to a concern that—

(1) Is designated in SAM as an SDVOSB concern certified by SBA; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted an application for certification to SBA on or before December 31, 2023. Pending applications for certification are in the SBA Veteran Small Business Certification Program database at *https://veterans.certify.sba.gov.*

(c) The SBA has the right to appeal the contracting officer's decision not to make an SDVOSB sole-source award.

■ 20. Amend section 19.1408 by revising the first sentence of paragraph (a) to read as follows:

19.1408 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–27, Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, service-disabled veteran-owned small business concerns under 19.1405 and 19.1406. * * *

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 21. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. In paragraph (a):

■ i. Removing the definition of ''Service-disabled veteran-owned small business concern'' and adding the definition of ''Service-disabled veteran-owned small business (SDVOSB) concern'' in its place;

■ ii. Adding in alphabetical order the definitions of ''Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program'' and ''Service-disabled veteran-owned small business (SDVOSB) Program''; and

■ iii. Removing from paragraph (1) in the definition of ''Veteran-owned small business concern'' the text ''51 percent of which is owned'' and adding the text ''51 percent of which is owned and controlled'' in its place;

■ c. Revising paragraph (c)(3);

■ d. Redesignating paragraphs (c)(4) through (10) as paragraphs (c)(5) through (11) and adding a new paragraph (c)(4);

■ e. Revising the note following newly redesignated paragraph (c)(8); and

■ f. In Alternate I:
■ i. Revising the date of the alternate; and
■ ii. Removing from the introductory text ''(c)(11)'' and adding ''(c)(12)'' in its place;
■ iii. Redesignating paragraph (c)(11) as paragraph (c)(12); and
■ iv. Removing from newly redesignated paragraph (c)(12) introductory text ''(c)(4)'' and adding ''(c)(5)'' in its place.

The revisions and additions read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Products and Commercial Services.

* * * * *

Offeror Representations and Certifications—Commercial Products and Commercial Services (FEB 2024)

* * * * *

(a) * * *

Service-disabled veteran-owned small business (SDVOSB) concern means a small business concern—

(1)(i) Not less than 51 percent of which is owned and controlled by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

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

(2) A small business concern eligible under the SDVOSB Program in accordance with 13 CFR part 128 (see subpart 19.14).

(3) *Service-disabled veteran,* as used in this definition, means a veteran as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16), and who is registered in the Beneficiary Identification and Records Locator Subsystem, or successor system that is maintained by the Department of Veterans Affairs' Veterans Benefits Administration, as a service-disabled veteran.

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that—

(1) Effective January 1, 2024, is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted a complete application for certification to SBA on or before December 31, 2023.

Service-disabled veteran-owned small business (SDVOSB) Program means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to SDVOSB concerns eligible under the SDVOSB Program.

* * * * *

(c) * * *

(3) *SDVOSB concern.* [*Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (c)(2) of this provision.*] The offeror represents that it ☐ is, ☐ is not an SDVOSB concern.

(4) *SDVOSB concern joint venture eligible under the SDVOSB Program.* The offeror represents that it ☐ is, ☐ is not an SDVOSB joint venture eligible under the SDVOSB Program that complies with the requirements of 13 CFR 128.402. [*Complete only if the offeror represented itself as an SDVOSB concern in paragraph (c)(3) of this provision.*] [*The offeror shall enter the name and unique entity identifier of each party to the joint venture:*__.]

* * * * *

(8) * * *

Note to paragraphs (c)(9) and (10): Complete paragraphs (c)(9) and (10) only if this solicitation is expected to exceed the simplified acquisition threshold.

* * * * *

Alternate I (FEB 2024). * * *

* * * * *

■ 22. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Removing from paragraph (b)(20) ''(SEP 2023)'' and adding ''(FEB 2024)'' in its place;
■ c. Revising paragraph (b)(25);
■ d. Removing from paragraph (b)(26)(i) ''(SEP 2023)'' and adding ''(FEB 2024)'' in its place;
■ e. Removing from paragraph (e)(1)(viii) ''(SEP 2023)'' and adding ''(FEB 2024)'' in its place; and
■ f. In Alternate II:
■ i. Revising the date of the alternate; and
■ ii. Removing from paragraph (e)(1)(ii)(H) ''(SEP 2023)'' and adding ''(FEB 2024)'' in its place.

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (FEB 2024)

* * * * *

(b) * * *

(25) 52.219–27, Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program (FEB 2024) (15 U.S.C. 657f).

* * * * *

Alternate II (FEB 2024). * * *

* * * * *

■ 23. Amend section 52.213–4 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (a)(2)(vii) ''(DEC 2023)'' and adding ''(FEB 2024)'' in its place.

The revision reads as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (FEB 2024)

* * * * *

■ 24. Amend section 52.219–1 by—
■ a. Revising the date of the provision;
■ b. In paragraph (a):
■ i. Removing the definition of ''Service-disabled veteran-owned small business concern'' and adding the definition of ''Service-disabled veteran-owned small business (SDVOSB) concern'' in its place; and
■ ii. Adding in alphabetical order the definitions of ''Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program'' and ''Service-disabled veteran-owned small business (SDVOSB) Program'';
■ c. Revising paragraphs (c)(6) and (7);
■ d. Redesignating paragraphs (c)(8) as paragraph (c)(9) and adding a new paragraph (c)(8);
■ e. Revising the introductory text of newly redesignated paragraph (c)(9); and
■ f. In Alternate I:
■ i. Revising the date of the alternate;
■ ii. Removing from the introductory text ''(c)(9)'' and adding ''(c)(10)'' in its place; and
■ iii. Redesignating paragraph (c)(9) as paragraph (c)(10).

The revisions and additions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (FEB 2024)

(a) * * *

Service-disabled veteran-owned small business (SDVOSB) concern means a small business concern—

(1)(i) Not less than 51 percent of which is owned and controlled by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

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

(2) A small business concern eligible under the SDVOSB Program in accordance with 13 CFR part 128 (see subpart 19.14).

(3) *Service-disabled veteran,* as used in this definition, means a veteran as defined in 38 U.S.C. 101(2), with a disability that is

service-connected, as defined in 38 U.S.C. 101(16), and who is registered in the Beneficiary Identification and Records Locator Subsystem, or successor system that is maintained by the Department of Veterans Affairs' Veterans Benefits Administration, as a service-disabled veteran.

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that—

(1) Effective January 1, 2024, is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted a complete application for certification to SBA on or before December 31, 2023.

Service-disabled veteran-owned small business (SDVOSB) Program means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to SDVOSB concerns eligible under the SDVOSB Program.

* * * * *

(c) * * *

(6) *Veteran-owned small business concern.* [*Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.*] The offeror represents as part of its offer that it ☐ is, ☐ is not a veteran-owned small business concern.

(7) *SDVOSB concern.* [*Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (c)(6) of this provision.*] The offeror represents as part of its offer that it ☐ is, ☐ is not an SDVOSB concern.

(8) *SDVOSB joint venture eligible under the SDVOSB Program.* [*Complete only if the offeror represented itself as a SDVOSB concern in paragraph (c)(7) of this provision*]. The offeror represents as part of its offer that it ☐ is, ☐ is not a SDVOSB joint venture eligible under the SDVOSB Program that complies with the requirements of 13 CFR 128.402. [*The offeror shall enter the name and unique entity identifier of each party to the joint venture:__*.

(9) *HUBZone small business concern.* [*Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.*] The offeror represents, as part of its offer, that—

* * * * *

Alternate I (FEB 2024). * * *

* * * * *

■ 25. Amend section 52.219–8 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a):

■ i. Removing the definition of ''Service-disabled veteran-owned small business concern'' and adding the definition of ''Service-disabled veteran-owned small business (SDVOSB) concern'' in its place; and

■ ii. Adding in alphabetical order the definitions of ''Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program'' and ''Service-disabled veteran-owned small business (SDVOSB) Program'';

■ iii. Removing from paragraph (1) in the definition of ''Veteran-owned small business concern'' the text ''51 percent of which is owned'' and adding the text ''51 percent of which is owned and controlled'' in its place;

■ c. Adding to the end of paragraph (c)(1)(ii) ''(See 13 CFR 125.9(d).)''; and

■ d. Revising paragraph (c)(2).

The revisions and additions read as follows:

52.219–8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (FEB 2024)

(a) * * *

Service-disabled veteran-owned small business (SDVOSB) concern means a small business concern—

(1)(i) Not less than 51 percent of which is owned and controlled by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

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

(2) A small business concern eligible under the SDVOSB Program in accordance with 13 CFR part 128 (see subpart 19.14).

(3) *Service-disabled veteran,* as used in this definition, means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16), and who is registered in the Beneficiary Identification and Records Locator Subsystem, or successor system that is maintained by the Department of Veterans Affairs' Veterans Benefits Administration, as a service-disabled veteran.

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that—

(1) Effective January 1, 2024, is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted a complete application for certification to SBA on or before December 31, 2023.

Service-disabled veteran-owned small business (SDVOSB) Program means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to SDVOSB concerns eligible under the SDVOSB Program.

* * * * *

(c) * * *

(2) A joint venture qualifies as a HUBZone small business concern if it complies with the requirements in 13 CFR 126.616(a) through (c).

* * * * *

■ 26. Revise section 52.219–27 to read as follows:

52.219–27 Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program.

As prescribed in 19.1408, insert the following clause:

Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program (FEB 2024)

(a) *Definition. Service-disabled veteran-owned small business (SDVOSB) concern* means a small business concern—

(1)(i) Not less than 51 percent of which is owned and controlled by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

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

(2) A small business concern eligible under the SDVOSB Program in accordance with 13 CFR part 128 (see subpart 19.14).

(3) *Service-disabled veteran,* as used in this definition, means a veteran as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16) and who is registered in the Beneficiary Identification and Records Locator Subsystem, or successor system that is maintained by the Department of Veterans Affairs' Veterans Benefits Administration, as a service-disabled veteran.

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that—

(1) Effective January 1, 2024, is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted a complete application for certification to SBA on or before December 31, 2023.

Service-disabled veteran-owned small business (SDVOSB)-Program means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to SDVOSB concerns eligible under the SDVOSB Program.

(b) *Applicability.* This clause applies only to—

(1) Contracts that have been set aside for, or awarded on a sole-source basis to, SDVOSB concerns eligible under the SDVOSB Program;

(2) Part or parts of a multiple-award contract that have been set aside for SDVOSB concerns eligible under the SDVOSB Program;

(3) Orders set aside for SDVOSB concerns eligible under the SDVOSB Program, under multiple-award contracts as described in 8.405–5 and 16.505(b)(2)(i)(F); and

(4) Orders issued directly to SDVOSB concerns eligible under the SDVOSB Program, under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) *General.* (1) Effective January 1, 2024, for SDVOSB set-aside or sole-source procurements, offers are solicited only from, and awards resulting from this solicitation will be made only to, concerns—

(i) Designated in SAM as an SDVOSB concern certified by SBA; or

(ii) That have represented their status as an SDVOSB in SAM and submitted a complete application for certification to SBA on or before December 31, 2023.

(2) Offers received from concerns that do not meet the criteria of paragraph (c)(1)(i) or (ii) of this clause, shall not be considered.

(d) A joint venture may be considered an SDVOSB concern if the managing partner of the joint venture complies with the criteria defined in paragraph (a) of this clause and 13 CFR 128.402.

(e) In a joint venture that complies with paragraph (d) of this clause, the SDVOSB party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the SDVOSB party or parties to the joint venture must be more than administrative functions.

(End of clause)

■ 27. Amend section 52.219–28 by—

■ a. Revising the date of the clause; and

■ b. Redesignating paragraph (h)(8) as paragraph (h)(9) and adding a new paragraph (h)(8).

The revision and addition read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (FEB 2024)

* * * * *

(h) * * *

(8) *Service-disabled veteran-owned small business (SDVOSB) joint venture eligible under the SDVOSB Program.* The Contractor represents that it ☐ is, ☐ is not an SDVOSB joint venture eligible under the SDVOSB Program that complies with the requirements of 13 CFR 128.402. [*The Contractor shall enter the name and unique entity identifier of each party to the joint venture:* __.]

* * * * *

■ 28. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (c)(1)(x) ''(SEP 2023)'' and adding ''(FEB 2024)'' in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (FEB 2024)

* * * * *

[FR Doc. 2024–02797 Filed 2–22–24; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25, and 52

[FAC 2024–03; FAR Case 2023–012; Item II; Docket No. FAR–2023–0012; Sequence No. 1]

RIN 9000–AO62

Federal Acquisition Regulation: Trade Agreements Thresholds

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to incorporate revised thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.

DATES: *Effective date:* February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or by email at *michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2024–03, FAR case 2023–012.

SUPPLEMENTARY INFORMATION:

I. Background

Approximately every two years, the trade agreements thresholds for the World Trade Organization Government Procurement Agreement (WTO GPA) and the free trade agreements (FTAs) are adjusted according to predetermined formulae under the agreements. These thresholds are effective as of January 1, 2024. On December 8, 2023 (88 FR 85718), the United States Trade Representative (USTR) published new procurement thresholds.

The United States Trade Representative has specified the following new thresholds:

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	$174,000	$174,000	$6,708,000
FTAs:			
Australia FTA	102,280	102,280	6,708,000
Bahrain FTA	174,000	174,000	13,296,489
Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR) (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	102,280	102,280	6,708,000
Chile FTA	102,280	102,280	6,708,000
Colombia FTA	102,280	102,280	6,708,000
Korea FTA	100,000	100,000	6,708,000
Morocco FTA	174,000	174,000	6,708,000
United States-Mexico-Canada Agreement (USMCA):			
—Mexico	102,280	102,280	13,296,489
Oman FTA	174,000	174,000	13,296,489
Panama FTA	174,000	174,000	6,708,000
Peru FTA	174,000	174,000	6,708,000
Singapore FTA	102,280	102,280	6,708,000
Israeli Trade Act	50,000	....	....

II. Discussion and Analysis

This final rule implements the new thresholds in FAR subpart 25.4, Trade Agreements, and other sections in the FAR that include trade agreements thresholds (*i.e.,* FAR 22.1503, 25.202, 25.402, 25.603, 25.1101, and 25.1102).

A group of FTAs have been at the $92,319 threshold and are increasing to $102,280. This group includes the Australia, Chile, Colombia, and Singapore FTAs, CAFTA–DR, and Mexico in the USMCA. The 2024 threshold change places these FTAs above the $100,000 Korea FTA threshold, instead of beneath it. These new thresholds do not work with the pre-existing framework in the FAR. The Korea FTA at $100,000 and above previously fit alongside the Australia FTA/CAFTA–DR group at $92,319 and above, but this will no longer be so because there can no longer be any values that are less than the Korea FTA threshold, but greater than the Australia FTA/CAFTA–DR group threshold. Three primary changes were made to fix the framework.

1. At FAR 25.1101, the prescription for Alternate II of FAR 52.225–3, Buy American—Free Trade Agreements—Israeli Trade Act, is changed so that it no longer applies to the Australia FTA/CAFTA–DR group, but instead only to the Israeli Trade Act. There are no changes to the Alternate II language.

2. At FAR 25.1101, the prescription for Alternate III of FAR 52.225–3 is changed so that it only applies to the Korea FTA and Israeli Trade Act. Application of the Australia FTA/CAFTA–DR group moves into the base clause of FAR 52.225–3.

3. A change to the Alternate III language was needed due to the change in the prescription. DoD, GSA, and NASA deleted the definition of ''Bahraini, Moroccan, Omani, Panamanian, or Peruvian end product,'' and in its place added a definition of ''Korean end product.'' DoD, GSA, and NASA also added a corresponding change in the prescription and Alternate III of FAR 52.225–4, Buy American—Free Trade Agreements—Israeli Trade Act Certificate.

In addition, changes are required to the provisions at FAR 52.204–8, Annual Representations and Certifications, and 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services, and to the clause at FAR 52.222–19, Child Labor—Cooperation with Authorities and Remedies, with conforming changes to the clause dates in FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Products and Commercial Services, and FAR 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is 41 U.S.C. 1707. Subsection (a)(1) of 41 U.S.C. 1707 requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it only adjusts the thresholds according to predetermined formulae to adjust for changes in economic conditions, thus maintaining the status quo, without significant effect beyond the internal operating procedures of the Government and without a significant cost or administrative impact on contractors or offerors.

IV. Expected Impact of the Rule

This final rule will adjust the thresholds for application of the WTO GPA and FTAs, as determined by the USTR. For acquisitions covered by the WTO GPA or FTAs, the USTR has waived the Buy American statute and other discriminatory provisions for eligible products. As a result, eligible products and services will receive equal consideration with domestic offers if the estimated value of the contract meets or exceeds the new thresholds set by the USTR. This rule is not expected to significantly impact domestic offerors or offerors covered by the WTO GPA or a FTA because the threshold adjustments made under this rule simply accommodate changes in economic conditions, while maintaining the status quo.

V. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), or for Commercial Services

This rule amends the FAR to make minor revisions in the thresholds for application of the WTO GPA and the FTAs. The revisions do not add any new burdens or, except for the thresholds changes themselves, impact applicability of clauses and provisions at or below the simplified acquisition threshold, to acquisitions of commercial products (including commercially available off-the-shelf items), or to acquisitions of commercial services.

VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 (as amended by E.O. 14094) and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VII. Congressional Review Act

Pursuant to the Congressional Review Act, DoD, GSA, and NASA will send this rule to each House of the Congress and to the Comptroller General of the United States. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this rule does not meet the definition in 5 U.S.C. 804(2).

VIII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

IX. Paperwork Reduction Act

This rule affects the information collection requirements in the provisions at FAR 52.225–2, 52.225–4, 52.225–6, and 52.225–10, and the clauses at FAR 52.225–9, 52.225–11, 52.225–21, and 52.225–23, currently approved under OMB Control Number 9000–0024, entitled ''Buy American Act, Trade Agreements, and Duty-Free Entry,'' in accordance with the Paperwork Reduction Act (44 U.S.C. 3501–3521). The impact, however, is negligible, because the threshold changes are in line with inflation and maintain the status quo. As a result, there is no change to the estimated burden.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

William F. Clark,

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1503 [Amended]

■ 2. Amend section 22.1503 by—
■ (a) Removing from paragraph (b)(2) ''$92,319'' and adding ''$102,280'' in its place; and
■ (b) Removing from paragraph (b)(3) ''$183,000'' and adding ''$174,000'' in its place.

PART 25—FOREIGN ACQUISITION

25.202 [Amended]

■ 3. Amend section 25.202 by removing from paragraph (c) ''$7,032,000'' and adding ''$6,708,000'' in its place.

■ 4. Amend section 25.402 in paragraph (b) by revising table 1 to read as follows:

25.402 General.

* * * * *

(b) * * *

TABLE 1 TO PARAGRAPH (b)

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	$174,000	$174,000	$6,708,000
FTAs:			
Australia FTA	102,280	102,280	6,708,000
Bahrain FTA	174,000	174,000	13,296,489
CAFTA–DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	102,280	102,280	6,708,000
Chile FTA	102,280	102,280	6,708,000
Colombia FTA	102,280	102,280	6,708,000
Korea FTA	100,000	100,000	6,708,000
Morocco FTA	174,000	174,000	6,708,000
USMCA:			
—Mexico	102,280	102,280	13,296,489
Oman FTA	174,000	174,000	13,296,489
Panama FTA	174,000	174,000	6,708,000
Peru FTA	174,000	174,000	6,708,000
Singapore FTA	102,280	102,280	6,708,000
Israeli Trade Act	50,000	....	....

25.603 [Amended]

■ 5. Amend section 25.603 by removing from paragraph (c)(1) ''$7,032,000'' and adding ''$6,708,000'' in its place.

25.1101 [Amended]

■ 6. Amend section 25.1101 by—
■ a. Removing from paragraph (b)(1)(i)(A) ''$183,000'' and adding ''$174,000'' in its place;
■ b. Removing from paragraph (b)(1)(ii) ''$92,319'' and adding ''$100,000'' in its place;
■ c. Removing from paragraph (b)(1)(iii) ''$92,319'' and ''$100,000'' and adding ''$100,000'' and ''$102,280'' in their places, respectively;
■ d. Removing from paragraph (b)(2)(ii) ''$92,319'' and adding ''$100,000'' in its place;
■ e. Removing from paragraph (b)(2)(iii) ''$92,319'' and ''$100,000'' and adding ''$100,000'' and ''$102,280'' in their places, respectively;
■ f. Removing from paragraph (c)(1) ''$183,000'' and adding ''$174,000'' in its place; and
■ g. Removing from paragraph (d) ''$183,000'' and adding ''$174,000'' in its place.

25.1102 [Amended]

■ 7. Amend section 25.1102 by—
■ a. Removing from the introductory text of paragraphs (a) and (c) ''$7,032,000'' and adding ''$6,708,000'' in their places; and
■ b. Removing from paragraphs (c)(3) and (d)(3) ''$7,032,000'' and ''$12,001,460'' and adding ''$6,708,000'' and ''$13,296,489'' in their places, respectively.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.204–8 by—
■ a. Revising the date of the provision;
■ b. Removing from paragraph (c)(1)(xxi)(B) ''$92,319'' and adding ''$100,000'' in its place; and
■ c. Removing from paragraph (c)(1)(xxi)(C) ''$92,319'' and ''$100,000'' and adding ''$100,000'' and ''$102,280'' in their places, respectively.

The revision reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Feb 2024)

* * * * *

■ 9. Amend section 52.212–3 by revising the date of the provision and paragraph (g)(3) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Products and Commercial Services.

* * * * *

Offeror Representations and Certifications—Commercial Products and Commercial Services (Feb 2024)

* * * * *

(g) * * *

(3) *Buy American-Free Trade Agreements-Israeli Trade Act Certificate, Alternate III.* If Alternate III to the clause at 52.225–3 is included in this solicitation, substitute the following paragraphs (g)(1)(i)(B) and (g)(1)(ii)

for paragraphs (g)(1)(i)(B) and (g)(1)(ii) of the basic provision:

(g)(1)(i)(B) The terms ''Korean end product'', ''commercially available off-the-shelf (COTS) item,'' ''critical component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' ''Free Trade Agreement country,'' ''Free Trade Agreement country end product,'' ''Israeli end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American—Free Trade Agreements—Israeli Trade Act.''

(g)(1)(ii) The Offeror certifies that the following supplies are Korean end products or Israeli end products as defined in the clause of this solicitation entitled ''Buy American—Free Trade Agreements—Israeli Trade Act'':

Korean End Products or Israeli End Products:

Line Item No.	Country of origin

[*List as necessary*]

* * * * *

■ 10. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (b)(32) ''(NOV 2023)'' and adding ''(FEB 2024)'' in its place; and

■ c. Removing from paragraph (b)(53)(iv) ''(NOV 2023)'' and adding ''(FEB 2025)'' in its place.

The revision reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (FEB 2024)

* * * * *

■ 11. Amend section 52.213–4 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (b)(1)(iii) ''(NOV 2023)'' and adding ''(FEB 2024)'' in its place.

The revision reads as follows:

52.213–4 Terms and Conditions–Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (FEB 2024)

* * * * *

■ 12. Amend section 52.222–19 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (a)(2) ''$92,319'' and adding ''$102,280'' in its place; and

c. Removing from paragraph (a)(3) ''$183,000'' and adding ''$174,000'' in its place.

The revision reads as follows:

52.222–19 Child Labor—Cooperation With Authorities and Remedies.

* * * * *

Child Labor—Cooperation With Authorities and Remedies (FEB 2024)

* * * * *

■ 13. Amend section 52.225–3 by revising Alternate III to read as follows:

52.225–3 Buy American—Free Trade Agreements—Israeli Trade Act.

* * * * *

Alternate III (FEB 2024). As prescribed in 25.1101(b)(1)(iii), delete the definition of ''Bahraini, Moroccan, Omani, Panamanian, or Peruvian end product'' and add in its place the following definition of ''Korean end product'' in paragraph (a) of the basic clause; and substitute the following paragraph (c) for paragraph (c) of the basic clause.

Korean end product means an article that—

(1) Is wholly the growth, product, or manufacture of Korea (Republic of); or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(c) *Delivery of end products.* 41 U.S.C. chapter 83 provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see 12.505(a)(1)), except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding COTS fasteners. In addition, the Contracting Officer has determined that the Korea (Republic of) FTA and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled ''Buy American—Free Trade Agreements—Israeli Trade Act Certificate.'' If the Contractor specified in its offer that the Contractor would supply a Korean end product or an Israeli end product, then the Contractor shall supply a Korean end product, an Israeli end product, or at the Contractor's option, a domestic end product.

* * * * *

■ 14. Amend section 52.225–4 by revising Alternate III to read as follows:

52.225–4 Buy American—Free Trade Agreements—Israeli Trade Act Certificate.

* * * * *

Alternate III (FEB 2024). As prescribed in 25.1101(b)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The Offeror certifies that the following supplies are Korean end products or Israeli end products as defined in the clause of this solicitation entitled ''Buy American—Free Trade Agreements—Israeli Trade Act'':

Korean End Products or Israeli End Products:

Line Item No.	Country of origin

[List as necessary]

[FR Doc. 2024–02798 Filed 2–22–24; 8:45 am]

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FEDERAL REGISTER

Vol. 89 Friday,
No. 37 February 23, 2024

Part VII

The President

Notice of February 21, 2024—Continuation of the National Emergency With Respect to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

Notice of February 21, 2024—Continuation of the National Emergency With Respect to Libya

Federal Register
Vol. 89, No. 37
Friday, February 23, 2024

Presidential Documents

Title 3—

The President

Notice of February 21, 2024

Continuation of the National Emergency With Respect to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

On March 1, 1996, by Proclamation 6867, a national emergency was declared to address the disturbance or threatened disturbance of international relations caused by the February 24, 1996, destruction by the Cuban government of two unarmed, United States-registered civilian aircraft in international airspace north of Cuba. On February 26, 2004, by Proclamation 7757, the national emergency was expanded to deny monetary and material support to the Cuban government. On February 24, 2016, by Proclamation 9398, and on February 22, 2018, by Proclamation 9699, the national emergency was further modified based on continued disturbances or threatened disturbances of the international relations of the United States related to Cuba. The Cuban government has not demonstrated that it will refrain from the use of excessive force against United States vessels or aircraft that may engage in memorial activities or peaceful protest north of Cuba.

Further, the unauthorized entry of any United States-registered vessel into Cuban territorial waters continues to be detrimental to the foreign policy of the United States because such entry could facilitate a mass migration from Cuba. It continues to be United States policy that a mass migration from Cuba would endanger United States national security by posing a disturbance or threatened disturbance of the international relations of the United States.

Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Cuba and the emergency authority relating to the regulation of the anchorage and movement of vessels set out in Proclamation 6867, as amended by Proclamation 7757, Proclamation 9398, and Proclamation 9699.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
February 21, 2024.

[FR Doc. 2024–03937
Filed 2–22–24; 11:15 am]
Billing code 3395–F4–P

Presidential Documents

Notice of February 21, 2024

Continuation of the National Emergency With Respect to Libya

On February 25, 2011, by Executive Order 13566, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions of Colonel Muammar Qadhafi, his government, and close associates, which took extreme measures against the people of Libya, including by using weapons of war, mercenaries, and wanton violence against unarmed civilians. In addition, there was a serious risk that Libyan state assets would be misappropriated by Qadhafi, members of his government, members of his family, or his close associates if those assets were not protected. The foregoing circumstances, the prolonged attacks, and the increased numbers of Libyans seeking refuge in other countries from the attacks caused a deterioration in the security of Libya and posed a serious risk to its stability.

On April 19, 2016, the President signed Executive Order 13726, which expanded the scope of the national emergency declared in Executive Order 13566. The President found that the ongoing violence in Libya, including attacks by armed groups against Libyan state facilities, foreign missions in Libya, and critical infrastructure, as well as human rights abuses, violations of the arms embargo imposed by United Nations Security Council Resolution 1970 (2011), and misappropriation of Libya's natural resources threaten the peace, security, stability, sovereignty, democratic transition, and territorial integrity of Libya, and thereby constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

The situation in Libya continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, and measures are needed to protect against the diversion of assets or other abuses by members of Qadhafi's family, their associates, and other persons hindering Libyan national reconciliation.

For this reason, the national emergency declared on February 25, 2011, and expanded on April 19, 2016, must continue in effect beyond February 25, 2024. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13566.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
February 21, 2024.

[FR Doc. 2024–03940
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Federal Register

Vol. 89, No. 37

Friday, February 23, 2024

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List February 14, 2024

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